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Rape, Sexual Slavery, and Forced Marriage at the International Criminal Court: How *Katanga* Utlilizes a Ten-Year-Old Rule but Overlooks New Jurisprudence

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"My body was affected. My God, I was very ashamed. Now I have become useless. That is something that I do not believe anyone could be subjected to in life, that is to totally destroy someone's body. You become totally useless. You no longer have any value. When somebody sees you, they do not value you any longer, and they look down on you." [*Testimony of Witness 132*[1]]

I. INTRODUCTION

On February 24, 2003, the village of Bogoro in the Ituri province of Democratic Republic of Congo (DRC) was startled awake by heavy gunfire.[2] The Nationalist and Integrationist Front (FNI) and the Front for Patriotic Resistance of Ituri (FRPI) soldiers were attacking the Union of Congolese Patriots (UPC) militia in control of the Hema-dominated village.[3] The attack was aimed at driving the UPC from Bogoro, a strategically important town between Bunia, the district capital, and the border with Uganda.[4] FNI and FRPI soldiers, often children under the age

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1. Women's Initiatives for Gender Justice, *Gender Report Card on International Criminal Court 2010*, 175 (Nov. 2010) http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf [hereinafter *Gender Report Card 2010*].

2. Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Transcript of Record, 21 (Apr. 19, 2010), ICC-01/04-01/07-T-129-Red-ENG; *Gender Report Card 2010*, *supra* note 1, at 160.

3. *Gender Report Card 2010*, *supra* note 1, at 160.

4. U.N. Secretary-General, *Special Report on the Events in Ituri, January 2002-December 2003*, ¶ 64, U.N. Doc. S/2004/573 (July 16, 2004) *available at* http://allafrica.

of fifteen, circled the village, armed with machetes, spears, arrows, rocket-propelled grenades, rocket launchers and semiautomatic weapons.[5] At least 200 civilians were killed in a matter of hours, and the village looted, while survivors were imprisoned in rooms filled with corpses, and women and girls were gang-raped, mutilated, and sexually enslaved.[6] The United Nations (U.N.) estimated that 173 of the over 200 victims were under the age of eighteen.[7] Two men are alleged to have stood at the helm of this massacre—Germain Katanga and Mathieu Ngudjolo Chui,[8] respective leaders of the FRPI and FNI.[9]

What sets this incident apart from other similar atrocities committed over the last fifty years in various parts of the world? The alleged perpetrators of these crimes have been forced to face the charges brought against them in an international court of law.[10] Katanga and Ngudjolo were initially jointly accused of three crimes against humanity (murder, sexual slavery, and rape) and seven war crimes (using children under the age of fifteen to take an active part in hostilities; deliberately directing an attack on a civilian population as such or against individual civilians not taking part in hostilities; willful killing; destruction of property; pillaging; sexual slavery and rape).[11] However, even though there was sufficient evidence and known instances, forced marriage was not charged due to lack of international jurisprudence and independent recognition of forced marriage as a crime against humanity.[12] This is the second International Criminal Court (ICC) trial and the first trial at the Court to include charges for gender-based crimes.[13] While this is certainly not the first instance of

com/download/resource/main/main/idatcs/00010308:0f169b3a522a70b9d8d609a898b7041e.pdf.

5. Press Release, U.N. News Centre, Congolese war crimes suspect turned over to International Criminal Court (Oct. 18, 2007), http://www.un.org/apps/news/printnewsAr.asp?nid=24325.

6. *Id.*

7. U.N. Secretary-General, *supra* note 4, ¶ 65.

8. On December 18, 2012, the ICC's Trial Chamber II acquitted Ngudjolo. *See infra* V.B.2.

9. *Id.*; Open Society Justice Initiative, *The Trial of Mathieu Ngudjolo Chui* (Dec. 2012), http://www.opensocietyfoundations.org/sites/default/files/ngudjolo-judgment-brief-20121217.pdf.

10. Press Release, International Criminal Court, Opening of the trial in the case of Germain Katanga and Mathieu Ngudjolo Chui on 24 November, 2009 (Nov. 11, 2009), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2009)/Pages/pr477.aspx.

11. *Id.*

12. *See generally Gender Report Card 2010*, *supra* note 1, at 161, 165, 171, 174.

13. *Gender Report Card 2010*, *supra* note 1, at 160. This is the second trial at the Court arising out of the DRC Situation. The first was that of UPC leader Thomas Lubanga Dyilo ("Lubanga"), who was charged with enlisting child soldiers under the age of to take active part in hostilities. He was the first-ever accused to be convicted by the ICC since its inception in 2002 and sentenced to fourteen years imprisonment. Although Lubanga was only charged with one crime, there was a strong push by the Legal Representative for Victims to include a charge for gender-based offenses mid-trial but Office of the Prosecutor

gender-based crimes committed in the context of either an international or non-international armed conflict prosecuted by an international tribunal, the significance of this decision rests in the precedent it sets for future prosecution of similar crimes at the first-ever permanent international criminal court.[14] The lack of attention paid to prosecuting the crime of forced marriage may be indicative of the Court's reluctance to address a pressing issue due to a lack of consensus and precedent.

This Note will examine the history of international prosecution of sexually-based crimes, discuss the precedents[15] set by the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for former Yugoslavia (ICTY) in *Akayesu*, *Furundžija*, and *Kunarac*, and why these decisions have become the legal standard for prosecution and conviction of sexual violence crimes in the ICC. It will address the development and establishment of ICTY rules, such as the narrow definition of rape as set forth in *Furundžija* and the inclusion of sexual enslavement as a crime under slavery, which has long been recognized for its peremptory status, in *Kunarac*, and why these particular rules are necessary for the effective functioning of the ICC. This Note will maintain that the codification of the ICTY and ICTR rules under the ICC's Elements of Crimes was, and continues to be, necessary to promote the standardization of prosecution of sexual violence crimes, to provide the victims of these atrocities with tangible results and faith in the international legal system, and to continue on the path of establishing rape and sexual violence as distinct norms of jus cogens. Specifically, it will apply the Elements of Crimes to the sexually based crimes committed in Bogoro on February 23, 2003, and that fall within the jurisdiction of the ICC under Article 7(1)(g) and Article 8(2)(b)(xxii), and conclude that Katanga should be found guilty of his alleged crimes. This Note will also discuss the crime of forced marriage and its recent recognition as an independent crime against humanity by the Special Courts of Sierra Leone (SCSL). It will

chose not to do so. For in-depth discussion of the Lubanga trial and failure to bring forth additional charges see *Gender Report Card 2010*, *supra* note 1, at 129; *see also* K'Shaani O. Smith, Note, *Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo*, 54 HOW. L.J. 467 (2011).

14. *See generally* James R. McHenry III, Note, *The Prosecution of Rape Under International Law: Justice That Is Long Overdue*, 35 VAND. J. TRANSNAT'L L. 1269 (2002) (discussing the history of sexual violence prosecution and the ICTY decision in *Prosecutor v. Kunarac* where enslavement was broadened to include sexual enslavement as a crime against humanity) [hereinafter *The Prosecution of Rape*]. *See also* Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT'L & COMP. L. 135 (2005) (discussing the first-ever conviction for rape and sexual violence by the International Criminal Tribunal for Rwanda (ICTR) in Prosecutor v. Akayesu).

15. Here, and in the remainder of this note, the word "precedent" is used not within its normal context of a binding decision. I use "precedent" to only mean a prior ruling on a similar legal issue. The Rome Statute does not provide for a concept of binding precedent as is customary in U.S. law but, instead, sets out a hierarchy of rules and law for the ICC to apply when deciding a particular case. *See infra* V.

discuss the two cases that defined the crime of forced marriage and went on to apply the definition but it will also discuss the difficulty in differentiating between the elements of sexual slavery and forced marriage and in applying them. This Note will recommend that forced marriage should be recognized as a particular crime of sexual slavery due to its inherent sexual nature and conclude with the observation that the law will likely continue in recognizing and narrowing the definitions of various sexual violence crimes, and rape and sexual violence crimes will likely be recognized as separate jus cogens norms, in order to vindicate and internationally recognize the victims' suffering.

Part II of this Note will discuss international criminal law prior to the formation of the ad hoc tribunals and the prosecution of sexual violence crimes that occurred in that time. Part III will address the events leading up to the necessity for and the emergence of the two notable ad hoc tribunals, the ICTY and the ICTR. It will also discuss the history of the Rwandan conflict and the landmark *Akayesu* decision that first promulgated a uniform definition of rape in international criminal law. Part IV will discuss the ICTY, the history of the Balkan conflict, the ICTY's jurisdiction over sexual violence crimes and two important sexual violence cases, *Furundžija* and *Kunarac*. Therein will also discuss the two crucial rules arising out of the ICTY, a narrower definition of rape and the inclusion of sexual enslavement under the peremptory norm of slavery. Part V will discuss the establishment of the International Criminal Court as the first permanent court dealing with grave prosecutions of criminal law and its limited jurisdiction, both in terms of complementarity and precedent. Part V will also discuss the *Katanga* and *Ngudjolo* cases in greater detail and the ICC's jurisdiction over sexual violence crimes. Part VI will apply the Elements of Crimes of rape and sexual slavery to the pending *Katanga* case and endorse that the Court find Katanga guilty of the crimes allegedly committed at Bogoro. Part VII will discuss the relative newness of defining and prosecuting forced marriage at the SCSL, the two leading cases that have defined forced marriage and applied the definition, and will recommend that the ICC should adopt forced marriage as a particular crime under sexual slavery as opposed to enumerating it as a "new" crime of humanity due to the inherent difficulty in separating the sexual nature of the crime from the persecutor's intent to form true marital relations. Part VIII will conclude by addressing that the rules established by the ICTY and ICTR have achieved the status of well-recognized principles of international criminal law, and in fact have been codified in Elements of Crimes, and the crime of forced marriage should be subjected to the same treatment due to the need for a standardized prosecutorial scheme, recognition of victims rights and experiences, and promulgation of the need for rape and sexual violence to become recognized norms of jus cogens.

II. INTERNATIONAL LAW AND PROSECUTION OF SEXUAL VIOLENCE CRIMES PRIOR TO THE AD HOC TRIBUNALS

International prosecution prior to World War II is both sparse and far-reaching, generally owing its roots to the "extensive development of the international law of war crimes."[16] The movement for prosecution of war crimes committed during World War I, and specifically of the Armenian genocide committed by the Ottoman Turks, had support among the Russian, French, and British forces, not solely to prosecute the offenders on an individual basis, but instead, as more of a political statement of condemnation.[17] The Allied Governments also established a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties where the nonexhaustive list of thirty-two categories of violations included, finally, sexual violence crimes.[18] The Commission was likely influenced by, and attempted to apply, the Hague Conventions of 1899 and 1907, which established a very basic foundation for the prosecution of later violations of the laws of humanity.[19] However, any real progress and further actions were thwarted by in-house bickering and power struggle in the postwar environment.[20]

International criminal law, as we know it today, has predominantly derived from the prosecutions at the Nuremburg and Tokyo war crimes trials. The phrase "crimes against humanity" was first used by the Allied prosecutors in the Nuremburg Trials, which was defined by the charter establishing the International Military Tribunal.[21] The charter, however, did not encompass sexual violence crimes.[22]

A great step for prosecution of sexual violence crimes came in 1949 with the conclusion of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which entered into force on October 21, 1950.[23] The Convention, for the first time ever, asserts that "[w]omen shall be especially protected against any attack on their honour, in particular

16. Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 682 (1997). See *supra* for an in-depth discussion of development of international law and the post-WWII prosecution of violations.

17. A joint Declaration to the Ottoman Empire was issued in May 1915 "hold[ing] personally responsible for these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres." *Id.* at 700.

18. *Id.* at 701.

19. *The Prosecution of Rape*, *supra* note 14, at 1276.

20. *The Prosecution of Rape*, *supra* note 14, at 1276.

21. James McHenry, Casenote, *Justice for Foca: The International Criminal Tribunal for Yugoslavia's Prosecution of Rape and Enslavement as Crimes Against Humanity*, 10 TULSA J. COMP. & INT'L L. 183, 188 (2002) [hereinafter *Justice for Foca*].

22. *Id.*

23. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 UNTS 287, *available at* http://www.unhcr.org/refworld/docid/3ae6b36d2.html.

against rape, enforced prostitution, or any form of indecent assault."[24] This sentence single-handedly established rape in particular, and sexual assault through later interpretation, as a crime under international criminal law, as both the ICTR and ICTY rely on various articles of the Convention for prosecutorial jurisdiction.[25]

III. EMERGENCE OF THE AD HOCS

The atrocities of the late twentieth century led to the revolutionary establishment of the ad hoc tribunals (ad hocs), most notably the ICTR and ICTY in 1994 and 1993, respectively. I will discuss the establishment of ICTY and its jurisprudence in detail *infra* IV. In both cases, the Tribunals were established pursuant to U.N. Security Council Resolutions under Chapter VII of the U.N. Charter providing for the handling of "any threat to the peace, breach of the peace, or act of aggression."[26] The Security Council gave both Tribunals the binding authority to prosecute individuals accused of committing grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity, "and also authorized that the act of rape could fall under the aegis of any of these violations and crimes."[27]

A. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

On April 6, 1994, a plane carrying Rwandan President Habyarimana was shot down.[28] In a country already deeply divided along ethnic lines—majority Hutu, minority Tutsi—the death of a Hutu president resulted in immediate violence.[29] The Hutu resentment of the Tutsi because of the Belgian historical preference eventually led to a series of riots in 1959 when more than 20,000 Tutsis were killed and many more sought refuge in neighboring countries.[30] When the Belgians granted Rwanda independence in 1962, the Hutus secured power.[31] During the three months following the assassination of Habyarimana, over 800,000 Rwandan men, women, and children were massacred.[32] The Hutu were encouraged by the presidential

24. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 23, art. 27.

25. *See* S.C. Res. 955, art. 4, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 2, U.N. Doc. S/25704, annex (1993).

26. U.N. Charter art. 39.

27. *The Prosecution of Rape*, *supra* note 14, at 1279.

28. *Genocide in Rwanda*, Human Rights Council, http://www.unitedhumanrights.org/genocide/genocidein_rwanda.htm (last visited Sept. 1, 2013).

29. *Id.*

30. *Rwanda: How the Genocide Happened*, BBC, http://news.bbc.co.uk/2/hi/1288230.stm (last visited Oct. 19, 2013).

31. *Id.*

32. Obote-Odora, *supra* note 14, at 139.

guard and radio propaganda to murder, mutilate, and loot their Tutsi and moderate Hutu neighbors.[33] More significantly, Tutsi women were raped and sexually violated with the centralized aim at wiping out the entire Tutsi population of Rwanda. Statistical projections estimate that between 250,000 to 500,000 women were raped based on the number of pregnancies that coincided with the three months of the genocide.[34] However, it is highly likely that these numbers fail to take into account the women who were, for any reason, unable to conceive or those who experience multiple rapes or gang rapes, and therefore do not represent the total amount.[35] These numbers also fail to take into account the women who were mutilated, raped by foreign objects, those who self-aborted or committed infanticide, and those who were murdered after they were raped.[36] In short, "rape was the rule and its absence the exception."[37]

In response to the atrocious acts of violence committed in Rwanda, the United Nations Security Council established the International Criminal Tribunal of Rwanda (ICTR) in 1994 with a mandate to prosecute rape and sexual violence alongside genocide, crimes against humanity, and war crimes.[38] Since its inception, the ICTR has developed extensive jurisprudence on prosecution of rape and violence including finding that rape and sexual violence were major components of the Rwanda Crisis and that they were committed as part of a widespread and systematic attack against a targeted group.[39] However, the ICTR's greatest contribution to successful prosecution of sexual violence is the decision in *Prosecutor v. Akayesu*.

B. THE FIRST STEP: *AKAYESU*

Jean Paul Akayesu, the bourgermester (mayor) of Taba commune in Rwanda, was charged with fifteen counts including rape and sexual violence as crimes against humanity, war crimes, and genocide.[40] Even though *Akayesu* has been hailed as a revolutionary moment in the field of sexual violence prosecution, surprisingly, the initial indictment did not

33. Obote-Odora, *supra* note 14, at 139–40; BBC, *supra* note 30.
34. Obote-Odora, *supra* note 14, at 141.
35. Obote-Odora, *supra* note 14, at 141.
36. Obote-Odora, *supra* note 14, at 141.
37. Obote-Odora, *supra* note 14, at 141.
38. Obote-Odora, *supra* note 14, at 141.
39. Obote-Odora, *supra* note 14, at 144. Classification of "widespread and systematic attack against a targeted group" is necessary as part of the elements establishing crimes against humanity. International Criminal Court, Rome Statute of the International Criminal Court (2011), *available at* http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf [hereinafter Rome Statute].
40. Prosecutor v. Jean Paul Akayesu, Case No. ICTR 96-4-I, Indictment (Jan. 1, 1996), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/actamond.pdf.

include charges of sexual violence.[41] In fact, it was only after the testimony of Witness J, who testified that her six-year-old daughter had been "raped by three Interahamwe [Hutu extremists] when they came to kill her father," that the Tribunal recommended for the prosecutor to initiate further investigation into the situation.[42]

The Trial Chamber delivered its judgment on September 2, 1998, where it finally provided an internationally accepted definition for rape, defining it as "a physical invasion of sexual nature, committed on a person under circumstances which are coercive."[43] The Trial Chamber also went on further to define sexual violence as "any act of a sexual nature which is committed on a person under circumstance which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[44] Finally, the case did not allege that Jean Paul Akayesu physically engaged in the rape and sexual violence but that he ordered, instigated, or otherwise facilitated the acts by his words of encouragement, his presence, and his failure to prevent, stop, or punish his subordinates.[45] The Chamber convicted Akayesu "by virtue of his authority," of individual criminal responsibility for rape and sexual violence.[46]

IV. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created in May 1993 by the U.N. Security Council to prosecute the war criminals responsible for the ethnic cleansing campaigns in the former Yugoslavia in the late 1980s and 1990s.[47] Yugoslavia's inception post-World War II inevitably arranged for the resulting ethnic conflicts when

41. Samantha I. Ryan, Comment, *From the Furies of Nanking to the Eumenides of the International Criminal Court; The Evolution of Sexual Assaults as International Crimes*, 11 PACE INT'L L. REV. 447, 469 (1999).

42. *Id.*

43. Prosecutor v. Jean Paul Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688 (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

44. *Id.* The Trial Chamber cited testimony of Witness KK who described Akayesu ordering the undressing of a student in a public courtyard and forcing her to do gymnastics as an example of forced nudity constituting sexual violence. The judgment stated that coercion need not be physical and that it may be inherent in armed conflicts or when military is present. The Trial Chamber also broadened the definition of rape to include acts involving the insertion of foreign objects and "the use of bodily orifices not considered to be intrinsically sexual." *Id.* ¶ 686. This is significant because it recognizes the reason behind raping and sexual violence committed during an armed conflict with genocidal intent—to demean and humiliate the "other." *See also* Obote-Odora, *supra* note 14, at 149 (noting the special importance of recognizing rape as only a part of destruction and the subsequent psychological damage).

45. *See* Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 692-94.

46. Obote-Odora, *supra* note 14, at 150.

47. Andrea R. Phelps, Note, *Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution*, 12 WM. & MARY J. WOMEN & L. 499, 504 (2006).

Dictator Josip Tito unified the six republics of Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and Montenegro into one communist country.[48] After Tito's death in 1980 and just prior to the fall of the Soviet Union, Slobodan Milošević emerged out of the power vacuum as the leader of the Serbian Communist Party in 1986 on a platform of Serbian independence.[49] Croatia and Slovenia held elections and declared independence in 1991, closely followed by Bosnia-Herzegovina in 1992, leading to an even greater drift between the Serbs, Muslims, and Croats dominating the region.[50] The ethnic groups within the now-independent countries turned on each other and sought alliances with their brethren in neighboring countries, engulfing the entire region in an ethnically fueled armed conflict. The Bosnian Serbs initiated attacks against the Croats and Muslims of Bosnia and subjected them to military attacks, interrogation, and torture.[51] Sexual crimes[52] were among the most prevalent and included rape, forced sterilization, forced pregnancy and childbirth, sexual slavery, and other sexual violence offenses.[53] ICTY estimates that from 1992 to 1995, between 20,000 and 50,000 mostly Bosniak woman and girls were raped.[54] "Rape was an official policy of war" and the perpetrators were limited only by their imagination.[55]

A. SEXUAL VIOLENCE CRIMES IN ICTY STATUTE

ICTY Statute Articles 2 through 5 provide for the Tribunals jurisdiction in prosecuting "serious violations of international humanitarian law

48. CENTER FOR EUROPEAN STUDIES, UNIVERSITY OF NORTH CAROLINA CHAPEL HILL, *What Happened to Yugoslavia?* 3 (2004) http://www.unc.edu/depts/europe/teachingresources/balkan-crisis.pdf.

49. Phelps, *supra* note 47, at 505.

50. CENTER FOR EUROPEAN STUDIES, *supra* note 48, at 5–6.

51. Phelps, *supra* note 47, at 505.

52. Most legal commentary hails the ad hocs with revolutionizing the prosecution of sexual violence in the context of female victims and overlooks sexual violence targeting male victims. ICTY's first case, and the first international war crimes trial since Nuremburg and Tokyo, was also the first-ever trial for sexual violence against men. After a three-year trial, the Trial Chamber handed down a guilty verdict. *See* Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Opinion and Judgment, (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). *See* Dagmar Herzog, *Sexual Violence against Men: Torture at Flossenbürg*, *in* RAPE: WEAPON OF WAR AND GENOCIDE 29 (Carol Rittner & John K. Roth eds., 2012), for an academic discussion of sexual violence against men in the context of conflicts, and specifically in the Nazi concentration camps, for scientific, genocidal, and personal purposes.

53. Phelps, *supra* note 47, at 505; *Crimes of Sexual Violence*, ICTY, http://www.icty.org/sid/10312 (last visited Oct. 19, 2013).

54. Christina M. Morus, *War Rape and the Global Condition of Womanhood: Learning from the Bosnian War*, *in* RAPE: WEAPON OF WAR AND GENOCIDE 45, 47 (Carol Rittner & John K. Roth eds., 2012).

55. Phelps, *supra* note 47, at 505 (internal quotations omitted).

committed in the territory of the former Yugoslavia since 1991."[56] While only Article 5, "Crimes Against Humanity," provides for rape as a specific crime, both Articles 3, "Violations of the Laws or Customs of War," and 4, "Genocide," have been interpreted to cover sexual violence offenses. The Appeal Chamber in the *Tadić Jurisdiction Decision* interpreted Article 3 as having "a very broad scope" and covering "any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule."[57] Furthermore, the Trial Chamber in the *Furundžija Judgment* concurred with the ICTR *Akayesu* decision categorizing rape as a crime of genocide, where the other elements are present as well.[58]

B. DEFINING MOMENTS: *FURUNDŽIJA* AND *KUNARAC*

In April 1993, Anto Furundžija served as a local commander of a special unit of Croatian forces known as the "Jokers."[59] His team was tasked with interrogating two witnesses, Witness A (a Muslim woman) and Witness D (a Croatian soldier).[60] By the time Furundžija and his team were through with Witness A, she had been subject to multiple rapes, sexual assaults, and physical abuse.[61] Ultimately, the Tribunal found Furundžija guilty of violation of the laws or customs of war, torture and outrages upon personal dignity, including rape.[62] However, the Judgment's most crucial component was its narrow definition of rape under international law, wherein the elements of rape were defined as: "(1) sexual penetration, however slight, of the vagina, anus, or mouth of the victim by the penis or the vagina or anus of the victim by an object used by the perpetrator, and 2) by coercion or force or threat of force against the victim or a third party."[63]

In a 1996 indictment, the ICTY named Dragoljub Kunarac, Radomir Kuvač, and Zoran Vuković, in addition to several other codefendants, in an

56. *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, UNITED NATIONS (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

57. Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

58. *Id.* ¶ 172.

59. Chad G. Marzen, *The Furundžija Judgment and Its Continued Vitality in International Law*, 3 CREIGHTON L. REV. 505, 507 (2010).

60. *Id.*

61. *Id.* at 508. In addition to being present and overseeing the interrogation, Furundžija also directly took part in the interrogation of Witness A. While he questioned the woman, another soldier "rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth." Witness A was also forced to perform oral sex, raped on numerous occasions, and eventually collapsed of exhaustion. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 38.

62. Furundžija, Case No. IT-95-17/1-T, Judgment, part IX.

63. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 185.

indictment stemming from actions occurring in Foca in 1992.[64] All three were charged with rape, in addition to other individual offenses.[65] The incident took place during and after a Bosnian Serb takeover of the town, after which all the Croats and Muslims were rounded up, separated, and imprisoned in various detention facilities.[66] All three were accused of personally partaking in raping and sexually assaulting Muslim women and girls.[67] On February 22, 2001, the Trial Chamber announced its conviction of all three men of both war crimes and crimes against humanity.[68] It is important to note that the Chamber also ruled that the rapes in Foca constituted an outrage upon personal dignity under Article 3(c) of the Geneva Conventions, even though the Conventions do not explicitly hold jurisdiction over rape crimes.[69] The Chamber believed that the crimes committed at Foca were of such a grave nature that they could constitute a war crime as contemplated by the Conventions' drafters.[70] Furthermore, the Chamber relied on an extensive history of enslavement as part of international human rights and humanitarian law in finding that a particular type of enslavement (i.e., sexual enslavement) constituted a crime against humanity.[71]

Akayesu, *Furundžija*, and *Kunarac* established solid rules pertaining to recognition and prosecution of sexual violence crimes by frankly acknowledging sexual violence crimes as significant components of international and non-international armed conflicts and by defining the exact nature of the crimes. These established rules have never been disputed or overruled by any international judicial or legislative body and, in fact, have been used in finding crimes of genocide and torture, well-established peremptory norms.[72] The broad definition of rape and sexual violence in *Akayesu* was fitting considering this was the first occasion that an international tribunal of this sort considered specifically proven instances of rape and sexual violence. The particular nature of the conflict as well supported a more inclusive definition—the deplorable nature of the conflict and the extremely short amount of time it took (100 days) may have prompted the ICTR judges to err on the side of over inclusivity. The ICTY took the opportunity to polish and narrow in scope the definition of rape in *Furundžija* while still revolutionizing prosecution of sexual

64. *The Prosecution of Rape*, *supra* note 14, at 1283.
65. *The Prosecution of Rape*, *supra* note 14, at 1283.
66. *The Prosecution of Rape*, *supra* note 14, at 1283.
67. *The Prosecution of Rape*, *supra* note 14, at 1284.
68. *The Prosecution of Rape*, *supra* note 14, at 1283.
69. *The Prosecution of Rape*, *supra* note 14, at 1285.
70. *The Prosecution of Rape*, *supra* note 14, at 1285.
71. Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 542 (Feb. 22, 2001), http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf.
72. Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L. L. 287, 295 (2002).

violence crimes by recognizing that coercion can exist whether directed toward the victim or toward third parties and specifically acknowledging oral sexual acts as rape.[73] While some may see the narrowing of the definition of rape as negative, it in fact makes the definition more explicit, which simplifies the process of establishing a uniform definition for international bodies, an undoubtedly positive development if the goal is to standardize the prosecution of sexual violence crimes.[74] Crucially, the ICTY also demonstrated the fluid and ever-evolving nature of international criminal law where peremptory norms are still subject to novel interpretation when it explicitly included sexual enslavement as an accepted form of slavery in *Kunarac*.[75] It is undisputed that in adopting these particular rules in its Elements of Crimes,[76] the ICC relied on well-established international law arising out of real, fact-based situations and any further application of these principles will ground them as customary international law and peremptory norms.

V. PERMANENT SOLUTION: INTERNATIONAL CRIMINAL COURT[77]

ICTY and ICTR are generally the best known of the ad hoc tribunals established by the United Nations. However, it would be wrong to assume that prosecution of the world's atrocities has stopped there. The United Nations have also subsequently established the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia,[78]

73. Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L. L. 225, 231 (2006-2007).

74. *Id*. It also reflects the narrower definition of rape generally accepted within various national law systems, like the U.S. *See generally* CAL. PENAL CODE § 261 (stating, in pertinent part, that "rape is an act of sexual intercourse accomplished . . . where the person is incapable . . . of giving legal consent . . . [and] where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.").

75. Sellers, *supra* note 72, at 296.

76. International Criminal Court, Elements of Crimes, art. 7(1)(g)-1, 2 (2011) *available at* http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf. Throughout this note, I will refer to the International Criminal Court Elements of Crimes as "Elements of Crimes."

77. It is worth noting that neither the ICC nor the ad hoc tribunals are the first international court established by the United Nations. The International Court of Justice (ICJ) was established in June 1945 by the Charter of the United Nations as the principal international judicial organ. However, the ICJ is a civil court tasked with resolving legal disputes submitted by the Member States and issuing advisory opinions on legal questions referred to it by the United Nations. *See generally* International Court of Justice, http://www.icj-cij.org (last visited Oct. 1, 2013).

78. The Special Court of Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia are distinguishable from the ICTY and ICTR since they are not seated in The Hague, Netherlands, as most others tribunals are and they place a greater emphasis on prosecution of crimes under both international humanitarian law and national law. *See generally* Special Court for Sierra Leone, http://www.sc-sl.org/ (last visited Oct. 1, 2013);

and the Special Tribunal for Lebanon[79] amongst numerous ideas for others.[80] The international community finally realized that crimes based on preconceived notions and cultural differences would unfortunately continue to occur and establishing isolated, individual tribunals *ex post facto* with limited jurisdiction is simply unfeasible. Thus, in 1995, the United Nations established an ad hoc committee pursuant to the recommendation of the International Law Commission to establish an international criminal court, and agreed to convene in Rome, Italy, during the summer of 1998.[81] The result of that convention was a multilateral treaty, the Rome Statute of the International Court, which, if ratified by sixty countries, would establish the International Criminal Court (ICC).[82] As of May 1, 2013, 122 countries are considered Member States to the ICC.[83] Importantly, the ICC only has complementary jurisdiction over its Member States and is often described as the "court of last resort" as it will not act if a case is already being investigated or prosecuted by a national judicial system unless the State is unable or unwilling to genuinely prosecute.[84] It is also important to note the limitation of *ratione temporis*—"the Court has jurisdiction only with respect to crimes committed after the entry into force of [the Rome] Statute" or "[i]f a State [became] a Party to [the Rome] Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of [the Rome] Statute for that State," unless the State voluntarily accepted the Court's jurisdiction.[85]

Extraordinary Chambers in the Courts of Cambodia, http://www.eccc.gov.kh/en (last visited Oct. 1, 2013).

79. The Special Tribunal for Lebanon, although seated in The Hague, is further unique in that its jurisdiction is limited to Lebanese criminal code; it prosecutes terrorism as a distinct crime; it allows full participation by victims in the trial; it also allows trials in absentia; and it has created a separate Defence Office as an equal counterpart to the Office of the Prosecutor. *See Unique Features*, Special Tribunal for Lebanon, http://www.stl-tsl.org/en/about-the-stl/unique-features (last visited Oct. 1, 2013).

80. *See International Law*, UNITED NATIONS, http://www.un.org/en/law (last visited Oct. 1, 2013).

81. G.A. Res. 49/53, ¶ 2, U.N. Doc. A/RES/49/53 (Feb. 17, 1995); Cheryl K. Moralez, *Establishing an International Criminal Tribunal: Will It Work?*, 4 DEPAUL INT'L L.J. 135, 140 (2000).

82. Rosaria Vigorito, *The Evolution and Establishment of the International Criminal Court (ICC)*, 30 INT'L J. LEGAL INFO. 92, 93 (2002). One hundred twenty countries voted in favor and seven voted against (including the United States) with twenty-one abstentions. Interestingly, while the United States did sign the Rome Statute on December 31, 2000, it has yet to ratify it.

83. *ICC at a glance*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx (last visited Oct. 1, 2013). The United States is not one of the 122 Member States.

84. *Id.*; Rome Statute, *supra* note 39, art. 17(1)(a).

85. Rome Statute, *supra* note 39, art. 11.

A. ROME STATUTE AND JURISDICTION OVER SEXUAL VIOLENCE CRIMES

An important aspect of the Rome Statute and a peculiarity of the ICC, and international law in general, is the lack of *binding* legal precedent. Article 21 provides for the hierarchy of law and legal principles that the Court may apply in handing down its decisions and, specifically, that "[t]he Court *may* apply principles and rules of law as interpreted in its previous decisions," but it does not *have* to.[86] This presents a significant legal challenge in the equal application of the law, as it is quite feasible for two different Trial Chambers, presiding over different cases with similar legal questions, to issue two separate and conflicting judgments. Furthermore, the Court may also apply, after relying on "[the Rome] Statute, Elements of Crimes and its Rules of Procedure and Evidence, . . . applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."[87] This language allows the ICC to consider judgments of the other ad hocs on factually similar cases, as many have been recognized to be "established principles," but, as noted, does not *mandate* the Court to do so. These considerations potentially present a challenge in specific areas of law that have yet to be clearly established and thoroughly analyzed by international tribunals and reflects the new-ness and constant evolution of the international criminal law. However, in the limited area of scope addressed in this Note—rape, sexual slavery, and sexual violence—the Court has chosen to rely on the findings of other notable ad hocs and codify "much of what was first articulated [and prosecuted] in the ICTY and ICTR, but not enumerated as a crime in their respective Statutes."[88] A notable exception to this absorbing of the law is the crime of forced marriage, discussed *infra* VII.

The Rome Statute, similar to the statutes of ICTY and ICTR, provides for the Court's jurisdiction over "the most serious crimes of concern to the international community as a whole," and specifically: the crimes of genocide; crimes against humanity; war crimes; and the crime of aggression.[89] Jurisdiction over crimes of sexual nature can be found within crimes against humanity ("rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity")[90] and war crimes ("rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions").[91]

86. Rome Statute, *supra* note 39, art. 21(2) (emphasis added).
87. Rome Statute, *supra* note 39, art. 21(1)(a-b).
88. Ellis, *supra* note 73, at 238.
89. Rome Statute, *supra* note 39, art. 5.
90. Rome Statute, *supra* note 39, art. 7(1)(g).
91. Rome Statute, *supra* note 39, art. 8(2)(b)(xxii). For the purposes of this Note, the discussion of the required circumstances for an international or a non-international conflict

A crucial aspect of the ICC and its jurisdiction over sexual violence crimes is its uniformity. As mentioned previously in this Note, ICC and its jurisdiction arose out of a recognized need for a consistent definition of rape and sexual violence and manner of prosecution. That has been combined with the need for a competent international judicial organ that would oversee the prosecution of well-established international crimes of uniform definition, which was foreseen by the U.N. in the post-WWII world.[92] The Rome Statue itself recognizes that need and the danger of "the most serious crimes of concern to the international community as a whole [going] unpunished."[93] The ICC and its Elements were the answer. As the world conceded its inability to continue responding to crises on a case-by-case basis and circled back to the initial discussion of a unified, international, controlling judicial organ it was only logical to adopt the legal precedents already established by ad hocs created by the United Nations for the sole purpose of deciding these very issues. Even those criticizing a unified international criminal court, boasting about its downfalls and oversights, and instead proposing a system of regional enforcement of international law, admit that "[e]ven a slight variation in substantive rules of international criminal law could prove extremely damaging."[94] Lacking a consensus, the universal international crimes would lose their universality, perpetrators and judges could have their choice of applicable law, and "the legitimacy of international criminal law could be fundamentally threatened."[95] And while it is true that the various ad hocs and regional tribunals have for the most part adhered to the rules and standards set out by their counterparts, a universal, singular international criminal court codifying those rules as the only valid interpretation of international law significantly elevates the validity of the new law.

It is also worth noting that the ICC and codification of the definition of rape in the Elements of Crimes, aside from promoting a uniform application of law of use to international tribunals, judges, attorneys, and perpetrators, also provides a uniform method of relief for the victims. In a world where rape is still often seen as the fault of the woman-victim, where even the victims continually blame themselves, "saying 'I was in the wrong place, I should have fought harder, I should have . . . ,'" a written and consistent law that acknowledges the helplessness and vulnerability of the situation the victim is placed in and that definitively demonstrates that the

has been omitted. When deciding a case before any of the ad hocs or the ICC, the court would first establish the nature of the conflict to determine whether the court possesses jurisdiction.

92. G.A. Res. 260 (III) B, U.N. Doc. A/RES/260(III) (Jan. 1, 1948).

93. Rome Statute, *supra* note 39, Preamble.

94. William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INTL. L. J. 729, 756 (2003).

95. *Id.* at 757.

perpetrator will be prosecuted for his crimes, is of greater importance than even to the international prosecutorial system.[96] The ICC has been revolutionary in recognizing the victims' suffering and allowing them great participation in all stages of the prosecutorial process.[97] In fact, the "victim standing rule" has been codified in the Rome Statute stating, "[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court."[98] The ICC allows victims to have legal representatives to assist them in the process and to participate in the trial on their behalf;[99] establishes various protective measures during the testimonial and investigative process "to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses;"[100] and provides for reparations for victims.[101] These provisions and safeguards are new developments in the area of international criminal law and help create "a court where the victims are more than mere witnesses," and provide a forum for victims' experiences to be vindicated while also bringing about justice.[102]

By codifying the decisions handed down in ICTY and ICTR in its Elements of Crimes, the ICC also promoted the inclusion of rape and sexual violence as a norm of jus cogens. The jus cogens doctrine defines peremptory norms from which derogation is not allowed.[103] It essentially identifies those principles that override others based on certain values and interests.[104] Article 53 of The Vienna Convention on the Law of Treaties defines jus cogens:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international

96. Terese Godwin Phelps, *Feminist Legal Theory in the Context of International Conflict*, 39 U. BALT. L.F. 173, 178 (2009).

97. At least in comparison with the extent of victim participation in the U.S. "The rule stems from the continental European legal systems, which grant victims extensive rights and limit the government prosecutor's ability to control a criminal case." Smith, *supra* note 13, at 494.

98. Rome Statute, *supra* note 39, art. 68 § 3.

99. International Criminal Court, Rules of Evidence and Procedure, III §3 Rule 90–91 (2011), *available* at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.NG.08Feb1200.pdf [hereinafter Rules of Evidence and Procedure].

100. Rome Statute, *supra* note 39, art. 68 § 1; Rules of Evidence and Procedure, *supra* note 99, III §2 Rule 87–88.

101. Rome Statute, *supra* note 39, art. 75; Rules of Evidence and Procedure, *supra* note 99, III §4.

102. Phelps, *supra* note 47, at 517.

103. David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 228 (2005).

104. *Id.*

> law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[105]

Jus cogens norms generally develop over time with the consensus of the international community and, over the decades of legal development, have come to include genocide, crimes against humanity, war crimes, torture, aggression, piracy, and slavery as accepted peremptory norms.[106] In the ICTY and ICTR cases discussed above, the ad hocs interpreted rape and sexual violence as evidence of acts satisfying elements of genocide (*Akayesu*), torture (*Furundžija*), and slavery (*Kunarac*).[107] Unfortunately, the interpretation that rape may constitute conduct sufficient to prove elements of other peremptory norms but does not rise on its own rids sexual violence of the independent recognition it deserves.[108] To achieve the status of a peremptory norm, an international rule has to satisfy the basic sources of international law including treaty, custom, and general principles in addition to other objective indicia promulgated by the International Law Commission.[109] By codifying rape and sexual violence and enumerating the elements of these crimes, and through its status as a "widely endorsed multilateral treaty—[the ICC] can be taken to signify customary international law with respect to sexual violence as a war crime and crime against humanity," and satisfy the prongs of the first test of jus cogens.[110] Thus, the reasons for the initial necessity for the ICC and the uniform definition of rape and sexual violence have largely remained the same and continue to be necessary even a decade after the Court's formation.

B. THE PROSECUTOR V. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI

The Democratic Republic of Congo ratified the Rome Statute in April 2002.[111] In March 2004, the DRC government referred the situation on its territory since the Rome Statute's entry into force in July 2002.[112] The Prosecutor initiated an investigation in June 2004.[113] In July 2007, the Pre-

105. The Vienna Convention on the Law of Treaties, G.A. Res. 2166 (XXI), U.N. Doc. A/RES/2166 (XXI) (May 23, 1969), *available at* http://untreaty.un.org/cod/avl/ha/vclt/vclt.html.

106. Mitchell, *supra* note 103, at 231–232.

107. Sellers, *supra* note 73, at 296.

108. Sellers, *supra* note 73, at 296.

109. Mitchell, *supra* note 103, at 232.

110. Mitchell, *supra* note 103, at 232. For a further discussion of the second prong of the jus cogens test and the status of rape as a norm of jus cogens, *see supra*.

111. *Case Information Sheet*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/iccdocs/ PIDS/publications/KatangaChuiEng.pdf (last visited Oct. 1, 2013).

112. *Id.*

113. *Id.*

Trial Chamber I issued arrest warrants for Katanga and Ngudjolo and issued a decision in March 2008 joining the cases based on "alleged co-responsibility for the crimes allegedly committed during and in the aftermath" of the attack.[114] The charges were confirmed in September 2008.[115] Trial Chamber II then granted 366 victims the right to participate in the proceedings, represented by the Legal Representatives of the Victims.[116] The trial commenced on November 24, 2009.[117]

1. The Factual Backdrop to *Katanga* and *Ngudjolo*

The atrocities at Bogoro were committed as part of a wider international armed conflict arising out of Congo's deep and difficult history of exploitation and greed by outsiders. In 1871, Henry Morton Stanley, a Welsh journalist for the *New York Herald*, traveled to Africa, where he found the "lost" Scottish missionary Dr. David Livingstone, as well as the vast natural resources of ivory and, most importantly, rubber.[118] Upon his return to Europe, Stanley became the private emissary for King Leopold II of Belgium who laid personal claim to all of Congo.[119] Leopold was eventually forced to sell his claim to Belgium, which continued to administer Congo as a colony and exploit its natural resources until 1960.[120] Soon afterwards, the CIA assassinated Congo's first democratically elected leader, Patrice Lumumba, and Joseph Desiré Mobutu, a U.S. ally, became the leader of the newly renamed Zaire.[121] Zaire continued to be quietly ruled and exploited by Mobutu and his western allies for more than thirty years until, in 1994, the entire world became aware of the civil wars and genocide in the neighboring Rwanda and Burundi.[122] Zaire was the natural haven for the defeated Rwandan Hutus, who fled through the mountains and brought with them "an attitude cultivated by Hutu Power propaganda that as a matter of ethnic pride and political policy, Tutsi women must be raped."[123] The Rwandan Hutu introduced the concept of rape to Mobutu's regime and the numerous

114. *Case Information Sheet*, *supra* note 111; Prosecutor v. Mathieu Ngudjolo Chiu, Case No. ICC-01/04-02/07, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chiu, 6 (Mar. 10, 2008), http://www.icc-cpi.int/iccdocs/doc/doc460177.pdf.

115. *Case Information Sheet*, *supra* note 111.

116. *Case Information Sheet*, *supra* note 111.

117. *Case Information Sheet*, *supra* note 111.

118. Ann Jones, *The Democratic Republic of Congo: Rape*, *in* WAR IS NOT OVER WHEN IT'S OVER 131, 131–132 (2010).

119. *Id.* at 131.

120. *Id.* at 132–33.

121. *Id.* at 133.

122. *Id.* at 134.

123. *Id.* For an overview of the Hutu-Tutsi history and the Rwandan genocide, *see generally* Alexandra A. Miller, Comment, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN. ST. L. REV. 349 (2003).

guerilla factions keen on overthrowing the ailing kleptocrat.[124] But the Hutus also continued their war on the refugee Tutsi population in Zaire, and the various factions and governments in the region, for one reason or another, aligned themselves with either side. This resulted in what became known as "Africa's World War," and eventually involved eight African nations and about twenty-five armed groups.[125] In 1996, Laurent Kabila, a longtime Congolese rebel, gained the support of anti-Mobutu Zaire's Tutsi and was able to overthrow Mobutu in what became officially known as the First Congo War.[126] Kabila then turned on the Tutsis and their allies who helped him attain power in the Second Congo War whilst he continued exploiting Congo's resources for personal gain and while his armies continued raping for pleasure, need, and degradation.[127] In 2006, after the 2003 peace accords that in reality failed to stop the fighting and raping in eastern Congo, Joseph Kabila succeeded his assassinated father in an election aimed at merely covering up the instability in the region.[128]

2. The *Katanga* and *Ngudjolo* Decisions

Nearly four years after the start of the trial, Trial Chamber II issued a decision severing the charges against Katanga and Ngudjolo due to a "legal recharacterisation [sic]" of "the mode of liability under which Germain Katanga stands charged."[129] On December 18, 2012, the Chamber acquitted Ngudjolo finding that it was not proven beyond a reasonable doubt that he was the commander of the Lendu combatants at the time of the Bogoro attack.[130] Importantly, the judges did state, "that this did not signify that crimes had not been committed," and "recognised [sic] that Ngudjolo was a chief commander of the FNI," in March 2003, after the February attack.[131] Njudgolo was released from custody on December 21,

124. Jones, *supra* note 118, at 134.

125. Lee Ann De Reus, *My Name is Mwamaroyi: Stories of Suffering, Survival, and Hope in the Democratic Republic of Congo*, *in* RAPE: WEAPON OF WAR AND GENOCIDE 139, 144 (Carol Rittner & John K. Roth eds., 2012).

126. Jones, *supra* note 118, at 134–35.

127. Jones, *supra* note 118, at 135.

128. Jones, *supra* note 118, at 136. Kabila succeeded his father in 2001, but was formally elected in 2006. *See supra*.

129. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the implementation of Regulation 55 of the Regulations of the Court and severing charges against the accused persons, § III (Nov. 21, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1529337.pdf.

130. Press Release, Women's Initiatives for Gender Justice, First Acquittal by the ICC (Dec. 18, 2012) http://www.iccwomen.org/documents/Ngudjolo-Press-Release--final.pdf; Prosecutor v. Mathieu Ngudjolo, Case No. ICC-01/04-02/12, Judgment pursuant to Article 74 of the Statute (Dec. 18, 2012) http://www.icc-cpi.int/iccdocs/doc/doc1579080.pdf.

131. Ngudjolo, Case No. ICC-01/04-02/12, Judgment pursuant to Article 74 of the Statute.

2012.[132] The Office of the Prosecutor has appealed the decision.[133] Judgment in the *Katanga* case is pending.

VI. APPLYING THE ELEMENTS OF CRIMES TO *KATANGA*

The *Katanga* case serves as the first-ever opportunity for the ICC to apply the revolutionary rules it has codified since the Court's inception over a decade ago. However, it is necessary to mention that this lack of attention on behalf of the Court toward rape and sexual violence is not due to a lack of situations and test cases—the ICC is currently investigating eighteen cases in eight separate situations.[134] Eleven of the cases include charges for rape, sexual violence, and sexual enslavement, three of which, not including *Katanga* and *Ngudjolo*, stem from the situation in DRC.[135] But *Katanga* is the only currently pending case with the opportunity to finally apply the codified rules arising out of the ICTY and ICTR and create a prosecutorial standard for future use. And although, as mentioned above, forced marriage was not charged under "any other form of sexual violence" or "other inhumane acts," as it has been at the SCSL, the ICC may still seize *sua sponte* the opportunity to address and develop its jurisprudence on this matter in this case.[136]

Over the course of the trial, numerous male and female witnesses have testified as to the gender-based crimes occurring during the Bogoro attack, in the subsequent days, and as general practice of the two armed groups.[137] Three female witnesses testified specifically to rape—they were gang-raped by soldiers, and on multiple occasions, brought to a prison camp and sexually enslaved as "wives."[138] Male witnesses testified that women were abducted, taken hostage, used as sexual slaves, and forced into marriage

132. *Democratic Republic of Congo*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/ICC-01-04-02-12/Pages/default.aspx (last visited Oct. 1, 2013).

133. Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12, Prosecution's Appeal against Trial Chamber II's "Jugement rendu en application de l'article 74 du Statut" (Dec. 20, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1531064.pdf.

134. *Situations and Cases*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Oct. 1, 2013).

135. *Democratic Republic of Congo*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx (last visited Oct. 19, 2013).

136. Rome Statute, *supra* note 39, art. 7(1)(g), (e).

137. Women's Initiatives for Gender Justice, *Gender Report Card on International Criminal Court 2011*, 226 (Nov. 2011), http://www.iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2011.pdf [hereinafter *Gender Report Card 2011*].

138. *Gender Report Card 2010*, *supra* note 1, at 165–75. The ICC, in this instance, utilized the application of the word "wife" to show ownership of the victim as opposed to the perpetrator's intent to force a conjugal association with the victim, as the AFRC Appeals Chamber did, *infra* VII.

with Ngudjolo's knowledge and implicit permission.[139] A witness also testified to a system of mutilating men and women that was used during the attack in Bogoro, which included cutting off sexual organs as well as heads and opening the victim's chest.[140] However, neither Katanga nor Ngudjolo were charged with mutilation. Although these practices were disputed as "contrary to the use of the [battle] rituals," extensive witness testimony supports the allegations that these atrocities were nevertheless committed.[141]

Under both Article 7(1)(g)-1 and Article 8(2)(b)(xxii)-1, crimes against humanity and war crimes respectively, elements of rape are:

> 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
>
> 2. The invasion was committed 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, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[142]

This definition is reflective of the spirit of both the ICTR *Akayesu* and the ICTY *Furundžija* decisions as the definition is narrow and explicit enough to establish stable grounds for prosecution but also encompasses the broad spirit of *Akayesu* and allows for flexibility in prosecutorial and judicial discretion. Furthermore, the coercive element is also fairly broad and is meant to support the *Akayesu* court's supposition that "coercion may be inherent in certain circumstances, such as armed conflict," meaning that once the existence of an armed conflict is established, rape and sexual violence occurring within that conflict is assumed to be nonconsensual.[143] Furthermore, it is required that the rape, as a crime against humanity, was "committed as part of a widespread or systematic attack directed against a civilian population" and "[t]he perpetrator knew . . . or intended" it as such.[144] As a war crime "[t]he conduct [must have taken] place in the context of and was associated with an international armed conflict" and "[t]he perpetrator was aware" of such.[145] These requirements also apply to

139. *Gender Report Card 2011*, *supra* note 137, at 226–27.
140. *Gender Report Card 2011*, *supra* note 137, at 227.
141. *Gender Report Card 2011*, *supra* note 137, at 227.
142. Elements of Crimes, *supra* note 76, art. 7(1)(g)-1, 8(2)(b)(xxii)-1.
143. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 688.
144. Elements of Crimes, *supra* note 76, art. 7(1)(g)-1.
145. Elements of Crimes, *supra* note 76, art. 8(2)(b)(xxii)-1.

the war crime and crime against humanity of sexual slavery.[146] The Elements of Crimes expand on the *Kunarac* decision by specifically enumerating sexual slavery as a crime under war crimes and crimes against humanity; the Elements define sexual slavery as "[exercising] any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty" and "[causing] such person or persons to engage in one or more acts of a sexual nature."[147] The Elements of Crimes also specifically enumerate sexual violence as a crime against humanity and a war crime, a step in the right direction for independent recognition of gender-based crimes that neither the ICTY nor the ICTR took.[148]

In applying the Elements of Crimes to the Bogoro incident and *Katanga*, Trial Chamber II will have to decide whether the crimes were committed as part of a widespread or a systematic attack, whether Katanga knew or intended it as such, and whether the attack took place in the context of and was associated with an international armed conflict, and whether Katanga was aware of that. Based on the country conditions at the time of the attack and the widespread conflict between the Hema and the Lendu, as well as the participation of numerous neighboring countries in the conflict, it is likely that both of the conditions will be met.[149] Then, the Court will have to conduct a highly fact-specific finding based on witness testimony, as to whether Katanga was present at the Bogoro attack and whether his actions, based on the applicable mode of liability, rise to the conduct enumerated in the Elements. As the record has been redacted extensively for the purpose of witness protection and the cases are highly fact-based, it is difficult to conclude with certainty whether Katanga's conduct will give rise to a guilty verdict. However, it is likely, given available testimony that the evidence of rape and sexual slavery during and subsequent to the attack at Bogoro will be sufficient and extensive enough to find for a guilty verdict. Whether the Trial Chamber will choose to address the issue of forced marriage, under the umbrella of one of the crimes already charged, is uncertain but there is sufficient evidence in the record to allow such a diversion from the original indictment.

VII. FORCED MARRIAGE

It is important to note that the Trial Chamber does not have the opportunity of addressing *separately* the issue of forced marriage. Since the Rome Statute does not have jurisdiction over the independent crime of

146. Elements of Crimes, *supra* note 76, art. 7(1)(g)-2, 8(2)(e)(vi)-2.
147. Elements of Crimes, *supra* note 76, art. 7(1)(g)-2, 8(2)(e)(vi)-2.
148. Elements of Crimes, *supra* note 76, art. 7(1)(g)-6, 8(2)(b)(xxii)-6.
149. Trial Background, The Trial of Germain Katanga and Mathieu Ngudjolo Chui, http://www.katangatrial.org/trial-background (last visited Oct. 1, 2013).

forced marriage under either crimes against humanity or war crimes, as neither the ICTR nor the ICTY had, and the Office of the Prosecutor chose not to charge the crime under either "other form[s] of sexual violence" or "other inhumane acts,"[150] forced marriage was not charged in the indictment against either Katanga or Ngudjolo. In fact, the only modern tribunal that has thus far actively prosecuted and independently addressed the issue of forced marriage is the SCSL.[151] In 2008, the Appeals Chamber recognized forced marriage as a distinct crime falling under "other inhumane acts," as part of crimes against humanity.[152] This lack of legal attention to forced marriage is not due to the absence of the issue as both the cases at ICTR encountered extensive testimony regarding the forced taking of "wives"[153] and the ICC's investigation and prosecution in the DRC situation established the prevalence of the practice.[154] Rather, the hesitance to prosecute forced marriage during a conflict (as opposed to arranged marriages occurring in the peace time—an important distinction[155]) arises out of the debate whether explicitly enumerating forced marriage as a crime against humanity would diminish the gravity of the crime by limiting it to a domestic distinction or if such action would instead internationally recognize the specific crime the victims endured.[156] In the case of *Katanga*, the lack of recognition of forced marriage as a separate crime against humanity likely does not diminish the seriousness of the prosecution and of the recognition of atrocities committed against the women and girls at Bogoro and in the Ituri region such that the benefit in adoption by the ICC of the standards SCSL has used in its crucial forced marriage cases, discussed *infra*, would outweigh the muddling of the

150. Rome Statute, *supra* note 39, art. 7(1)(g), (e).

151. The Extraordinary Chambers in the Courts of Cambodia (ECCC) has also begun conducting investigations into forced marriage during the Khmer Rouge regime. *See* Prosecutor v. Nuon Chea, Ieng Sary, Ieng Thirith & Khieu Samphan, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations (Extraordinary Chambers in the Courts of Cambodia, Dec. 18, 2009), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D268_2_EN.pdf.

152. Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Judgment, ¶ 202 (Feb. 22, 2008), http://www.sc-sl.org/LinkClick.aspx?fileticket=6xjuPVYy%2fvM%3d&tabid=173 [hereinafter AFRC Appeals Judgment].

153. Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed,* 7 U.C. DAVIS J. INT'L L. & POL'Y 197, 201 (2001).

154. *Gender Report Card 2010*, *supra* note 1, at 171, 174; Eva Smets, *Justice for "Bush Wives": The ICC and Bosco Ntaganda*, HUFF. POST (May 31, 2012, 10:25 AM), http://www.huffingtonpost.com/eva-smets/justice-for-bush-wives-congo_b_1534000.html; Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 353 (Int'l Crim. Court Pre-Trial Chamber I (Sept. 30, 2008), http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf.

155. *See* Jennifer Gong-Gershowitz, *Forced Marriage: A "New" Crime Against Humanity?*, 8 NW. U. J. INT'L HUM. RTS. 53, 34 (2009).

156. *Compare* Valerie Oosterveld, *The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments*, 44 CORNELL INT'L L.J. 49, 67 (2011) *with* Gong-Gershowitz, *supra* note 155, at 3.

distinction in the elements between forced marriage and sexual slavery. However, this fear of muddling of the elements does not mean that the ICC should avoid addressing the issue altogether. At the very least, in finding Katanga guilty of sexual slavery, the Court could identify the specific aspects of forced marriage that also constitute sexual slavery, discuss any potential differences it recognizes in the practices, and acknowledge that such practices have been prevalent in the conflict.

The SCSL developed its forced marriage jurisprudence in two notable cases—Prosecutor v. Brima, Kamara and Kanu, also known as the Armed Forces Revolutionary Council (AFRC) trial, and Prosecutor v. Sesay, Kallon and Gbao, known as the Revolutionary United Front (RUF) case. Both cases arose out of the severe sexual violence atrocities committed during the decade long civil war between various guerilla factions, often supported by neighboring countries, where as many as 257,000 women and girls were subject to brutal sexual violence.[157] The perpetrators indiscriminately gang raped, sexually mutilated and tortured, abducted, sexually enslaved, and forcibly "married" women and girls as young as ten.[158]

In June 2007, the SCSL Trial Chamber II handed down the judgment in the AFRC trial concluding that forced marriage failed to qualify as "other inhumane acts" under the SCSL Statute due to a lack of "need to create a new, distinct category of crime," and finding that the crime of forced marriage was wholly subsumed by the crime against humanity of sexual slavery.[159] In fact, elements of sexual slavery include exercising "any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty," and causing "such person or persons to engage in one or more acts of a sexual nature" during the conflict.[160] Sufficient testimonial evidence supports the conclusion that specifically these actions occurred under the characterization of marriage.[161] The prosecutor argued that a crime against

157. HUMAN RIGHTS WATCH, "WE'LL KILL YOU IF YOU CRY": SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT, Vol. 15, No. 1 (A), 25–26 (Jan. 2003), *available at* http://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf (citing PHYSICIANS FOR HUMAN RIGHTS, WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE: A POPULATION BASED ASSESSMENT 3–4 (2002), *available at* http://physiciansforhumanrights.org/library/ documents/reports/sexual-violence-sierra-leone.pdf) [hereinafter WE'LL KILL YOU IF YOU CRY]. For an in-depth background discussion of the conflict, *see supra* at 9–15; *see also* Gong-Gershowitz, *supra* note 155, at 6–10.

158. WE'LL KILL YOU IF YOU CRY, *supra* note 156, at 28–45.

159. Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Trial Chamber II Judgment, ¶¶ 703, 711 (June 20, 2007), http://www.sc-sl.org/LinkClick.aspx?fileticket=EqikfVSpLWM=&tabid=106 [hereinafter AFRC Trial Judgment]; Statute of the Special Court of Sierra Leone, art. 2(i) (Jan. 16, 2002), http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176 [hereinafter SCSL Statute].

160. AFRC Trial Judgment, *supra* note 159, ¶ 708.

161. *See generally* AFRC Trial Judgment, *supra* note 159, ¶¶ 1080–1188.

humanity of forced marriage should be based around the intention by the perpetrator to "confer a status of marriage by force or threat of force or coercion . . . with the intention of conferring the status of marriage,"[162] such that "a declarative act alone, if intended to 'confer a status of marriage,' would constitute a violation of international criminal law."[163] But simply using the term "wife" would not satisfy the gravity element adopted by the Trial Chamber and such a definition of the crime of forced marriage would have to imply acts in addition to those intended to confer marital status.[164] To address this issue, the prosecutor argued that forced marriage possesses distinctive features, other than sex, that warrant a separate definition and recognition from sexual slavery, namely conjugal duties such as cooking and cleaning.[165] However, the Trial Chamber notably rejected cooking and cleaning as essential characterizations of marriage and instead considered those acts further evidence of forced labor thus proving the element of control, as was found in the *Kunarac* decision in ICTY, and similar to the use of the word "wife" to demonstrate intent "to exercise ownership over the victim."[166]

The Appeals Chamber, in handing down its verdict in February 2008, agreed with the prosecution's argument that forced marriage is not only a sexual crime but that the perpetrators intended to impose a "forced conjugal association rather than exercise an ownership interest" in the women and girls.[167] The Appeals Chamber then enumerated distinguishing factors differentiating forced marriage and sexual slavery: 1) "perpetrator compelling a person by force or threat of force . . . into a forced conjugal association with a [sic] another person resulting in great suffering, or serious physical or mental injury on the part of the victim," thereby 2) "[implying] a relationship of exclusivity between the husband[168] and wife, which could lead to disciplinary consequences for breach of this exclusive

162. AFRC Trial Judgment, *supra* note 159, ¶ 701.

163. Gong-Gershowitz, *supra* note 155, at 22.

164. The Trial Chamber adopted additional elements from the Element of Crimes of the Rome Statute under "other inhumane acts" including that the "act was of a gravity similar to the acts referred to in Article 2(a) to (h) of the [SCSL] statute." AFRC Trial Judgment, *supra* note 159, ¶ 698.

165. AFRC Trial Judgment, *supra* note 159, ¶ 701.

166. AFRC Trial Judgment, *supra* note 159, ¶ 711. The Trail Chamber also held that "other inhumane acts" did not include crimes of sexual nature since Article 2(g) of the SCSL Statute already contained the catchall provision of "any other form of sexual violence." SCSL Statute, *supra* note 159.

167. AFRC Appeals Judgment, *supra* note 152, ¶¶ 189–90.

168. The term "husband" is certainly not used in this note in the traditional sense to connote a consensual marital relationship but only for the sake of simplicity in the discussion. Both the AFRC Appeals Chamber and the RUF Trial Chamber noted the explicit lack of consent in testimonial evidence. *See* AFRC Appeals Judgment, *supra* note 152, ¶ 190; Prosecutor v. Sesay, Kallon, and Gbao, Case No. SCSL-04-15-T, Judgment, ¶¶ 1185, 1211–12, 1287, 1293 (Mar. 2, 2009), http://www.sc-sl.org/ LinkClick.aspx?fileticket= D5HojR8FZS4%3d&tabid=215 [hereinafter RUF Trial Judgment].

arrangement."[169] In attempting to establish the gravity of forced marriage as a stand-alone crime against humanity, the Appeals Chamber relied on the very same evidence that it had rejected earlier as unnecessary elements to forced marriage—evidence of physical and sexual violence—in finding that this conduct on behalf of the perpetrator was grave enough considering "the atmosphere of violence in which the victims were abducted."[170] The Appeals Chamber also relied on the notion of exclusivity to differentiate between sexual slavery and forced marriage even though exclusivity may also serve as evidence of ownership over the victim supporting the crime of sexual slavery.[171] Even though the Appeals Chamber attempted to provide a basis for providing a new definition for the crime of forced marriage, the result created confusion as to what elements constitute the crime and what weight should evidence of sexual violence be given, as well as when should it be considered. The Chamber seemed to support the conclusion that whether the crime at hand is one of sexual slavery or forced marriage turned on the use of the word "wife" and the intent of the perpetrator to impose a forced conjugal association. Regardless of its findings, however, the Appeals Chamber declined to enter fresh convictions on this count.[172]

The Trial Chamber in the RUF trial was the first to be able to apply the confusing jurisprudence stemming from the ARFC case in February 2009 when it found three former members of the RUF "guilty of two separate crimes against humanity, sexual slavery and another inhumane act, based on a pattern of conduct that the Trial Chamber broadly characterized as forced marriage."[173] The Trial Chamber, as did the ARFC Appeals Chamber, used evidence of sexual violence to support findings of both sexual slavery and forced marriage thus further clouding the distinction between the two crimes without setting our specific elements defining the latter.[174] Instead, the Trial Chamber explained its understanding of forced marriage through specifically enumerated instances: forced into conjugal relationships with RUF soldiers, expected to have sexual intercourse[175] on demand and maintain an exclusive sexual relationship, forced to perform

169. AFRC Appeals Judgment, *supra* note 152, ¶ 195.
170. AFRC Appeals Judgment, *supra* note 152, ¶¶ 200–01.
171. AFRC Appeals Judgment, *supra* note 152, ¶ 195.
172. AFRC Appeals Judgment, *supra* note 152, ¶ 202.
173. Gong-Gershowitz, *supra* note 155, at 56 (internal quotation marks omitted); RUF Trial Judgment, *supra* note 168, ¶ 1293.
174. RUF Trial Judgment, *supra* note 168, ¶ 1293–94.
175. The Trial Chamber differentiates through its language the sexual violence committed against the victims into before and after their "marriages." In recalling the testimony of witness TF1-314, the Chamber states "that she was raped twice before being married" and "[a]s the Commander's wife . . . was forced to . . . have sexual intercourse with him." RUF Trial Judgment, *supra* note 168, ¶ 1460 (internal quotations marks omitted). The difference in language may be the Chamber's attempt to highlight the apparent nonsexual nature of forced marriage, as the AFRC Appeals Chamber decided, and the obviously sexual nature of sexual slavery thus attempting to clarify the difference in crimes.

domestic chores such as cooking and housework, made to carry the husband's possessions, bear children, and completely acquiesce to the will of her husband.[176] These specific instances, however, may be and have been interpreted by the Trial Chambers as fulfilling the elements of both sexual slavery and forced marriage, using "the term 'wife' [to] either demonstrate the 'exclusivity' factor required for forced marriage or to demonstrate the ownership factor required for sexual slavery."[177]

The ARFC Appeals Chamber finding of a distinct crime against humanity of forced marriage and the RUF Trial Chamber[178] applying the definition of forced marriage in its trial is a significant step in legally recognizing and addressing the prevalent issue of forced marriage in an international court of law. However, the confusing repackaging of the same facts to prove similar elements of both crimes may in fact be more harmful in the goal of recognizing and prosecuting forced marriage, which more often is better described as "sexual slavery plus" and could be better used as "evidence of aggravating circumstances warranting an additional penalty during the sentencing phase."[179] Although the ARFC Appeals Chamber may have been attempting to do for forced marriage what the *Kunarac* decision did for sexual slavery—namely bring it to the forefront of international prosecution and establish it as a recognized peremptory norm—the definition set forth may have actually set back international criminal prosecution by muddling the distinctions between the two crimes against humanity. Instead of trying to enumerate specific elements of forced marriage under "other inhumane acts" and having to provide evidence of sufficient gravity, it would be better for the ICC, in developing its own forced marriage jurisprudence, to accept the sexually based nature of forced marriage and explicitly recognize it as a particular form of sexual slavery. In doing so, the victims would be internationally recognized and vindicated for the especially egregious crime they were forced to experience instead of being hurriedly lumped together in an ambiguously defined and overlapping category. By focusing on the conjugal duties, such as cooking and cleaning, and deeming forced marriage a nonsexual crime, the ARFC Appeals Chamber directs the focus away from the physical and sexual violence committed in the conflict and experienced by the victims while the RUF Trial Chamber's change in language from

176. RUF Trial Judgment, *supra* note 168, ¶¶ 460, 1154–55, 1211–13, 1293, 1295, 1413, 1460, 1472.

177. Gong-Gershowitz, *supra* note 155, at 62.

178. Both the prosecution and the defendants appealed the Trial Chamber's verdict on various grounds and the Appeals Chamber dismissed and amended certain counts of the indictment but it upheld the counts of sexual slavery and forced marriage, relevant to the purposes of this note. *See generally* Prosecutor v. Sesay, Kallon, and Gbao, Case No. SCSL-04-15-A, Judgment (Oct. 26, 2009), http://www.sc-sl.org/LinkClick.aspx?fileticket =CGgV JRfNF7M%3d&tabid=218.

179. Gong-Gershowitz, *supra* note 155, at 65.

"rape" to "sexual intercourse" diminishes and normalizes the extreme sexual violence experienced by the "wives," neither of which aids in recognition and destigmatization of the victims. Specifically recognizing forced marriage as a crime under sexual slavery would allow for the specific act to be prosecuted to the full extent of the law with the application of the term "wife" not being central to the finding of guilt on a particular count but as an aggravating factor used in sentencing once the general crime of sexual slavery has been found and as evidence of the intent to dominate or control. In handing down the verdict in *Katanga*, the ICC could seize upon the opportunity of introducing the crime of forced marriage into the Court's jurisdiction and discussion.

VIII. CONCLUSION

Utilizing the *Katanga* case as the ICC's first-ever trial study for prosecuting rape and sexual slavery under the finally codified rules arising out of the extensive work at the ICTY and ICTR, the ICC will be able to establish prosecutorial and judicial procedures for prosecuting similar cases in the near future. Such procedures will not only be useful for the eleven upcoming rape, sexual violence, and sexual slavery trials, but also in meeting the original need that led to the inclusion of these definitions and rules in the ICC in the first place: the creation of a reliable and coherent jurisprudence, one that would eventually homogenize prosecution of grave international crimes, including sexual violence crimes. This case is multifunctional: by employing these rules and definitions in an actual case, the ICC is demonstrating that an internationally accepted definition of rape and sexual violence is still necessary and pertinent; by revolutionizing victim participation, the ICC is calling greater attention to the needs and well-being of the victims, who undeniably benefit from a solid, universal legal definition for the crimes committed against them—And by acknowledging the prevalence of rape and sexual violence in international and non-international armed conflicts, and enumerating the specific crimes and their elements, the ICC is endorsing the recognition of rape and sexual violence as independent jus cogens norms. Additionally, the *Katanga* case may also be a suitable platform for the ICC to integrate and develop further the SCSL jurisprudence on forced marriage even though the crime was not initially charged in the indictment since sufficient testimonial evidence has been presented to prove the existence of such practices. If not, the ICC should continue to monitor the progression of prosecution of forced marriage through the SCSL and the ECCC tribunals and attempt to develop its own forced marriage jurisprudence, which would recognize the sexual nature of forced marriage and enumerate it as a particular crime under sexual slavery. Such work by the ICC would enable the development of a uniform definition and application of forced marriage thus recognizing the atrocities the victims have experienced, similar to the vindication the

victims are allowed now through the recognition and standardization of rape, sexual violence, and sexual slavery under the Rome Statute. While the establishment of these rules reinforces the international cooperation of States and helps further develop the relatively new field of international criminal law, these rules will ideally eventually fall into disuse, as rape and sexual violence would become unthinkable violations of jus cogens norms. Likewise, the validation of the victims' experiences and recognition of the atrocities by the international community, especially by States where these atrocities are being committed and where the culture continues to blame the victims, will hopefully assist in the eventual disuse of these rules as well. In the meantime, the codification of the ICTY and ICTR principles continues to play a crucial role in the prosecution of rape, sexual slavery, and sexual violence at the international criminal level.

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