

GALYA RUFFER*

Testimony of Sexual Violence in the Democratic Republic of Congo and the Injustice of Rape: Moral Outrage, Epistemic Injustice, and the Failures of Bearing Witness¹

* Professor Ruffer is the Director of International Studies and the founding Director of the Center for Forced Migration Studies housed at the Buffett Center for International and Comparative Studies at Northwestern University. Her work centers on refugee rights and protection, citizenship, human rights, rule of law and the process of international justice with a particular focus on testimony and sexual violence in the Democratic Republic of Congo. She has published on asylum law and policy, human rights litigation in transnational courts and immigrant incorporation and integration in Europe. Her recent work focuses on methods of documenting displacement in global crisis and the use of the *Ushahidi* Crowdmapping platform to document refugee rights. Aside from her academic work, she has worked as an immigration attorney representing political asylum claimants both as a solo-practitioner and as a pro-bono attorney.

¹ I would like to thank the Kellogg School of Management Dispute Resolution Research Center for funding the field research for this project. I would also like to thank Dagmar Soennecken of the York University European Union Center of Excellence and Elizabeth Holzer of the University of Connecticut Human Rights Institute for providing a forum for me to present early drafts of this work and the following colleagues for their feedback and advice during the formation of this article: Bonnie Honig, William Reno, William Murphy, Akbar Virmani; and the following students who provided research assistance along the way: Elisabeth Casano, Mark Birhanu, Ayanna Legros, Alex Korngut and Rebecca Liron. I would especially like to thank Jennifer Lackey and Benjamin Frommer. It was through our collaboration in teaching “Testimony and Justice” in the Kaplan Humanities Scholars Program, our many discussions and having the opportunity to learn from them that the ideas in this paper developed. Finally, great thanks is owed to all the women who took the time to share their stories and concerns with me and the following local contacts in South Kivu who facilitated my research: Pastor Joseph Kitungano (CADDHOM), Thérèse KULUNGU (Panzi Foundation), Fr. Jean-Paul Bahati (Bernabite Fathers), Jules Safari Mastaki (FODECO), Descartes Mponge and Mohamedoun Ag Mohamed (ABA ROLI) and Christian Akonkwa, Sandra Mvumbi Mayifuila and, especially, Leopold Musingilwa not just for their translation services, but for their friendship and hospitality.

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ABSTRACT

Whereas prosecutions in international criminal courts have increasingly included charges of rape, the messy realities of justice reveal that many witness testimonies are never heard, convictions are limited, sentences are not served, reparations are not paid and women who bring cases to trial become social outcasts. This research examines the ways in which the norms and vocabularies of international criminal justice concerning sexual violence in genocide and mass conflict mediate localized understandings of witness testimony ultimately affecting the ability of international courts to bear witness to the injustice of rape. The work examines the construction of official narrative as moral outrage regarding rape in international criminal trials versus the injustice of rape within the sociocultural and political context that shapes local perceptions of justice and the dynamics of change. This work argues that official narratives regarding rape in the ICC, ICTY and ICTR have resulted in epistemic injustices in which the testimony of women is often silenced, rejected and ignored through notions of the nature of generalized violence and political engagement. The work concludes by taking up the question of what are the duties to bear witness and how do failures in social and cultural capabilities contribute to the legal ambiguity regarding international understandings of gender-based violence.

INTRODUCTION

The recent instability in the eastern Democratic Republic of Congo (DRC) began with the 1994 Rwandan genocide that led to two wars in the region. The 1998 war, also known as Africa's World War, officially ended in 2003. Joseph Kabila was elected in 2006 in an election heavily financed and monitored by the International

Community. At this time, the rebel forces were integrated into the Congolese national military, the Forces Armées de la République Démocratique du Congo (FARDC), and, until shortly after the 2011 elections when the M23 rebel group again brought instability to North Kivu, remained generally stable.

It was only in 2003, at the end of the war that had claimed more than five million lives, when the international community became aware of massive rapes in the DRC² and not until 2006 when it began to react by launching large-scale international campaigns to fight sexual violence and support victims.³ As Christof Ruhmich, who has been working in South Kivu with Malteser International for twenty years, observed, the international community arrived too late.⁴ By the time rape became the focus of international attention, the war had ended and rape had become more a profitable NGO business.

Trying to gain a genealogical sense of rape in the Congo, it turns out that this was actually not the first time the international community was concerned about rape in the Congo. The first was in 1906 when an international coalition drew attention to the conditions in the Congo Free State. Clergy and laymen, at that time, sent a letter to Secretary of State Elihu Root in Washington, “calling his attention to conditions in the Congo Free State, and urging him on behalf of the American people to use the ‘moral support’ of the Nation to wipe out whatever abuses may be found.”⁵ Among the “measures and practices” listed was “[t]he employment under the authority of the Government as sentries of cruel, brutish black, chosen from hostile tribes, who murder, pillage, and rape the people for whose protection the Government is avowedly established.”⁶

After independence from Belgium in 1960, when the mineral-rich province in southeastern Congo, Katanga, formally declared its secession from the new Republic of Congo, the new Premier, Patrice Lumumba, regarded Katanga’s provincial Premier, Moïse Tschombe, as a Belgian puppet and the Deputy Premier, Antoine Gizenga, accused the United Nations of being complicit in “‘a war of colonial reconquest’ waged by the Belgians” by allowing the Belgians to

² See HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN THE EASTERN CONGO* (2002).

³ Gaëlle Breton-Le Goff, *Ending Sexual Violence in the Democratic Republic of the Congo*, 34 *FLETCHER F. OF WORLD AFF.* 13, 19 (2010).

⁴ Interview with Christof Ruhmich (Sept. 3 2011) (on file with author).

⁵ *Appeal to Root to Help End Congo Abuses*, N.Y. TIMES, Dec. 26, 1906.

⁶ *Id.*

remain armed while systematically disarming the newly independent Congolese.⁷ He further accused the UN policy of “systematic looting” of the country, corrupting the Congolese way of life and inciting conspiracies “while accusing the Congolese of ‘rape.’”⁸ On February 28, 1961, a *New York Times* article reported that a woman employee of the United Nations was raped in a suburb of Leopoldville by Congolese soldiers,⁹ and a March 14, 1961 headline *Terror in Congo Related by Nuns: U.N. Gets Reports of Rape and Pillage in Kivu*, reported “rape, pillage and degradation of nuns by Congolese soldiers in Kivu Province” where victims were “stripped, beaten and terrorized by rioting Congolese soldiers in the Maniema region of Kivu,” with one American missionary girl saying that she had “been raped by four Congolese soldiers.”¹⁰ A headline on November 7, 1961, read: *Whites Attacked by Congo Troops: 15 Women Raped in Kasai*.¹¹ Writing on *Key Chapters in Congo’s Tragedy*, the *New York Times* depicted in photos events since Congo’s independence on June 30, 1960, and descent into war with an introductory paragraph stating: “In the year and a half of its independence it has seen massacre, pillage and rape among the people. . . .”¹²

In yet another report on January 12, 1962, President Moïse Tshombe of Katanga Province charged that “central Congolese troops has massacred 1,000 civilians at Kongolo, in northwestern Katanga” and “raping hundreds of women in the area near the juncture of Kivu and Kasai Provinces.”¹³ Once the secession of Katanga had been quelled and most whites had left the Congo, reports of rape in the Congo no longer appeared in the *New York Times*, but a 1963 feature article entitled *The Congo Tries to Build an Army* wrote of the difficulty in welding undisciplined troops, torn by tribal loyalties stating that “it must outgrow much of its heritage. Some of the army’s least admirable habits can be traced back to the eighteen-eighties when the Belgians began recruiting Congolese to replace the Zanzibar

⁷ Henry, Tanner, *Hammar-skjold Bids Belgium Clarify Stand on Katanga*, N.Y. TIMES, Aug. 1, 1960.

⁸ *Id.*

⁹ Henry Tanner, *Congo Soldiers Attack U.N. Aides in Leopoldville*, N.Y. TIMES, Feb. 28, 1961.

¹⁰ *Terror in Congo Related by Nuns: U.N. Gets Reports of Rape and Pillage in Kivu*, N.Y. TIMES, Mar. 14, 1961, at 3.

¹¹ *Whites Attacked by Congo Troops: 15 Women Raped in Kasai*, N.Y. TIMES, Nov. 7, 1961, at 1.

¹² *Key Chapters in Congo’s Tragedy*, N.Y. TIMES, Dec. 17, 1961.

¹³ David Halberstam, *Gizenga, In Shift, Pledges Return*, N.Y. TIMES, Jan. 12, 1962, at 2.

guards used in the earliest explorations.”¹⁴ These troops, known as the “Force Publique” were “used to expel Arab slave traders and protect white settlers,” but the “Congo Reform Association complained that ‘wherever [the Force Publique’s] operations have ranged, native livestock has almost totally disappeared [and] women have been raided in enormous numbers to satisfy its lusts.’”¹⁵

Although not in the press, rapes were documented throughout the 1960s and 1970s as part of local administration tactics by academics such as Thomas Callaghy¹⁶ writing on Mobutu’s rule in, what is now called Zaire. In his study of the *State-Society Struggle in Zaire*, Callaghy documented the administrative practices of national authorities in two subregions, Bas-Zaire and North-Kivu. His focus was the tasks of political order, control of key societal groups, extraction, the search for compliance with the regime’s policies, and staff control, which, as he wrote, “are at the heart of Zairian absolutism.”¹⁷ The Mobutu absolutist state maintained a state of emergency in Kivu even after it was lifted for other areas of the country in 1967, stating that: “The enemy is still within our walls and the danger remains.”¹⁸ “In late 1972, army units were still attempting to eradicate the last remnants of opposition to the new regime in the Walikale Zone of Nord-Kivu Subregion. . . . Assassinations, kidnappings, and human sacrifices were still being practiced according to administrative and military officials. . . . Subregional officials also constantly watched ‘the subversive movement called ‘Kanyarwanda,’ ‘an opposition group active among the large Rwandan refugee population in Nord-Kivu, particularly in Masisi Zone where the refugees outnumbered the Zairians.’”¹⁹

According to Callaghy, the deeply rooted regionalism and local particularism meant that the local populations tended to view state administration (police and army) as an occupying force and had “little interest in obeying the laws.”²⁰ Crime was endemic, especially banditry and armed robbery that affected “just about everyone—missions, businesses large and small, state offices and houses,

¹⁴ J. Anthony Lukas, *The Congo Tries to Build an Army*, N.Y. TIMES, July 21, 1963.

¹⁵ *Id.*

¹⁶ THOMAS M. CALLAGHY, *THE STATE-SOCIETY STRUGGLE: ZAIRE IN COMPARATIVE PERSPECTIVE* (1984).

¹⁷ *Id.* at 277.

¹⁸ *Id.*

¹⁹ *Id.* at 278.

²⁰ *Id.* at 281.

foreigners, travelers, residents of large towns and the smallest villages, peasants, and workers” and, “[f]ed by the problems of the rural exodus, urban crowding, unemployment, and opposition to the absolutist regime, organized groups of bandits have operated widely.”²¹ In Nord-Kivu, the bandits came from Rwanda.²²

In seeking to assure order and security, Callaghy describes the gendarmery practice of *ratissages*. The *ratissage* was a “major control and extraction tool of the Zairian absolutist state.”²³ These were conducted late at night when troops and gendarmes would start to arrive in trucks and be distributed to various assembly points. The *ratissage* would begin at about 6 A.M. when troops and gendarmes moved “systematically from house to house, street to street, from one locale to another, demanding people to ‘present their identification cards in order to see if they had paid their taxes and fulfilled other requirements.’”²⁴ Victims of the *ratissage* reported that “soldiers and gendarmes committed robberies and rapes, beat people, committed ‘other abuses about which one does not dare reveal the secret because it is shameful.’”²⁵ Further accounts document that the Zairian military constantly abused the subject population through “theft, extortion, and armed robbery of all kinds; arbitrary arrest; illegal fines; setting up unauthorized barricades; kidnappings; beatings; rapes; forced labor” such that “the traditional chief of Gombe-Sud complained in 1972 that the current situation is worse than it was under colonial domination” citing that “[t]he girls and even old women are often violently raped.”²⁶ And that in “1971 and early 1972 the zone commissioner for Kimvula reported serious problems with the local police contingent. One police agent raped several women . . . another raped a fourteen-year-old girl and then coerced her parents into dropping charges against him . . . a fourth severely beat a young girl of fourteen for refusing to have sexual relations with him.”²⁷ The zone commissioner for Songololo was “forced to suspend nightly patrols by the military in September 1971 because the soldiers were setting up unauthorized barricades, demanding ‘drinking money’ from people, and raping women at will.”²⁸ In Bas-Zaire, on June 19, 1972,

²¹ *Id.* at 283.

²² *Id.*

²³ *Id.* at 287.

²⁴ *Id.*

²⁵ *Id.* at 289.

²⁶ *Id.* at 294.

²⁷ *Id.* at 295–96.

²⁸ *Id.* at 296.

“[s]everal soldiers severely beat a school director who had tried to stop the rape of a thirteen-year-old girl and a male nurse who had tried to prevent the rape of hospitalized women. A twelve year-old girl was raped in her village. . .”²⁹

Perhaps because the rapes documented by Callaghy in Zaire were part of local Congolese opposition and regionalism in the outlying provinces, they were not considered something to report on in an international newspaper. The only report was by the *Los Angeles Times* where a headline read: *Zaire Refugees Say Rebels Went on Rape, Killing Spree* in their hunt for, the article stated, “the white man” in the Kolwezi fighting (Shaba) in Katanga, Zaire’s copper-mining capital.³⁰ A French survivor reported, “I saw three Katangans rape a 10-year-old girl in the presence of her parents and three brothers.”³¹ There were a number of reports of the “Katanga terrorists” that included “large-scale rape of white women”³² in the *Los Angeles Times* in that year, but once that international incident subsided, no mention of rape was made again until on February 3, 1994, when the *New York Times* reported on a State Department report which, for the first time, focused on treatment of women in its annual human rights report.³³

Even though the instability in the DRC began in late 1994, it was not until 2003, when the war ended that the *New York Times* ran its first headline of rape in the Congo, *U.N. Says Congo Rebels Carried Out Cannibalism and Rapes*.³⁴ This was followed on June 9, 2003, with Somini Sengupta’s *New York Times* article: *Congo’s Warring Factions Leave a Trail of Rape*.³⁵ In that article Sengupta quoted Mathilde Mahindo, the woman who runs the Centre Olame, a church run rape victim center, as saying that discussing sex is taboo in Congolese society and “talking about sexual assault is even less acceptable.”³⁶ She added further that “[r]ape doesn’t have a place in

²⁹ *Id.* at 297.

³⁰ *Zaire Refugees Say Rebels Went on Rape, Killing Spree*, L.A. TIMES, May 22, 1978.

³¹ *Id.*

³² *Id.*

³³ Steven Greenhouse, *State Dept. Finds Widespread Abuse of World’s Women*, N.Y. TIMES, Feb. 3, 1994, at A1.

³⁴ *U.N. Says Congo Rebels Carried Out Cannibalism and Rapes*, N.Y. TIMES, Jan. 16, 2003, at A5.

³⁵ Somini Sengupta, *Congo’s Warring Factions Leave a Trail of Rape*, N.Y. TIMES, June 9, 2003.

³⁶ *Id.*

the culture . . . sexual attacks have become endemic and have gone virtually unpunished, as soldiers from one armed group after another have seized villages, pillaged homes, taken women and taken women or girls at the point of a gun or knife.”³⁷ At that point numerous articles appeared citing a new culture of rape in the Congo as the country headed towards its first national elections since Patrice Lumumba was elected after independence and the International Criminal Court (ICC) began to consider taking up the violence in the Congo as its first case.

Rape was a focus point of DRC reconstruction after the 2003 peace agreements that included the Sun City Agreement creating a multi-party government headed by Joseph Kabila and the Pretoria Accord promising Rwandan withdrawal in exchange for the commitment to disarm the Hutu militias. Through the influence and pressure of the international community, the new Congolese government passed an amendment to the 1940 Penal Code adding specific crimes of sexual violence (2006 *Rape Law*)³⁸ designed to be in accordance with international standards for the crime of rape and sexual violence more broadly. The two-part 2006 Rape Law provided a formal definition of rape to include both men and women and criminalized acts of sexual assault and mutilation, sexual harassment, sexual slavery, forced prostitution, and forced marriage.³⁹ It also toughened up sentencing and changed the legal age of a minor from fourteen to eighteen criminalizing sexual relations with anyone under age eighteen with or without consent.⁴⁰ Procedurally, it mandated that judicial proceedings cannot last longer than three months and prevented the use of character accusations or the victim’s past actions from being used against her or him. Significantly, the law did not prohibit spousal rape and, although the 2006 Constitution declared the government’s commitment to eliminating all forms of discrimination against women and to combat all forms of violence against women in the public and private sphere, there was no mention of domestic violence in the penal code.⁴¹

³⁷ *Id.*

³⁸ Law number 06/018 modifying and completing the Congolese penal code, July 20, 2006; Law number 06/019 modifying and completing the Congolese criminal procedure code, July 20, 2006.

³⁹ *Id.*

⁴⁰ *Id.* The Family Code, however, continued to permit women to marry at fifteen.

⁴¹ The Penal Code was originally enacted in 1940. See *Democratic Republic of the Congo: Domestic and Sexual Violence, Including Legislation, State Protection, and Services Available to Victims (2006–March 2012)*, IMMIGRATION AND REFUGEE BOARD

The emphasis on “zero tolerance” by the international rule of law efforts such as the American Bar Association Rule of Law Initiative (ABA ROLI) program, meant that victims of sexual violence who wanted to pursue justice in the courts would have to agree not to pursue any form of mediation or other local forms of justice. While international actors heralded the formal enactment of the 2006 Rape Law as an end of impunity for sexual violence, local NGO legal aid providers emphasize that in making funding for the reconstruction of DRC contingent on the introduction of the Rape Law, the international community failed to understand the particularities of Congolese culture regarding women and the role that informal justice played in the lives of victims and communities. In other words, international efforts and legal instruments do not easily map onto local contexts. Six years later, most sexual crimes continue to go unpunished “because of judicial inaction and a legal culture at odds with the changes. The laws, ignored and misinterpreted, have left escalating numbers of sexual violence survivors unprotected, and perpetrators free to violate again.”⁴²

The pressure to enact a rape law in 2006 can be best understood within the broader international normative framework that had just started developing concerning sexual violence and the recognition of the crime of sexual violence through initiatives designed to provide greater security to women and girls in conflict zones. There have been a number of UN Security Council Resolutions focused on the security of women in conflict beginning with the passage in 2000 of Resolution 1325 on the “protection of women and girls during war and conflict,”⁴³ Resolution 1888 which appointed a Special Representative on sexual violence in conflict,⁴⁴ and Resolution 1820 which called for the “immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians with immediate effect.”⁴⁵ Regionally, the 2008 International Conference of the Great Lakes Region Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children has been working

OF CANADA, Apr. 17 2012, *available at* <http://www.unhcr.org/refworld/docid/4f9e5e532.html>.

⁴² UN Office for the Coordination of Humanitarian Affairs, *Analysis: New Laws Have Little Impact on Sexual Violence in DRC*, IRIN HUMANITARIAN NEWS AND ANALYSIS, June 7, 2011, *available at* <http://www.irinnews.org/printreport.aspx?reportid=92925>.

⁴³ S.C. Res. 1325, ¶ 9, U.N. Doc. S/Res/1325 (Oct. 31, 2000).

⁴⁴ S.C. Res 1888, U.N. Doc. S/Res/1888 (Sept. 30, 2009).

⁴⁵ S.C. Res 1820, ¶ 2, U.N. Doc. S/Res/1820 (June 19, 2008).

to end impunity and provide legal, medical, and material assistance (including compensation) to victims.⁴⁶

In March 2004 the government of the DRC referred the “situation of grave crimes allegedly committed on the territory of the Congo to the [ICC]” and, on June 21, 2004, the Chief Prosecutor announced his decision to open the Court’s first investigation⁴⁷ into “grave crimes allegedly committed on the territory of the . . . DRC since July 1, 2002.”⁴⁸ In issuing his announcement, Prosecutor Luis Moreno Ocampo noted that “reports pointed to ‘a pattern of rape, torture, forced displacement and the illegal use of child soldiers.’”⁴⁹ Investigations led to arrest warrants against six individuals, four of whom have been apprehended. The trial against Thomas Lubanga Dyilo (Lubanga) became the first completed trial process with a judgment issued in March 2012 and sentencing him to fourteen years imprisonment for the enlistment, conscription and use of child soldiers.⁵⁰ The first trial to include gender-based crimes, the Germain Katanga (Katanga) & Mathieu Ngudjolo Chui (Ngudjolo) trial, concluded in early 2012. It was not until 2008, however, that the United Nations Security Council, in a unanimous vote, formally declared rape a “weapon of war” with UN Secretary General Ban Ki-Moon stating that violence against women had reached “unspeakable proportions” in some societies recovering from conflict.⁵¹ The resolution, sponsored by the United States, “expressed reservations during the negotiations” by China, Russia, Indonesia, and Vietnam, “asking whether rape was really a matter for the security council.”⁵²

The official narrative of DRC rape that has emerged over the past decade has been one linked to the Rwandan genocide and the trade in illegal minerals by rebel warlords. The narrative points the main blame for massive rape in the DRC primarily on the Democratic Forces for the Liberation of Rwanda (FDLR), comprised of Rwandan

⁴⁶ INTERNATIONAL CONFERENCE ON THE GREAT LAKES REGION, PROTOCOL ON THE PREVENTION AND SUPPRESSION OF SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN art. 2 (2006).

⁴⁷ See *Situation in the Democratic Republic of the Congo*, THE HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/index.php?id=6174> (last visited Apr. 21, 2013).

⁴⁸ WOMEN’S INITIATIVES FOR GENDER JUSTICE, GENDER REPORT CARD ON THE INTERNATIONAL CRIMINAL COURT 2012 97 (2012) [hereinafter GENDER REPORT CARD].

⁴⁹ *Id.*

⁵⁰ See *id.*

⁵¹ *UN Classifies Rape a ‘War Tactic,’* BBC NEWS (June 20, 2008), <http://news.bbc.co.uk/2/hi/americas/7464462.stm>.

⁵² *Id.*

Hutus who had fled deep into the Congo forests after the 1994 genocide and National Congress for the Defence of the People (CNDP), a Tutsi rebel group led by Laurent Nkunda who had been a senior official in the Congolese Rally for Democracy in the eastern Congo Kivu provinces during the war and continued to launch attacks until 2006 when his troops were integrated into the FARDC as part of the peace agreement.⁵³ The CNDP mixed brigades continued to launch attacks against the FDLR and generate instability in the region. In the summer of 2012, a splinter group of the CNDP renamed the M23 for the March 23, 2009, peace agreement the CNDP signed with the DRC government, escalated fighting in North Kivu stating that the November 2011 elections failed to produce promised changes in governance and conditions.

With the FDLR seen as the main cause of the instability and massive rapes, in 2009–2010 the international community funded the FARDC campaign against the FDLR (Kimini II and Amani Leo) believing that chasing the FDLR back into Rwanda would solve the problem. Instead, these campaigns were fraught with human rights abuses and massive rapes increased. The international press and local Congolese declared the DRC the “Rape Capital of the World” and, increasingly, the term a “culture of rape” has been used to explain the persistence of rape that has continued steadily, even though international money has poured in for rule of law and SGBV programs.⁵⁴ The narrative of a “culture of rape,” places the root cause of rape in the DRC as “foreign” in the form of the FDLR and CNDP soldiers who had been integrated into the FARDC but continue to prey on the local population.⁵⁵ The standard narrative is captured by a 2009 U.S. Congressional Report⁵⁶:

⁵³ See Séverine Autesserre, *Dangerous Tales: Dominant Narratives on the Congo and Their Unintended Consequences*, 111 AFR. AFF. 202 (2012); JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* (2011); HUMAN RIGHTS WATCH, *DEMOCRATIC REPUBLIC OF CONGO: RENEWED CRISIS IN NORTH KIVU* 19 (2007).

⁵⁴ *UN Official Calls DR Congo ‘Rape Capital of the World,’* BBC News (Apr. 28, 2010), <http://news.bbc.co.uk/2/hi/8650112.stm>; Flynn Lloyd-Davis, *Why Eastern DR Congo is ‘Rape Capital of the World,’* CNN (Nov. 25 2011), <http://www.cnn.com/2011/11/24/world/africa/democratic-congo-rape>; Lauren Wolfe, *End Culture of Rape in 2013*, CNN (Jan. 3, 2013), <http://www.cnn.com/2013/01/01/opinion/wolfe-end-rape-in-2013/index.html>.

⁵⁵ According to The Women’s Initiative for Gender Justice, Congo has one of the most serious incidences of gender based violence and human rights violations in the world. GENDER REPORT CARD, *supra* note 48. The DRC was until recently, a country emerging from years of armed conflict which has perpetuated rape and sexual violence as a weapon

The prevalence of sexual violence has been attributed to the eroded status of women over years of conflict, weak state authority, a weak justice system, and a breakdown in community protection mechanisms. Sexual violence by the military has also been linked to waves of integration of rebel organizations into the military through successive peace accords, with little accompanying attention to military discipline or the chain of command. Military troops are poorly paid, and troops deployed in conflict areas are not provided adequate food or supplies, which some observers believe encourages looting and other abuses. Reports suggest that while most sexual crimes are carried out by members of armed groups in conflict zones, incidents or rape by civilians are also increasing. One report expressed concern that rape may have “become trivialized and has been increasingly perpetrated in zones of relative stability.”⁵⁷

The framing vocabulary of sexual violence in the report as caused by an “eroded status of women over years of conflict,” “breakdown in community protection” and an unpaid, uncared for military has its international criminal justice counterpart in the vocabulary of rape as a “weapon of war” that is “systematic” in the DRC and targeted towards inciting fear in the local population as part of the conflict over minerals.⁵⁸ But the narrative of women and girls strategically and systematically targeted in epidemic proportions does not tell the full story of rape in the DRC or the local context that made the extreme violence inflicted upon women (and men) by armed groups over the last ten years possible. The report mentions that “[f]ew reliable statistics exist on sexual violence in most African countries and that data collection is not a component of most U.S. programs. Little is known, additionally, about the effectiveness of individual programs in reducing the scale of violence.”⁵⁹

Whereas one can tell the story of rape in the DRC as a part of the regional conflict over land rights and minerals, the view that emerges from a study of the scholarship and journalistic accounts of the Congo since the late 1880s suggests that rape in the Congo has been, at different times, part of the international narrative of the conquest,

of war. DRC’s capital city of Kinshasa was dubbed the “capital of rape” by the UN special rapporteur Margot Wallström. In South Kivu alone 54,000 cases of rape were reported in the first six months of 2010. According to an Al Jazeera report, one commonly quoted statistic in DRC is that there are about 400 rapes a day.

⁵⁶ See also Janine de Vries, *Sexual violence against women in Congo: Obstacles and Remedies for Judicial Assistance* 36–37 (2007); HUMAN RIGHTS WATCH, *supra* note 2.

⁵⁷ ALEXIS ARIEFF, CONG. RESEARCH SERV., R40956, *SEXUAL VIOLENCE IN AFRICAN CONFLICTS* 18 (2009) (footnotes omitted).

⁵⁸ *Id.*

⁵⁹ *Id.* at 23.

Belgian rule, struggle for independence, secession of Katanga, character of the undisciplined military, Mobutuism administration and, now, Rwandan and Ugandan influence in the conflict over minerals, ever since the first Western colonizers arrived. Whereas the assumption of the Congressional Report, as representative of the dominant international narrative concerning Congo as “the Rape Capital of the World,” is that rape is foreign to the Congo and developed out of a context of genocidaires (known as “Interahamwe”) who continue to wreak havoc in the region through a war over minerals—the broader time frame reveals the short sightedness of this narrative in terms of understanding rape in the Congo.⁶⁰ It also shows how, what I term, the international *moral outrage* at rape in the Congo has always ebbed and flowed with international interests in the country that, in different ways has differentiated between blameless victims of sexual violence, who are caught in the conflict, and regrettable civil forms of rape that do not require international attention. A fundamental problem with this differentiation is that in the current conflict international organization data shows that the majority of rapes in the Congo between 2004 and 2008 were perpetrated by civilians, not soldiers.

Understood as an act of war, rape has been treated through short-term post-conflict construction efforts. International and regional programs to combat rape are filtered through a number of local outlets including rule of law programs, mobile gender courts, sexual violence sensitization trainings, SGBV programs, economic integration initiatives, and gender empowerment programs. This has produced, at the local level, what some have referred to as “NGO Justice” or an NGO industry in sexual violence.⁶¹ In different respects the NGO industry in sexual violence is both part of and separate from the everyday reality of rape in the DRC. Over the course of two years, I observed and interviewed local lawyers, NGOs, religious workers, medical staff, women groups, communities, and bystanders throughout South Kivu and sought the testimonies of rape victims in order to better understand local perceptions of justice. In line with the

⁶⁰ *See id.* at 21.

⁶¹ KAMARI MAXINE CLARKE, *FICCTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA 2* (2009); DVD: *Justice for Sale* (IF Productions 2011) (directed and produced by Femke van Velzen, Ilse van Velzen).

work of scholars such as Kay Schaffer and Sidone Smith,⁶² Kimberley Theidon,⁶³ Erin Baines⁶⁴ and April Shemak,⁶⁵ my interest is in testimonial discourse as the expression of everyday justice, repair and, ultimately, social transformation.⁶⁶ In particular, my interest is in the way in which international norms and vocabularies of rape have filtered into the testimonial discourse of rape at the local level. More broadly, my concern is with how emerging legal norms of testimony concerning sexual violence relate to the concerns for social justice for victims of sexual violence in mass atrocity.

Instead of highlighting the practices that violate internationally accepted human rights standards or assessing customary justice against an idealized formal legal system,⁶⁷ my research examines the formal system as it functions in the “messy realities” of justice reform taking into account “the sociocultural and political context that shapes local perceptions of justice and the dynamics of change.”⁶⁸ As Isser states, “actual practice and everyday experience, far more than any written laws, determine the nature and quality of justice accessible to the population. . . . [E]mpirical practice rather than written codes must serve as our starting point in any rule-of-law assessment—we need to examine the justice landscape as the population sees and acts in it.”⁶⁹ Particularly relevant for this study, Isser found the need for more focused research attention on how the dynamics of legal pluralism

⁶² KAY SCHAFFER & SIDONIE SMITH, *CONJUNCTIONS: LIFE NARRATIVES IN THE FIELD OF HUMAN RIGHTS* (2004).

⁶³ Kimberley Theidon, Address at the Oregon Review of International Law Symposium: War and Memory, *Speaking of Silences: Sexual Violence and Redress in Peru* (Oct. 19–20, 2012) (An ethnographically grounded study of reparations, gender, and justice, drawing on the author’s research in Peru.).

⁶⁴ Erin Baines & Beth Steward, *I Cannot Accept What I have Not Done: Storytelling, Gender and Transitional Justice*, 3 J. HUM. RTS. PRACTICE 245 (2011); Pilar Riaño Alcalá & Erin Baines, *Editorial Note*, 6 INT’L J. OF TRANSITIONAL JUST. 385 (2012) (on the relationship between justice and the everyday).

⁶⁵ APRIL SHEMAK, *ASYLUM SPEAKERS: CARIBBEAN REFUGEES AND TESTIMONIAL DISCOURSE* (2011).

⁶⁶ See Alcalá & Baines, *supra* note 64.

⁶⁷ Deborah H. Isser, *Conclusion: Understanding and Engaging Customary Justice Systems*, in *CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES* 325, 327 (Deborah H. Isser ed., 2011).

⁶⁸ *Id.* at 326.

⁶⁹ *Id.* at 341. Isser outlines points of guidance for research methodology that includes (1) focus on the actual experiences of those seeking justice, (2) taking into account the inevitable variations from one location to another, (3) joint efforts between policymakers/practitioners and social scientists, (4) research as an ongoing process over time that both informs policy and measures impact, and (5) integration of research into donor programming and national policy to empower local communities. *Id.* at 344–45.

affect women's rights, not just in terms of normative discrimination and access to formal and informal systems, but "to examine how rights are mediated by social norms and community power holders, and how to harness mechanisms of change."⁷⁰

Rule of law programs in eastern Congo were implemented to end impunity by criminalizing rape in accordance with the internationally drafted 2006 Rape Law through a "zero tolerance" policy for customary or informal practices such as mediation. In keeping with the findings of Isser, I found that the decision to prohibit local justice practices in response to sexual violence has resulted in unintended local results. In particular, there is a stark gap between the ability of the legal system to produce judgments and its inability to end impunity or better the lives of victims of sexual violence.

Although the focus of criminal justice in the DRC is on ending impunity for sexual violence, the deeper concern of women in the Congo is social justice. They share a story of victimhood that is rooted in social inequality, poverty, and gender disparities and oppression that is not uncommon for women worldwide. Their situations are similar to other situations, such as Japanese comfort women, where there is military predation on local populations and sexual slavery, but where, ultimately, rape is a story of poverty and gender inequality.⁷¹ In the DRC, however, there has been an unprecedented international rule of law effort to end impunity demanding an inquiry as to whether testimonies of sexual violence, mediated through international criminal justice norms and vocabularies, can contribute to broader concerns for social justice. In other words, does the individual act of testifying to all the facts necessary to successfully convict a perpetrator of rape relate to or contribute to the life of the testifier? And, does the act of testimony collection, practiced by the international criminal justice industry, contribute to social transformation at the local level? These social justice concerns include the economic integration of women, educational opportunities, right to own land, and concerns for gender equality that include a focus on domestic violence, early marriage, and incest.

We live in a world where "human rights discourses, norms, and instruments depend upon the international commitment to narratability, a commitment to provide, according to Joseph

⁷⁰ *Id.* at 366.

⁷¹ SCHAFFER & SMITH, *supra* note 62, at 142–43.

Slaughter, ‘a public, international space that empowers all human beings to speak.’”⁷² But, “[w]hether or not storytelling in the field of human rights results in the extension of human justice, dignity, and freedom depends on the willingness of those addressed to hear the stories and to take responsibility for the recognition of others and their claims.”⁷³ Schaffer and Smith recognize that in this contestation over human rights, only certain stories emerge and are able to lay claim to a right and justice. In a world of uneven power relationships, only certain speakers of crimes and injustice are able to have their narratives championed by the human rights community and, mainly, only when they are intelligible to Western understanding of victimhood and suffering. In other words, what is required to become a testifier is not just the desire to speak, but also a normative framework and vocabularies that allow the testifier to speak in her own words and an international community with the ability to bear witness to the atrocity, as common place or outrageous as it may be.⁷⁴ In other words, with an understanding that, within the local vocabulary, rape may not be understood as a crime as western morality would have it, but it may be understood within vocabularies of injustice.

The human rights moment for sexual violence did not come with the WWI War Crimes Commission of 1919 inscription of rape and forced prostitution among the thirty-two violations of the laws of war, the knowledge by Nuremberg prosecutors of rapes in WWII who opted to focus only on Crimes of Aggression nor with the UN adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979. At that time, violence against women was not considered a human rights violation or a war crime. It was only in 1992 that CEDAW included gender violence as a form of discrimination.⁷⁵ But even the emergence of international instruments and the opening of institutions of justice such as the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY) and, more recently, the ICC to prosecution of the crime of rape, has not shifted the fundamental ambiguity surrounding rape more

⁷² KAY SCHAFFER & SIDONIE SMITH, HUMAN RIGHTS AND NARRATIVE LIVES: THE ETHICS OF RECOGNITION 3 (2004).

⁷³ *Id.* at 5.

⁷⁴ I am thinking here of Hannah Arendt’s concept of the “Banality of Evil.” See HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1994).

⁷⁵ SCHAFFER & SMITH, *supra* note 62, at 132–33.

generally. Whereas the general proposition of the human rights movement is that the collectivization of testimony can raise awareness of a human rights abuse and provide a global space for justice, this has not been the case of victims of sexual violence in the DRC who continue to live everyday lives of the broader injustice of rape. Unlike the benefits of collective testimony, Schaffer and Smith highlight such as enabling “new forms of subjectivity and radically altered futures,”⁷⁶ a way to claim “new identities and assert participation in the public sphere,”⁷⁷ the official narrative of rape that has emerged from the DRC is an abbreviated one focused on Rwandan genocidaires and the conflict over minerals that is legible to western audiences’ understanding of rape as completely outside of Western moral comprehension and, therefore, justifies prosecutorial intervention in an international tribunal.

I

MORAL OUTRAGE AND THE INJUSTICE OF RAPE

Within this narrative of rape as a weapon of war, new norms and vocabularies of sexual violence have emerged and are, at the local level, filtered through rule of law and other SGBV programs. If “vernacularization is the process through which individuals and institutions appropriate and customize human rights discourses in ways that make sense in their own cultural space,”⁷⁸ what happens to testifiers across the legal fora where norms of testimony, as expressions of power, contribute to the rejecting, ignoring and silencing of speakers? The question of who speaks, on what terms, and towards what ends, is a question of power. In the ICC, only certain people get to be heard, certain charges and theories of atrocity crimes are pursued and, for those who do come forth as witnesses, only certain testimonies are heard or valued as part of the legal theory explored and argued by the prosecution.

As Pamela Scully points out, “discourses about gender-based violence and the suffering of women create particular cultural and political subjects, which often accompany and can come to subvert

⁷⁶ SCHAFFER & SMITH, *supra* note 72, at 17.

⁷⁷ *Id.* at 19.

⁷⁸ DOROTHY L. HODGSON, *GENDER AND CULTURE AT THE LIMITS OF RIGHTS* 8 (Dorothy L. Hodgson ed., 2011) (quoting Peggy Levitt and Sally Engle Merry).

some of the other powerful enabling ideas of human rights.”⁷⁹ The rise of empathetic sensibility⁸⁰ that helped create the context in which the notion of human rights took hold⁸¹ has, I argue, been replaced by an international criminal justice regime based on moral outrage. Unlike empathy which assumes a capacity to imagine people from far away as somehow connected to one through shared humanity,⁸² moral outrage objectifies people as “other” than oneself and, as such, in need of being saved and in need of being brought back into the world of “humanity.” Whereas empathy seeks to address injustice (social, economic, etc.) as part of the condition and challenge of humanity, moral outrage demarcates the space of humanity (as the secure space the international community occupies) as separate from victims and wrongdoers who are outside of humanity, existing in the space of insecurity. International moral outrage is premised on values that define who is the victim and the wrongdoer and is generally tied to narratives of Western foreign policy as played out in the Security Council. Justice is, therefore, the process of bringing “humanity back in,” to the values and framing of western politics and narrative of security.

In his 1978 book *Injustice: The Social Bases of Obedience and Revolt*, Barrington Moore examined how people who are victims of their societies feel about and explain the circumstances of their lives. “What are their notions of injustice and thereby of justice, and where do these ideas come from?”⁸³ It is essentially a study of moral outrage, “the social and historical conditions under which moral outrage did and did not put in an appearance.”⁸⁴ But, Moore said that he could not have it be about moral outrage since:

People of little education and refinement are certainly capable of feeling anger, but the word “moral” carries overtones of condescension and introspection that miss both the tone and concreteness of much popular anger. At the same time there is a clearly moral component to this anger. Hence “injustice,” or the

⁷⁹ Pamela Scully, *Gender, History and Human Rights*, in *GENDER AND CULTURE AT THE LIMITS OF RIGHTS* 17, 17 (Dorothy L. Hodgson ed., 2011).

⁸⁰ See LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2008).

⁸¹ Scully, *supra* note 79, at 20.

⁸² *Id.*

⁸³ BARRINGTON MOORE, JR., *INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT* xiii (1978).

⁸⁴ *Id.*

sense of injustice, captures the tone and content of these expressions more accurately.⁸⁵

The international attention to rape in the Congo, however, does carry overtones of condescension and introspection and is, therefore, moral outrage.

Moore wrote about local contexts, but the growth of humanitarian interventions renders it important to examine the international phenomenon of moral outrage. Whereas it seems obvious that the international community should respond to reports of massive rape in the Congo with moral outrage, it becomes less obvious when we consider that rape is a pernicious worldwide problem. And, even less obvious that rape in the Congo could be solved through the use of criminal justice strategies in the Congo, a place that justice has eluded for over a hundred years, when criminal justice has been unable to end impunity for rape anywhere in the world, even in the United States. There is the additional question as to the limited focus of the moral outrage as, for example, only when committed against Tutsi women in Rwanda although there was also evidence of rapes of Hutu women by RPF troops during the Rwandan genocide⁸⁶ and only when considered a crime against humanity by rebel forces, but not when it is deemed opportunistic as part of military combat such as the rape of women in Ituri by different warring factions including the Congolese military and humanitarian aid workers.

It is, therefore, relevant to examine the norms and vocabularies of the international crime of rape as a weapon of war and crime against humanity, on the one hand, and, what Barrington Moore would call, the *injustice* of rape in eastern Congo. The *injustice* of rape is both distinct from the international moral outrage and connected to it in so far as local actors seek justice through the medium of international criminal justice. I share the concern of scholars such as Dorothy Hodgson that rights-based discourses, “with their presumption of an individual, secular, gendered subject and their reliance on state-run legal systems as the mechanisms of implementation and enforcement, can ever be a truly emancipatory strategy for women.”⁸⁷ This is a

⁸⁵ *Id.* at xiii–xiv.

⁸⁶ MARIE BEATRICE UMUTESI, SURVIVING THE SLAUGHTER: THE ORDEAL OF A RWANDAN REFUGEE IN ZAIRE (Julia Emerson trans., 2004); *Summary of UNHCR Presentation Before Commission of Experts: Prospects for Early Repatriation of Rwandan Refugees Currently in Burundi, Tanzania and Zaire*, RWANDAINFO (Oct. 11, 1994), available at http://rwandainfo.com/documents/Gersony_Report.pdf.

⁸⁷ HODGSON, *supra* note 78, at 5.

study, therefore, of the lived-experience of gender-based injustice as the “assumptions, meanings, ideas, and practices that shape and are shaped by people’s everyday interactions”⁸⁸ in this case, the “culture” of rule of law and criminal justice legal *fora*. What we can see through such a study is the ways in which vocabularies of criminal justice intersect with, expand, inhibit or constrain other vocabularies that may, ultimately, be more productive in the contestation over social justice that is the basis for the ongoing rapes in the Congo.

II

NORMS AND VOCABULARIES OF SEXUAL VIOLENCE

Sexual Violence as defined in the main legal instruments that comprise international criminal justice has shifted from a limited definition of “physical violence of a sexual nature such as rape”⁸⁹ to a broad definition of “attack on the sexuality of the victim that may or may not involve physical attack . . . harassment, sexual exploitation, sexual abuse, sexual assault . . . without the consent of the victim” or perceived by the victim to be of a sexual nature.⁹⁰ The Rome Statute explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence as war crimes in international and non-international armed conflict as well as crimes against humanity.⁹¹ In addition to the crimes of sexual and gender-based violence listed above, persecution is included in the Rome Statute as a crime against humanity and specifically includes for the first time the recognition of gender as a basis for persecution.⁹² The Rome Statute also includes trafficking in persons, in particular women and children, as a crime against humanity within the definition of the crime of enslavement.⁹³ Finally,

⁸⁸ *Id.* at 6.

⁸⁹ VAHIDA NAINAR, LITIGATION STRATEGIES FOR SEXUAL VIOLENCE IN AFRICA 1 (2012).

⁹⁰ *Id.*

⁹¹ Rome Statute of the International Criminal Court, art. 7, ¶ 1(g), art. 8, ¶¶ 2(b)(xxii), 2(e)(vi), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute]. *See also* United Nations Diplomatic Conference of Plenipotentiaries, Rome, Italy, June 15–July 17, 1998, *Report of the Preparatory Commission for the International Criminal Court*, art. 7, ¶ 1(g), art. 8, ¶¶ 2(b)(xxii), 2(e)(vi), PNCICC/2000/1/Add.2, Nov. 2, 2000 [hereinafter Elements of Crimes]; GENDER REPORT CARD, *supra* note 48, at 63.

⁹² Rome Statute, *supra* note 91, art. 7, ¶¶ 1(h), 2(g), 3, at 4–5; *see also* Elements of Crimes, *supra* note 91, art. 7, ¶ 1(h).

⁹³ Rome Statute, *supra* note 91, art. 7, ¶¶ 1(c), 2(c), at 3–4; *see also* Elements of Crimes, *supra* note 91, art. 7, ¶ 1(c); GENDER REPORT CARD, *supra* note 48, at 63.

the Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention.⁹⁴ The Elements of Crimes (“EoC”) specify that “genocide by causing serious bodily or mental harm” may include: “acts of torture, rape, sexual violence or inhuman or degrading treatment.”⁹⁵ Together, these are the definition of sexual violence as an “atrocity crime.” The DRC occupies a unique legal space in that the 2006 Rape Law has made the definitional elements and crimes included in the International Criminal Court statute part of the national law. Therefore, “NGOs have made a tremendous effort to educate and to explain the law to the community, the police, and the judiciary since its adoption.”⁹⁶

The norms and vocabularies that have emerged through international legal advocacy against sexual violence have shaped the way in which individual rape victims in the Congo must testify in order to access international justice. While this sentence rings true in general in regards to all legal norms and penal codes, the question here has to do with the scale of international obligations (to whom and what are the obligations addressed) and the costs of distortion to individual women’s lives who fail to frame their experience of rape in these terms and, therefore, ongoing failure to attain social justice.

Although the Nuremberg court knew that rapes had occurred in World War II,⁹⁷ rape was not addressed at Nuremberg. Silence was the norm. The publication of *A Woman in Berlin: Eight Weeks in a Conquered City: A Diary*,⁹⁸ an anonymous diary was controversial in post-war Germany where men felt they did not do enough to protect “their” women. Similarly, *The Pink Triangle: The Nazi War Against Homosexuals*⁹⁹ was a testimony of the writer, writing under a pseudonym of the brutality and rape he endured as a gay man. These singular testimonies provided a space through which others who

⁹⁴ Rome Statute, *supra* note 91, art. 6, at 3.

⁹⁵ Elements of Crimes, *supra* note 91, art. 6(b) n.3; *see also* GENDER REPORT CARD, *supra* note 48, at 63.

⁹⁶ Breton-Le Goff, *supra* note 3, at 23.

⁹⁷ *See* KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 49 (1997); 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, 440 (2009).

⁹⁸ A WOMAN IN BERLIN: EIGHT WEEKS IN A CONQUERED CITY: A DIARY (Philip Boehm trans., 2006); *see also* Atina Grossman, *A Question of Silence: The Rape of German Women by Occupation Soldiers*, OCTOBER, Spring 1995, at 42.

⁹⁹ RICHARD PLANT, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS (1986).

experienced such sexual violence in the war could begin to form a collective memory of rape that the Nuremberg or post war trials in Germany did not.¹⁰⁰

The first time testimony of rape became the focus of a trial was the moment in the *Akeyesu* trial in the ICTR when Justice Pillay asked the witness to elaborate on her mention of rape as she was being questioned about the events in Taba. This was the moment when a collective memory of sexual violence in the Rwandan Genocide and, ultimately, in mass atrocity, could begin to form. In the first international conviction of sexual violence as an atrocity crime, the prosecutor had originally failed to investigate and charge acts of sexual violence.¹⁰¹ John Paul Akayesu, who served as *bourgmestre* of Taba Commune during Rwanda's 1994 genocide was one of the first individuals to be arrested and prosecuted by the ICTR. At the time of his arrest, he was charged with direct responsibility for genocide, complicity in genocide, incitement to genocide, the crimes against humanity of extermination and murder, and the war crime of murder. In their analysis of the case, Susana SaCouto and Katherine Cleary state that "shortly after the start of trial, a witness called to testify about the murder of most members of her family mentioned—"in an almost offhand way"—that her six-year-old daughter had been raped."¹⁰² In response to questioning by members of the Tribunal, which included Judge Navanethem Pillay, the only female judge on the ICTR at the time, the witness stated that she had never been questioned about the rape by ICTR investigators.¹⁰³ She further testified that she "had heard that other girls had been raped in Akayesu's *bureau communal*, but she had not seen it herself."¹⁰⁴ Two months later, another Prosecution witness was called to testify about an attack on her house that her family had tried to flee, and ended up telling the story of her capture, rape, and abandonment.¹⁰⁵ This witness also discussed her attempt to find refuge in the *bureau communal*, where she witnessed women and girls being raped by

¹⁰⁰ See generally Geoffrey Hartman, *The Shoah and Intellectual Witness*, PARTISAN REV., Vol. LXV, 1 (1998); SCHAFFER & SMITH, *supra* note 72; KELLY OLIVER, WITNESSING: BEYOND RECOGNITION (2001).

¹⁰¹ See Prosecutor v. Akayesu Case No. ICTR 96-4-I Judgment, (Oct. 2 1998).

¹⁰² Susanna SaCouto & Katherine Cleary, *The Women's Protocol to the African Charter and Sexual Violence in the Context of Armed Conflict or Other Mass Atrocity*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 173, 180 (2009).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

communal police and *Interahamwe* in the presence of the accused.¹⁰⁶ Although neither the Prosecution nor the Defense followed up on this testimony, the three judges asked her to elaborate on Akayesu's whereabouts and actions during the rapes.¹⁰⁷

Following *Akayesu*, a number of amended indictments were filed in cases before the ICTR to include charges of rape and other forms of sexual violence.¹⁰⁸ Taking into account only the number of indictments containing counts of sexual violence, one might have an optimistic view that rape victims were finally being given access to justice. Indeed, more than half of the indictments issued by the ICTR Office of the Prosecutor between 1995 and 2002 were counts of sexual violence.¹⁰⁹ But a detailed analysis of trends in the prosecution of sexual violence in the ICTR from November 1995 through November 2002, shows that the number of indictments of sexual violence leveled-off between 1996 and 2001, and then decreased sharply through the end of 2002.¹¹⁰ In two of the later cases in which crimes of sexual violence were charged, the Prosecution later sought to withdraw the charges due to insufficient evidence.¹¹¹ The reason, according to the report is that "testimony" is "the Gordian Knot of the Prosecutor's work, both due to the imperative necessity of assembling the case files and the difficulty of finding witnesses."¹¹² According to the report the difficulties in finding witnesses are due to the doubt of women's NGOs and female victims regarding the Tribunal's real capacity to prosecute sexual violence. Even after the *Akayesu* judgment, judges in other chambers continued to "maintain a stony

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ MCGILL DOCTORAL AFFILIATES WORKING GRP. ON INT'L JUSTICE, RWANDA SECTION, ANALYSIS OF TRENDS IN SEXUAL VIOLENCE PROSECUTIONS IN INDICTMENTS BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR) FROM NOVEMBER 1995 TO NOVEMBER 2002 (S.I. 2002).

¹¹⁰ *Id.*

¹¹¹ SaCouto & Cleary, *supra* note 102, at 181.

¹¹² MCGILL DOCTORAL AFFILIATES WORKING GRP. ON INT'L JUSTICE, *supra* note 109 at 7. They also cited "[T]he bad experiences of women in giving testimony on sexual violence in terms of the lack of psychological counseling, the absence of preparation for testimony and especially for cross examination, the absence of psychological and financial assistance and the ineffectiveness of the anonymity or discretion measures that increase the risks incurred (death threats, assassination attempts) by the witnesses upon their return to the country. . . . Moreover, women who were victims of sexual violence during the genocide have immediate needs other than their need for justice or recognition of these crimes, including subsistence, housing, schooling and medical care." *Id.*

silence” on the issue of investigation of allegations of sexual violence or “items of evidence regarding sexual violence were knowingly kept quiet by the prosecution under a strategy defined by the Prosecutor.”¹¹³ In the *Serushago* case, the rape charge was dropped from the indictment in favor of the other counts which gave “female victims and women’s associations the impression that crimes of sexual violence are not treated with the same degree of seriousness and importance as other crimes.”¹¹⁴

Whereas rape was mainly added as amendments to trials that were already started in the ICTR, the *Foca* Rape trial in the ICTY was the first time that prosecutors put forth the charge of rape as the center of prosecution. The *Foca* trial concerned Serbian commander, Dragoljub Kunarac arrested in 1999 by the ICTY. The legal question was whether the acts of these soldiers were collective or simply individual acts of depravity. The prosecution argued that the use of rape in attacks on civilians was widespread and systematic. For the first time, the theory of the case was that rape, as a tactic of war and genocide, was repeated and continuous. They maintained that the Serbian methods of ethnic cleansing in Bosnia was “widespread” and “systematic” and that there was a chain of command such that rape was occurring with his knowledge and he did not intervene to stop it. Whereas the assumption in domestic law of rape is that the woman consented to the sexual act unless it could be demonstrated that she was forced to have sex under the *Foca* standard, there could no longer be implied consent during violent conflict.

Together, the *Akeyesu* and the *Foca* Rape trials enabled the formation of a collective account of rape as genocide and a crime against humanity. These collective accounts, however, had the unintended effect of silencing the experience of rape for those who did not fit into this collective account. In other words, the collective memory of rape as inscribed in recent court trials has not contributed to fostering access to justice for the individual experience of rape when that individual experience diverges from the official account that emerges as the collective memory. As Buss has noted, “Rape” as official collective account of mass atrocity has a hyper-visibility (credibility excess) while peacetime or individual rape in atrocity remains relative invisible (credibility deficit).¹¹⁵ She explains that:

¹¹³ *Id.* at 8.

¹¹⁴ *Id.*

¹¹⁵ Doris E. Buss, *Rethinking ‘Rape as a Weapon of War,’* 17 FEM. LEG. STUD. 145, 153–54 (2009).

Part of the process by which types of harms and categories of victims are rendered invisible or un-seeable is through the act of defining and sorting crimes. The legal categorisation of war crimes does more than merely recognise as criminal different types of harm. It also provides a “grammar of pain” (Ross 2003, p. 1); a language by which the Tribunal can identify, and witnesses can testify to, their experiences of (legally recognised) harm (Ross 2003; Campbell 2007). As categories of harm, rape as a crime against humanity and rape as genocide structure not only which harms are recounted (and which are not), but also the subjects who can speak to those harms.¹¹⁶

Karen Engle¹¹⁷ studied how testimonies were collected preceding the ICTY trials. She noted the way in which journalists and others who investigated the rapes made assumptions about the reasons why a testifier would not testify to having been raped (the assumption was that all Muslim women were raped). The following are two accounts she documented that bring out this problem:

I asked Mersiha, but what about you? She looked at her mother, sitting there and listening, as if asking her for permission to say more. “No, it did not happen to me,” she said, but I doubted her. Maybe, if empathy can break the wall of self-protection

...

All of those who investigated the war rapes in Bosnia have noted that the silence of the victims was the biggest, and often invisible, obstacle to discovering the truth. My own experience confirms this. The silence of the victims during my investigation was also my adversary. Very often I felt as if I were standing in front of a wall, yet it was human beings, not bricks, that were in front of me. Human beings who were unhappy, shamed, humiliated and lost. Such shame and humiliation explained the silence for others as well.¹¹⁸

The testimonies that have gained access to the ICTY and ICTR as part of the prosecutions theory that genocide and crimes against humanity are limited by a “rape script.” Testimony of sexual violence is transformed into genocide vocabularies of sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes, and prohibition of marriages so that rape can be articulated as a measure to prevent births within the target ethnic group. Women who

¹¹⁶ *Id.* at 155.

¹¹⁷ Karen Engle, *Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778 (2005).

¹¹⁸ *Id.* at 795 (Journalist, Slavenka Drakuli); see also SEADA VRANIC, BREAKING THE WALL OF SILENCE, X (Zagreb 1996).

chose to marry the rapist or view the baby as being of their own ethnic group are problematic. This legal theory continues to perpetuate the patriarchal society understanding that membership of a group is determined by the identity of the father. In the ICTR the official understanding of rape that emerged through the *Akayesu* trial was that Hutu men raped Tutsi women in order to cleanse Rwanda of Tutsi by conquering women's wombs. On account of this legal theory, Hutu rapes went unheard. Rape as genocide assumes that through forced impregnation the womb becomes "occupied" and the woman is no longer capable of bearing a child of *her own ethnicity*. Critics of this legal approach point out that, while portending to emancipate women, this legal approach continues and fosters patrimonial understandings of the woman's body.¹¹⁹

In all accounts, women can only play the role of "victims" acted upon "against their will," not as having exercised a choice or as perpetrators or political agents who join rebels because they want to fight.¹²⁰ The problem with this is that in the prosecutorial push for a legal theory of rape as genocide or weapon of war, it creates a vocabulary and normative order for rapes that cross this threshold as *morally outrageous* and, by definition, those who cannot speak within this vocabulary are silenced, rejected or ignored as having experienced private acts, motivated by overwhelming sexual desire. Similarly, in the case of asylum, while rape and sexual violence can amount to persecution under the 1951 Convention and European law, it has often been dismissed in practice as a criminal act committed by individuals. "A Ugandan woman, Rose Najjemba, for example, was raped by Ugandan soldiers questioning her about a rebel group, but her asylum claim was initially turned down on the grounds that, '*there was nothing in the evidence . . . to suggest that the incident was anything more than a very serious criminal act of sexual gratification on the part of the soldiers.*'"¹²¹ While there has been greater international awareness of rape as an atrocity crime, there continues

¹¹⁹ Buss, *supra* note 115; Engle, *supra* note 117.

¹²⁰ Arturo Arias, Professor, University of Texas at Austin, Keynote Address at the Oregon Review of International Law Review Symposium: War and Memory: Bearing Witness to Loss in Everyday Life (Oct. 19, 2012).

¹²¹ Bertin Mboko, *Between Testimony and Bearing Witness: Sexual Violence and the Justice in the DR Congo*, ASYLUM IN SOUTH AFRICA, <http://people.rit.edu/bxm4031/Wf/stage3/congo.html> (last visited Apr. 2, 2013) (emphasis added).

to be ambiguity surrounding rape as persecution which results in low rates of asylum for gender based persecution.¹²²

One can conclude, therefore, that the normative framework of rape as an atrocity crime has been path breaking, but not as progressive as the doctrinal recognition might suggest. Collectivizing the experience of rape as genocide and a weapon of war points to the deeper problems that still exist in recognizing the “harm” and “injustice” of rape. It turns out that the individual experience of rape is incompatible with collective knowledge and truth necessary for international prosecution. This problem can be seen, in particular, through the concept of “command responsibility.” Rather than addressing root causes of sexual violence such as poverty, sovereign control of wealth, land disputes, and complex social relations, the legal theory of command responsibility as argued in these trials attempts to simplify the complexity of criminality into the body of a singular person: the commander.¹²³ As Clarke argues, “this articulation of criminal responsibility in the defence of the victim has had the opposite of its intended effect by producing what Jacques Raniciere [sic] (2004) has called *disembodied political subjects* that allow agency to be reassigned to the institutionally powerful in their name.”¹²⁴

In the end, these legal theories create a normative framework that becomes disconnected from the local context of rape. Rosa Brooks insightfully wrote that “the rule of law is a culture, yet the human-rights-law and foreign-policy communities know very little—and manifest little curiosity—about the complex processes by which cultures are created and changed.”¹²⁵ Lincoln adds that:

[c]ultural norms permeate many of the factors that contribute to the sexual violence crisis. In fact, Erturk cautions against singling out sexual violence from the ‘continuum of violence that Congolese women experience’ which seems ‘to be perceived by large sectors of society to be normal.’ Certain preexisting norms have helped create the problem by contributing to judges’ unwillingness to hear claims of sexual violence and the reluctance of police to investigate allegations. Cultural norms also prompt traditional self-help

¹²² See Lindsey M. Harris, *Untold Stories: Gender-Related Persecution and Asylum in South Africa*, 15 MICH. J. GENDER & L. 291 (2009); Amanda Blanck, *Domestic Violence as a Basis for Asylum Status: A Human Rights Based Approach*, 22 WOMEN’S RTS. L. REP. 47 (2000).

¹²³ CLARKE, *supra* note 61, at 23.

¹²⁴ *Id.* at 4.

¹²⁵ Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2285 (2003).

remedies such as forced marriage, that reify a woman's second-class status in society. This point does not warrant outright rejection of the rule of law as a solution to the sexual violence crisis. Nor does it deny that laws do have some norm-creating capacity. Christine Bell writes, 'in transitional societies, law must be both the subject and object of change: It must simultaneously both produce change and be changed itself.' Most agree that impunity for perpetrators is a significant problem in the perpetuation of sexual violence, and appropriate laws can help alleviate this impunity by offering some measure of deterrence. In light of these considerations, practitioners should be aware of the limits of the rule of law and should focus on—or find partners who can invest in—efforts to change detrimental preexisting norms and rebuild norms that have been fractured by conflict.¹²⁶

To sum up, international criminal justice, which stems from a *moral outrage* of rape, has produced norms and vocabularies of rape as genocide and a weapon of war such as “systematic rape,” “sexual slavery,” and the “suffering of conscription” which limit the ability of courts to bear witness to the individual experience of rape that is much more complicated than these vocabularies suggest and tied to particular local contexts that often predate the mass atrocity in regards to women's bodies. The question, therefore, is how does the creation of a military, criminal justice narratives relate to the local context of the injustice of rape? And, in particular, do these narratives empower or hinder and constrain the discursive power of testimony as a space where women can contest the terms of their membership and foster social justice?

III

TESTIMONIAL DISCOURSE OF SEXUAL VIOLENCE IN DR CONGO AND EPISTEMIC INJUSTICE

The legal process of international criminal trials leads to the collection of *atrocious testimony* as an activity of the prosecution and defense teams through which the goal is to have as many victims and witnesses as possible testify and confirm the theory of the case, the end goal of which is to end impunity for sexual violence by bringing perpetrators to justice. In the process of bringing about social justice and transformation, on the other hand, testifying is an activity through which an excluded or marginalized group or individual seeks to gain recognition and, ultimately, membership. In the post-conflict setting,

¹²⁶ Ryan S. Lincoln, Recent Development, *Rule of Law for Whom?: Strengthening the Rule of Law as a Solution to Sexual Violence in the Democratic Republic of Congo*, 26 BERKELEY J. GENDER L. & JUST. 139, 164–65 (2011).

where actors seek transitional justice through truth-commissions, testifying is an act that victims and others engage in who have experienced or witnessed atrocity. Whereas *atrocity testimony* places the victim in a passive role in need of protection in a system that is almost exclusively focused on the perpetrator, *testimonial discourse* is an active contestation over membership and the right to speak one's truth. Testimonial discourse is a political ritual situated on the periphery of citizenship that serves as a precursor to political membership.¹²⁷ Those who speak of *testimony work* recognize that "the terms of the aspiration must be negotiated, amended, and compromised; through that process, new fictions will be derived to meet the memories of our past and the needs of our pluralist social worlds."¹²⁸

When we reconsider the sexual violence cases from the standpoint of the discursive function of *testimony work*, we are better able to see the way in which these international criminal trials commit, what Miranda Fricker has termed, "Epistemic Injustices."¹²⁹ Testimonial injustice is a philosophical understanding of the failure to treat a person as a source of knowledge. A hermeneutic injustice occurs when a society lacks a conceptual framework for understanding the experiences of someone who has been treated badly. Posing the question of testimony regarding rape in criminal trials from the perspective of epistemic injustice one might ask, does atrocity testimony silence, reject or ignore testimonies of the *injustice* of rape as it is experienced in a local context? The argument is that epistemic injustice limits testimony in its discursive function as political ritual of claims to citizenship.

The following sections present an analysis of the Lubanga trial in the ICC and the trial of Kibibi in a mobile gender court in Baraka, DRC through the lens of epistemic injustice as we consider how the silencing, rejecting and ignoring of testimony in these cases limits the discursive function of testimony.

¹²⁷ See SHEMAK, *supra* note 65; STEVAN WEINE, TESTIMONY AFTER CATASTROPHE: NARRATING THE TRAUMAS OF POLITICAL VIOLENCE (2006).

¹²⁸ CLARKE, *supra* note 61, at 22.

¹²⁹ MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2009).

A. *Lubanga Case*

Charges for gender-based crimes have been brought in six of the seven Situations before the ICC (Uganda, the DRC, the CAR, Darfur, Kenya and Ivory Coast) and eleven of the total sixteen cases currently before the Court.¹³⁰ This represents sixteen individual suspects out of the twenty-nine total accused by the ICC and, of these sixteen, five are from the DRC. Although sexual violence charges include causing serious bodily or mental harm, rape, sexual slavery, other forms of sexual violence, torture, persecution, other inhumane acts, cruel or inhumane treatment, and outrages upon personal dignity,¹³¹ particular legal theories pursued by the prosecutor have ultimately limited witness testimony that would substantiate these charges.

Although sexual violence has been widespread, the Prosecution of the DRC Situation has focused on North and South Kivu and mainly on the particular area of Ituri in North Kivu and, even more particular, on specific incidents such as the attack on Bogoro Village resulting in six total arrest warrants issued, four of whom have been arrested.¹³² The Court's first trial was against Thomas Lubanga Dyilo (Lubanga Case) that concluded in August 2011 and the Court's first trial judgment was issued in the Lubanga case in March 2012. Lubanga was convicted of the enlistment, conscription, and use of child soldiers and sentenced to fourteen years imprisonment. The Chamber and final judgment described the conflict in terms similar to the official narrative noted above and the specific place where the crimes took place, Ituri, as "fertile and rich in resources, such as gold, diamonds, oil, timber and coltan, and noted that the experts suggested that much of the violence was economically motivated, including exploitation of the social unrest by the Ugandan national army for economic advantage."¹³³ Although it noted Congo's 450 ethnic groups and the ethnic divisions between the Hema and Lendu that

¹³⁰ GENDER REPORT CARD, *supra* note 48, at 103. According to the Women's Initiatives for Gender Justice's *Gender Report Card* for 2012, "Charges for gender-based crimes have been included: in the Kony *et al* case in the Uganda Situation; in the Katanga & Ngudjolo, Ntaganda, Mbarushimana and Mudacumura cases in the DRC Situation; in the Bemba case in the CAR Situation; in the Al'Bashir, Harun & Kushayb and Hussein cases in the Darfur Situation; in the Muthaura & Kenyatta case in the Kenya Situation; and in the Gbagbo case in the Côte d'Ivoire Situation. No charges for gender-based crimes were brought in the Lubanga case in the DRC Situation, the Abu Garda or Banda & Jerbo cases in the Darfur Situation, the Ruto & Sang case in the Kenya Situation or, to date, in the Gaddafi & Al-Senussi case in the Libya Situation." *Id.*

¹³¹ *Id.* at 105.

¹³² Ntaganda has not been arrested.

¹³³ GENDER REPORT CARD, *supra* note 48, at 137.

have been ongoing, the local context of rape, in its cultural and social dimensions that cut across ethnic lines, was never mentioned. The emphasis on only one village and one particular narrative of violence led local women's rights activists to wonder "why the Hema militiamen were not prosecuted for sexual violence perpetrated against Ntigi and Lendu women. 'Does a Hema woman deserve more protection than her sisters belonging to other ethnic groups?' asked an activist."¹³⁴

Charges of sexual violence have had a shaky history in these early years of the Court. As documented in the *Gender Report Card*:

Charges for gender-based crimes, when they have been brought, have been particularly susceptible to being dropped, or in some instances re-characterised, in the early stages of proceedings, in particular seeking the issuance of an arrest warrant or summons to appear, and the confirmation of charges phase. Gender-based crimes were not charged in the Lubanga case, as discussed in detail later in this Report and as raised by the Women's Initiatives in 2006, as the first NGO to file before the Court. No case containing charges of gender-based crimes has yet reached the stage of a trial or appeal judgement, although the case against Katanga & Ngudjolo, containing charges of rape and sexual slavery, is awaiting trial judgement.¹³⁵

According to the *Gender Report Card*, as of June 17, 2012, fifty percent of the charges for gender-based crimes sought by the Office of the Prosecutor had been dismissed before trial state of the proceedings.¹³⁶ In the cases against militia leaders Germain Katanga and Mathieu Ngudjolo, prosecutors dropped all sexual violence charges following disagreements with the court's registry over how to protect two witnesses whose testimonies could have backed up the charges.¹³⁷ The Prosecution had relocated witnesses in order to protect

¹³⁴ Breton-Le Goff, *supra* note 3, at 25.

¹³⁵ GENDER REPORT CARD, *supra* note 48, at 106.

¹³⁶ *Id.* "The Pre-Trial Chamber is charged with determining whether the Prosecution has presented sufficient evidence to meet the legal standards for issuing arrest warrants and summonses to appear, and with confirming charges. The Women's Initiatives' analysis of nine cases, namely the cases against Bemba, Muthaura & Kenyatta, Harun & Kushayb, Al'Bashir, Hussein, Gbagbo, Mbarushimana, Ntaganda and Mudacumura, shows that only seven charges out of a total of 204 requested by the Prosecution have not been included in the arrest warrants or summonses to appear issued by the Pre-Trial Chamber, and five of those seven charges related to sexual or gender-based violence." *Id.*

¹³⁷ Taylor Toeka & Katy Glassborow, *Sexual Violence Charges for DRC Cases Scrapped: Human Rights Groups Warn Controversial Move Could Lead to a Culture of Impunity*, INST. FOR WAR & PEACE REPORTING (June 3, 2008), <http://iwpr.net/report-news/sexual-violence-charges-drc-cases-scrapped>.

them without the consent of the court's registry and, in response, the judges excluded the women's statements, interview notes, and interview transcripts from being used in the confirmation of charges hearing for Katanga and Ngudjolo¹³⁸ since the Prosecution's actions had undermined the credibility of the testimony. The evidence was, ultimately, reintroduced, the Chamber confirmed the charges of rape and sexual slavery, but then found the evidence insufficient to confirm the specific charges that would "establish substantial grounds to believe that the suspects intended for rape and sexual slavery to be committed during the attack on Bogoro village, or even in the aftermath of the Bogoro attack, or to establish the suspects' knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of events."¹³⁹ And, "[i]n the decision issuing the Arrest Warrant for Ntaganda in July 2012, the Chamber signaled that the evidence supporting the allegation of sexual slavery as a crime against humanity, which consisted of two witness statements and other circumstantial evidence, may not be sufficient to reach the standard of proof required at future stages of proceedings."¹⁴⁰ The same problem existed in the Mbarushimana Case that led to the Chambers conclusion that the requisite standard of proof had not been met that the acts were committed by the FDLR, even though it was convinced the crimes had been committed.¹⁴¹ Significantly, "the Chamber noted that those witnesses who did speak about or acknowledge this order, 'mostly do so after specific, explicit and insistent prompting by the investigator, and they attach to such order a meaning that is different to that which is alleged by the

¹³⁸ *Id.*

¹³⁹ GENDER REPORT CARD, *supra* note 48, at 111 (quoting the dissenting opinion of Judge Ušacka).

¹⁴⁰ *Id.* "On 13 July 2012, Pre-Trial Chamber II delivered its decision on the Prosecution's application under Article 58, issuing a second Warrant of Arrest for Ntaganda. The Pre-Trial Chamber was satisfied that there were reasonable grounds to believe that Ntaganda was individually criminally responsible as an indirect cop perpetrator under Article 25(3)(a) for three counts of crimes against humanity (murder, rape and sexual slavery, and persecution) and four counts of war crimes (murder, rape and sexual slavery, attacks against a civilian population, and pillage). The Chamber was likewise satisfied that the Prosecution had established that both the crimes and the case against Ntaganda fell within the jurisdiction of the Court, and had provided reasonable grounds to believe that the crimes were committed pursuant to an organisational policy by the *Union des patriotes congolais* (UPC)/FPLC. The Chamber found reasonable grounds to believe that crimes of rape and sexual slavery had taken place, including allegations that women of Lendu ethnicity and other non-Hema 'female civilians' were 'abducted, systematically raped, and subjected to other forms of sexual violence as part of the UPC/ FPLC policy to gain control over Ituri.'" *Id.* at 114–15.

¹⁴¹ *Id.* at 117.

Prosecution.”¹⁴² Most recently, Trial Chamber II unanimously acquitted Ngudjolo stating that the ruling should not be taken to imply the crimes were not committed, just that there was insufficient evidence to prove that he was the commander during the attack on Bogoro.¹⁴³ The failures in being able to present witness testimony point to a limitation of the norms of testifying and vocabulary of the legal theories concerning sexual violence in the ICC. As a result, most of the Prosecution’s evidence has been open source documents from international organizations such as Human Rights Watch that have been among the core manufacturers of the sexual violence vocabulary of rape as a weapon of war.¹⁴⁴ The disjuncture between the internationally formed vocabulary and the testimony of witnesses can be seen in the problems the prosecution has faced in the court through its use of intermediaries. In the Lubanga trial, the Prosecution, the Chamber found, had placed undue reliance on three principle intermediaries that “created the significant possibility that they improperly influenced witnesses to falsify their testimony, rendering most of it unreliable.”¹⁴⁵

The Prosecution did not originally charge Lubanga with gender-based crimes, despite reports by the United Nations and other sources relating to their commission by the UPC soldiers Forces Patriotiques pour la Libération du Congo (FPLC) of which he was the Commander in Chief.¹⁴⁶ Instead, the Prosecution chose to focus on the use of child soldiers. The Chamber took note, however, that of the 129 victims whom it had authorized (34 female and 95 male), many had alleged “that they had suffered harm as a result of other crimes, such as sexual violence and torture or other forms of ill-treatment,” which were not the subject of charges against the accused.”¹⁴⁷ It also stated that not all of the facts set forth by the Prosecution fell within the parameters of the facts and circumstances described in the confirmation of charges decision, namely, “the use of girls as sexual slaves together with the resulting unwanted pregnancies.”¹⁴⁸ In other

¹⁴² *Id.*

¹⁴³ Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12, Judgment (Dec. 18, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1529535.pdf>.

¹⁴⁴ See generally *Reports*, HUM. RTS. WATCH, <http://www.hrw.org/publications/reports> (last visited Apr. 2, 2013).

¹⁴⁵ GENDER REPORT CARD, *supra* note 48, at 139.

¹⁴⁶ *Id.* at 133.

¹⁴⁷ *Id.* at 136.

¹⁴⁸ *Id.*

words, the issue of sexual violence came up repeatedly in the context of conscription of female recruits throughout the trial.

The undercurrent of sexual violence throughout the trial was largely due to the efforts of the Women's Initiatives for Gender Justice. When they heard that there would not be specific charges for sexual violence in the Lubanga trial they reported:

The DRC has one of the highest rates of sexual violence in the world. The Ituri region, where the UPC operates, continues to experience ongoing conflict and militia attacks, and eastern DRC has been described by Margot Wallström, the United Nations Secretary-General's Special Representative on Sexual Violence in Conflict, as the 'rape capital of the world.'

It was therefore shocking to many of us that the announcement in 2006 of the case against Thomas Lubanga did not include charges for such crimes and overlooked the suffering of thousands of victims of this conflict and victims of this militia. It was unimaginable to us and to our partners in eastern DRC, grassroots women's rights and peace advocates, that the Office of the Prosecutor (OTP) had not investigated these crimes in their initial strategy. It was also beyond comprehension that the OTP then decided not to undertake any specific investigations into these crimes in the six months between when Mr. Lubanga was taken into ICC custody in March 2006 and before the Confirmation Hearing in November of that year. Still further, the OTP did not investigate these crimes between the Confirmation Hearing and the start of the trial two years later in January 2009. In fact, there was almost three years from when Mr. Lubanga was taken into custody until the trial started—plenty of time in which the OTP could have conducted investigations of gender-based crimes in relation to child soldiers, thereby expanding thematically on their original charges and providing a more accurate reflection of the crime base. In our view, the OTP could have amended the document containing the charges, sought and held a Confirmation Hearing on such charges and still have been ready for trial three years later, with the rights of the accused to prepare his defense fully observed.¹⁴⁹

In May and July 2006, the Women's Initiatives for Gender Justice had conducted two documentation missions in Ituri, eastern DRC, and interviewed victims/survivors of gender based violence, committed by a range of militias including the UPC. They produced a dossier detailing fifty-five individual interviews with predominantly women victims/survivors of rape and other forms of sexual violence. Of

¹⁴⁹ Brigid Inder, *Reflection: Gender Issues and Child Soldiers-The Case of Prosecutor v Thomas Lubanga Dyilo*, LUBANGA TRIAL INT'L CRIM. CT. (Aug. 31, 2011), <http://www.lubangatrial.org/2011/08/31/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/> (footnote omitted).

these, thirty-one interviewees were victims/survivors specifically of acts of rape and sexual slavery allegedly committed by the UPC. On August 16, 2006, the Women's Initiatives submitted their dossier and a letter to the Office of the Prosecutor describing their concerns that gender-based crimes committed by the UPC had not been adequately investigated in the case against Mr. Lubanga. The dossier provided information about the commission of these crimes, indicated that sexual violence appeared to be an integral component of the attacks against the civilian population, provided material suggesting a pattern of rape, abduction, sexual slavery, and torture by the UPC, and confirmed that women victims/survivors were willing to be interviewed by the ICC. When the OTP never responded to this dossier, the Women's Initiatives became the first NGO to file observations under Rule 103 before the Court, concerning the absence of charges for gender-based crimes in the Lubanga case. On May 22, 2009, the Legal Representatives for Victims jointly requested the Trial Chamber to consider modifying the legal characterization of the facts to include inhuman and cruel treatment, and sexual slavery to the existing charges, pursuant to Regulation 55. Although granted by a majority decision of the Trial Chamber, this was overturned on appeal.¹⁵⁰ Even though the case proceeded without any further charges being brought, evidence of sexual violence was heard throughout the trial.

Legal Representative of Victims, Carine Bapita Buyangandu, outlined the historical context of the conflict and described the ill-treatment of children in the training camps. She noted that children in training camps were beaten and sometimes killed, were given poor food, inadequate training and no access to medical care, and that "they raped and they were raped." Bapita also explained the specific abuse of girl child soldiers in the training camps, who—in addition to receiving the same training and treatment as boy child soldiers—were also used as sexual slaves, became pregnant, had unwanted children, performed household chores, and were used to actively participate in hostilities by means of scouting, looting, killing, and fighting. She suggested to the Chamber that these criminal acts against girls should be considered as aggravating circumstances to the crime of enlistment and conscription of child soldiers under the age of fifteen and using them to participate actively in hostilities.

¹⁵⁰ GENDER REPORT CARD, *supra* note 48, at 158, 161.

The Women's Initiatives for Gender Justice analysis of the publicly available testimony indicates that "of the majority of the Prosecution witnesses who testified during the presentation of the Prosecution case in 2009, at least 21 out of 25, testified in open court about girl soldiers, and a significant number of Prosecution witnesses, at least 15, also testified about gender-based crimes, in particular rape and sexual slavery" even though none of this testimony was relied on by the Chamber in convicting Lubanga.¹⁵¹

In its closing arguments "[t]he Prosecution urged the Chamber to make clear that the girls forced into marriage with commanders were not the wives of commanders but victims of recruitment, and should be particularly protected by demobilisation programs and by the ICC."¹⁵² After the closing statements of the Prosecution in the Lubanga Case, Judge Odio-Benito noted that, despite submissions on sexual violence being included in the Prosecution's final brief and closing arguments, charges of sexual violence had not been included in the document containing the charges or included within the charges confirmed by the Pre-Trial Chamber. Making reference to Article 74, Judge Odio-Benito asked: "How is sexual violence relevant to this case, and how does the Prosecution expect the Trial Chamber to refer to the sexual violence allegedly suffered by girls if this was not in the facts and circumstances described in the charges against Mr Lubanga Dyilo?"¹⁵³ Although the question was directed at Deputy Prosecutor Fatou Bensouda, Chief Prosecutor Moreno-Ocampo, seated in the back of the courtroom and chided earlier for using email in the courtroom, was granted permission by the Chamber to answer this question. He stated:

We believe the facts are that the girls were abused, used as sexual slaves and raped. We believe this suffering is part of the suffering of the conscription. We did not allege and will not present evidence linking Thomas Lubanga with rapes. We allege that he linked it with the conscription and he knows the harsh conditions. So what we believe in this case is a different way to present the gender crimes. It presents the gender crimes not specific as rapes. Gender crimes were committed as part of the conscription of girls in—in the militias. And it is important to have the charge as confined to the inscription, because if not . . . the girls are considered wife and

¹⁵¹ *Id.* at 160.

¹⁵² *Id.* at 161 (footnote omitted).

¹⁵³ Women's Initiatives for Gender Justice, *Summary of the Closing Statements in The Prosecutor v. Thomas Lubanga Dyilo*, LUBANGA TRIAL INT'L CRIM. CT. (Nov. 3, 2011), <http://www.lubangatrial.org/2011/11/03/summary-of-the-closing-statements-in-the-prosecutor-v-thomas-lubanga-dyilo/>.

ignored as people to be protected and demobilised and cared. That is why the Prosecutor decided to confine the charges—to present the suffering and the sexual abuse and the gender crime suffered by the girls in the camps just as conscription, showing this gender aspect of the crime. The Prosecutor went on to explain that the Prosecution believed a commander’s order to abduct girls to use them as sexual slaves or rape them was an order to use the children in hostilities.¹⁵⁴

Judge Fulford stated that: “Mr. Ocampo’s submission differed from that presented by Ms. Samson’s argument—who had reasoned that sexual violence against female child soldiers was an aspect of their direct participation in hostilities. . . .”¹⁵⁵ When Ocampo “instructed the bench to accept his argument over Ms. Sampson’s, since he is the Chief Prosecutor . . . Judge Fulford promised to ‘ignore’ Mr. Ocampo’s remark.”¹⁵⁶ Ocampo presented this new conceptual framework as a last ditch effort to give voice to the invisible experience of female conscripts as a distinct category of child soldiers. While laudable in seeking to expand the vocabulary of “suffering of conscription,” it proved too little and too late. The trial judgment, in the end, does not consider sexual violence stating:

Regardless of whether sexual violence may properly be included within the scope of “using [children under the age of 15] to participate actively in hostilities” as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue.¹⁵⁷

In its *Gender Report Card 2012*, the Women’s Initiatives noted:

The absence of any factual findings related to the sexual violence committed against recruits in the trial judgment, and its exclusion

¹⁵⁴ *Id.*

¹⁵⁵ Alpha Sesay, *Prosecutors and Victims’ Representatives Make Closing Statements in Luganga Trial*, LUBANGA TRIAL INT’L CRIM. CT. (Aug. 25, 2011), <http://www.lubanga-trial.org/2011/08/25/prosecutors-and-victims-representatives-make-closing-statements-in-lubanga-trial/>.

¹⁵⁶ *Id.*

¹⁵⁷ GENDER REPORT CARD, *supra* note 48, at 162. “The Chamber also stated that ‘Ms Coomaraswamy gave relevant background evidence that children in this context frequently undertake a wide range of tasks that do not necessarily come within the traditional definition of warfare’, which exposed them to risks, including ‘rape, enslavement and other forms of sexual violence’ . . . While establishing a broad definition of the crime ‘use to actively participate in hostilities’, the Chamber did not make any definitive legal finding on whether sexual violence could or should be properly included within the scope of the crime.” *Id.*

from the definition of the crimes for which Lubanga was convicted, rendered these aspects of the crimes invisible, and impeded their consideration for the purposes of sentencing. Furthermore, it resulted in the omission of the harm suffered primarily by female recruits in the assessment of the gravity of the crime.¹⁵⁸

In a dissenting opinion,

Judge Odio Benito found that sexual violence was an ‘intrinsic’ aspect of the legal concept of ‘use to participate actively in the hostilities.’ She argued that the majority’s decision not to include sexual violence within the concept of ‘use to participate actively in the hostilities’ rendered this aspect of the crime invisible. Judge Odio Benito stated that the: ‘invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group’. Specifically, she argued that the Chamber had a ‘duty’ to include sexual violence within the legal definition of ‘use to participate actively in the hostilities’, regardless of the ‘impediment of the Chamber’ to base its decision on this aspect of the crime pursuant to Article 74(2) of the Statute.¹⁵⁹

As this section has shown, prosecution in the ICC, on numerous levels, fails to treat the individual women who have testified to rape as a source of knowledge about the harm she has experienced through the act of rape. Investigative teams silence women through intermediaries charged with finding testimonies that correspond to the rape scripts. Most of the testimonies collected by organizations such as the Women’s Initiatives for Gender Justice have been ignored as a result of legal theories that fail to see women, who do not fall within the legal theory, as testifiers.¹⁶⁰ Other times, even when they do fall within the legal theory, victim testimony is rejected through norms regarding the credibility of evidence. The next section examines mobile gender courts through the lens of hermeneutic injustice in that these trials are taking place in a local societal context that fundamentally lacks the conceptual framework (or local vocabulary) for understanding the experience of a rape victim as someone who has been treated badly.

¹⁵⁸ *Id.* at 159.

¹⁵⁹ *Id.* at 163 (footnotes omitted).

¹⁶⁰ Jeremy Wanderer, *Addressing Testimonial Injustice: Being Ignored and Being Rejected*, 62 PHIL. Q. 148 (2012).

B. Kibibi Trial

As mentioned above, the DRC national penal code includes sexual offences as crimes against humanity, as provided by the Rome Statute. The military law, however, “did not follow the detailed ICC definition of the crime of sexual violence. Therefore, military judges had to fill the gap in the law.”¹⁶¹ At the local level, military courts have jurisdiction to hear cases of sexual violence committed by military personnel as defined by the penal code.¹⁶² Victims enter these proceedings as civil parties. Prosecution for non-military rapes takes place in the criminal courts with civil action for reparations being stayed until the criminal court issues a final judgment. A victim who seeks reparations can either join the penal action or must wait for a judgment to use in the action before the civil jurisdiction to claim reparations. Either way, she must pay a fee to receive the judgment and, if she pursues civil action, to lodge the complaint. In 2010 the mobile gender justice courts in South Kivu heard a total of 186 military cases with 95 convictions for rape while the civil mobile courts have heard 49 cases.¹⁶³ After identifying the major obstacles as being a shortage of magistrates and difficulty for victims to access courts given the lack of infrastructure in the eastern provinces, the international community supported the creation of mobile gender courts. The idea of the Mobile Gender Court is to bring the court to the villages where the rapes occurred. Congolese Judges and lawyers conduct the trials that are overseen and funded by the Open Society Institute with implementing partners including the ABA ROLI program, Lawyers Without Borders, and USAID.

In February 2011, I attended the first three days of the ten day Mobile Court Trial of Lt. Col. Kibibi Mutuara in Baraka. The trial concerned rapes in Fizi that had occurred on New Year’s Day. This was the highest-ranking officer ever to be prosecuted locally for the

¹⁶¹ Breton-Le Goff, *supra* note 3, at 23.

¹⁶² Law no. 024/2002 of 18 November 2002 on the Military Penal Code. Rape and torture are covered by the military penal code as crimes against humanity, which was integrated into the military Penal and Justice Code, along with crimes of genocide and war crimes, through the laws of 18 November 2002.

¹⁶³ Akhila Kolisetty, *New Mobile Gender Justice Court Tries Rape Case in Congo*, JOURNEYS TOWARDS JUSTICE (Feb. 17, 2011), <http://akhilak.com/blog/2011/02/17/new-mobile-gender-justice-court-tries-rape-case-in-congo/>; see also *Medico-Legal Pilot Project to More Effectively Prosecute Crimes of Sexual Violence in the East Congo*, OSISA (last visited Apr. 7, 2013), <http://www.osisa.org/law/drc/medico-legal-pilot-project-more-effectively-prosecute-crimes-sexual-violence-east-congo>.

crime of sexual violence. The Open Society official Report of the Trial, “Justice in DRC,” states that:

On New Year’s Day, 2011, soldiers from the Congolese army descended on the town of Fizi, raping dozens of women and looting property in a terrifying night of violence. Six weeks later, Lieutenant Colonel Kibibi Mutuara, the commanding officer who ordered the attack, and 10 other soldiers were brought to trial before the mobile court. During the two-week session, prosecutors presented evidence, including the testimonies of 49 women who were raped, while defense counsel sought to rebut the charges. Hundreds of onlookers gathered each day to follow the trial. Kibibi and three of his officers were each found guilty and sentenced to 20 years in prison. Five enlisted men were also convicted and sentenced to 10 or 15 years in prison. One soldier was acquitted and one was found to be a minor and transferred to another domestic court.¹⁶⁴

While not untrue, the Open Society Foundation’s characterization of the trial omits some of the facts that complicate the local situation. For example, what sparked the incident was a fight over a girl in a bar. One of the soldiers, not wearing a uniform, had tried to pick up a local woman. Her boyfriend, angered, attacked the soldier, who later died. The soldiers looted the village in retaliation for the death of the soldier. These additional facts highlight how the official narrative of the incident and vocabulary of rape as a weapon of war causes distortions of the local context that result in a lack of “buy in” by the local population of what they see as a foreign tribunal. In the case of Fizi, the particular vocabulary of the rape as command authority and perpetrated by Congolese soldiers misses the relevant fact, on one side, that these were ex-CNDP (Tutsi) rebels integrated into the FARDC and, on the other side, that all of these men and boys, on that particular night, were not wearing uniforms. By classifying the incident as the Congolese military under the command authority of Kibibi, it inscribes only the identities that have to do with war and conflict, ultimately, shaping justice that end up ignoring the experience of victims as speakers of their social condition.

The Women’s Initiatives for Gender Justice similarly highlighted the disparity between the official narrative and the local context. On their website they highlight one of the victims interviewed in their publication, *Our Voices Matter*, who was among the 63 women who were raped by Kibibi’s FARDC soldiers during the Fizi New Year’s

¹⁶⁴ OPEN SOCIETY FOUND., JUSTICE IN DRC: MOBILE COURTS COMBAT RAPE AND IMPUNITY IN EASTERN CONGO 5 (2012), available at <http://www.opensocietyfoundations.org/sites/default/files/justice-drc-20130114.pdf>.

mass rape. As they document, following the sentence, the Congolese Government declared that it would compensate each victim with USD 10,000. However, no action has been taken to compensate victims/survivors of this case. They then quote the interviewee as saying, “We won the trial in Baraka but until now we haven’t even received copies of the judgement [sic]. The government told us that it would compensate us, but since then we haven’t seen anyone come to us, neither the authorities nor the judges.”¹⁶⁵

Drawing out more of the descriptive elements of the trial helps to situate the performance of testimony in its local context. The trial itself was staged in an open-air forum, and most of the bench seating within the forum was taken up by local NGOs and journalists. Hanging on the walls of the forum upon which police officers stood with their guns, were locals, mainly men, who had to be often reminded of court decorum as they broke out in laughter over matters such as the limited schooling of the accused. And, just across a small bridge a stone’s throw away, stood a military vehicle full of Kibibi’s men “patrolling” the population. The 43rd Sector had been stationed in Fizi and was Kibibi’s stronghold. Although “a big fish” and a high-profile case, there was a prison, but no key could be found, to secure the accused. When I asked why there were hardly any women present, I was told that they were working in the fields or at the market. Whereas for something like a V-Day celebration it was acceptable for women to attend, a trial could bring problems. Most of the people I spoke with saw the trial as more of a spectacle for the international community because, as has been their experience, afterwards the perpetrators go free. And, even if he was in prison, I was told that the “bandits” who work with him would still be there unless the 43rd Sector was replaced fully.

Not only was this the highest-ranking official ever charged for rape in a nationally based court, it was also one of the shortest timeframes within which a trial had been brought. The incidents had occurred on New Year’s Day 2011, and the trial was taking place a little over a month later. Because of the short timeframe, lawyers for the victims had not yet had a chance to meet with their clients who were being hidden in safe houses. The night before the trial began, Maitre Thérèse Kulungu, the only female lawyer on the case, prepared her

¹⁶⁵ DRC: *Our Voices Matter*, WOMEN’S INITIATIVES FOR GENDER JUSTICE (Aug. 2012), <http://www.iccwomen.org/news/docs/WI-WomVoices8-12-FULL/WomVoices8-12.html>.

opening statement, writing down notes until she quickly ran out of paper. She also did not have a copy of the dossier which was in Uvira, a village hours away. A dossier can be 500 pages long and, with printing costs at \$4 a page, the lawyers for the victims requested additional time to be able to view the court's copy.

Fifty-five women, ages nineteen through sixty, presented evidence for the trial with forty-seven testifying at the trial. Kibibi and three of his officers received twenty-year prison sentences while five more officers received shorter ones, and one was acquitted. Examining the sentences, one is struck by the short prison terms each of the convicted perpetrators received. In addition, no reparations were ever made to the women who continue to be social outcasts.

What these two examples emphasize is the need to better understand how local testifiers and actors identify or not with the new vocabularies of sexual violence as an atrocity crime. Has the growth of criminal tribunals at the international and local level enlarged state or local capacity to understand the experience of Congolese women? How does this new vocabulary affect who gets heard and how they are heard? In other words, have the norms of criminal justice and new vocabularies been able to give voice to epistemic injustice such that testifiers are able to lay claim to the discourse of sexual violence in the DR Congo? Or has it further isolated them as nonmembers of society? We turn now to these questions through an exploration of the discourse of sexual violence in the DR Congo.

IV

TESTIFYING TO SEXUAL VIOLENCE IN SOUTH KIVU

During my November 2011 trip to eastern Congo to monitor the elections, I met a woman at the Ihusi Hotel in Goma. She had worked for the U.S. Embassy in Kinshasa, and we spoke over drinks at the restaurant about my research. At the time she told me that I should take a closer look at issues of drug addiction and poverty in Kinshasa. A few weeks after I returned, I received an email from her in which she wrote:

Just wanted to share a few things with you since you are doing a study on rape here. First I need to share, I was a victim of rape by knife point in the US. He was convicted. Here there is a difference. Rape is still rape but MANY rapes that are reported here are from women who have men who are married and rely upon the money they get for being the "makango" spelling???? They have sex with the married man expecting to be the second wife. If they don't become the second wife they report the man for rape. You have to be careful on the definition of rape here. Women who have sex with

men and not paid falls under rape . . . Not by a law here but it happens frequently, reporting the men for rape. Rape has many meanings here so please keep that in mind.¹⁶⁶

This was not the first time I had been given advice by westerners who had spent time locally, but who were not taking part in sexual violence programs, to keep in mind that most westerners come to the DRC and take away what they want to see about rape. During the two years that I collected testimony and conducted focus groups with women throughout South Kivu regarding civil trials for rape, I learned that most of Congolese women shared the view that women were misusing the Rape Law as a way in which to get money from men. On the other hand, none of the women I interviewed had ever received any compensation from a trial. Instead, what I learned is that the Rape Law has essentially created another layer to the informal economy of corruption. Women would bring a case, but perpetrators paid off judges and the cases would be dropped. The perception in villages was that women who brought cases were behaving antisocially, and sympathy tended to go with the family of the man accused of rape who would no longer have its main source of income and, if put in prison, who have to find a way to care for him while he was there given that prisoners in the Congo receive no food and are kept in terrible conditions.

These stories were at odds with the many judgments being issued for civil and criminal rapes in local courts. Most of the rapes that are brought to court at the local level are civil. This is because it has proven impossible to apprehend FDLR perpetrators since these rapes occur deep in the forests. A study of these civil rapes provides a picture of the local “cultures” of rape. The kinds of situations that lead to civil trial include girls who have turned to older men to pay their school fees. It is also still common for girls from poor families or out in remote villages such as Shabunda, to marry early. Girls sometimes freely choose early marriage, but this is now considered rape. In other instances, there are girls who are raped by men in the village to “marry” them. Local NGOs encourage girls and their families in these cases to bring a case against the man as a rape case. Many women or girls were raped while they were tending fields or on their way home. Even when the rape was by a soldier, they often indicated that the soldier was from the local village, a “bandit.” Finally, many rapes had to do with disputes over land. In all these

¹⁶⁶ E-mail from J. to Galya B. Ruffer (Nov. 2011) (on file with author).

cases both the women I interviewed and the local NGOs stated that informal justice (where a mediation would take place) worked better than formal justice in terms of restoring the position of the rape victim in the community and allowing her to either continue to go to school or be cared for financially.

In addition, local NGOs stated that the international focus was missing the point that most rape in the Congo is due to the rampant incest, domestic violence, exploitation of girls and use of “witchcraft” (drugs) by uncles and neighbors to take advantage of girls and women. As such, there was really no local understanding that the girl had been harmed. There was, however, an understanding that a rape law exists and that, therefore, rape is a crime. These two positions did not seem contradictory to the informants I interviewed. For example, magistrates and judges told me that they had no problem processing cases because there was the letter of the law. At the same time, however, the head of the court in Bukavu wanted me to understand that when a girl reaches puberty her body needs sex to mature properly. This was, according to him, a well-known fact.

There seem to be separate normative understandings of the women’s lives, on the one hand, and the need to produce convictions/judgments in order to prove the success of rule of law programs. Local NGO partners, therefore, had lists of cases of women and men they were representing, but none of the women they had ever represented received any reparations from a civil or military judgment and all the women, by bringing a legal case, were shunned by their communities. Girls were thrown out of school once the community knew that her family had pursued a case in court, women told stories of being harassed by neighbors. All of them wanted to be able to relocate, but none had the funds to do so.

One local NGO shared a video with me of their argument with a girl who had been abducted into the forest by an FDLR soldier. In the video she is arguing with the lawyer that she wants to marry the man. The lawyer told me that under the new laws, she was obligated to bring the case. He then relayed to me that he saw her in the village about a year later and she said to him, “are you happy now you got your justice? I married the man as I wanted.”

The way in which local actors conveyed their perceptions of justice and stories recounted to me about local practices regarding the treatment of rape victims, are best understood as a contestation over membership and potential ways to address injustice. In focus groups and individual interviews, women who had participated in “know your rights” and women empowerment programs told me that using

these new vocabularies made them “delinquent women” in their communities. Delinquent meant that they were considered to no longer be carrying out the functions (taking care of children, tending the fields, etc.) of a woman. They also told me that the billboards that appear in Bukavu at circle intersections bring shame upon them. These billboards, expressive of rape as violence, portray women in shirts and pants being taken in force by men. The women did not see themselves in these billboards and conveyed that they gave men bad ideas about women who do not dress properly.

If we understand the introduction of the Rape Law as having introduced new vocabularies that enable new forms of contestation over the terms of membership and injustice, we can see that the criminalization model, which has directed rule of law efforts towards certain projects (building courts, policing, rights based education programs, etc.) has also produced the need for social justice programs that would target domestic violence, incest, school fees, curricular programs that would emphasize the value of women in society, inheritance reforms, and support for women engaged in land disputes. Given the criminal justice focus, civil law reform and social justice has remained underdeveloped. The impunity agenda focuses mainly on the perpetrator while we see matters of social justice for the victim such as civil remedies and inequalities in the family and home being contested through narratives such as that expressed in the email by “J” which sees women as seeking to use rape as a way to claim resources in the community.

CONCLUSION

DUTIES OF BEARING WITNESS TO THE *INJUSTICE OF RAPE*

The international criminal justice expression of, what I have termed, *moral outrage* concerning sexual violence through the vocabulary of command responsibility and rape as a weapon of war generates and supports an official narrative of rape in the DRC which, ultimately, does a disservice to victims of sexual and gender based violence as they strive to seek social justice. The underlying assumption of *moral outrage* is that rape is a singular horrific occurrence in a girl or woman’s life committed by a perpetrator who has behaved “criminally,” that is, outside the limits of how society defines acceptable behavior. Girls and women in the Congo, however, testify that rape is an ongoing part of their lives from early childhood through incest at home, the need to have sex to pay for school fees, and domestic violence after marriage and that the rape they were

asked to testify about for purposes of an international trial focused on the horrific experience of being gang raped or otherwise sexual assaulted by a soldier, is not the main horror in their lives. Their main horror concerns, what I have termed, the *injustice* of rape. Shifting the focus of efforts to combat rape in the DRC to the *injustice* of rape would allow victims to testify about their survival strategies in a society that devalues women to the extent they are in eastern DRC.