

## ASR FORUM

### The Case of Gender-Based Violence: Assessing the Impact of International Human Rights Rhetoric on African Lives

# The New Sexual Violence Legislation in the Congo: Dressing Indelible Scars on Human Dignity

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**Abstract:** This article describes a legal thread running from the commission of massive sexual violence in the eastern provinces of the Congo since 1996 to the enactment of liberal legislation in 2006 to combat sexual violence throughout the country, especially in eastern Congo. In doing so, the article fills a gap in the nascent legal literature on systematic sexual violence. It finds that the new rape law is progressive, liberal, gender-neutral, and in keeping with international law. However, an unfortunate lapse in legislative drafting puts in doubt the authority of the courts to use the new rape law to prosecute systematic sexual violence. Despite this weakness, as well as harsh realities such as resource limitations and institutionalized corruption, the new sexual violence law, “the law of shameful acts,” nonetheless provides a framework on the basis of which the state and rape survivors can prosecute perpetrators. It is a necessary step in upholding accountability and preparing for the more daunting task of healing communities affected by a devastating regional war.

**Résumé:** Cet article décrit le fil conducteur juridique reliant la perpétration de violences sexuelles massives dans les provinces de l’est du Congo depuis 1996, la mise en vigueur de la législation libérale en 2006, et la confrontation active des problèmes de violence sexuelle au niveau national, et en particulier dans les provinces de l’est. En offrant ce parcours chronologique, cet article comble un vide dans la littérature juridique naissante sur les problèmes de violence sexuelle systématique. Cette recherche montre que la nouvelle loi sur le viol est progressiste, libérale, égalitaire, et similaire à la loi internationale. Cependant, des failles malheureuses dans la formulation de cette loi mettent en doute l’autorité des tribunaux dans son utilisation

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pour poursuivre en justice les cas de violence sexuelle systématique. Cependant, en dépit de cette faiblesse, ainsi que des réalités difficiles de la vie quotidienne, telles que la quantité limitée de ressources et la corruption institutionnalisée, la nouvelle loi contre les violences sexuelles appelée “loi des actes honteux” offre un cadre dans lequel les victimes de viol et d’injustice institutionnelle peuvent poursuivre les auteurs de ces crimes. C’est une étape nécessaire vers une prise de responsabilité collective, et une préparation pour l’accomplissement de la tâche plus difficile de guérison des communautés affectées par une guerre régionale dévastatrice.

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## Introduction

The eastern provinces of the Democratic Republic of the Congo (North Kivu, South Kivu, and Province Orientale) have since August 1996 been the scene of intense and unspeakable human tragedy as armed conflict has taken the lives of millions of Congolese in a war now widely recognized as the deadliest since World War II. The intervention of eight foreign countries on both sides of the conflict turned it into “Africa’s World War,” while the industrial scale of sexual violence in eastern Congo turned the female body into a spoil of war, and, to borrow the phrase of Elisabeth Rehn and Ellen Johnson-Sirleaf, an “envelope to send messages to the perceived enemy” (2002:149). The logic behind these mass rapes is as intricate as the web of the war’s causes and contributing factors—from security considerations to the control of strategic minerals, the weakness of the Congolese state, internal political dynamics, ethnic rivalries, and regional territorial ambitions. Girls and women, more than any other group, have borne on their bodies the heaviest brunt of the conflict; and the world’s largest United Nations peacekeeping operation did little to prevent assaults on their dignity. Following vigorous lobbying by local and international nongovernmental organizations, the Congolese parliament in July 2006 amended criminal legislation in order to incorporate progressive provisions designed to combat sexual violence.

This article traces a legal thread running from the massive and horrific commission of sexual violence in the eastern provinces of the Congo since 1996 to the enactment of progressive legislation in 2006 to combat sexual violence throughout the country, especially in eastern Congo. The article begins with the historical background of the wars and systematic sexual violence in eastern Congo, and provides a short explanation of the legal context for the prosecution of sexual violence. The article then uses an actual court case to illustrate the many hurdles that survivors of sexual violence have to overcome throughout the criminal justice process in order to secure the conviction of perpetrators and ensure accountability for sexual offenses. The next section is the crux of the article as it describes how the new sexual violence legislation resolves some of those hurdles. The following section indicates where the new rape law fails to provide adequate

protection to the survivors of sexual violence and issues broad recommendations for making the protection of survivors in the new sexual violence legislation more effective. Recognizing a deterioration of the security situation in 2012 after a few years of perceptible improvement, the article ends by noting that the wounds caused by widespread and lasting sexual violence are profound and that healing requires more than prosecution, though accountability is a precondition for healing. The state will have to encourage and engage in the healing process wholeheartedly if it is to succeed in stitching back together the lives of survivors and their traumatized communities.

### **Systematic Sexual Violence in the Congo: Historical Background**

The link between the Congo wars and systematic rape in eastern Congo is not direct or immediately obvious. The illegal exploitation of Congo's enormous reserves of strategic minerals—primarily tantalum, tin, and tungsten, which are critical ingredients for electronic goods such as laptops and cell phones—finances rebel movements that vie with the Congolese military for the control of the resources. Rebels sell these materials to designated traders and companies, who subsequently sell them to leading manufacturers (e.g., Hewlett-Packard, Microsoft, Apple, Nokia, Acer, and Intel) in the global market (Enough Project 2010).<sup>1</sup> To retain control over mineral-rich areas, rebels and militias commit mass atrocities, systematic sexual violence being one of their most grisly signatures. Thus, a “curse of resources” gives birth to what the Congolese author Bernadette Tokwaulu Aena calls the “curse of the slit” (2008).<sup>2</sup>

The conflict–rape nexus has played itself out during three distinct periods. The first period (1996–97) was that of the first Congo war that flared up in late 1996, ignited by the brutal and bloody genocide of approximately eight hundred thousand Tutsis and moderate Hutus in neighboring Rwanda. The Hutus who participated in the genocide escaped to eastern Congo, where they were chased by the Rwanda Patriotic Front (RPF), the Tutsi-led rebel group that took over power from the former Hutu-dominated regime in Rwanda, accompanied by Congolese, Ugandan, and Burundian allies (see Nzongola-Ntalaja 2002). A 2010 United Nations Human Rights Council report on the most serious violations of international human rights and humanitarian law committed between March 1993 and June 2003 in the Congo (hereafter “Mapping Report”) averred that the RPF, together with the Congolese rebels they backed up, committed massive human rights violations, including sexual violence and mass killings of Hutus which, if proved in a court of law, could amount to genocide.

The second period (1998–2003) was the second Congo war which decimated human lives in eastern Congo, with death estimates ranging from nine hundred thousand (Voice of America 2010) to more than 5 million (Coghlan et al. 2007). This death toll, over and above the war's global

economic matrix and the direct involvement of eight foreign countries, explains why experts call the second Congo war “Africa’s World War.”<sup>3</sup> The war also facilitated mass rapes. As the Congolese economy deteriorated and plunged people deeper into poverty, women had to go out into the fields, to the markets, and to the forests in order to support their families, knowing full well that armed groups might detain and assault them (Ferril 2008:342). In December 2002, Congolese President Joseph Kabila signed a peace agreement with other belligerents, the *Accord Global Inclusif* (the Inclusive Global Agreement), which brought an official end to the war. The transitional government (formed in July 2003 pursuant to the 2002 Global Agreement) saw the growing integration of former rebels into the government and the army as well as the geographical downsizing of conflict from a countrywide war to much smaller skirmishes in eastern Congo.

The third period runs from the end of the second Congo war in 2003 up to the present. It is during this period that in July 2006 the Palais du Peuple, the Congolese parliament, enacted the sexual violence amendments to the 1940 Penal Code and the 1959 Penal Procedure Code. There was a brief spell of visible improvement to the security of civilians that was enabled mainly by a peace agreement sealed in 2009 between the government and rebels.<sup>4</sup> But sexual violence against civilians rapidly recommenced. Recent notable episodes of mass rapes took place in August 2010 in Luvungi and neighboring villages in North Kivu, seemingly within earshot of a U.N. military base (Gettleman 2010), and on New Year’s Day 2011 in Fizi in South Kivu. The first case involved the rape of hundreds of women, girls, men, and boys by rebels. The second case (hereafter the “New Year’s Day” case) involved the rape of at least thirty-five women by government soldiers. In 2009 the U.N. denounced mass sexual violence by Angolan security forces against Congolese women being deported from Angola. In 2010 the U.N. Special Representative of the Secretary-General on Sexual Violence in Conflict, Margot Wallström, designated the Congo the “rape capital of the world.”

Sadly, the security situation in eastern Congo has worsened even more quickly since April 2012. Violence re-emerged in April when Bosco Ntaganda, who is sought by the International Criminal Court (ICC) for war crimes, defected from the Congolese army and started receiving military and logistical aid from high-ranking officers in the Rwandan government (United Nations 2012).<sup>5</sup> Sexual violence is likely to increase as a result, along with an increase in sporadic violent attacks, sexual and otherwise, by rebels and government soldiers alike against civilians.

### Sexual Violence in the Congo: Legal Background

The subject of sexual violence is at the center of public discourse in the Congo, figuring prominently in communications by the government, opposition parties, academics, journalists, religious and professional associations, nongovernmental organizations (NGOs), students, and the general public.

It has entered the vocabulary of ordinary people and local languages like Swahili, a lingua franca in eastern Congo, with, for example, the governor of the southeastern province of Katanga recently coining the term *muviolo* (i.e., rapist). Nevertheless, while press and NGO reports on sexual violence in the Congo are legion, the legal literature on the subject is disconcertingly thin, largely because the jurisprudence on systematic sexual violence is still in its nascent stages (Halliday 2010:837).<sup>6</sup> It was only in 2002 that international human rights organizations began to document sexual violence in the Congo (Breton-Le Goff 2010:19). Thus, this article plugs a gap in the literature on sexual violence in eastern Congo by explicating the stipulations of the sexual violence amendments to the Penal Code and the Penal Procedure Code.

Under the 2006 Congolese Constitution, sexual violence is a form of gender-based violence and gender discrimination (article 14); a cruel, degrading, and inhuman treatment (article 16); a crime against humanity (article 15); and a violation of an individual's right to peace (article 52). In terms of international law, the state, state agents and nonstate private actors are responsible for the violations of the rights of survivors of sexual violence. The government has argued that it does not make sense for critics to accuse the Congolese state for crimes of which it is the principal victim (Digitalcongo 2011), but international law makes the Congo responsible for acts of nonstate actors, like rebel groups, just as it does for the criminal behavior of government troops. In *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, the African Commission on Human and Peoples' Rights held that even where it cannot be proved that government agents committed violations, the government has a responsibility to secure the safety of its citizens and to conduct investigations (1995:para.22). The state can be held responsible for human rights violations committed by private persons, not because of the violations themselves, but because of the lack of diligence by the state to prevent the violations or to respond to them (*Velásquez Rodríguez v. Honduras* 1988:para.172).

Article 215 of the Constitution confers on the international treaties and agreements superior binding force over national legislation.<sup>7</sup> This implies that the international treaties—most pertinently, the International Criminal Court (ICC) Rome Statute—supersede Congolese Acts of Parliament, including the Penal Code (which dates mostly from colonial times), the 2002 Military Penal Code, and the 2006 amendments to the Penal Code. A further implication of article 215 is that litigants before Congolese courts may test the constitutionality of the sexual violence amendments to the Penal Code against the provisions of the ICC Rome Statute.

### Gaps in the Old Rape Law

Before the enactment of the new sexual violence legislation in July 2006, the prosecution of rape claims ran into major difficulties, arising largely

from gaps in the old rape law. Gaps existed in the definition of “rape” or “sexual violence,” the prevention and punishment of that crime, the protection of vulnerable groups, investigations, court settings, the treatment of evidence, and the compensation of victims. The Songo Mboyo mutiny case, discussed below, illustrates these gaps. The remainder of this article shows the extent to which the new sexual violence legislation has tried to address them.

In December 2003 a mutiny erupted in Songo Mboyo in the northwest province of Équateur after a captain in the Congolese army stole the salary of the soldiers under his command. In retaliation, the soldiers—who in fact were former rebels awaiting their formal integration into the army in accordance with the Global Agreement—looted property and raped thirty-one civilians, including one man. Eighty percent of the victims contracted sexually transmitted diseases (STDs); the brutality of the violence killed one of the women. Thirteen of the rape survivors took the matter to the Military Tribunal of the Garrison of Mbandaka, and as permitted by Congolese law (see Zongwe et al. 2010), initiated both a civil action and criminal prosecution in the same proceedings against the thirteen soldiers and the state. The Military Prosecutor who was acting on behalf of the rape victims pressed charges of “crimes against humanity of rape” against eight of the thirteen accused soldiers.

The eight soldiers in the case (*Auditeur Militaire v. Eliwo Ngoy*; hereafter the Songo Mboyo case) all pleaded not guilty, arguing that the military prosecutor had failed to produce sufficient evidence to prove guilt beyond a reasonable doubt. The prosecutor replied that the evidence—above all the gynecologist’s medical report and the testimony of the surviving victims and their relatives—showed not only that the soldiers had raped the victims, but also that the rapes qualified as “crimes against humanity” because they had been part of a widespread attack. For their part, the accused soldiers, through defense counsel, argued that the list of the alleged perpetrators presented to the Tribunal by the Prosecutor differed from the one presented by the uncle of the deceased woman. They also submitted that the male victim could not have been raped in law because the purpose of the rape law was to protect women, not men.

The Military Tribunal found the eight accused soldiers guilty of the “crime against humanity of rape” as charged. It stated that rape had been committed through the use of force in a manifestly coercive environment: the soldiers had been wearing uniforms, carried weapons of war, and were shooting them in the air, which terrified the victims into submission. Furthermore, the Tribunal was not convinced by the arguments of the eight soldiers. It held that the number of victims was sufficiently large for a finding that the attack against the victims was widespread. It also rejected the contention by the defense attorney that the law on rape did not protect males on the basis that the ICC Rome Statute, particularly its “Elements of Crime,” was gender-neutral. Seven of the eight soldiers were convicted

and condemned to life imprisonment; the soldier accused of raping a man was discharged because his alleged victim would not testify. The Tribunal awarded damages to the plaintiffs, and after an appeal, the life sentences of the defendants were reduced to twenty-year prison terms.

As can be seen from the Songo Mboyo court case, prosecution of rape accusations was no easy matter, and the law on rape was patently deficient. The first shortcoming was the definition of rape. In Songo Mboyo, the Tribunal remarked that the definition of rape as an inhuman act in Congolese law was at odds with the definition under international law. The Tribunal did not elaborate on or recite the Congolese definition of “rape,” and prior to the 2006 amendments, Congolese laws on rape hailed exclusively from the nineteenth-century Belgian Colonial Penal Code (Cahn 2005:228). According to the Congolese Penal Code (article 170), any man who had committed rape with violence or serious threats, or by taking advantage of a victim whose faculties were impaired because of disease, accident, or the perpetrator’s own cunning, was susceptible to punishment (according to article 170). Thus Congolese law had penalized rape but had not actually defined it. It confined itself to qualifying the crime of “rape” by adding that “rape with violence” (*viol à l’aide de violences*) included any carnal contact with a child below the age of 14 (article 170).

Because of the lack of a precise legal definition, Congolese lawyers developed a definition of “rape” by drawing from judicial precedents (*la jurisprudence*) and doctrinal writings (*la doctrine*). This conceptual void left the door half-open for predominantly male judges to write their judgments relying on their own understanding of women’s experience of sexual abuse. Like the pre-amendments Penal Code, the 2002 Military Code does not define “rape.” Nor does it define “rape” as a crime against humanity. It merely states that the crime against humanity of rape is “rape or any other form of sexual violence of comparable gravity knowingly committed in peacetime or wartime in the context of a systematic and widespread attack against a civilian population” (article 169 [7]). The Military Code therefore punishes the crime against humanity of rape, also leaving open the question as to what it is that constitutes “rape.” Thus, before the 2006 Penal Code amendments, “rape” meant the act by which a man engages in sexual intercourse with a woman without her permission, either because she did not give her consent, because of physical or psychological violence, or because of the element of surprise or other coercive means. Put another way, that definition of “rape,” as pleaded by the defense attorney in the Songo Mboyo mutiny case, was not intended to protect men.

The difficulty of defining rape or sexual violence is one of the challenges facing criminal laws in many jurisdictions, and questions remain as to whether the law is capable of fully capturing the reality of sexual violence. Part of the problem is the insistence of the law on whether or not the victim consented to sex, which in practice means looking at the crime through the eyes of the perpetrator (Pillay 2010:848–9). The other way in which the

law does not bear out lived reality is that it tends to stereotype the victim of sexual violence as a woman and the perpetrator as man. While these stereotypes accurately depict the overwhelming majority of rape claims, sexual violence in eastern Congo also involves men raping men, and women raping men (Radio Okapi 2008).

In the Songo Mboyo mutiny case under discussion, the Military Tribunal attempted to circumvent the defects in the Congolese rape law by calling on the ICC Rome Statute for a definition of rape. It arrived at that solution based on article 215 of the Constitution, which holds that treaties ratified by the Congo take precedence over the Congolese Acts of Parliament, including the Penal Code and the Military Code.

### Investigations, Court Settings, and Evidence

Just as it is difficult to investigate sexual violence as a war crime and a crime against humanity, it is also an exacting task to prosecute cases involving sexual violence (Obote-Odora 2005:156). The sheer logistical demands and the disruption of lives involved in bringing victims to court are daunting (Moreno-Ocampo 2010). Some jurists have also voiced concern that the legal process and court settings themselves often add to the trauma of the victims and alienate potential witnesses, who must endure deeply intrusive questioning from court participants seeking to establish the nature of the violence (see Pillay 2010:849). In the Songo Mboyo trial, the process required the rape survivors to testify about the traumatic violence they suffered, and in one instance they had to describe an accused soldier's sexual organ. The humiliation that the process normally entails and the social opprobrium that at times follows revelation of sexual violence tend to alienate potential witnesses.

Male victims are very reluctant to appear in court. According to a *New York Times* report, several male victims who did testify instantly became cast-aways in their villages—lonely, ridiculed figures, derisively referred to as “bush wives” (Gettleman 2009). This sort of stigmatization may explain why the male victim in the Songo Mboyo trial refused to testify, which led to the discharge of the soldier who allegedly assaulted him sexually. The rules of court empower judges to exclude the public in order to encourage victims to come forward with evidence and to ensure the privacy of the victims; unfortunately, these rules alone do not reassure potential male witnesses. By the same token, male victims may be unable to find the words to explain something which, if proved, could lead to a finding of consensual homosexual activity (Sivakuraman 2007:256), which is taboo if not simultaneously a criminal offense in the Congo.

Another shortcoming of the old rape law has to do with the treatment of evidence. Rape survivors often face the risk that prosecutors will fail to institute prosecution regardless of available evidence. Judges may not give due weight to their testimony, partly because of subconscious gender bias

and partly because single witness evidence, typical of rape cases, lacks corroboration, except for mass sexual violence, where there are commonly many eyewitnesses. The Mbandaka Tribunal acknowledged that rape survivors may encounter problems refreshing their memories, out of embarrassment, shame, or aversion to relive a traumatic experience. In some instances, rape victims may feel that they need to add to their story to make it more credible. For all these reasons, courts may end up finding the evidence adduced by the victims unreliable. The tribunal's acknowledgment of these factors in the Songo Mboyo case was welcome, as was its assertion that in such circumstances it is up to the court to discern the truth and discard dramatizations.

### The New Sexual Violence Legislation

The African Charter on Human and Peoples' Rights (article 1) imposes a duty on the Congo to "undertake to adopt legislative or other measures to give effect" to the rights of people to dignity, privacy, physical integrity, and peace. The 2006 amendments to the Penal Code—whose Swahili name is *vitendo vya haya*, "the law of shameful acts" (see Dolan 2010:10)—contain new provisions on indecent assault, rape, and other forms of sexual violence. Possible sentences range from six months to twenty years for indecent assault or rape, depending on whether the act involved violence, cunning, threats, or an attack against a child. The amended Penal Code defines indecent assault as any act against good morals carried out intentionally against any person without his or her valid consent (article 167).

The greatest achievement of the amendments is the provision of a modern, enlightened, and gender-neutral definition of "rape." This is no small feat in light of the diverging definitions of rape in national laws and the sparse international criminal jurisprudence on systematic sexual violence (Joseph 2008:79ff; Schomburg & Peterson 2007:123). The definition of rape in the amended Penal Code is more stringent than that of the Rome Statute. The Parliament is to be commended for such progressive legislation, and so are local NGOs for actually drafting the amendments, most likely inspired by the relevant international criminal law jurisprudence. The Congolese government has also mounted a National Strategy to Combat Gender-Based Violence, whose provisions include reparations to rape survivors.

According to article 170 of the amended Penal Code, the crime of "rape" has been committed:

- (1) [when] any man, irrespective of age, [has] introduced his sexual organ, even superficially, into that of a woman or [when] any woman, irrespective of age, [...] obliges a man to introduce even superficially his sexual organ into hers;
- (2) [when] any man [has] penetrated, even superficially, the anus, the

- mouth or any other orifice of a woman's body or a man's body with his sexual organ, with any other part of his body or with any object;
- (3) [when] any person [has] introduced, even superficially, any other part of his body or any object into a vagina; or
- (4) [when] any person [has] obliged a man or a woman to penetrate, even superficially, his or her anus, mouth or any other orifice of his or her body with a sexual organ, with any part of his or her body or with any object.

For the above acts to qualify as "rape," some coercive circumstances, with or without serious violence, must accompany them. That is, these coercive acts (or threats) must have taken place directly or through a third party, by surprise or accompanied by psychological pressure or abuse—including the coercion of a person who, because of disease, impaired mental faculties, or any other cause has lost the use of his or her senses or has been deprived of them by trickery. The International Criminal Tribunal for Rwanda (ICTR) held in *Akayesu* that the presence of coercive circumstances is inferred from armed conflict. This holding broadens the scope of conduct falling in the category of "rape" (Joseph 2008:80) and negates the plausibility of genuine consent in cases of rape as a crime against humanity and a war crime (Schomburg & Peterson 2007:124). Under the amended legislation rape convictions carry a prison term from five to twenty years and a minimum fine of 100,000 Congolese francs (a little less than US\$1,000). Where indecent assault or rape has caused the death of the victim, the punishment is life imprisonment.

Courts must double minimum sentences in cases with certain aggravating circumstances in which the victim was decidedly vulnerable or the rape was willfully destructive, for instance, when (1) the culprits are public agents; (2) they engage in gang rape; (3) they act in public or at gunpoint; or (4) the rape gravely damages the victim's health or leaves grievous physical and psychological after-effects. In the Songo Mboyo case, the aggravated circumstances consisted of the identities of the perpetrators as agents of the state, their brandishing of firearms as part of the threat, the death of a woman following the gang rape, and the damaged health of many of the other victims.

### Rape versus Systematic Rape

Both Congolese law and international law draw a distinction between sexual violence in the ordinary criminological sense and sexual violence as a crime against humanity. They distinguish between the two crimes in terms of their gravity, causes, and level of physical violence, as well as the resulting court procedures and punishments. Legally, sexual violence in the ordinary sense is a crime against the state, and as such, the concern and the jurisdiction of national courts. Systematic sexual violence, characteristically more serious and more violent, is an international crime and the concern of

the international community and both national and international courts. What further sets sexual violence as an ordinary criminal law offense apart from the crime against humanity of rape—a capital crime in the Congo (article 169, Military Code)—is that the latter is “widespread” or “systematic.” “Widespread” relates to the scale of attacks and the number of victims, while “systematic” refers to organized attacks and the improbability that they occurred randomly (U.N. Department of Peacekeeping Operations 2010:23).

This distinction between ordinary criminal law rape and systematic rape has not gone undisputed. Breton-Le Goff disputes one key aspect of that distinction by stating that sexual violence, in the Congo as in many countries, does not stem from war and conflict but from prior social, economic, and cultural discriminations that nurture sexual violence when conflict breaks out (2010:17–18). She suggests that various forms of discrimination against women cause both ordinary and systematic sexual violence. Other scholars counter that an exclusive focus on sexual violence against women and girls limits people’s ability to understand the root causes of violence (see Scully 2009; Baaz & Stern 2010), of which sexual violence is but one of many guises.

The position of this article is that sexual violence in ordinary criminal law and systematic sexual violence, though intimately linked, are analytically and legally distinct, and that a conflation of the two denies the etiologic complexity of the crime. Whereas the origins of violence against women in the Congo are to be found in patriarchy, sexual violence as a war crime and a crime against humanity is a product of conflict. Systematic sexual violence, in other words, is not a mere byproduct of invidious discrimination: belligerents employ sexual violence as a weapon of war (Schomburg & Peterson 2007:121) and have done so throughout the history of warfare (Obote-Odora 2005:135). Maintaining that all sexual violence is born of preexisting sociological conditions fails to account for the concentration of systematic rapes in eastern Congo, where conflict is raging, and the great many male victims of sexual violence, even if female victims considerably outnumber them.

### **Strengths and Weaknesses of the Amended Penal Code**

The commendable attempt to merge rapes and systematic rapes has opened one of the largest structural cracks in the new sexual violence legislation. In their quest to combine these two types of sexual violence in the new legislation, the legislators neglected explicitly to extend the liberal meaning of sexual violence in the Penal Code amendments to the criminalization of rape in the Military Code. The Military Code criminalizes the crime against humanity of rape, but does not define what constitutes rape. Although a court can always construe the definition of rape in the Penal Code amendments so as to purvey a meaning to references to systematic rape or sexual

violence in the Military Code, technically such interpretation has no footing in the text of the Military Code. As a consequence, military courts, which have exclusive jurisdiction to hear and determine crimes against humanity of rape (article 161, Military Code), have not been properly authorized to deploy the generous Penal Code definition to try those crimes.

Nevertheless, nothing prevents the parliament from amending the sexual violence amendments or military courts adjudicating systematic sexual violence from directly applying the Rome Statute definition relying on article 215 of the Constitution. For the ICC Rome Statute (article 7(1)(g)-1:para.1), the crime against humanity of rape occurs where “the perpetrator invade[s] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”

The notion of “consent” is missing as an element of the crime of rape, except for indecent assault, as the word *consent* does not appear anywhere in the definition of the crime of rape or the circumstances it enumerates. The absence of the notion of “consent” in the new rape law is both a strength and a weakness. It is a strength when the sexual violence amendments substitute the notion of coercion for that of consent. Coercion encompasses coercive acts (e.g., threats, cunning), coercive circumstances (e.g., age, disease) and coercive environments (e.g., war, mutiny). On the other hand, the new sexual violence law is weak in that it omits the intentional element in the conduct of the accused, creating the possibility—albeit an odd one—that a person may be indicted for introducing accidentally or without the requisite criminal intention an object into another’s private parts. In any event, since the crucial issue is when sexual contact becomes sexual violence, criminal defendants should be able to raise “consent” as an affirmative defense to prove the absence of coercive circumstances as is permissible under international criminal law (Schomburg & Peterson 2007:123–24). Perhaps the fairly broad definition of the crime against humanity of rape in the Constitution (article 15), with an evident intentional requirement, can be useful to defendants.

Another strength of the new Penal Code is that the act of penetration is no longer restrictively delineated; even the slightest penetration constitutes a sexual act in terms of the Code. The ICTR in *Furundzija* had observed that in the majority of domestic jurisdictions, rape is the “forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus,” although in *Kunarac* the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the definitional requirement of “sexual penetration” set by the ICTR was not warranted under international law. The repealed provisions of the old Penal Code (specifically article 170) did not treat as rape acts other than coitus (Cahn 2005:228). The new Congolese rape law, by contrast, does away with the “sexual penetration” requirement.

In fact, the verb “to penetrate” has been replaced by the verb “to introduce,” which has the advantage of eliminating the gender-specific connotations of “penetration” in the old understanding of rape. (When referring to the classes of perpetrators to which the new definition of rape pertains, the amendments refer at times to “any man,” “any woman,” and “any person.”) The perpetrator does not need to invade a female’s victim’s vagina for sexual violence to take place; penetration (or “introduction”) can be with any object: for instance, where a female soldier thrusts her gun into a man’s anus in the course of a military attack against a civilian population. Rape no longer solely means penetration of the victim’s sexual organ, but equally any orifice of her or his body.

Articles 172–174 of the Penal Code have criminalized other forms of sexual violence, to wit, the deliberate transmission of STDs, child trafficking, child pornography, child prostitution, sexual exploitation of minors, forced pregnancy, forced sterilization, sexual harassment, forced marriage, forced prostitution, procuring customers for prostitutes, sexual slavery, sexual mutilation, and zoophilia. Marital rape does not feature in the sexual violence amendments, but the generous purview of “rape” in the amendments should permit the prosecution of marital rape as a crime. Some of the forms of sexual violence newly covered by the amended Penal Code—for example slavery, mutilation, and calculated STD transmission—befit the security backdrop in eastern Congo. In particular, the U.N. Mapping Report details acts of sexual slavery and sexual mutilation (2010:318ff). In the Songo Mboyo case, 80 percent of the rape survivors contracted STDs as a result of the sexual violence.

The ghoulish imagination of rape perpetrators in eastern Congo has outdone the foresight of the national legislature in listing the forms of sexual violence to which the amended Penal Code applies. To be sure, reports describe other forms of sexual violence that defy popular imagination, like the disemboweling of pregnant women (Mapping Report 2010:318) and the shooting of women in the vagina (Human Rights Watch 2002:2). However, the Congolese parliament has inserted an all-embracing mechanism into the Penal Code amendments that addresses novel forms of sexual violence by putting within the ambit of the amendments any act of a sexual nature performed under coercive circumstances. That is the approach that the ICTR embraced in *Akayesu* and the one, according to the American feminist scholar Catharine MacKinnon, that was the ICTR’s “single biggest substantive accomplishment” (2008:212).

A third strength of the amended Penal Code is that its definition of rape and sexual violence is gender-neutral. Even so, rape and sexual violence are such gendered phenomena that a conscientious law on sexual violence should be gender-neutral *as well as* gender-sensitive, as delegates of the women’s NGO Femme Plus argued before the Congolese parliament (Yogolelo 2011). Indeed, sexual violence is inflicted on women preferentially for several reasons: because women have historically been treated as

spoils of war and as enjoyable prizes for the victors; because rapes humiliate the defeated community and symbolize victory; and because they further the enemy's position in armed conflict by forcing women to bear and raise children belonging to the invaders' ethnic group (see Sackellares 2005:139ff; Meier 2004:87ff). In the Songo Mboyo case, the military tribunal was faced with domestic law whose provisions on rape and sexual violence were at variance with equivalent provisions in international criminal law, notably the Rome Statute, in the sense that they did not protect male victims. Those provisions flew in the face of evidence that sexual violence against men typifies "nearly every armed conflict in which sexual violence is committed" (Sivakumaran 2007:255). Conversely, the amended Penal Code is abundantly clear that "any man who has penetrated, even superficially the anus, the mouth or any other orifice of a . . . man's body with his sexual organ, with any other part of his body or with any object" is guilty of rape. The amended Penal Code also penalizes rape of male victims by female soldiers.

### Residual Problems and General Recommendations

Whatever the emendations the amendments brought about in the law, they have not answered all the problems related to the scourge of sexual violence in the Congo, some of which have been singled out by legal practitioners. The obvious question is whether and to what extent the new law on sexual violence is enforced. This question hinges principally on prosecution rates, available resources, institutional capacity, and people's awareness of the amendments. In regard to all these areas of intervention, this section outlines broad recommendations, in addition to the legislative rectifications to be made in light of the preceding exposé.

*Increasing prosecution rates.* Whereas the U.N. has advanced a conservative estimate of two hundred thousand women raped in the past twelve years (Office of the High Commissioner for Human Rights, United Nations 2011), the Congolese government has yet to release statistics on prosecution rates. A government spokesperson has stated only that two to three thousand government soldiers—roughly two percent of the Congolese army—have been arrested for criminal conduct (France 24). The extent to which the new rape law has increased prosecution rates is unknown, since not all the inculpated soldiers were arrested for sexual violence. But even with a properly functional judiciary working at full capacity, the Congo would not be able to handle the floods of sexual violence cases (Mapping Report 2010:996).

*Addressing resource constraints.* The judiciary and the state are in dire need of financial, physical, and human resources. The Congolese government has protested against the international community's loud criticisms that the Congo neglects the prosecution of sexual violence by complaining that the international community does not couple its calls for the prosecution of sexual violence with financial support for the Congolese judiciary

(Rép. Dém. Congo, Ministère de la Justice 2010:7). In its 2011 budget the Congolese government, negotiating among competing priorities, allocated a meager US\$15 million to the judiciary (Rép. Dém. Congo, Ministère du Budget 2010:15–22), a sum that amounts to less than 1 percent of the country's US\$7 billion annual budget. Furthermore, the area from which most reports of sexual violence originate (Province Orientale, North Kivu, and South Kivu) is immense, and even the existence of special mobile courts has not palliated the acute demand for more courts and judges. In the 2011 New Year's Day trial, the eleven soldiers implicated in the rapes of at least thirty-five women, along with other trial participants and personnel, had to be flown by U.N. helicopters to a special mobile military court in Baraka in South Kivu at a cost of US\$30,000 (Radio Okapi 2011). In 2010 the Congo completed the training of one thousand judicial officers, and there are plans to hire another thousand, which should bring the total to 3,700 judges and prosecuting attorneys for the whole country (Radio Okapi 2010). It remains to be seen whether the new hires will translate into higher prosecution rates.

*Reducing corruption.* The amendments to the Penal Code have not enfeebled corruption in the Congo. On the contrary, corruption continues to corrode the enforcement of the amendments before Congolese courts. Transparency International (2011) ranks the Congo as one of the world's most corrupt countries (at 164th out of 178 countries). If it is serious about strictly applying the new sexual violence legislation, the government needs to resolutely pursue its zero-tolerance anticorruption policy and go as far as removing immunities attached to parliamentary and ministerial offices that may impede prosecution. A reduction in corruption would not only increase prosecution rates, but it would also free up resources that could be allocated to the judiciary and that would otherwise have been diverted to personal accounts. Besides, successfully combating corruption may instill discipline among poorly paid and trained government soldiers, who, by virtue of various peace agreements, include former rebels who may harbor conflicting loyalties and commit sexual violence, as did the mutinous soldiers in the Songo Mboyo incident.

*Inducing victims to cooperate.* The prevalence and expectation of corruption discourage victims from cooperating with prosecution efforts. When complainants in eastern Congo seek redress for sexual violence, they frequently turn to alternative dispute resolution mechanisms and try to have the perpetrators compensate the victim's family whenever feasible. These mechanisms, anchored in customary laws and cultural norms, sometimes result in legally and morally unacceptable compromises: for example, the agreement that the perpetrator will marry his victim, the reasoning being that the victim is unlikely to find a decent husband after a rape. To make matters worse, public prosecutors have inordinately stayed formal proceedings when parties have entered into those kinds of agreements (Yogolelo 2011). Moreover, victims are also unwilling to cooperate with the criminal

justice system because they believe it does not offer sufficient witness and evidence guarantees.

*Publicizing the new law.* The government has not publicized the contents of the new rape law widely enough for people to take full advantage of the greater protections that it does afford. Access to legal information and the contents of the new sexual violence law is further restricted by high illiteracy rates, especially among women. The government, therefore, needs to intensify efforts to translate the law into the local languages and encourage civil society to advocate criminal prosecutions of sexual violence by explaining the law in person or on the radio.

*Easing bottlenecks in the justice system.* A handful of other bottlenecks in the justice system in the Congo have survived the advent of the amendments to the Penal Code. Obstacles in identifying and securing the arrest of alleged perpetrators have not disappeared. Gender imbalance among investigating officers and judges remains common. Now and then, suspects are released after arrest on bail, with a suspended sentence, or otherwise, creating a risk that the victims may be intimidated into silence and that the suspects will abscond. Obstacles to lowering the cost, the duration, and the distance involved in prosecuting sexual violence persist. Judges are regularly unable to satisfy the requirement that they complete a sexual violence case within four months. The trial of the New Year's Day rapists provides a rare yet exemplary demonstration of speedy justice, with the trial commencing one month after the mass rapes and lasting only eleven days.

Finally, there are obstacles in collecting substantial evidence to prove the guilt of alleged perpetrators, which on some occasions give judges no choice but to acquit the accused. The Songo Mboyo case stood apart from the typical sexual violence case because the victims managed to set forth solid evidence for the court to declare the accused soldiers guilty.

### **Conclusion: Healing the Tear in the Social Fabric**

What emerges from a close reading of the sexual violence amendments to the Penal Code is that the Congolese people, through Parliament, have attempted to put a definitive end to an abominable phenomenon that threatens to hurt the wounded nation at its core. Sexual violence dismantles communities by spreading fear, tearing apart the family (the basic cell of the community, as article 40 of the Constitution proclaims). Then inexorably as a manifestation of the gradual breakdown of traditional cultures, communities are growing unsympathetic toward rape victims, who often are ostracized through rumors and gossip. And after three years of relative calm, the sudden relapse into armed conflict in eastern Congo since April 2012 will probably escalate sexual violence.

Through the enactment of the sexual violence amendments to the Penal Code, the government has provided a framework on the basis of which the state and survivors can initiate prosecution of rape and all man-

ner of sexual violence. The new sexual violence legislation has provided a modern, progressive, and gender-neutral understanding of sexual violence; it has enlarged the range of behavior constituting the crime, while distinguishing between sexual violence in the ordinary criminal law sense and as a crime against humanity; and it has changed the sort of evidence (i.e., coercion) that secures conviction.

Nevertheless, that framework has not fully articulated the crime of rape and sexual violence, as it neither criminalizes other forms of gender-based violence nor expressly authorizes military courts to adopt the liberal definition of the crime. Even assuming an adequate formulation of the crime in a corruption-free environment, the state is hampered by insufficient resources and a host of other practical impediments. Surely the Congolese government, together with its external partners, must work to expand the resources and the capacity of the state to ensure accountability for mass sexual violence and to take care of the survivors.

Prosecution, indispensable though it may be, will not be able in and of itself to heal the deep trauma of rape survivors and to repair the tear in the social fabric. Legal responses can satisfy only limited aspects of the population's postconflict needs (see Cahn 2005:221). The state and its partners, civil society, and other stakeholders must also look for solutions from outside the law and care for the survivors and their communities. A few NGOs and private initiatives strive to dispense vital relief to the survivors of sexual violence. These initiatives fill a gap, especially because the state hardly ever honors its obligation to pay court-ordered damages to the victims. In Bukavu in South Kivu, UNICEF and an NGO called the V-Day Movement inaugurated in February 2011 a "City of Joy" to help victims of gender violence move from pain to leadership. The "City of Joy," whose construction began in August 2009, is a vast complex comprising several buildings for the psychological care and the rehabilitation of victims. In February 2011 the victims of the Songo Mboyo mutiny received a whaleboat from the U.N. that is intended to help them sustain themselves through fishing, and the victims of the mutiny have formed an association to assist one another in generating revenues.

These sorts of initiatives are what is needed to reintegrate survivors into society, to redress—not simply (window) dress—the injury to the dignity of survivors. What is needed is an integrated approach to healing survivors that speaks directly to their needs and enlists influential actors (e.g., traditional chiefs, community leaders, and policymakers). At present these initiatives are extremely rare, and the challenge is to multiply them, to raise more resources to secure the eastern provinces, and to prosecute all forms of sexual violence as spelled out in "the law of shameful acts."

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## Notes

1. The Enough Project report also states that Hewlett-Packard, Intel, Motorola, Nokia, Microsoft, and Dell are spearheading efforts to reduce the trade of conflict minerals, namely efforts involved with tracing, auditing, certification, legislative support, and stakeholder engagement.
2. Literally "malédiction de la fente." The novel concerns the conception of the vagina in the animist and superstitious beliefs of some Bantu tribes in the Congo.
3. The eight countries are Angola, Burundi, Chad, Libya, Namibia, Rwanda, Uganda, and Zimbabwe.
4. This account of the security situation is not oblivious of the sharp peaks of violence in 2004, 2008, and 2009 that drastically reversed the modest security gains made in eastern Congo.
5. By 2009, the Congo laid an international law claim before the U.N. in which it says Angola has encroached upon Congolese territory by drilling oil in what is according to international law Congolese waters. It is perceived in the Congo that Angola resorted to the violent deportation of Congolese nationals because it is angry at the Congo's pending claim before the U.N. The retort of Angolan officials is that Angola is merely deporting illegal immigrants.
6. Joanna Mansfield (2009) identifies the obstacles to the successful prosecution of rape claims in eastern Congo and recommends measures to remove or reduce the obstacles to prosecution. She presents the sexual violence amendments to the Penal Code (2009:375ff) but does not explain how these amendments have rectified shortcomings in the past penal legal dispensation. Gaëlle Breton-Le Goff (2010) inventories sexual violence before, during, and after the conflict in the Congo, describes actions taken by international actors, and makes recommendations on how to strengthen local women's NGOs. Unlike

Mansfield, Breton-Le Goff does not present the provisions on sexual violence. She simply mentions the amendments and notes the role played by a coalition of local NGOs supported by Global Rights in drafting the amendments and urging the Congolese parliament to adopt them (2010:22–23). Neither Mansfield nor Breton-Le Goff gives a rundown of the innovations of the Penal Code amendments.

A report by the Agency for Co-operation and Research in Development (ACORD) pinpoints flaws in the protection of and reparations to rape survivors under Congolese law and suggests a legislative model for the reparation of sexual violence (2010:17). A report of the U.N. Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo (2010) endorses the establishment of a multilateral fund to provide reparations for victims of sexual violence in the Congo. The U.N. Panel takes note of the Congo's new sexual violence law, whereas ACORD is silent on that law. Neither report discusses the Congolese sexual violence amendments.

7. The Congo has adhered to the International Criminal Court (ICC) Rome Statute, the U.N. Convention on the Rights of the Child, the U.N. Convention on the Elimination of All Forms of Violence Against Women, and the African Charter on Human and Peoples' Rights.

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