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## Innocence Lost: Instituting Harsher International Criminal Court Sentences for Perpetrators of Sex Crimes Against Children

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# INNOCENCE LOST: INSTITUTING HARSHER INTERNATIONAL CRIMINAL COURT SENTENCES FOR PERPETRATORS OF SEX CRIMES AGAINST CHILDREN

*Rachel F. Braden\**

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*I started to ask myself what was going on. These weren't just violent acts of war, but part of a strategy. You had situations where multiple people were raped at the same time, publicly—a whole village might be raped during the night. In doing this, they hurt not just the victims but the whole community, which they force to watch. The result of this strategy is that people are forced to flee their villages, abandon their fields, their resources, everything. It's very effective.*

—Denis Mukwege, gynecologist and surgeon working in the Democratic Republic of the Congo<sup>1</sup>

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1. Denis Mukwege: *The Rape Surgeon of DR Congo*, BBC NEWS (Feb. 18, 2013, 20:04 ET), <http://www.bbc.co.uk/news/magazine-21499068> (quoting Denis Mukwege).

*They would rape me in turns. It got to a point where I did not feel pain . . . .*

*One day they tied me to a tree and tried to pull the baby out. The blood . . . it just kept flowing.*

–15-year-old rape survivor, Goma, Democratic Republic of the Congo<sup>2</sup>

## I. INTRODUCTION

The face of armed conflict in the world today is changing. Gone are the days where the armed forces of two countries faced each other on the battlefield; today, wars are increasingly fought by non-state actors who target civilians as often as they target government forces.<sup>3</sup> As the strategy of targeting vulnerable civilian populations increases in popularity, non-state actors turn to rape as a preferred weapon of war.<sup>4</sup> Even more disturbing, the growing trend seems to be in targeting children as the victims of these attacks.<sup>5</sup> In the face of increasing attacks on civilians in conflicts across the globe, the international community is searching for a solution.

In July 2002, the International Criminal Court (ICC) became the first permanent international court with the jurisdiction to try war crimes, crimes against humanity, genocide, and the crime of aggression,

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2. Anne Mawathe, *Haunted by Congo Rape Dilemma*, BBC NEWS (May 15, 2010, 07:58 GMT), <http://news.bbc.co.uk/2/hi/africa/8677637.stm> (quoting anonymous 15-year-old rape survivor).

3. The terrorist attacks of September 11, 2001 in the United States, of July 7, 2005 in London, and most recently the bombings in Boston, Massachusetts, are all signs of this trend, as are many of the ongoing conflicts on the African continent. Civilian attacks in Syria, although allegedly committed by state actors, are also indicative of the increased targeting of civilians in conflict. See Laura Smith-Spark et al., *Rights Group Accuses Syrian Military of Targeting Civilians*, CNN (Apr. 11, 2013, 8:18 PM EDT), <http://www.cnn.com/2013/04/11/world/meast/syria-civil-war/index.html>.

4. See *Women Under Siege: About*, WOMEN'S MEDIA CENTER, <http://www.womenundersiegeproject.org/pages/about> (last visited Feb. 12, 2014).

5. See generally Michele Lent Hirsch, *Report: Sexualized Violence May Disproportionately Affect Children in War*, WOMEN'S MEDIA CENTER: WOMEN UNDER SIEGE (Apr. 11, 2013), <http://www.womenundersiegeproject.org/blog/entry/report-sexualized-violence-may-disproportionately-affect-children>; VERONIQUE AUBERT ET AL., *UNSPEAKABLE CRIMES AGAINST CHILDREN: SEXUAL VIOLENCE IN CONFLICT* 5 (2013) (discussing the alarmingly high percentage of child victims of sexual violence in conflict today and proposing reforms to address the problem).

committed by or in the territory of its signatory countries.<sup>6</sup> As a “court of last resort,” the ICC hears cases regarding conflicts both of an international nature and of a domestic nature when the subject countries are either unable or unwilling to conduct the prosecution themselves.<sup>7</sup> Because of the nature of its subject matter jurisdiction, the ICC sees some of the most horrific crimes committed in the world. And because the perpetrators of these crimes target vulnerable populations, many of the victims are children.

As conflicts today shift from interstate to intrastate, the rules governing warring parties are less clear. Rebel groups and other non-state actors have never been party to the treaties states sign amongst themselves regulating their own behavior during wartime; the fact that non-state actors are not party to these treaties is often reflected in the groups’ disregard for these behavioral guidelines. Due to a confluence of factors, crimes committed by both state and non-state actors against vulnerable populations—and in particular, sex crimes committed against children—are on the rise.<sup>8</sup> Yet despite the disproportionate number of child victims, the Rome Statute—which is the only international instrument holding non-state actors accountable,<sup>9</sup> and which so clearly establishes which actions are considered illegal in modern conflict—includes no provision specifically addressing sentences for perpetrators who commit crimes against children. Rather, the same sentencing guidelines apply to all crimes within the court’s jurisdiction.<sup>10</sup> Additionally, there has been no judicial opinion establishing the concept of harsher sentences for crimes committed

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6. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Treaty]. The Rome Treaty (referred to interchangeably in this Article as both the Rome Treaty and the Rome Statute) is the treaty that established the International Criminal Court. The Crime of Aggression was not part of the Court’s original subject matter jurisdiction but was added to the Rome Statute via Resolution RC/Res.6 on June 11, 2010. Resolution RC/Res.6, June 11, 2010, 11-E-011110, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

7. Rome Treaty, *supra* note 6, art. 17 (regarding crimes of a domestic nature).

8. See generally Sara Meger, *Rape of the Congo: Understanding Sexual Violence in the Conflict in the Democratic Republic of Congo*, 28 J. CONTEMP. AFR. STUD. 119 (2010) (discussing reasons why instances of rape are increasing in the conflict in the DRC).

9. Non-state actors are not parties to international treaties (such as the Geneva Conventions governing states’ wartime behavior). Although non-state actors are not signatories to the Geneva Conventions or other international treaties, the Rome Statute gives the ICC subject matter jurisdiction over crimes committed on a state party’s territory, or when the perpetrator is a citizen of a state party—regardless of whether the perpetrator is acting on behalf of a state government or a rebel group. Rome Treaty, *supra* note 6, art. 12.

10. See *id.* art. 78 (emphasis added) (noting that when sentencing for any offense, “the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person”).

against children.<sup>11</sup> In this Article, I will argue the ICC should judicially adopt the practice of giving “augmented” sentences to defendants found guilty of committing of sex crimes against children.<sup>12</sup> The child status of the victim would be its own aggravating factor, considered under the structure of the International Criminal Court’s Rules of Procedure and Evidence Rule 145(2)(b) (governing aggravating factors to be considered in sentencing).<sup>13</sup> Although not binding on the court, such a judicial rule could influence the court going forward: Article 21 of the Rome Statute provides that the court “*may* apply principles and rules of law as interpreted in its previous decisions.”<sup>14</sup> Thus, a judicial opinion establishing the victim’s child status as a separate aggravating factor would provide useful precedent for ICC judges considering such cases in the future.<sup>15</sup> Indeed, given the prevalence of sex crimes committed

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11. Indeed, only one case has completed adjudication and sentencing. See INTERNATIONAL CRIMINAL COURT, *Case Information Sheet: Situation in Democratic Republic of the Congo The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06*, (last updated Sept. 13, 2012), <http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>.

12. Although children are the victims of many different crimes, due to the heinous nature of sex crimes committed against children, I have chosen to limit my argument only to include these crimes. Arguments for augmented sentencing of criminals who commit other crimes against children can—and should—be made; they are, however, beyond the scope of this Article.

13. International Criminal Court’s Rules of Procedure and Evidence Rule 145(2)(b), *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court* ICC-ASP/1/3 and Corr.1, (Sept. 3–10, 2002). There are those who might say a proposed judicial rule will be insufficient for the needs of the situation. In response to these critics, I say, this is a “both/and” situation, not an “either/or.” The root causes of these conflicts are myriad, and the international community should continue to seek to address the underlying causes of sex crimes against children. Use of this proposed judicial rule in continued ICC prosecution, however, is important for two reasons. First, it demonstrates to both the general international community and the specifically affected communities that these crimes are taken seriously. On a more pragmatic level, however, augmented ICC sentencing for sex crimes against children should be pursued because it sets an example for the judicial systems of the affected countries. By modeling how perpetrators of these crimes should be sentenced, the ICC provides a template for countries to conduct their own prosecutions. Although addressing this phenomenon is beyond the scope of this Article, such “modeling” will be particularly valuable to post-conflict countries seeking to establish and legitimize their judicial systems.

14. Rome Treaty, *supra* note 6, art. 21 (emphasis added).

15. Although at the time of writing we have no indication of how the court will treat its past decisions (as so far only one case has been fully concluded), like its predecessors, the ICC will face the most difficult legal and moral issues of the day as well as cases of first impression. This Author believes that, like the ICTR and ICTY before it, the ICC will find it helpful to consider its past cases when deciding cases with similar fact patterns or legal questions, even though its precedent is non-binding. See, e.g., Jens David Ohlin, *Precedent and Stare Decisis at International Tribunals*, LIEBERCODE (Mar. 3, 2012), <http://www.liebercode.org/2012/03/precedent-and-stare-decisis-at.html> (noting that the ICTY has considered judicial rules from previous cases “settled jurisprudence” when considering cases on appeal). A judicial decision

against children in conflicts around the world today, such a case is likely to appear before the Court soon.

The case of Bosco Ntaganda, the notorious general of the Congolese M23 rebel group, is one such case. In March 2013, Ntaganda gave himself up to the ICC<sup>16</sup>—rendering the issue of augmented sentences for sex crimes against children particularly timely. Ntaganda, known as “The Terminator” due to his ruthless treatment of soldiers and civilians alike, was charged in two separate arrest warrants with conscripting child soldiers, rape, murder, and other war crimes and crimes against humanity.<sup>17</sup> The Court’s arrest warrants do not specifically allege sex crimes committed against children; however, given Ntaganda’s well-documented practice of recruiting child soldiers,<sup>18</sup> the fact that female child soldiers are often used as sex slaves,<sup>19</sup> and the plethora of accounts of rape committed by Ntaganda and his accomplices,<sup>20</sup> it is likely that the Court will find Ntaganda complicit in and/or directly responsible for sex crimes against children. If the Court were to establish a judicial rule requiring harsher sentences for perpetrators of sex crimes against children in a case decided before Ntaganda’s, that opinion could be considered by the Court when sentencing him.<sup>21</sup> If no such rule has been established by the time Ntaganda is sentenced, his case provides the perfect opportunity for the ICC to create one. Given the trend in armed conflict today of targeting children with rape,<sup>22</sup> Ntaganda will certainly not be the last defendant to appear before the court accused of committing such crimes.

Part II of this Article will provide a brief summary of the situation in

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establishing the practice of giving higher sentences to perpetrators of sex crimes against children will therefore likely influence the ICC when treating similar cases in the future, even if it is not legally binding. *Id.*

16. Ntaganda handed himself in to the U.S. Embassy in Kigali, Rwanda, on March 18, 2013, specifically requesting to be sent to the ICC. *See, e.g., Bosco Ntaganda: Wanted Congolese in U.S. Mission in Rwanda*, BBC NEWS (Mar. 18, 2013, 18:23 ET), <http://www.bbc.co.uk/news/world-africa-21835345>.

17. *Id.*

18. *See, e.g., Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 7, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF>.

19. *See, e.g., Karen Allen, Bleak Future for Congo’s Child Soldiers*, BBC NEWS (July 25, 2006, 15:51 GMT), <http://news.bbc.co.uk/2/hi/africa/5213996.stm> (noting the practice of using girl child soldiers as sex slaves).

20. *See Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Prosecutor’s Application under Article 58 (July 13, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1441449.pdf>.

21. One such opportunity was already presented through the case of Thomas Lubanga; unfortunately, a judicial rule similar to the one proposed was not adopted in this case. For more on *Lubanga*, see *infra* Part IIB.

22. *See, e.g., Mawathe, supra* note 2; Hirsch, *supra* note 5.

the Democratic Republic of the Congo (DRC) as an illustration of the kind of conflict where enhanced sentencing for sex crimes against children is necessary. Through an analysis of the case of Thomas Lubanga, Part II will show not only that an enhanced sentencing provision is necessary, but that the ICC has already laid the groundwork for such a judicial rule. Part III will discuss the theory behind augmented sentences for sex crimes against children, providing a brief summary of prevailing theories of criminal punishment and applying these theories to explain why augmented sentences are warranted. In particular, I will argue that this “augmented sentence rule” is warranted under the retributivist theory of criminal punishment, as the crimes to which the rule would apply have much graver long term consequences for children than they do for adults. Finally, Part IV of this Article will propose a rule which would be established through an ICC judicial opinion, and which would require the judges to specifically take into account the child status of victims when considering the “gravity of the crime” (as directed under Article 78 of the Rome Statute). This new judicial rule would require the sentence for sex crimes committed against children to be greater than that for an identical crime committed against an adult. Part IV will end by looking at how the hypothetical new “rule” could be applied to the case of Bosco Ntaganda specifically and to the situation in the DRC generally.

## II. THE CONFLICT IN THE DRC

The conflict in the DRC has its roots in events that took place twenty years ago. After the Rwandan genocide in 1994, many of those who participated in the genocide, as well as members of the Hutu ethnic group who had not participated in the actual killing but feared reprisal nonetheless, fled across the border into eastern DRC.<sup>23</sup> As the Rwandan Hutus settled in to the DRC, they joined forces with Congolese Hutus and targeted Congolese Tutsis, seeking to ethnically cleanse them from the area and force them into Rwanda.<sup>24</sup> In response, the newly formed Rwandan government supported Congolese Tutsi rebel groups in their fight against the Hutus; the conflict has been further fueled by disputes over the country’s vast natural resources.<sup>25</sup> Although the war between the groups officially ended in 2003, ten years later there is still vicious

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23. See, e.g., *Q&A: DR Congo Conflict*, BBC NEWS (Nov. 20, 2012, 07:13 ET), <http://www.bbc.co.uk/news/world-africa-11108589>. The DRC is Africa’s largest country, comparable in size to Western Europe. See *id.*

24. See *id.*

25. See *id.*

fighting in the eastern part of the Congo.<sup>26</sup> The cumulative death toll is estimated at three million.<sup>27</sup>

### A. *The Nature of the Crimes in the DRC*

The situation in the DRC has made international headlines—not simply because of its length or the number of casualties, but because of the brutal nature of the crimes committed. In choosing the DRC for its first investigation, ICC officials noted “[s]tates, international organizations and non-governmental organizations have reported thousands of deaths by mass murder and summary execution in the DRC since 2002. The reports allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers.”<sup>28</sup> In particular, rape is used in the DRC as a weapon of war.<sup>29</sup> For members of the Congolese Army (known by its acronym FARDC—*Forces Armées de la République Démocratique du Congo*) as well as for rebel groups, rape is no longer a side-effect of war: rather, it is part of a greater strategy of oppressing and dehumanizing the targeted populations.<sup>30</sup> Single-instance rapes have, of course, been prevalent throughout the conflict.<sup>31</sup> Within the past several years, however, armed groups (both state-affiliated *and* non-state affiliated) have engaged in raping sprees leaving dozens—even hundreds—of victims each time.<sup>32</sup>

26. See *id.*; Barbara Plett, U.N. “Plans to Fight Rebels in DRC,” BBC NEWS (Jan. 25, 2013, 18:55 ET), <http://www.bbc.co.uk/news/world-africa-21208401>.

27. See Q&A: *DR Congo Conflict*, *supra* note 23 (death toll including deaths due to starvation and displacement).

28. Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation, ICC Press Release 23.06.2004 (June 23, 2004), available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx).

29. See, e.g., K. Chandler, *Atrocities in Democratic Republic of Congo Outpacing Darfur; Rape, Weapon of Choice for Fighting Forces*, 36 WESTSIDE GAZETTE 1A (Jan. 17, 2008); Julianne Kippenberg, *Soldiers Who Rape, Commanders Who Condone*, HUM. RTS. WATCH, July 16, 2009, at 15, available at [http://www.hrw.org/sites/default/files/reports/drc\\_0709web.pdf](http://www.hrw.org/sites/default/files/reports/drc_0709web.pdf); MARTIN BELL, CHILD ALERT: DEMOCRATIC REPUBLIC OF CONGO, UNICEF 3 (2006), available at [http://www.unicef.org/childalert/drc/content/Child\\_Alert\\_DRC\\_en.pdf](http://www.unicef.org/childalert/drc/content/Child_Alert_DRC_en.pdf).

30. See, e.g., Kippenberg, *supra* note 29, at 21 (noting the strategy has been adopted specifically by the 14th brigade of the FARDC); Mawathe, *supra* note 2.

31. See generally Brett D. Nelson et al., *Impact of Sexual Violence on Children in the Eastern Democratic Republic of Congo*, 27 MED., CONFLICT & SURVIVAL 211 (2011) (discussing, among other things, the different “kinds” of rape: single instance, sexual slavery, gang rape).

32. A four-day raping spree by rebel groups in late summer 2010 left over 300 victims. “The known victims include 235 women, 52 girls, 13 men, and 3 boys, some of whom were raped multiple times.” Preliminary U.N. Report Confirms over 300 Rapes by Rebels in Eastern



The specific targeting of women and girls as the subject of public sexual violence is an extremely effective way to “break” a community. Not only are the direct victims of the sexual assault often gravely wounded and as a result lose their reproductive capabilities, they are also ostracized and shunned by members of the community at large who have themselves been victimized through being forced to witness the violations of their loved ones.<sup>33</sup> Even more troubling, sources report that many of the victims of this type of sexual violence are girls under the age of 18. One report estimated that 65% of the sexual violence survivors in the DRC are minors;<sup>34</sup> according to Human Rights Watch, “an estimated ten percent of victims are children less than ten years old.”<sup>35</sup> The victimization of girls is compounded by the conflict’s use of child soldiers: not only are both boys and girls conscripted against their will, but the girls are often used by the soldiers as “soldier wives”—sex slaves who also help around the camp as needed.<sup>36</sup> Although it is beyond the scope of this article to conduct an in-depth exploration of the use of child soldiers in the conflict, it is important to consider this crime in the wider context of crimes against children and their adjudication in the ICC. A brief consideration of how the ICC treats child conscription is particularly warranted given the recent case of Thomas Lubanga.

### B. *Prosecutor v. Thomas Lubanga Dyilo*

Thomas Lubanga Dyilo has the distinction of being the first person to be found guilty and sentenced by the ICC.<sup>37</sup> On March 14, 2012, Thomas Lubanga was convicted of “enlisting and conscripting of children under the age of 15” into his rebel group the Force Patriotique pour la Libération du Congo (FPLC) and “using them to participate

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*DR Congo*, U.N. NEWS CENTRE (Sept. 24, 2010), <http://www.un.org/apps/news/story.asp?NewsID=36129#>. In January 2011, a Congolese army lieutenant led his troops in a raping spree in Fizi, South Kivu province, leaving over 60 survivors of sexual violence. David Smith, *Congolese Soldiers go on Trial Accused of Raping More than 60 Women*, GUARDIAN (Feb. 10, 2011, 11:44 EST), <http://www.theguardian.com/world/2011/feb/10/congolese-soldiers-rape-trial-gender-court>.

33. Mawathe, *supra* note 2.

34. AUBERT ET AL., *supra* note 5, at 2.

35. *Id.*

36. See, e.g., Allen, *supra* note 19. UNICEF estimates that 30–40% of children in armed groups are girls, many of whom are “held in captivity as sexual slaves.” BELL, *supra* note 29, at 4.

37. See, e.g., *ICC’s Landmark Verdict in Congolese Rebel Case*, HUM. RTS. WATCH, <http://www.hrw.org/node/104711>.

actively in hostilities.”<sup>38</sup> In their opinion, three judges found Lubanga guilty of conscripting and using the child soldiers in *intrastate* conflict in the DRC.<sup>39</sup> Four months later, Lubanga was sentenced to fourteen years’ imprisonment (including time already served).<sup>40</sup>

Absent from the charges against Lubanga, however, were those for sex crimes<sup>41</sup>—and this absence did not go unnoticed.<sup>42</sup> Although the Prosecution failed to bring the charges initially, the former Chief Prosecutor Luis Moreno Ocampo did ask the court to consider Lubanga’s complicity in alleged sex crimes as an aggravating factor when determining his sentence.<sup>43</sup> In the Sentence Request, the

38. See, e.g., Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (2012). Lubanga was charged under the articles criminalizing the conscription of child soldiers for both interstate and intrastate conflict (articles 8(2)(b)(xxvi) and 25(3)(a), and article 8(2)(e)(vii), respectively), but found guilty only of the intrastate aspect (articles 25(3)(a) and 8(2)(e)(vii)). See *id.* A short summary of the case, including a brief recap of the legal theory behind Lubanga’s conviction, can be found on the ICC website. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Summary of the “Judgment Pursuant to Article 74 of the Statute” (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379843.pdf> [hereinafter Dyilo, Summary of Judgment].

39. See Dyilo, Summary of Judgment, *supra* note 38.

40. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf> [hereinafter Dyilo, Decision on Sentence]. In finding Lubanga guilty of conscripting child soldiers, the court considered extensive testimony from witnesses who observed the soldiers in Lubanga’s army and testified that many soldiers were clearly less than 15 years of age. *Id.* at 290. Based largely on this witness testimony, the court learned about the activities of these child soldiers. *Id.* at 367 (participating in battle as soldiers and bodyguards); *id.* at 372–73 (serving as military/body guards); *id.* at 385, 388–91 (doing domestic service which often included a sexual slavery component); *id.* at 289, 304 (serving in a special unit comprised solely of small children. This unit was called the Kadogo unit; the word “kadogo” means a child roughly between the ages of 13–16.). The court also found that in addition to ordering/condoning the use of these children in his armed forces, Lubanga himself used children as young as nine years old as his personal bodyguards. *Id.* at 376–80.

41. See, e.g., Dyilo, Summary of the Judgment, *supra* note 38.

42. See, e.g., Dyilo, Decision on Sentence, *supra* note 40, at 390–91, 398.

The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. . . . [N]ot only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis. Notwithstanding this stance on his part throughout these proceedings, he suggested that sexual violence ought to be considered for the purposes of sentencing.

*Id.* at 24.

43. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Prosecution’s Sentence Request 16 (May 14, 2012), <http://icc-cpi.int/iccdocs/doc/doc1411278.pdf>.

Prosecution stated that “the sexual violence and rape to which the girl child soldiers were subjected show that the crimes were committed with particular cruelty and against victims who were particularly defenseless, as contemplated in Rule 145(2) (b) (iii).”<sup>44</sup> Yet despite the Prosecution’s request for a higher sentence, the Court sentenced Lubanga to only 14 years’ imprisonment. Although the Court did find that evidence of sex crimes against girl child soldiers could be considered under Rule 145 as an aggravating factor, it ultimately held that the prosecution had not met its burden of proving that sexual abuse of girl soldiers was widespread, and that Lubanga was complicit in the abuse.<sup>45</sup>

*Lubanga* is crucial to our analysis of augmented sentencing for sex crimes against children for two reasons. First, as many opined in the wake of the pronouncement, Lubanga’s sentence was exceedingly light.<sup>46</sup> Fourteen years’ imprisonment for conscripting children and using them in hostilities—especially when Lubanga used children as young as nine for his personal bodyguards<sup>47</sup>—seemed inappropriate given his victims’ child status.<sup>48</sup> In light of this lenient sentence, the Chief Prosecutor of the ICC, Fatou Bensouda, petitioned the court for a

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44. *Id.* Rule 145 of the ICC’s Rules of Procedure and Evidence governs the court’s sentencing. Rule 145(1)(c) and 145(2)(b) direct the court as follows:

(c) [The court should give] consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime

...

2. In addition to the factors mentioned above, *the Court shall take into account, as appropriate:*

(a) . . . [subsection omitted]

(b) As aggravating circumstances:

[subsections (i) and (ii) omitted]

(iii) *Commission of the crime where the victim is particularly defenseless;*

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3

*Id.* (emphasis added). Rules of Procedure and Evidence, ICC-ASP/1/3 (Part. II-A), Sept. 9, 2002, available at [http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RPE.4th.ENG.08Feb1200.pdf).

45. Dyilo, Decision on Sentence, *supra* note 40.

46. See, e.g., Abdoulaye Bah, *République Démocratique du Congo: Thomas Lubanga, une Sentence Controversée*, GLOBAL VOICES (July 12, 2012, 2:03 PM GMT), <http://fr.globalvoicesonline.org/2012/07/12/115116/> (quoting various sources’ editorials—including Radio France International and France24—arguing that Lubanga’s sentence was extremely light).

47. See discussion in *supra* note 40.

48. *Id.*

higher sentence. In her December 3, 2012, application to the court, Ms. Bensouda stated that Lubanga's sentence was "manifestly inadequate and disproportionate to the gravity of the crime."<sup>49</sup> Specifically, Ms. Bensouda argued that crimes against children were particularly grave, and that the extent of the damage suffered by children, their families and communities was not reflected by the fourteen-year sentence.<sup>50</sup> Ms. Bensouda's argument that conscripting a child soldier has graver repercussions than similar crimes committed against adults is key: the fact that an office of the ICC believes Lubanga should receive a higher sentence due to the child status of his victims is support for the general belief that crimes against children are particularly heinous. This argument may then be applied to sex crimes committed against children: as a subset of the greater category of crimes against children, sex crimes against children (which are arguably even more terrible than other crimes) are certainly deserving of a higher sentence than similar crimes committed against adult counterparts.

Second, *Lubanga* is important to our analysis of augmented sentences for sex crimes against children because of the court's reasoning behind his awarded sentence. The Court found there was not enough evidence of his complicity in sex crimes against children to consider it as an aggravating factor at the sentencing stage.<sup>51</sup> Crucially, however, the Court did acknowledge that the victim's child status could be considered an aggravating factor in future cases. In order to consider the sex crimes against girl soldiers as an aggravating factor, the prosecution would have to show: "(i) child soldiers under 15 were subjected to sexual violence; and (ii) this can be attributed to [the defendant] in a manner that reflects his culpability, pursuant to Rule 145(1)(a) of the Rules."<sup>52</sup> The Court's explicit statement that sex crimes against child soldiers under 15 could be considered as an aggravating factor is robust support for our argument: a sex crime against a child soldier under 15 shares many characteristics with a sex crime against any child. Therefore, the Court's reasoning behind one may logically be applied to the other.

That both the Chief Prosecutor and ICC judges believe that the child status of a victim should trigger a harsher sentence is indicative of a larger philosophy behind criminal punishment. Put simply, their belief is an embodiment of the reasoning that crimes that are "more horrible" should be punished more harshly. To better understand the reasoning behind harsher sentences, we now turn to a discussion of theories of

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49. *Id.*

50. *See, e.g., id.*

51. Dyilo, Decision on Sentence, *supra* note 40, at 28.

52. *Id.* at 27.

punishment.

### III. PUNISHMENT IN THEORY: WHY AUGMENTED SENTENCING FOR SEX CRIMES AGAINST CHILDREN IS WARRANTED

#### A. Theories of Punishment

*The most serious offenses are crimes not simply because society finds them inconvenient, but because it regards them with moral horror. To steal, to rape, to rob, to assault—these acts are destructive of the very possibility of society and affronts to the humanity of their victims. Parents do not instruct their children to be law abiding merely by pointing to the risks of being caught . . . .*

—James Q. Wilson<sup>53</sup>

In any discussion of modern Western criminal justice, two theories of punishment will inevitably be mentioned: utilitarian theory and retributivist theory.<sup>54</sup> Understanding these theories is a necessary prerequisite to implementing any kind of punishment system, as the types of punishments depend on the goals of the punishers, and the goals of the punishers are determined by the theory of punishment to which they adhere. For the purposes of our discussion, we first turn to the utilitarian theory of punishment.

The utilitarian theory focuses on the consequences of punishment: utilitarianists seek the punishment which is most likely to deter future similar crimes.<sup>55</sup> In deterring crimes, the utilitarian approach strives to provide the greatest benefit to the whole community.<sup>56</sup> As the philosopher H.J. McCloskey noted:

[T]he utilitarian, even the enlightened utilitarian who is clear

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53. JAMES Q. WILSON, THINKING ABOUT CRIME 252 (Rev. ed. 1983).

54. See, e.g., David B. Muhlhausen, *Theories of Punishment and Mandatory Minimum Sentences*, THE HERITAGE FOUNDATION (May 27, 2010), [http://www.heritage.org/research/testimony/theories-of-punishment-and-mandatory-minimum-sentences#\\_ednref8](http://www.heritage.org/research/testimony/theories-of-punishment-and-mandatory-minimum-sentences#_ednref8) (citing RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA (2000)).

55. The deterrence being the consequence. See, e.g., Bernard Weiner et al., *An Attributional Examination of Retributive Versus Utilitarian Philosophies of Punishment*, 10 J. SOC. JUST. RES. 431, 432 (1997) (summarizing the utilitarian theory of punishment) (citations omitted).

56. In keeping with the greater theory of utilitarianism espoused by philosophers such as Jeremy Bentham and John Stuart Mill, that is, seeking to maximize the most happiness for the most people.

about what constitutes responsible behavior, is committed to taking full note of the beliefs of the members of his community about responsibility when determining what constitutes useful deterrent punishment. Punishment which would have no utility in a community of enlightened people and which would shock as callous, pointless inhumanity, may in a less enlightened community be very useful punishment.<sup>57</sup>

Because the focus of utilitarian punishment systems is to deter future crimes and provide the best benefit for the community, when a crime is seen as attributable to an “unstable factor,” utilitarian communities will try to address that factor.<sup>58</sup> For example, under a cause-and-effect analysis, if the “effect” is drug dealing and the “cause” is addiction, a utilitarian punishment would be to send the perpetrator to rehab and counseling. A successful completion of rehab is likely the best way to deter, as someone who is truly cured of their addiction will be much less likely to deal in the future.<sup>59</sup> A retributivist punitive system, however, would take a very different approach.

According to philosopher Emmanuel Kant, under the retributive theory, punishment “must in all cases be imposed *only* because the individual on whom it is inflicted has committed a crime . . . . *He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens.*”<sup>60</sup> First and foremost in the retributive theory of punishment, then, is the idea that the perpetrator of a crime deserves punishment because he committed a crime. To put it another way, “[r]etribution pertains to retaliation for a past wrong rather than being concerned with the subsequent consequences of the punishment. That is, the goal is to avenge a prior evil deed rather than to prevent future ones.”<sup>61</sup>

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57. H.J. McCloskey, *Utilitarian and Retributive Punishment*, 63 J. PHIL. 91, 99 (1967). McCloskey made this statement in his argument regarding the famous *Tait* case. Despite the facts that (1) the Victorian government had been conducting a campaign against the death penalty and it had not been used in years and (2) Tait was declared insane, the jury sentenced Tait to death because, as his crime had caused such a stir, giving the death sentence in such a visible case would be a greater deterrent for similar crimes in the future than if it had been given to someone who was “more guilty” of committing a similar crime but whose case was less visible. *Id.* at 98–99.

58. See Weiner et al., *supra* note 55, at 437–38.

59. See *id.* (Utilitarian systems will often adopt rehabilitative measures when the crime is perceived as being caused by an unstable factor. *Id.*

60. Immanuel Kant, *The Retributive Theory of Punishment*, excerpted and translated from IMMANUEL KANT, *THE PHILOSOPHY OF LAW, PART II* (W. Hastie, trans.) (1887) (emphasis added), available at <http://faculty.msmar.edu/Conway/PHIL%20400x/Kant%20Retributive%20Theory.pdf>.

61. Weiner et al., *supra* note 55, at 432.

The retributivist theory of punishment then takes the concept of avenging a past wrong one step further. As the main reason for punishing the perpetrator is his wrongdoing, it follows that his punishment should “fit the crime”: the more heinous the crime, the harsher the punishment. As Kant reasoned, proportionality of the sentence to the crime is essential to true justice; “[a]ll other standards are wavering and uncertain.”<sup>62</sup> In other words, the retributivist theory of punishment gives us a clear rubric: punishment commensurate to the severity of the crime is a constant standard. The ease with which one can apply this “bright line” standard is likely one of the reasons why retributive justice is found in judicial systems around the world.<sup>63</sup> Retributive justice is also popular in many Western societies given its strong religious overtones; Exodus 21:24’s famous quote of an “eye for eye, tooth for tooth, hand for hand, foot for foot” is perhaps one of the clearest and most literal illustrations of retributive justice. (This exact verse is often quoted by American supporters of the death penalty as they argue that retribution is not only right, it is ordered by G-d.<sup>64</sup>) While other judicial systems have eschewed retributive justice in favor of what is known as restorative justice,<sup>65</sup> the theory of retributive justice

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62.

[Justice] may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: “If you slander another, you slander yourself . . . if you strike another, you strike yourself; if you kill another, you kill yourself.” This is the right of retaliation (*Jus talionis*); and properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice.

Kant, *supra* note 60.

63. The United States, China, and Saudi Arabia all have the death penalty for murder—one clear illustration of retributive justice. Other countries exhibit retributive justice at the more lenient end of the spectrum: for example, by making marijuana use a “non-arrestable” offense on par with a speeding ticket (based on the theory that personal use causes harm to none but the user).

64. See, e.g., John Blake, *How Does a Christian Support the Death Penalty?*, CNN BELIEF BLOG (Sept. 23, 2011, 10:10 AM ET), <http://religion.blogs.cnn.com/2011/09/23/how-does-a-christian-support-the-death-penalty/>.

65. Although beyond the scope of this Article, many scholars find the juxtaposition between retributive and restorative justice fascinating. See generally Max Fisher, *A Different Justice: Why Anders Breivik Only Got 21 Years for Killing 77 People*, ATLANTIC (Aug. 24, 2012, 12:48 PM ET), <http://www.theatlantic.com/international/archive/2012/08/a-different-justice-why-anders-breivik-only-got-21-years-for-killing-77-people/261532/> (discussing the

remains persuasive to a certain degree—no country, for example, punishes speeding with amputation or the pettiest of thefts with execution.

If we hold the idea of “more terrible crimes deserve harsher punishments” to be true, we must then establish what makes one crime more “terrible” than another. One source of information for making such considerations is the effects—long- and short-term, physical and psychological—of the crime on the victim. Under the retributive theory of justice, a crime resulting in grievous bodily harm or death would merit a much harsher punishment than a “victimless” crime, as the outcome is much more severe (and permanent). When it comes to sexual violence, many jurisdictions recognize that acts of sexual violence committed with a weapon or use of physical force are deserving of harsher penalties than other kinds of sexual assault; these crimes often leave the survivor with more physical and emotional damage.<sup>66</sup> Sexual violence against children should therefore be treated similarly, as the effects of sexual violence on children are both more severe and longer-lasting (physically and mentally) than they are on adults.<sup>67</sup>

### *B. The Physical and Psychological Effects of Sexual Violence on Children*

Sexual violence against children is, unfortunately, prevalent throughout the world—not just in the DRC. Despite what this prevalence says about society as a whole, it does mean that much research has been conducted documenting the physical and

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restorative justice approach in the case of Anders Breivik).

66. For example, the American state of North Carolina’s rape statute describes “First-degree rape” as when someone has vaginal intercourse:

- [w]ith another person by force and against the will of the other person, and:
- a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
  - b. Inflicts serious personal injury upon the victim or another person[.]

N.C. GEN. STAT. § 14-27.2 (2004). This is punished more harshly than second-degree rape, which is defined as vaginal intercourse “[b]y force and against the will of the other person; or [when the person is] is mentally disabled, mentally incapacitated, or physically helpless[.]” N.C. GEN. STAT. § 14-27.23 (2004). The fact that the rape resulting in “serious personal injury upon the victim or another person” is punished more harshly is proof that North Carolina legislators believe violent sexual assault is deserving of a more severe punishment; many other states and countries have very similar statutes.

67. See, e.g., AUBERT ET AL., *supra* note 5, at 15–16 (discussing the long-term psychological and physical effects of sexual violence on children).



psychological effects of sexual abuse on children. In considering these effects—and their relative severity compared to the effects suffered by adults—we strengthen the argument that such crimes against children merit a higher sentence.

### 1. Physical Effects

Generally speaking, children (particularly female children) suffer more severe and more long-term health effects from sexual injury than their adult counterparts. One survey of recent studies found that in American female children, incidences of genital injury from sexual abuse ranged from 50-90%; according to this survey, at least half the time an abuse occurs, a girl will suffer a genital injury.<sup>68</sup> “The major cause of genital trauma sustained during a rape is an entry injury with insertion or attempts of insertion of the penis into the vagina.”<sup>69</sup> Genital injuries sustained from sexual assault are evaluated along the TEARS protocol, which is particularly adept at identifying injuries that heal with time and medical care.<sup>70</sup>

Although the above research is certainly a strong “opening bid” in our argument that sex crimes against children should receive a higher sentence (as the percentage of injury among children is so high), the majority of research regarding the physical effects of child sexual abuse has been done in instances where the abuse was largely non-violent.<sup>71</sup>

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68. Diane F. Merritt, *Genital Trauma in Prepubertal Girls and Adolescents*, 23 CURRENT OPINION IN OBSTETRICS & GYNECOLOGY 307, 308 (2011), [http://goemescam.com.br/BD\\_Arquivos/Genital%20trauma%20in%20prepubertal%20girl%20and%20adolescents.pdf](http://goemescam.com.br/BD_Arquivos/Genital%20trauma%20in%20prepubertal%20girl%20and%20adolescents.pdf).

69. *Id.* at 311 (citation omitted). This statement does not take into account the nature of the rapes committed in the DRC, which are often accompanied by (or solely committed by) insertion of dangerous objects into the victim—the injuries sustained in such situations are clearly different. *Infra* Part IV(A)(b) (discussing the unique nature of the rapes committed in the DRC).

70. The TEARS protocol categorizes injuries in the following way:

- (1) Tears: any breaks in tissue integrity, including fissures, cracks, lacerations, cuts, gashes, or rips.
- (2) Ecchymoses: skin or mucous membrane discolorations due to damage to small blood vessels beneath the skin or mucosal surface “bruising.”
- (3) Abrasions: skin excoriations caused by removal of the epidermal layer with a defined edge.
- (4) Redness: erythematous skin which is abnormally inflamed because of irritation or injury without a defined edge or border.
- (5) Swelling: edematous or transient engorgement of tissues.

*Id.* at 309 (citation omitted).

71. See generally *id.*; Christopher J. Hobbs, *Physical Evidence of Child Sexual Abuse*, EUR. J. PEDIATR. 171(5), 751–55 (2012); David Finkelhor & Angela Browne, *The Traumatic*

This concentration in research is due in part to the fact that until recently, most recorded instances of child sexual abuse occurred in a situation where the abuser was known to the child and the abuse took place on multiple occasions (both factors contributing to the non-violent nature of the abuse). In a Western setting where the abuse is non-violent and immediate, state-of-the-art medical care is available to the survivor, long-term physical effects are less common and therefore less documented in medical studies of child sexual abuse.<sup>72</sup> As previously noted, the sex crimes in the DRC are being committed on a never-before-seen scale. Consequently, there is less research documenting the long-term physical effects on the survivors, which in turn provides us with less definitive evidence for our argument.

There have, however, been a few studies documenting the sexual abuse suffered by both civilian children and child soldiers in conflict settings and predicting the long-term effects on the survivors. One such study was conducted by doctors and public health officials from the United States, the United Kingdom, and the DRC in a hospital in South Kivu province (one of the most affected areas in the conflict).<sup>73</sup> In their study, Nelson et al. documented both individual injuries sustained as well as trends in injuries for “pediatric survivors” (victims under the age of 18 at the time of assault),<sup>74</sup> who constitute over half of all victims of sexual assault in the DRC.<sup>75</sup> Generally speaking, “pediatric survivors were more likely than adult survivors to have experienced gang rape, been attacked by a civilian perpetrator, and been assaulted during the day.”<sup>76</sup> Over half of the survivors interviewed were between the ages of 11-15 at the time the assault occurred.<sup>77</sup> Common injuries (reported by nearly a quarter of interviewees) sustained by the survivors interviewed included “chronic pain, urinary incontinence, generalized malaise, and symptoms consistent with sexually transmitted infections (such as, vaginal discharge, dysuria, skin lesions, and abdominal or pelvic pain). In 19.3% of cases, survivors reported pregnancy as a result of the sexual violence.”<sup>78</sup> Nelson et al. drew some interesting conclusions from their research, noting that “the odds among pediatric survivors for being attacked by a civilian were 92.6 times greater than the odds of civilian

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*Impact of Child Sexual Abuse: A Conceptualization*, 55 AM. J. ORTHOPSYCHIATRY 1 (1985).

72. See, e.g., Merritt, *supra* note 68; Hobbs, *supra* note 71.

73. Nelson et al., *supra* note 31.

74. *Id.* at 211.

75. *Id.* at 212.

76. *Id.* at 211.

77. *Id.* at 215.

78. *Id.* at 218 (75 cases out of a total of 389).

attacks among adult survivors.”<sup>79</sup>

While Nelson et al. concentrated on the short-term physical effects of the sexual violence and analyzed the long-term implications of the demographic differences between adult and child rape cases, a report issued in 2013 by Save the Children addressed the long-term physical effects for child victims of sexual violence. In their study titled “Unspeakable Crimes against Children: Sexual Violence in Conflict,” Save the Children began the section on physical and psychological impact with this harrowing quote:

The physical, psychological and social impact on both girls and boys of experiencing sexual violence is significant, in both the short and the long term. The impact of the violence on children’s bodies may be very severe given their smaller size and physical immaturity and the risk of infertility.<sup>80</sup>

The study went on to note that, in the cases of violent rape seen in conflict situations,<sup>81</sup> the injuries suffered by children are so severe they often require “long-term and complex treatment.”<sup>82</sup> The well-documented practice in the DRC conflict of inserting objects into the victim’s vagina and mutilating her genitals with the intent to permanently injure only serves to highlight the potential for permanent physical injuries in child victims.<sup>83</sup> Most common among the long-term injuries are those that, under different circumstances, could be fully healed but due to lack of proper medical care become permanent.<sup>84</sup> In

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79. *Id.* at 215. The fact that children were more likely to be attacked by civilians than by armed groups is also an indication that even once the conflict is brought under control, children will continue to suffer more than their adult counterparts: although an easing in the conflict would logically mean less armed groups, children will still be vulnerable to rape in their communities.

80. AUBERT ET AL., *supra* note 5, at 15.

81. Compared to the “non-violent” instances of sexual abuse noted in the Merritt study.

82. AUBERT ET AL., *supra* note 5, at 15.

83. See, e.g., *id.*; Denis Mukwege: *The Rape Surgeon of DR Congo*, *supra* note 1 (giving specific examples of injuries sustained by victims).

84.

Girls may suffer uterine prolapses (the descent of the uterus into the vagina or beyond), vesico-vaginal or recto-vaginal fistulas and other injuries to the reproductive system or rectum . . . . Other effects of sexual violence on girls can include gastrointestinal problems . . . and gynecological symptoms—for example, dysmenorrhea (severe pain or cramps in the lower abdomen during menstruation) and menorrhagia (abnormally heavy or prolonged bleeding during menstruation).

addition to permanent physical injury, long-term effects include: living with HIV/AIDS, infertility in girls, and “difficult[y] maintaining normal sexual relationships.”<sup>85</sup>

The Save the Children report also highlighted specific health repercussions for female children and adolescents who become pregnant as a result of the assault. Although a girl child may be menstruating, during the first few years of fertility her body is still not fully developed to bear children.<sup>86</sup> “Adolescents aged 15–19 are twice as likely to die during pregnancy and childbirth, and girls under 15 are five times more likely to die, compared with women aged 20 and older.”<sup>87</sup> To make matters worse, abortion is illegal in many countries where women suffer sexual violence as a result of conflict—in the DRC the minimum sentence is five years in prison.<sup>88</sup> Female children and adolescents impregnated by their assailant are therefore faced with a decision where both choices (having the child or getting an abortion) will likely result in injury—further compounding the negative effect of the rape on their lives. Adult women, by contrast, are less likely to suffer physically from pregnancy and childbirth.<sup>89</sup>

## 2. Psychological Effects

In addition to physical injury, child victims of sexual violence also suffer psychological trauma. The psychological effects of sexual assault on a child are often just as (if not more) severe and debilitating as the physical effects, and, compared to the average injury sustained in a child victim’s sexual encounter, can last longer than the average physical injury.<sup>90</sup> In the immediate aftermath of a sexual assault, children’s experiences vary enormously, and can include “intense feelings of terror, shock, rage and shame, depression, loss of self-esteem, loss of confidence, self-blame, memory loss, nightmares and

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AUBERT ET AL., *supra* note 5, at 15 (citation omitted). Additionally, some sexually transmitted infections (like gonorrhea and syphilis) can be cured if caught early, but receiving medical attention in time to treat these diseases is extremely rare. *Id.* at 15. The Save the Children study also notes that boy child victims of sexual violence also suffer physical trauma, including “damage to the anus, pain during urination, blood in the stools and severe anal, rectal, penile and testicular pain.” *Id.* (citation omitted).

85. *Id.* at 16 (citation omitted).

86. *Id.*

87. *Id.* (citation omitted).

88. *Id.*

89. Small comfort, of course, to an adult woman who is pregnant as a result of rape and who may be suffering from other physical effects from her assault.

90. See generally AUBERT ET AL., *supra* note 5 (discussing both the physical and psychological effects of child sex abuse in conflict settings).

day-time ‘flashbacks’ to the rape.”<sup>91</sup> Generally speaking, adult survivors of sexual abuse suffered as a child experience a range of long-term psychological effects, including depression, alcoholism and other forms of substance addiction, self-harming behaviors, anger management issues, and intimacy issues.<sup>92</sup> However, more acute effects are all too common. In a study using 30 years of data from 2759 adult survivors of child sexual abuse in New Zealand, researchers found that “[r]ates of psychiatric and schizophrenic illnesses were 4-fold higher among CSA [child sexual abuse] individuals less than 12 years of age with penetrative injuries; and 15-fold higher for CSA individuals over 12 years of age with penetrative injuries and more than one abuser compared with controls.”<sup>93</sup> Another study of female child victims of sexual violence in Turkey found that Post Traumatic Stress Disorder (PTSD) was the “most common psychiatric diagnosis established after sexual abuse.”<sup>94</sup> Regardless of where or under what circumstances the abuse occurs, long-term psychological effects are a near-certainty for child survivors, and therefore, another reason why harsher sentences should be given to those who commit child sexual abuse.

The physical and emotional effects of sexual violence on children are horrifying. Compared to their adult counterparts, children are more likely to suffer physical trauma from the assault,<sup>95</sup> and the trauma suffered is likely to be more severe and long-term.<sup>96</sup> From incontinence to infertility, the long-term physical effects of sexual violence are manifold, and for children these effects are compounded by the fact that child bodies are not fully developed to handle sexual activity and its many consequences.<sup>97</sup> Additionally, children are arguably more affected by sexual violence than their adult counterparts,<sup>98</sup> and research on adult survivors of child sexual abuse suggests the long-term effects are incredibly severe.<sup>99</sup>

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91. *Id.* at 16.

92. *See, e.g., Long Term Effects for Adult Survivor*, TURNING POINT SERVICES, [http://www.counseling.org/docs/disaster-and-trauma\\_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf?sfvrsn=2](http://www.counseling.org/docs/disaster-and-trauma_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf?sfvrsn=2).

93. Merritt, *supra* note 68, at 312 (citation omitted).

94. *Id.* at 309-10.

95. *See supra* Part III(B)(a). Furthermore, Merritt notes that in a study of sexual violence victims conducted in Taiwan, “[g]enital and anal lesions were most commonly found in victims with no sexual experience”—further evidence that child sexual violence victims (who are much more likely to have no sexual experience compared to their adult counterparts) suffer more than adult victims. Merritt, *supra* note 68, at 312.

96. *See, e.g., AUBERT ET AL. supra* note 5, at 15-16.

97. *See id.*

98. *See, e.g., id.*

99. *See Merritt, supra* note 68.

Within the conflict in the DRC, the instances of sexual violence against children have increased at an alarming rate.<sup>100</sup> Although charges of sexual violence against children were not brought in the ICC's first DRC case, the Court has since brought charges of sexual slavery and rape against defendants from the DRC.<sup>101</sup> The ICC's charges against these defendants reflect the Court's recognition of the need to address the widespread use of children in conflict and the sex crimes committed against them and their communities. In light of this recognition, the time is ripe for a judicial rule establishing higher sentences for perpetrators of sex crimes against children. Indeed, countries around the world have already adopted similar rules via legislation, penal codes, and judicial precedent further strengthening the theory that sex crimes against children should receive harsher punishment, and therefore providing further support for the creation of a similar rule in the ICC.<sup>102</sup>

#### IV. GOING FORWARD: ESTABLISHING THE CHILD STATUS OF VICTIMS AS A FACTOR WHEN CONSIDERING "GRAVITY"

##### A. *The Solution: A Judicial Rule*

As it stands, Article 78 of the Rome Statute (governing sentencing) provides only this guidance: "[i]n determining the sentence, the Court

100. See *supra* Part II(A).

101. In addition to bringing similar charges against defendants from other situations. See *infra* Part IV(B).

102. See, e.g., Sexual Offences Act, 2003, c. 42, §§ 5–9 (Eng.); STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT [BGBl.] 3214, as amended, §§ 176–77 (Ger.); NAT'L CONFERENCE OF STATE LEGISLATURES, STATE STATUTES RELATED TO JESSICA'S LAW (2008), available at [http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs\\_Jessicas\\_Law\\_Summary.pdf](http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf) (providing information on which states have enacted mandatory minimum sentences for sex crimes against children; these mandatory minimum sentences are often higher than those imposed by the state for the same crime committed against an adult). Other examples include U.S. Federal law, which imposes a mandatory life sentence (when the death sentence is not imposed) for repeat perpetrators of sex crimes against children. (A mandatory life sentence is not automatically imposed for repeat perpetrators of sex crimes against adults.) 18 U.S.C. § 3559 (2013). See also U.S. SENTENCING COMM'N, SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 37–39 (1996) (analyzing the increased penalties requested by Congress for sex crimes against children). In Lithuania, the Penal Code imposes a mandatory minimum sentence of three years in addition to a higher maximum sentence (ten years for rape against minors, fifteen for rape against children under the age of 10) for rape against a child, in contrast to no mandatory minimum sentence and a maximum sentence of seven years for rape against an adult. Law on the Approval and Entry into Force of the Criminal Code, Sept. 26, 2000, as amended, Chapter XXI: Crimes and Misdemeanors against Freedom of a Person's Sexual Self-Determination and Inviolability, § 149 (Lith.).

shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”<sup>103</sup> Rule 145 of the Rules of Procedure and Evidence does provide further guidance to the sentencing judges, instructing the judges to take into consideration “all the relevant factors, including any mitigating and aggravating factors and [to] consider the circumstances both of the convicted person and of the crime.”<sup>104</sup> Specific circumstances do include “the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location,”<sup>105</sup> and the court should also consider as aggravating “[c]ommission of the crime where the victim is particularly defenseless [and] commission of the crime with particular cruelty or where there were multiple victims.”<sup>106</sup> And yet, despite these instructions, the ICC judges failed to award Thomas Lubanga the appropriate sentence. Without a specific rule to guide them in the future, they will continue to under-sentence perpetrators who commit crimes against children.<sup>107</sup>

A judicial opinion issuing such a rule would clearly state that in cases where a victim of sexual violence is under age 18 at the time of assault, the judges must consider the age of the victim as a separate aggravating factor when sentencing the defendant. Specifically, in considering aggravating factors that merit a harsher sentence for the defendant, “victim[s] [who are] particularly defenseless” (as included in the Rules of Procedure and Evidence Rule 145(2)(b)(iii)) should automatically be read to include children under the age of eighteen. When a sentence is being considered for a sex crime against a child, this specific aggravating factor should be considered separately and in addition to other aggravating factors, thus necessitating a greater sentence for a defendant who committed a crime against a child as compared to his counterpart who committed the same crime against an adult. Depending on how the opinion is written, the judicial rule could be interpreted to mean that for any crime committed against a person under age 18, the victim’s age should be considered a separate aggravating factor under Rule 145. I have chosen to frame my argument for augmented sentencing solely within the context cases of sex crimes against children. Under my argument, then, the judges writing the rule should issue it within a Sentencing Judgment for a perpetrator who

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103. Rome Treaty, *supra* note 6, art. 78.

104. Rules of Procedure and Evidence, *supra* note 44, r. 145(1)(b).

105. *Id.* r. 145(1)(c).

106. *Id.* r. 145(2)(b)(iii), (iv).

107. *See supra* Part II(B).

committed sex crimes against children. The rule would then clearly be applicable to future cases of sex crimes against children; theoretically, it could be distinguished from cases with different fact patterns.

Such a judicial rule would not be binding on the Court the way *stare decisis* is in common law courts. The Rome Treaty specifically states that the Court “*may* apply principles and rules of law as interpreted in its previous decisions,”<sup>108</sup> this is deliberately distinguished from the previous provision which states the court shall consider the Rome Treaty and its “Elements of Crimes” and “Rules of Procedure and Evidence,” as well as international law norms, when sentencing.<sup>109</sup> Despite this non-binding quality, an ICC opinion establishing a rule of augmented sentences for perpetrators of sex crimes against children would likely be influential for future similar cases. As noted in the introduction, the ICC’s predecessors (the ICTY and ICTR) considered their previous decisions precedent, despite the fact that their founding treaties did not create a rule of *stare decisis*.<sup>110</sup> Although the ICC has decided two cases so far, given (A) the general usefulness of direction established by previous cases, and (B) the fact that the ICC’s predecessors used the rules established by their previous cases, this Author believes that the ICC will likely use the rules established by its previous decisions when deciding future cases. A judicial rule establishing a higher sentence for perpetrators of sex crimes against children is therefore a useful rule for the Court to institute, as it will likely be referred to in similar cases in the future. As previously mentioned, the Court has in fact multiple cases pending with defendants accused of committing sex crimes against children.

### B. *In Action: The Rule as Applied to the DRC*

Bosco Ntaganda was allegedly a co-perpetrator of Thomas Lubanga’s, committing crimes under the jurisdiction of the ICC. Given the nature of the conflict in the Congo,<sup>111</sup> the charges against him naturally include enlisting children under the age of fifteen in armed

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108. Rome Treaty, *supra* note 6, art. 21(2) (emphasis added).

109. *Id.* art. 21(1).

110. See, e.g., Ohlin, *supra* note 15 (noting that the ICTY has considered judicial rules from previous cases “settled jurisprudence” when considering cases on appeal). The ICTR case of Jean-Paul Akayesu is also an example of a rule established in one case being used in the court’s future cases (as well as future international treaties). Akayesu established that rape can be an act of genocide when it meets certain conditions; this rule was applied in many later ICTR cases. See Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

111. *I.e.*, that the conflict in the DRC is notorious for the use of child soldiers. See, e.g., Allen, *supra* note 19.



conflict. Ntaganda, however, also faces charges of rape and sexual slavery,<sup>112</sup> particularly relevant to our analysis as reports from the conflict in the DRC have established that much of the rape and sexual slavery is committed against children.<sup>113</sup> Through two arrest warrants, the Office of the Prosecutor (OTP) charged Ntaganda on ten counts, including two counts of rape and sexual slavery (one as a War Crime and one as a Crime Against Humanity).<sup>114</sup> The documents accompanying Ntaganda's arrest warrant describing his alleged crimes are currently not available to the public, thus, we do not know with certainty if he stands accused of committing sex crimes against children. As it is likely that at least some of his victims were children, however, a judicial rule previously issued establishing harsher sentences for perpetrators of sex crimes against children would almost certainly be applied in his case.

If such a rule has not been established by the time *Ntaganda* is decided, the court will likely consider the nature of sex crimes in its

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112. See Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Case Information Sheet (last updated June 18, 2013), [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx) [hereinafter *Ntaganda*].

113. See, e.g., 2010 *Human Rights Report: Democratic Republic of the Congo*, U.S. EMBASSY, <http://www.state.gov/documents/organization/160453.pdf>, at 9 (describing rapes committed against victims ranging in age from three to fifteen years old). One report currently estimates the majority of sex crimes committed in the DRC are committed against children. See Hirsch, *supra* note 5.

114. *Ntaganda*, *supra* note 112:

[T]hree counts of war crimes on the basis of his individual criminal responsibility under article 25(3)(a) of the Rome Statute:

The enlistment of children under the age of fifteen;

The conscription of children under the age of fifteen; and

Using children under the age of fifteen to participate actively in hostilities,

[S]even counts . . . on the basis of his individual criminal responsibility as an indirect co-perpetrator under article 25(3)(a) of the Rome Statute:

Four counts of war crimes:

Murder;

Attack against the civilian population;

Rape and sexual slavery;

Pillaging

And three counts of crimes against humanity:

Murder;

Rape and sexual slavery; and

Persecution[.]

sentencing under Rule 145 as aggravating factors under “(iii) Commission of the crime where the victim is particularly defenseless” and “(iv) Commission of the crime with particular cruelty or where there were multiple victims,” and will award a higher sentence. However, unless the court reveals in its opinion that the “defenseless” nature of the victims was due solely to their age and not to other environmental factors (gender and socioeconomic status), we will never know if Ntaganda’s sentence is due only to the general heinous nature of his crimes, where the court did not take into consideration the age of his victims as a separate factor requiring a higher sentence than if his victims had been exclusively adults. As it seems unlikely that the court will consider age as a separate factor in and of itself requiring a higher sentence for Ntaganda (see Court’s Decision on Sentence for the Lubanga trial, discussing age as just one of the many factors in its holistic approach<sup>115</sup>), a judicial rule establishing age as a separate aggravating factor requiring a higher sentence is essential to ensure Ntaganda and other defendants receive just sentences going forward. Whether such a precedential rule is established in Ntaganda’s case or one adjudicated before his, a rule requiring harsher sentences for sex crimes committed against children is necessary to ensure justice is served to Bosco Ntaganda and others like him. Until society reaches a point where such crimes are no longer committed against children, a judicial rule establishing this sentencing practice will serve to promote justice in Ntaganda’s case and in cases to come.<sup>116</sup>

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115. See Dyilo, Decision on Sentence, *supra* note 40.

116. The ICC has also brought charges of sex crimes (instances of which often include said crimes against children) against defendants in other Situations. In the Situation in Uganda, Joseph Kony (alleged commander in chief of the Lord’s Resistance Army, or LRA) has been charged with sexual enslavement and rape (crimes against humanity under Article 7 of the Rome Statute) and inducing rape and enlisting children (war crimes under Article 8); Vincent Otti (Kony’s second-in-command), Okot Odhiambo (a deputy LRA commander) and other LRA officials face the same or similar charges. In the Situation in the Central African Republic (CAR), Jean-Pierre Bemba Gombo has been charged with rape under Articles 7 (crimes against humanity) and 8 (war crimes). In Darfur, three of the seven defendants are charged with rape; charges of rape have also been leveled against defendants in the Situations in Kenya and the Republic of Côte d’Ivoire—in other words, charges of sex crimes have been brought in all but two of the Situations currently before the court. For more information on these Situations and the charges against the defendants, see *Situations and Cases*, ICC-CPI.INT, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx). In some of the Situations more than others, sex crimes committed against children were incredibly prevalent. While no one can know for sure the number of child victims, it is almost guaranteed that at least some of the rape victims in each Situation were minors. The need for augmented sentencing for those who commit sex crimes against minors is therefore all the more necessary, given that so many defendants before the ICC face such charges.

## V. CONCLUSION

Unfortunately, the crimes committed in the conflict in the DRC are not unique. Although they are seen on an unprecedented scale there, sex crimes against children are committed every day in conflicts around the world.<sup>117</sup> Establishing a judicial rule in the International Criminal Court requiring harsher sentences for perpetrators of sex crimes against children is therefore essential to making sure such perpetrators are brought to justice in the future. Under the retributivist theory of criminal punishment, a harsher sentence for such perpetrators is warranted, given the particularly heinous nature of the crime and the potential for physical and psychological consequences more severe than those suffered by the child victim's adult counterparts. Given the practice established by the ICTY and ICTR of considering precedent in subsequent cases, such a rule at the ICC would likely be applied to future cases concerning sex crimes against children—and unfortunately, it is virtually certain the Court will see such cases.<sup>118</sup>

Such a rule is needed all the more because it will likely influence future cases of sex crimes against children in other jurisdictions. Given the scale of the atrocities committed in the DRC, the ICC will not be able to bring the perpetrators of every crime to justice. By establishing a rule mandating harsher sentences for perpetrators of sex crimes against children, the ICC will be signaling to other jurisdictions (including domestic courts in the DRC) that such a practice is preferable. Pilot programs are already in place in the DRC for trying such crimes on a domestic level;<sup>119</sup> this Author believes they will likely take into consideration sentencing practices of the ICC when adjudicating such crimes on the domestic level. By establishing such a rule, the ICC will not only ensure the defendants it sees are brought to justice, it will set a precedent for all perpetrators to come.

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117. *See, e.g., supra* text accompanying note 114.

118. *See supra* Part IV(B).

119. *See, e.g.,* JUSTICE IN DRC: MOBILE COURTS COMBAT RAPE AND IMPUNITY IN EASTERN CONGO, OPEN SOCIETY FOUNDATION (2013) (documenting the progress of the Mobile Courts in Eastern DRC established by the American Bar Association, the Open Society Foundation, and other NGOs).