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THE IMPACT OF TRANSNATIONAL ACTIVISM ON THE PROSECUTION OF WARTIME RAPE: NORM FORTIFICATION AT THE INTERNATIONAL CRIMINAL COURT (199 PP.)

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Using the ICC's first convictions for rape as a war crime and crime against humanity, this study finds that the role of NGOs in forging the path of international justice have shifted with the institutionalization of the Court. In this work, I investigate quantitatively the degree of public-facing activism on the part of two major international NGOs during the ICC trials of Jean-Pierre Bemba and Bosco Ntaganda. Using qualitative data collected in court documents, journalist reports, government reports, scholarship, and via interviews with those directly involved in the work, I investigate the less public roles of various actors in the evolution and implementation of international law regarding sex and gender-based violence in these two cases. I find that while NGOs seem, publicly, nearly silent on the pursuit of justice for myriad sexual and gender-based crimes committed by these two individuals and those under their command, the work of NGO leaders and activists continues to lend expertise to the Court. This is especially obvious through the formulation and implementation of specific policy papers coming from the Office of the Prosecutor. Further, using data on the daily progression of each case, I argue that the Court is in a period of norm fortification, during which the practice of holding individuals criminally responsible for the crime of wartime rape has surpassed the existence of a law on the books and is increasingly supported in jurisprudence and precedent.

THE IMPACT OF TRANSNATIONAL ACTIVISM ON THE PROSECUTION OF WARTIME RAPE: NORM FORTIFICATION AT THE INTERNATIONAL CRIMINAL COURT

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Thank you to my parents for the unending belief in my ability to do something scary.

To Julie Mazzei, for all of the things.

INTRODUCTION

"The creation of this court will be a historic occasion generally and especially for women as the Rome Statute has dramatically raised the standard for responding to crimes against women that have long been overlooked" announced the Women's Caucus for Gender Justice in 2002. In just one sentence—part of a larger announcement about the creation of the International Criminal Court—they summed up the state of affairs for international justice. The creation of the International Criminal Court was a unique institution, not just because it was the world's first permanent criminal court, but because it would have a particular focus on prosecuting sexual and gender-based violence. Although the codification of international humanitarian law has strengthened since the end of WWII, the institutional and state resistance to legal accountability has long meant that any progress was heavily reliant on powerful actors pushing for that accountability. It is clear that transnational activists rallied on behalf of holding states and individuals accountable for war crimes and crimes against humanity, ensuring that the most heinous crimes were put on the books.

Just as critically, even after the norm of holding individuals criminally accountable for violations of international humanitarian law was established, the implementation and enforcement of those laws remained inconsistent. The conviction of former Vice President of the Democratic Republic of Congo Jean-Pierre Bemba Gombo for wartime rape at the International Criminal Court in 2016 exemplifies the continuing tension between the *existence* of laws and the *implementation* of them. After many failed attempts to prosecute this crime, Bemba was the first conviction for wartime rape at the International Criminal Court (ICC). It remains one of the very few guilty verdicts for the crime of wartime rape ever. Yet, the commission of this crime is extensive. An estimated 50,000-64,000 women experienced sexual violence during the Sierra

Leone conflict that lasted from 1991 to 2002 (Physicians for Human Rights 2002, 3). In less than half that time, somewhere between 250,000 and 500,000 women and children were raped during the Rwandan Civil War, ending in 1994 (Nowrojee 1996). Thousands of women were raped during the conflict in Kosovo (Plesch 2019). In fact, fewer than half of all conflicts between 1989 and 2009 had *no* reports of sexual violence, while "14% of individual conflicts experienced sexual violence at the highest level of prevalence" (Cohen and Nordas 2014, 423). Whereas millions of people have been raped in war, few international prosecutions have taken place, and until Jean-Pierre Bemba's conviction in 2016 *zero* perpetrators had been prosecuted for rape at the International Criminal Court (ICC). Despite the 1998 Rome Statute's recognition of rape as a crime, it took nearly two decades to see a conviction at the International Criminal Court.

Journalists, field personnel, and academics alike have lauded the work of NGOs and transnational activists in helping to promote international justice for the most egregious war crimes and crimes against humanity (Keck and Sikkink 1998; Sikkink 2011; Simons 2016). The literature is clear on the critical role played by NGOs in helping to create the ICC itself. However, their role since the creation of the institution is less understood. The human rights organization International Federation for Human Rights (FIDH) recently was quoted stating that it is like "an iron door, that trying to get the Office of the Prosecutor's attention was really, really hard" (Anderson and Van den Berg 2023). The ICC itself is not completely transparent about the role played by NGOs nor the extent to which (or stage at which) it is open to communication with NGOs and other activists.

In this research[1], I look to explore transnational activist influence on the ICC's implementation of its mandate outlined in the Rome Statute, using two case studies of ICC defendants: Jean-Pierre Bemba and Bosco Ntaganda. Bemba became the first ever conviction for wartime rape at the ICC after more than 30 indicted individuals and over a decade with no convictions for sexual violence, although he was acquitted upon appeal two years later, in 2018. Ntaganda became the second conviction for wartime rape (or any other sexual and gender-based crime) at the ICC when he was convicted in 2019, which was upheld upon appeal. These two cases serve to demonstrate activism in action—both its strengths and limitations. In tracing the development of these trials over time, one thing becomes clear—the Court is learning. This happens, in part, through the cooperation with activists behind the scenes and sometimes in positions of influence within the Court. This development is extremely important in our understanding of the Court and its outcomes.

I argue that we have entered a phase following those described as the "justice cascade" (see Sikkink 2011). I call this phase "norm fortification" and find that the role of NGO leadership has changed significantly without diminished impact since the era of rule-creation. This phase succeeds the dynamics explained by Sikkink (2011) in which transnational activist networks played a critical and public-facing role in helping to establish the court and the laws it is intended to uphold. *Norm fortification* is the step that *follows* policy or law establishment and adoption. During this period, implementation becomes more consistent as institutions begin to establish the norms and practices that allow for reliable rule implementation. My research demonstrates that during this phase NGO impact remains part of the life and practice of the ICC but is far less public-facing, and indeed less transparent. As ICC Judge Chile Eboe-Osuji

[1] Conducted with Kent State University IRB approval, Protocol #18-463.

suggested, we cannot define success at the ICC *only* in terms of convictions, as justice also includes fair trials for defendants, which may rationally and legally end in acquittals (Eboe-Osuji 2020). The changes I track here in Court behaviors, procedures, policies, and personnel signal this commitment to the fortification of the norm of prosecuting sexual and gender-based violence, and a continued relationship with international activists through the process of fortification.

The act of holding individuals criminally responsible for human rights violations, war crimes, and crimes against humanity was normalized through military tribunals in Latin America, the International Criminal Tribunals of Yugoslavia and Rwanda, and special courts such as those in Sierra Leone and Cambodia. After a slow start characterized by a lackluster track record, the ICC has critically contributed to the consolidation of this norm through the execution of justice via trials. Over time, in part as a response to the tireless efforts of transnational activists, the Court has become more successful in terms of both policy and the service of justice (convictions). This continues to *strengthen* the norm of individual criminal accountability for violations of international humanitarian law.

What follows is a study of the development of the Court's approach to the prosecution of war crimes and crimes against humanity through the exploration of the role of transnational activism in the Jean-Pierre Bemba and Bosco Ntaganda trials at the International Criminal Court. I use newspapers, published reports, *amicus curiae* briefs, social media posts, and other documents to compare the levels of NGO public-facing activism during each trial, showing that although human rights organizations *were* active during each, the important publicly-visible work paints an incomplete picture of what yields positive outcomes at the ICC. It is here that we must look to the Court itself—at how it has changed over time and how these changes are

buttressed by the work of advocates for progress and justice. I find that *this* is what explains increased efficacy in the prosecution of sexual and gender-based violence, specifically wartime rape, at the ICC. Interviews with members of the Office of the Prosecutor and major human rights organizations involved in justice advocacy with the ICC help to show the clear link between organizations and the Court and explain *how* these organizations are able to make a difference in Court functions. They also demonstrate the key function of certain Court personnel who can serve as agents of change from within that I trace over the course of the two aforementioned trials. I conclude that we must look both to the institution itself and to external pressure in order to understand changes in justice outcomes for wartime rape at the ICC over time.

Literature Review: How Legal Structures Evolved via Civilian Actors.

There are several streams of literature that connect transnational activism and human rights or humanitarian law prosecutions. Some scholars offer insights into the changes in international criminal structures regarding human rights law (Broomhall 2003; Schiff 2008; Sikkink 2011). Others focus on the issue emergence, adoption, and success of transnational activist networks (TANs) (Keck and Sikkink 1998; Askin 2003; Haddad 2011; Sadat, Crane, and Scharf 2018). Together, these two areas of scholarship explain structural impunity for violations of international humanitarian law, as well as moments where that impunity is challenged or (if temporarily) dismantled, particularly due to the work of civil society activists. What is missing from this literature, however, is concrete data about what transnational activists do in order to impact legal structures and outcomes and when those activities might play a role. The literature on transnational activism, in other words, leaves room for a study such as this one on the process

of implementing and fortifying the norms of individual criminal accountability for the violation of international humanitarian law.

The prosecution of the violation of international humanitarian law, including war crimes and crimes against humanity, began with Nuremberg and Tokyo trials following WWII. The International Military Tribunals for the Far East (1946) and Nuremberg (1945) were created to hold individuals (rather than states) accountable for those crimes that "'shock the conscience of humanity'" including crimes against humanity, war crimes, and crimes against peace (Spees 2003; Broomhall 2003, 19). Importantly the Nuremberg Tribunal failed to prosecute the newly coined concept of "genocide," prompting the creation of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Schabas 2007). These tribunals also laid the foundation for the Greek junta trials in the 1970s, and later those in Portugal and Argentina, which prosecuted human rights violations (Sikkink 2011, 6). Even later, they provided a basic framework for the UN tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Although these courts were based upon the Nuremberg principles, "the tribunals changed the course of justice by expanding and clarifying the Nuremberg crime definitions, including raising to the highest level of concern gender crimes such as rape and sexual slavery" (Schiff 2008, 31).

Later, the International Criminal Tribunals for Yugoslavia and Rwanda were instrumental in shaping what became the ICC with the passage of the Rome Statute in 1998. In fact, Schiff (2008) states that the ICC is "explicitly a combination of the two" (Schiff 2008, 66). These bodies, amongst others, have been instrumental in bringing legal justice to victims of these heinous violations. However, the existence of these institutions, even the ICC, is not enough to ensure prosecution, much less retributive justice: Broomhall (2003) notes that "[i]n many

instances, the ICC is unlikely to be effective where [international] mobilization is absent or insufficient" (Broomhall 2003, 162). History and scholarship have repeatedly shown the importance of civil society demands for justice and the structures necessary to secure it. It is partly because of this dynamic that I began to look for the involvement of transnational activists in the ICC trial process for Jean-Pierre Bemba.

The "justice cascade" framework advanced by Sikkink (2011) focuses on the emergence, diffusion, and impact of prosecutions of international human rights law violations on the basis of individual—rather than state—criminal accountability (Sikkink 2011, 5-6). The "cascade" is the wave of activity committed to the seemingly simple principle of holding individuals accountable for their crimes. This principle, according to the framework, is first driven by norms adopted by a few individuals and spread to states throughout the globe, although the author notes that it has not become "fully internalized" (Sikkink 2011, 12). As part of the "cascade," transnational advocates have been successful in promoting human rights law, developmental reforms, and humanitarian projects by state actors and international organizations (Keck and Sikkink 1998; Price 2003; Carpenter 2007a). The literature on these networks helps to explain differences in issue emergence, success of advocacy campaigns, and their effects on state behavior (Carpenter 2007a; Carpenter 2007b; Spees 2003; Keck and Sikkink 1998).

Sikkink finds that the justice cascade gained traction in the 1970s, particularly in Eastern Europe and Latin America, and especially in Argentina. This handful of states appeared to fully embrace the principle of prosecuting heads of state for violations against human rights and humanitarian law, creating a new norm that was later manifest in the creation of the ICC and special tribunals such as the ICTY/ICTR and the Special Court for Sierra Leone (SCSL) (Sikkink 2011). However, in places outside of Latin America this justice cascade has not had a major

impact and for wartime rape especially, prosecution has progressed slowly, as noted above (Askin 2003, Haddad 2011; St. Germain and Dewey 2012; Heaton 2013). It is certainly clear that the prosecution of wartime rape has failed to keep pace with the perpetration of it.

Keck and Sikkink (1998) argue that transnational advocacy networks "helped instigate and sustain the change between 1968 and 1993" on three central issues including human rights, the environment, and women's rights (Keck and Sikkink 1998, *ix*). These networks use moral and material pressure, or reputational and economic incentives, to promote norm changes (Keck and Sikkink 1998, 118). They continue that the goal of TANs is quite clear—to use advocacy to influence the behavior of states and international organizations. R. Charli Carpenter (2007b) also laments the ways in which TANs fail to adopt all issues of importance. Ultimately, she concludes that the dynamics *between* networks are crucial to issue advocacy. This is an extension of Keck and Sikkink's focus on issue attributes, public visibility, and legal precedent, which Carpenter finds insufficient in explaining the variation of interest (Carpenter 2007b).

While scholarship on the contributions of advocacy agree on its importance, literature looking very specifically at the evolution of justice structures and rape in war demonstrate the disagreement on *when* wartime became legally prohibited. Inal (2013) traces the development of the "prohibition regime" against rape in war. Initially, the mechanisms for international law such as the Hague and Geneva Conventions (1899 and 1907; 1864, 1906, 1924, and 1949 respectively) did not address wartime rape or sexual violence against women. Even the 1977 Additional Protocols to the 1949 Geneva Convention failed to include rape. However, Inal mentions that women's movements were able to create a "normative context" in which the prohibition regime was created with the Rome Statute in 1998, establishing the ICC (Inal 2013). Efforts on the part of international activists began in earnest prior to that with the 1993 ICTY

statute (Inal 2013, 10). The literature emphasizes the role of civil society in leading the change in international justice norms, especially those related to sexual and gender-based violence. Sikkink (2011) explains the considerable time lapse between the Geneva Conventions to the achievements of the Rome Statute and International Criminal Tribunals with a simple historical factor: the author states, "the end of the Cold War opened up the political space necessary to begin resurrecting the Nuremberg precedent" (Sikkink 2011, 110). According to Inal, what was needed for a true prohibition regime was the concerted promotion of a new norm (Inal 2013). Haddad (2011) argues that transnational advocacy contributed to the implementation of norms against sexual and gender-based violence in the ICTY and ICTR (Haddad 2011). Further, Haddad explains that the different levels of success in sexual and gender-based violence prosecution in the ICTY and ICTR were the result of TAN effectiveness. TANs were able to bring issues of SGBV into discussion in the context of the ICTY/ICTR. She stresses the importance of cooperation between local groups within the network, stating that the ICTR was less successful simply because Rwandan activists did not have the issue of wartime rape at the top of their agenda (Haddad 2011).

Continuing the work regarding civil society and changes to international legal institutions, Jefferson (2004) tells us that the ICTR made changes to indictments "in response to complaints by local and international NGOs about a lack of political will to prosecute sexual violence" (Jefferson 2004, n.p.). Specifically, they write that "it was *only* [emphasis added] after local and international women's rights activists protested the absence of rape charges against Akayesu, including by submitting an *amicus curiae* brief to the ICTR urging it to bring charges of rape and other crimes of sexual violence against Akayesu, did the tribunal amend the indictment" (Jefferson 2004). Karin Grewal (2012) also finds that feminist advocates, including

organizations and individuals, played an important role in the relatively recent prosecution of sexual violence in the 2002 Special Court for Sierra Leone. These events, influenced by transnational activists, laid the foundation for future work in prosecuting war crimes and crimes against humanity, including the creation of the ICC itself.

Transnational civil society organizations were involved in the ICC from the beginning. In fact, non-governmental organizations (NGOs) were present for the Rome Conference, at which the Statute was drafted. Pace and Thieroff (in Lee 1999) note that more than 200 NGOs participated in the Rome Conference, including Amnesty International and Human Rights Watch. Certain NGO representation was greater than that of some governments (Pace and Thieroff in Lee 1999). The Women's Caucus for Gender Justice was also a strong advocate for the creation of an international criminal court which would focus on sexual violence (Sadat, Crane, and Scharf 2018; Steains in Lee 1999). This group, created right before the ICC in 1995, was part of the Coalition for the International Criminal Court (CICC) which was involved in each session for the Preparatory Committee for the ICC (Coalition for the International Criminal Court, n.d.d).

Anne-Marie de Brouwer (2005) claims that the ICC's efforts to address "the goal of criminalizing crimes of a sexual violence nature" are a result, in part, of a "strong NGO lobby" (de Brouwer 2005, 39). Chappell (2016) discusses the "politics of gender justice" within the ICC, including the role played by organizations in holding the ICC accountable for upholding and promoting gender justice (Chappell 2016). They tell us that the primary organizations of interest involved in this work at the ICC are: The Women's Caucus for Gender Justice (later Women's Initiatives for Gender Justice); and the Coalition for the ICC (CICC) and its members

REDRESS, Human Rights Watch, Amnesty International, and the International Bar Association (Chappell 2016, 24).

In analyzing the history of the prosecution of war crimes and SGBV at the international level, particularly at the ICTR and ICTY, many scholars point to the role of international and local activists in lobbying for particular changes and outcomes (Faucette 2012; Grewal 2012; Haddad 2011; Nelaeva 2010). However, these scholars fail to provide empirical evidence of how these lobbying efforts actually affect the process. These scholars, along with Winter (2012), St. Germain and Dewey (2012), and Engle (2005) do not provide any substantive qualitative data through which we can learn about the various activities, campaigns, methods, and strategies adopted by transnational activists in their work on SGBV and wartime rape. Further, the case of Jean-Pierre Bemba was concluded so recently that little scholarly work has been published in the field of political science studying the relationship between transnational activism and the first successful prosecution for wartime rape at the ICC. This is the gap in the literature that I intend to fill. This study will investigate the actors and dynamics that drive international justice mechanisms beyond structures to implementation and accountability. It is important to not only tell the story of the legal justice[2] achieved through these specific trials but also to demonstrate the broader dynamics furthering the accountability objective. Furthermore, I will shed light on the evolution of the Court as it establishes stronger precedents and better practices in the pursuit of justice for the aforementioned crimes.

[2] It is essential to note here that this dissertation focuses solely on legal or retributive justice, or the formal prosecution of crimes through the (international) court system rather than other mechanisms or processes aimed at restorative justice. Hyndman states that "[h]umanitarian law and its provisions may create some useful protected spaces for civilians and wounded combatants, but they are by no means sufficient" (Hyndman 2003: 183). However, a comprehensive study of alternative provisions is beyond the scope of this project. It must be said, however, that the Court describes itself as a mechanism serving both retributive and restorative justice (see, for example, International Criminal Court 2012a).

It would be irresponsible to fail to address here the strong critiques of the ICC's pursuit of justice coming from the literature and the field. Some of these focus on the general issues of criminal accountability and retributive justice or the role of politics in justice mechanisms (see Schabas 2013; Mamdani 2009; de Hoon 2017; Ba 2020). Increasingly, though, are discussions surrounding the ICC's alleged bias against the individuals and populations from the continent of Africa (see Keppler 2012; Clarke 2019; Bikundo 2011; Ba 2020). These are particularly relevant here, as the allegations would suggest an entirely alternative explanation for why the ICC has pursued (and successfully pursued) justice in certain cases. Authors of this critique note that nearly *all* situations under investigation are in Africa and all defendants who have been tried were African. The African Union (AU) called for ICC member states to refuse to cooperate with ICC calls for the apprehension of Sudan's Omar al-Bashir (Keppler 2012). This was shocking, considering the AU had been a supporter of the ICC and most members of the ICC were African. Clarke (2019) cites Rwanda's President Paul Kagame and his critique that "the ICC appears to have been 'put in place only for African countries, only for poor countries […] Every year that passes, I am proved right […] Rwanda cannot be part of colonialism, slavery and imperialism'" (Clarke 2019, 2). One implication of this, particularly relevant to this study, would be the ICC leadership pursues cases not because there is advocacy pressure to do so, nor because it is pursuing implementation of the laws it has been tasked to adjudicate, but because it acts with prejudice against African offenders and privileges offenders from other regions of the globe.

Human Rights Watch's Elise Keppler (2012) argues that this criticism does not represent most African individuals or states and that "[t]he characterization of the ICC as unfairly targeting Africans is not supported by the facts" (Keppler 2012, 6). The ICC itself responded to the criticism of its bias against African countries, stating:

> The ICC is concerned with countries that have accepted the Court's jurisdiction and these are in all continents. African countries made great contributions to the establishment of the Court and influenced the decision to have an independent Office of the Prosecutor. In 1997, the Southern African Development Community (SADC) was very active in supporting the proposed Court and its declaration on the matter was endorsed in February 1998, by the participants of the African Conference meeting in Dakar, Senegal, through the "Declaration on the Establishment of the International Criminal Court". At the Rome Conference itself, the most meaningful declarations about the Court were made by Africans. Without African support the Rome Statute might never have been adopted. In fact, Africa is the most heavily represented region in the Court's membership. The trust and support comes not only from the governments, but also from civil society organisations [sic]. The Court has also benefited from the professional experience of Africans and a number of Africans occupy high-level positions in all organs of the Court. The majority of ICC investigations were opened at the request of or after consultation with African governments. Other investigations were opened following a referral by the United Nations Security Council, where African governments are also represented. Finally, in addition to its formal investigations, the Court's Office of the Prosecutor is conducting preliminary examinations in a number of countries across four continents (International Criminal Court 2020b).

In the course of my research, I did not uncover evidence suggesting clear or overt bias against African states or individuals. This is especially true, considering the current investigation into the Ukraine situation, as well as several attempts to bring an investigation to Afghanistan, including the role of the United States in crimes committed there.[3] ICC expert Oumar Ba relayed his experience, telling me, "[w]hat response I've gotten was it is an insult to even suggest that because Bensouda is an African" (interview with author). From the existing literature and my own research, it does not appear that any nationality bias drives the ICC's investigative decision-making.

[3] Bensouda announced her intention to open such an investigation in Afghanistan. The US responded by revoking her visa to the US (Wintour, Bowcott, and Borger 2019).

Research Design and Methods

In order to better understand the impact and influence that transnational activists have on the prosecutorial process for wartime rape at the ICC, I adopted an inductive and qualitative approach within a case study design using interviews and document analysis. This allows for an assessment of the impact that various actors have on the court proceedings with process tracing. This provides exceptional leverage over this research question for several reasons. Rather than focusing solely on the *outcome* of advocacy (changes in law, charges, etc.) I am interested in uncovering the causal mechanism that connect the efforts of these transnational activists to the (successful) prosecution of wartime rape at the ICC. This will require, in order to make inferences about the mechanisms at work, relying on the "observable implications" of transnational activist influence. In other words, the task was to conduct an "analysis of evidence on processes, sequences, and conjunctures of events within a case for the purposes of either developing or testing hypotheses about casual mechanisms that might causally explain the case" (Bennett and Checkel 2015, 7). The goal of this study is to contribute to a broader understanding of how, and when, and to what extent transnational activists and other relevant actors serve as change agents in international justice mechanisms, specifically the International Criminal Court. This includes an in-depth look at actors within the Office of the Prosecutor and the development of the Court itself to ascertain changes in practices, procedures, and personnel that make prosecuting wartime rape a possibility. Using Bemba's and Ntaganda's trials as case studies for process-tracing allows us to understand shifts in both the contexts and actors that contributed to this dramatic change in international accountability and rule of law.

Given that my goal for this research was to understand the role of activism in wartime rape prosecution, and not the testing of a pre-existing theory, this research is inductive in nature.

That is not to say, however, that it is fully exploratory in approach, as the research was guided by the theoretical frameworks capturing transnational activist roles in international regimes (Keck and Sikkink 1998). These theories are useful, if limited here, in that they are largely focused on explaining when transnational activists choose to become active on a particular issue area and how they are able to achieve a certain level of success, rather than focusing on the causal mechanism. In terms of wartime rape, the phenomenon that needs to be explored is the newly successful prosecution of an old crime; in other words, why were known perpetrators of wartime rape often not indicted at the ICC for these crimes while Bemba was? How can the oft-cited lobbying efforts of transnational advocates contribute to our understanding of this shift? This can contribute to our understanding of the tools adopted by transnational activists in the pursuit of international justice and accountability.

This dissertation uses a case-based design utilizing process-tracing. Particularly, I am engaging in the "explaining-outcome" variant of process-tracing. My methods of data collection include interviews and the collection of court documents, such as *amicus curiae* briefs, and documentary evidence from transnational activist networks (TANs). These are used to construct a narrative for the Bemba trial, which is then evaluated and analyzed in order to construct and elucidate the causal mechanism at work between the activists' presence and the 2016 conviction of Jean-Pierre Bemba. The following chapter outlines the philosophical and logical underpinnings of my process-tracing research on the 2016 ICC trial of Jean-Pierre Bemba. I detail the sources of data and how I evaluated what I found as evidence, drawing on a rich tradition of qualitative case-study research on transnational activism, the creation of the ICC, and the changing of international legal norms regarding sexual and gender-based violence as war crimes and crimes against humanity. While conducting analysis on the Bemba trial, I found

rather surprising results—there was little-to-no public advocacy by major international NGOs regarding the case. Given what the literature indicated I should expect, it became clear that a comparison case would be useful. I wanted to determine whether the seeming silence of TANs was typical or atypical. Bemba was acquitted for his crimes in 2018, but a year later, Bosco Ntaganda was convicted of wartime rape (and many other crimes, including the first conviction for sexual slavery). The goal became to compare the treatment of each trial by transnational activists, in terms of the level attention given to each trial/defendant by the major human rights and humanitarian organizations, exemplified by public lobbying and activism.

Process-tracing is one approach to within-case analysis of social dynamics that is growing in importance in the study of the international criminal justice regime. Broadly speaking, process-tracing is a method that allows us to explore a case in-depth, with the analytical focus falling on the links *between* a cause and outcome (Beach and Pedersen 2019). This whole project, and process-tracing generally, is grounded in the pragmatist variant of "analyticism", in which we recognize that we, as researchers, cannot be separated from the social world we study, but that we can attempt to explain the world through grounding theory within the context of interest (Beach and Pedersen 2016, 13). Pragmatism further promotes that cases are "understood holistically" (Beach and Pedersen 2016, 13). This philosophy of science is consistent with the use of case studies, which are built upon the use of multiple data sources, allowing greater and more nuanced understanding and data triangulation, providing for enhanced validity (Yin 2014). The case study design also allows for the open and inductive approach that is required for theory development. Further, Yin (2009) notes that case studies are ideal ways to "deal with operational links needing to be traced over time, rather than mere frequencies or incidence" (Yin 2009, 9). Gillham (2000) echoes this and reinforces the unique ability of the

case study to "recreate the context and sequence of evidence" in order to find meaning in the phenomenon of interest (Gillham 2000, 21).

More specifically, I will be engaging in explaining-outcome process tracing. Explaining-outcome process tracing is used to develop a "comprehensive explanation of a particularly interesting historical outcome" (Beach and Pedersen 2019, 6). This approach is abductive in process, involving a constant iterative strategy linking theory and empirical observation in order to explain a specific case, rather than testing an existing theory or building a theory from scratch (Beach and Pedersen 2019, 11). With explaining-outcome process tracing, one can begin with the theoretical or the empirical. It was this research design that allowed for, and in fact necessitated, the addition of a second case.

The main starting point for my work is the theoretical. In particular, I was greatly impacted by the literature on the creation of the ICC and the diffusion of the norm for prosecuting perpetrators of wartime rape during and after the ICTR and ICTY as a starting point for understanding the 2016 conviction of Jean-Pierre Bemba. Even more compelling, however, was an assertion made by *New York Times* journalist Marlise Simons in an article on the Bemba conviction. Simons stated that "[l]argely because of pressure from human rights advocates and women's groups, organized or mass rape is increasingly being recognized and prosecuted as a weapon of war, not as a by-product" (Simons 2016, n.p.)

Using these as a starting point, I sought to explain how transnational activists and their efforts influenced the process of holding perpetrators accountable for wartime rape, specifically in the Bemba trial. This trial is essential for understanding how perpetrators are brought to justice, as it was the first conviction for wartime rape at the ICC. Yin (2009) cites Schramm, stating that "'[t]he essence of a case study […] is that it tries to illuminate a decision or set of

decisions: why they were taken, how they were implemented, and with what result'" (Yin 2009, 17). This is consistent with explaining-outcome process tracing, in which the goal is not generalizability, "but to construct a case-specific explanation of the major factors in a case" for a unique case with a historically important outcome (Beach and Pedersen 2019, 282). The Bemba trial is clearly such a case. The empirical record shows that TANs have lobbied for particular outcomes in international courts (see Broomhall 2003 and Spees 2003) making it reasonable to suspect that similar actions were taken during the Bemba trial. Further, non-academic sources have referenced the involvement of feminist organizations, as well as local and international NGO efforts. Therefore, this creates a reasonable starting point for this theory-first, but generally abductive case study.

Case selection for this dissertation was determined by both the research question and the logic of the research design: the conviction of Jean-Pierre Bemba was the *only* case at the start of this project. Ntaganda, the comparison case, was the second conviction at the ICC and the first upheld upon appeal, making both of these trials exemplary cases. Beach and Pedersen (2016) discuss the issue of case selection in great detail, particularly as it relates to process tracing. They define a "case" as an "instance of a causal process playing out, linking a cause (or set of causes) with an outcome (Beach and Pedersen 2016, 16). Importantly, the Bemba trial was the only conviction for wartime rape at the ICC before the Ntaganda trial in 2018[4].Therefore, these cases are the only available cases for studying how transnational activists can contribute to the successful prosecution of wartime rape at the International Criminal Court. As Beach and Pedersen (2016) point out, there is often little room for cross-case causal inference in process

[4] In 2021, Dominic Ongwen was convicted of several sexual and gender-based crimes, including wartime rape, a decision which was upheld upon appeal in 2022.

tracing. However, the acquittal of Bemba and the almost immediate conviction of Ntaganda for wartime rape makes iterative case work necessary and adds to the rigor of the findings.

There are several challenges with process tracing as a method of data analysis. First, there are myriad ways to do process tracing. Further, like any qualitative method of data analysis, process tracing is very time intensive. It requires fully delving into the details of a particular process, which may be a lengthy process, and reaching true data saturation before completing the project. This will also mean "seeking to fill the gap between the independent variable [transnational activism] –and the outcome [Bemba's conviction]" (Checkel in Bennett and Checkel 2015, 79). This gap is the causal mechanism that connects the activism of transnational networks to particular outcomes; in this case, the outcome is the conviction of Bemba for wartime rape at the ICC. Although this concern is important to acknowledge, it cannot keep a researcher from using it if it is the best tool to answer her research question. I sought to determine if transnational activists impacted the Bemba trial, and if so, explain the causal mechanism linking these two variables. As the literature currently offers no explanation for the success of this monumental case, I must employ the theory-building process tracing approach, which will allow me to identify the causal mechanism based upon an in-depth single case study utilizing myriad data types and sources (Beach and Pedersen 2019; George and Bennett 2005). Part of this process will be to utilize Hedström and Swedberg's template, as outlined by Schimmelfennig in following the four basic steps for process tracing for causal mechanisms: first, one must determine "who the relevant actors are; how their beliefs and preferences are formed […]; how they choose their actions […]; how the individual actions of multiple actors are aggregated to produce the collective outcome" (Schimmelfennig in Bennett and Checkel

2015, 105-106). Recreating the timeline and interviewing decision-makers regarding when and why they made their decisions will facilitate this analysis.

Methods of Data Collection

The use of archival and document research with interviews as methods of data collection is optimal for enabling me to investigate how transnational activists have been involved in the prosecution of Bemba for wartime rape, as well as how those activities have affected the process, the perception and decisions of the actors, and therefore the outcome. Text-based sources, such as website updates, social media posts, and organization reports provide valuable information regarding their activities and the response to activists. The value of using primary documents as data is not only to triangulate findings from the other methods of data collection, but also to understand the context in which the phenomenon of interest occurs, which is an essential function of the case study (Yin 2009; Beach and Pedersen 2019). These documents are also evidence of how actors prioritized action, what they perceived as important, and what their objectives were. They have allowed me to create timelines of activism and of the trials.

The organizations of interest were identified first by examining existing scholarship. The reading of contemporary news media articles identified new organizations and confirmed the involvement of others. *Amicus* briefs submitted to the Court provided further guidance for focus on organizations such as Women's Initiatives for Gender Justice (WIGJ) and Amnesty International, as they were parties to several *amicus* attempts and/or submissions. Especially useful for this research have been the *International Justice Monitor*, Amnesty International, and Human Rights Watch websites. Major news publications published stories following the Bemba trial, including *Al Jazeera, The New York Times, The Guardian,* and *Africanews*.

After identifying the activist organizations most involved in fighting for the creation of the ICC and monitoring its trials, I began searching their websites for relevant published reports. I consider two important, overlapping windows of time: the trial of Jean-Pierre Bemba which ran from his first appearance at the ICC on July 4, 2008, to his guilty verdict on March 21, 2016[5]. In order, however, to gauge the full range of transnational activism surrounding his prosecution, I include the period of time from the release of his arrest warrant on May 23, 2008, before his trial officially began. It is interesting to note that his arrest warrant was amended on June 8, less than a month after the first was issued, to include additional charges. At the ICTY and ICTR, we know indictments and charges were amended due to political pressure largely by activists, thus providing justification for me to use the issuance of the first arrest warrant as the starting point for the research on activism surrounding the Bemba trial. This same time frame is used for the search of activism surrounding Ntaganda's trial, which overlapped Bemba's trial from 2013 to 2016 (Ntaganda was arrested in 2013 and convicted in 2019).

The next step was to find contemporary news articles about the trial, from that same time period. I used the database Lexis Nexis to search for news articles published during Bemba's primary proceedings, from the issue of his arrest warrant to the day of his conviction (from May 23, 2008, to March 21, 2016). Articles were excluded if the focus was regarding Bemba's separate trial for witness tampering. These news sources were coupled with a close reading of the *International Justice Monitor*, published by the Open Society Justice Initiative and designed specifically to "provide regular, balanced, and accessible monitoring reports on select trials of those accused of atrocity crimes, focusing on prosecutions at the International Criminal Court

[5] Of course, this excludes the sentencing hearing and appeals process. He was acquitted by the Appeals Chamber on June 8, 2018.

(ICC), national courts, and hybrid tribunals" (International Justice Monitor, n.d.). The same process was undertaken for the trial of Ntaganda, using the same search window.

An important element of this research is the data collected in interviews completed with Special Advisers to the Prosecutor; transnational activists representing Human Rights Watch, Amnesty International, and the Women's Initiatives for Gender Justice; and ICC experts. I identified these interviewees through the process of secondary research for my literature review, noting which organizations were involved with the CICC and lobbying for the creation of the ICC, and later in providing communications to (and about) the ICC. I was particularly interested in members of the international justice wings of each organization, where applicable. Many of these same individuals continued to work in monitoring progress of the ICC and particular trials. These interviewees cross-referenced each other as well, demonstrating the connection between various actors involved in this work and their significance in the field. The scholars on the ICC were also identified through the literature review process. The Special Advisers I interviewed represent several portfolios and prosecutors, covering the initial operations of the ICC through the current prosecutor, Karim A.A. Khan. These interviews were conducted via telephone or Zoom video call, as many of the individuals operate from the Hague or European offices. This was especially necessary during the COVID-19 pandemic when international travel was impossible. Several interviewees only responded to my repeated interview requests after the emergency COVID-19 declarations had ended. There are several possible reasons for this, not the least of which is the increased comfortability of most individuals in using videocall technology and trusting in its security.

These methods of data collection provide the greatest validity in answering this particular research question. The initial phenomenon of interest, the conviction of Bemba for wartime rape

at the ICC, has already occurred thus making other methods of data collection impossible, including participant observation or an experimental design. Further, surveys would be inadequate, as they provide too many constraints on the respondent. Question and wording bias can affect the validity and reliability of data collected. In addition, the sample size would not be great enough to render surveys useful (Chambliss and Schutt 2006). As a result, documentary analysis demonstrating public advocacy and interviewing those involved in the activist organizations allows me to get closest to the truth, as it is perceived by those present for the trial process.

Summary of Findings

Academic literature and journalists credit the work of human rights actors for ending impunity for violations of international humanitarian law. However, I do not find much public evidence of these dynamics when it comes to the Bemba and Ntaganda cases. What I do find is evidence that the Court does have relationships with these actors and organizations—by design—and those relationships appear to be important in helping shape overall Court procedures and practices. This then translates to better (more) convictions for wartime rape at the ICC. Transnational activists can submit amicus briefs during trials, which sometimes happens at the explicit request of the Prosecutor or other Court actors. Members of NGOs and well-known, respected scholars are often invited to serve as Special Advisers on issues of importance within the OTP itself. Assistance is sought at all levels of policy creation within OTP as well, through both formal and informal channels. I found that the public-facing role of transnational activists seems to matter more for the development of policy, rather than in advocating for outcomes of particular trials. The changes in the Court's practices, although aided by transnational activists

and external experts, seem largely to be driven from within. In other words, successful outcomes at the Court do not appear to be driven by NGO activism as the literature led me to expect.

Roadmap

This dissertation will proceed as follows: In the first chapter, I will discuss the international legal structures relevant to the prosecution of wartime rape at the ICC, including the history of wartime rape as a crime and the evolution of the ICC itself, especially in terms of the work transnational activists put forth to make the Court a success. In Chapter Two I will provide important context for the conflicts in which these two defendants operated, stories which overlap with each other in chronology and geography. I discuss the defendants: Jean-Pierre Bemba Gombo himself, as the former Vice President of the Democratic Republic of Congo (DRC) and, more importantly, the leader of a militia responsible for the murder of thousands and the rape of at least hundreds of men, women, and children in the Central African Republic, as well as Bosco "The Terminator" Ntaganda, former Congolese warlord and military chief of staff. I will outline the charges against these defendants for crimes against humanity and war crimes, as well as the proceedings of the trial culminating in their convictions. In Chapter Three, I will present the evidence derived from the document analysis and interviews. From this, we will be able to demonstrate the impact and influence that activists exerted on the trial proceedings in Chapter Three. I will conclude with a summary of these findings, as well as provide recommendations based upon the findings herein.

CHAPTER ONE: INTERNATIONAL LEGAL STRUCTURES AND THE CRIME OF WARTIME RAPE

The structural makeup of the ICC, including the influence of other international courts on that structure is key for understanding the role of transnational activists on the Court. As shown by the literature on the ICC, lessons were learned from prior tribunals and cases, which helped shape the creation of the ICC. However, the existence of a court focused on the prosecution of sexual and gender-based violence (SGBV) does not guarantee the successful prosecution of those crimes. In the first decade[6] of its operations, there were no convictions for SGBV. Bemba's conviction for wartime rape in 2016 was a monumental achievement for international justice and the ICC. This achievement was reversed upon his acquittal in 2018, though attained soon after by the conviction of Bosco Ntaganda for several sexual and gender-based crimes. The following chapter explains the origins of the ICC—the treaties and international law in which it is grounded, as well as the tribunals after which it was modeled. I describe several "structural roles" within the Court which help to understand the entry points for external influence of the Court via NGOs and other transnational activists.

Origins of the ICC, International Criminal Law, and Wartime Rape

International Law

The justification for prosecution of war crimes and crimes against humanity rests in international law, a combination of humanitarian and human rights law. Although these are codified in different places, collectively these legal provisions provide the foundation for

[6] More than a decade-the Court "began" when the Rome Statute entered into force in 2002.

international criminal prosecutions for the most egregious crimes of international impact. International humanitarian law is invoked during an armed conflict (Askin 2003). Human rights law, on the other hand, does not *require* this connection to armed conflict, although it can be invoked in the context of a conflict (Askin 2003). Human rights law "applies principally in times of peace as a way to protect individuals from their own governments" while humanitarian law "governs relations between states in times of war and protects individuals from enemy powers" (St. Germain and Dewey 2012, 3). The culminating international law is based upon major international treaties and conventions, such as the Hague and Geneva Conventions.

War crimes, embedded within international humanitarian law, are codified throughout several legal mechanisms, especially the Hague and Geneva Conventions, as well as the founding document of the ICC—the Rome Statute of 1998. These crimes can fall into one of several categories, although all refer to "violations of international humanitarian law (treaty or customary law) that incur individual criminal responsibility under international law" (United Nations, n.d.b) In short, war crimes are related to armed conflict and can include things such as murder, intentionally targeting civilians, pillaging, rape and other forms of sexual violence, and recruiting child soldiers. Especially important for our story is the section of the Rome Statute, Article 8, which cites as a war crime "committing rape, sexual slavery, enforced prostitution, forced pregnancy […] enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions (United Nations, n.d.b).

Article 7 of the Rome Statute addresses another aspect of international humanitarian law in crimes against humanity, meaning particular acts that are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" including "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization,

or any other form of sexual violence of comparable gravity; torture; and murder" (United Nations, n.d.b). The 'contextual element' distinguishes war crimes from crimes against humanity in that the act of violence must have "involved either large-scale violence in relation to the number of victims or its extension over a broad geographic area (widespread), or a methodical type of violence (systematic)" (United Nations, n.d.b). In other words, the same acts committed can be deemed either war crimes or crimes against humanity (or both) depending upon the context.

The Red Cross writes that "[t]he Geneva Conventions and their Additional Protocols are at the core of international humanitarian law, the body of international law that regulates the conduct of armed conflict and seeks to limit its effects" especially for non-combatants (International Committee of the Red Cross 2014). The four Geneva Conventions are the subject of much debate *vis-à-vis* sexual violence and wartime rape. The first three fail to mention wartime rape or sexual violence. The Fourth Geneva Convention (1949) goes further than the first three, considering that it does explicitly mention rape[7]. However, the specific wording leaves much to be desired in terms of general principle as well as practical application. The Fourth Geneva Convention states that "women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault" (International Committee of the Red Cross 1949, 179). This is problematic, as it does not make rape a crime in itself, but rather a violation of a woman's "honor" and "dignity" (Askin 1997; d'Aoust 2017). Further, the Fourth Geneva Convention does not include rape or sexual violence in its list of "grave breaches" in Article 147, despite the enumeration of many other charges

[7] Neither the word "rape" nor "sexual violence" appears in the Geneva Conventions of (1864, 1906, 1929).

(International Committee of the Red Cross 1949, 221). This is important, practically speaking, when it comes to charging *as wartime rape* and not a constitutive act of other crimes.

Other institutions, however, have set a precedent for the prosecution of wartime rape, albeit weakly. The Nuremberg Tribunals only prosecuted sexual atrocities as examples of torture, rather than as crimes themselves. The Tokyo Tribunals went a little further (Askin 2003). The ICTR and ICTY statutes were vague, at best, on the issue of rape, leading to the inconsistent prosecution of rape and sexual violence generally. Although the *Akayesu* trial at the ICTR established rape as a tactic of genocide, it did not do much to faithfully prosecute sexual violence as war crimes or crimes against humanity. Several trials at the ICTY, including the Čelebići and *Kunarac* trials, prosecuted sexual violence, although wartime rape was not included in the statute's "grave breaches" and therefore was vastly under-prosecuted (Askin 2003).

Askin (2003) argues that "both customary and Hague [Conventions] Law prohibited wartime rape" but confirms that sexual violence was under-prosecuted. Patricia V. Sellers further confirms that rape in conflict was a crime "on the book" dating back to 1919, meaning it was prosecutable, although the United Nations (UN) did not formally establish rape as a war crime until the 2008 United Nations Security Council Resolution 1820. The historical lack of clarity on the potential for prosecuting rape in international criminal judicial bodies is—to put it mildly—troubling considering what we know about the perpetration of wartime rape.

Wartime rape is pervasive across conflicts and impacts millions of civilians. At least 1,100 women were raped in DRC during the 2010 Kivu conflict *every day*, averaging to approximately 48 rapes per hour (Heaton 2013). As reported by Jo Adetunji, "[t]hat rate is 26 times more than the previous estimate of 16,000 rapes reported in one year by the United Nations" (Adetunji 2011). Other studies show that more than 200,000 women and children were

raped in the 10 years of conflict in the DRC (Jackson 2008). The conflict in Liberia has become infamous for wartime rape: a vast majority (81.6%) of women "experienced some form of violence" and among those, 72.1% were raped (Medic in St. Germain and Dewey 2012, 92). In 2007, after the end of the conflict in Liberia, rape was still the most reported crime. We have seen wartime rape, whether committed as an intentional strategy of war or otherwise in the Central African Republic, Democratic Republic of Congo, Afghanistan, Haiti, the former Yugoslavia—in short, *most* conflicts.

It is worth repeating that *fewer than half* of all conflicts between 1989 and 2009 had *no* reports of sexual violence (Cohen and Nordas 2014, 423). Because of the high numbers of perpetration and dismal track record for the prosecution of wartime rape—and sexual violence generally—activists worked hard to ensure that the ICC would be a step forward in ending impunity for sexual and gender-based violence and ensuring justice for victims and survivors. Below I will discuss the institutions that laid the foundation for the creation of the ICC, including the ICTR and ICTY, and how the ICC has evolved over its short history. This includes an exploration of how activists were involved in shaping the Rome Statute of 1998 and the design and function of the International Criminal Court.

Creation of the ICC: Origin Institutions

"describ[ing]the confluence of justice norms, historical conditions, and activists' efforts that led to the [Rome] Statute" (Schiff 2008, 15).

The ICC was created on the basis of complementarity—it was designed to bring to trial those cases which domestic courts were either "unwilling" or "unable" to prosecute (Sikkink 2011, 18). It was designed to strengthen international law in the realms of both humanitarian law and human rights law— often thought of as the laws of war and the laws of peacetime,

respectively. The prosecution of violations of these laws was proving lackluster, despite the hope promised by the creation of the Nuremberg and Tokyo tribunals following WWII. In the 1980s, global leaders recognized the need for improvement in holding perpetrators accountable for violations of international criminal law and initiated calls for the creation of a court that would have jurisdiction regarding "the most serious crimes of international concern" (International Criminal Court 2011a; Sikkink 2011). This affirmed that the most grievous humanitarian and human rights abuses were not just limited to the individual victim (for there usually were many) nor to the state in which they occurred and that the responsibility for prosecuting these crimes was not the burden of just one state (International Criminal Court 2011a; Sikkink 2011). Therefore, an international court was needed to address crimes such as genocide, mass persecution, crimes of aggression, and other violations of international criminal law. Almost 2,000 NGOs and other human rights groups, including the International Association for Penal Law (AIDP), Human Rights Watch, and Amnesty International, along with high-level figures in international justice such as lawyers Benjamin Ferencz and M. Cherif Bassiouni, were involved in the advocacy effort for the creation of the ICC. Sikkink (2011) speaks at great length about the importance of these organizations, as well as the founding institutions for the formulation of the Rome Statute, which established the ICC. Particularly, Finnemore and Sikkink (1998) and Sikkink (2011) tell us about the importance of "norm entrepreneurs" or "agents having strong notions about appropriate or desirable behavior in their communities" who worked tirelessly for the creation of this new international body in the effort to establish the norm of individual criminal accountability (Finnemore and Sikkink 1998, 896).

The ICC was a direct descendant of the Nuremberg and Tokyo trials following World War II. Although these international military tribunals were an important beginning to a long and

nonlinear process, they left much to be desired. Sikkink (2011) states that the outcomes of these trials signaled "only in cases of complete defeat in war was it possible to hold state perpetrators criminally accountable for human rights violations" (Sikkink 2011, 5). Further, Clay (2017) laments that "concern for rape and other sexual violence committed during war remained virtually absent amidst the increasing focus on war crimes and crimes against humanity in the pre- and post-World War II era" (Clay 2017, 407).

From the Nuremberg and Tokyo tribunals came the principles for the International Criminal Tribunals for both Yugoslavia (ICTY) and Rwanda (ICTR) in 1993 and 1994, respectively. These principles included those of "individual culpability, command responsibility, rejection of 'superior orders' defense, and the idea of crimes against humanity and crimes against peace" (Schiff 2008, 38). In short, these tribunals increased the possibilities for prosecutions of human rights violations by expanding the definitions of culpability and perpetration. The statutes of the ICTR and ICTY are, in part, the result of intense lobbying and pressure from activist organizations that fought to see sexual violence prosecuted more thoroughly than the Nuremberg and Tokyo tribunals or domestic courts had proved able. Clay tells us this about the ICTR: "it took efforts from outside advocate groups and internal pressure from those within the adjudicative process to get the prosecution to bring charges of rape along with the original charges" (Clay 2017, 409). This is partly due to the fact that the Statutes of the ICTR explicitly include rape as violations of the laws of war.[8]

The uniqueness of the inclusion of rape in the ICTR statute shows that even as late as 1993, wartime rape was yet to be considered a crime to be prosecuted in and of itself, rather than

[8] According to Common Article 3 of the Geneva Conventions regulating conduct during international armed conflict and Protocol II of the Geneva Conventions regulating conducting during non-international armed conflict.

as part of some other nominate crime (Clay 2017). Although many lament the inconsistent application of the sexual violence protocols in the ICTR and ICTY, the *Akayesu* trial in the ICTR and *Čelebići* trial in the ICTY are two instances in which individuals were convicted of wartime rape (Askin 2003; Haddad 2011; St. Germain and Dewey 2012). This was a significant departure from the history of wartime rape trials and outcomes. The ICTY and ICTR were instrumental in shaping what became the ICC in 1998. In fact, Schiff (2008) states that the ICC is "explicitly a combination of the two" (Schiff 2008, 66). These bodies, along with domestic efforts to prosecute human rights violations in Latin America and Eastern Europe, have been instrumental in the creation of the ICC.

The ICC is unique, however, because those involved in its creation and administration were able to build upon the international legal bases of the UN ad hoc tribunals (e.g. the Hague and Geneva Conventions) and learn lessons from the operational successes and failures of the ICTR and ICTY in order to direct the focus of ICC efforts towards previously ignored issues. This is particularly true for issues of sexual and gender-based violence (SGBV). Spees (2003) notes that the Geneva Conventions "fell short of confirming rape and other sexual violence as 'grave breaches'" (Spees 2003, 1239). The Rome Statute, which created the ICC, explicitly references sexual violence in its definitions of *both war crimes and crimes against humanity*. This is an important departure from the ICTY and ICTR statutes. Article 7 of the Rome Statute defines crimes against humanity as certain violent acts that are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" including murder and torture, which are found in most other enumerations of human rights violations. However, the Rome Statute is the most explicit in its reference to sexual violence, as it includes "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced

sterilization, or any other form of sexual violence of comparable gravity" (International Criminal Court 2011a). The definition of sexual violence as a war crime is complicated by the important distinction within international law about the nature of the conflict (whether it be international or non-international). Overall, however, sexual violence is considered a war crime within the Rome Statute, including "committing rape, sexual slavery, enforced prostitution […] enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions[9]" (United Nations, n.d.b; International Criminal Court 2011). According to Schiff (2008), activists were integral to this development, "buil[ding] upon Yugoslavia and Rwanda precedents to get gender concerns addressed in the Statute—including making gender crimes both war crimes and crimes against humanity" (Schiff 2008, 150). He later refers to particular organizations, including Human Rights Watch and Women's Initiatives for Gender Justice. Most importantly for this study, Schiff argues that the "CAR investigation announcement demonstrated the crucial connection between NGOs and the ICC and in particular their role in drawing attention to sexual crimes" (Schiff 2008, 244). Further, the ICC also takes particular measures to ensure that victims and witnesses are protected throughout their participation in an investigation or trial, and it mandates the "presence of women on the Court plus experts on gender and Violence against Women" (Spees 2003, 1242). This is, as Spees points out, partly the result of a high level of involvement and advocacy of women's groups in the negotiation process for the ICC.

[9] This definition refers to those wars of a non-international character. Within an international armed conflict, sexual violence is enumerated as "committing rape, sexual slavery, enforced prostitution, forced pregnancy […] enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" (International Criminal Court 2011a).

In contrast to the Rome Statute's—and therefore the ICC's—clear and explicit definition of sexual violence as both a war crime and a crime against humanity, there is a great deal of confusion among practitioners and scholars on one vital point: jurisdiction. It is clear how situations come to the ICC: they can be initiated by the Prosecutor; they can be referred by a state that is party to the Rome Statute; or they can be referred by the United Nations Security Council. Further, the ICC has jurisdiction regarding the most serious violations of human rights and humanitarian law—the crimes of genocide, aggression, crimes against humanity, and war crimes. However, there is a great deal of room for interpretation regarding the issues of case admissibility, due to the principle of complementarity and the language of Article 17 of the Statute. Article 17 references the Rome Statute's Preamble and Article 1, which cite complementarity with national or domestic jurisdiction, going on to provide three instances in which cases are inadmissible:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court (International Criminal Court 2011a).

For most of the ICC's existence it has been considered to have jurisdiction *only* when states are "unwilling" or "unable" to properly carry out an investigation or prosecution. However, there are many who dispute this interpretation, saying it changes the scope of cases the ICC could actually take on (see Robinson 2010). This question is important in establishing legitimacy for the Court, as it brings to bear many issues regarding the legal basis for the ICC's work. Despite this confusion, the ICC has indicted more than 40 individuals, detaining 17 of them; has had more than 30 cases before it related to 16 situations; and has completed more than 20 trials with 10 convictions and 4 acquittals (Coalition for the International Criminal Court, n.d.b; International Criminal Court, n.d.a; Klobucista 2022). And yet, the ICC failed to convict *any* defendant of sexual violence until Bemba's conviction in March 2016. Two years later, he was acquitted. This shows the Court was a long way from fulfilling its promise of ending impunity for sexual and gender-based violence, despite all the legal and institutional bases for doing so.

Goals of the ICC

The structure and function of the ICC is largely a product of existing institutions, including international human rights law and humanitarian law, as well as the existing international retributive justice mechanisms in Yugoslavia and Rwanda—the ICTY and ICTR. The ICC was designed in order to prosecute "[t]he gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression" (International Criminal Court, n.d.a). However, it was not meant to simply be a war crimes tribunal. Spees (2003) writes that "[t]he ICC will also be a court for the trial of violators of a developing international criminal law that encompasses violations of the laws of war in addition to genocide and crimes against humanity, which can be committed in times of war as well as in

times of so-called peace" (Spees 2003, 1246). The Court claims to be "participating in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again" (International Criminal Court, n.d.a). Further, the Court notes that "[j]ustice is a key prerequisite for lasting peace. International justice can contribute to long-term peace, stability and equitable development in post-conflict societies. These elements are foundational for building a future free of violence" (International Criminal Court 2020a). Baked into the structure of the ICC is an element of restorative justice, beyond the retributive justice that traditionally dominates criminal judicial proceedings. The "victim-focused" orientation of the Court, including participation of victims as well the creation of the Trust Fund for Victims which implements reparation and support programs for victims and their families, is key to this principle of restorative justice (Schiff 2008, 32-33). The founders of the ICC were intentional, in both rhetoric and policy, in looking beyond the realm of retributive justice, which was a significant diversion from previous international court structures.

The ICC Finally in Operation: Prosecutor v. Lubanga, the ICC's First Trial Judgment

Thomas Lubanga Dyilo was the leader of the Union of Congolese Patriots (UPC), a Congolese militia supported by Uganda from its creation in 2000 until he was arrested by United Nations Peacekeepers in 2005 (International Criminal Court 2021c; BBC News 2012b). He was responsible for the massacre of hundreds, if not thousands of civilians over that time. However, he was not charged for these crimes at the ICC. Instead, he was charged and convicted as a co-perpetrator of "enlisting and conscripting of children under the age of 15 [and] using them to participate actively in hostilities in the context of an armed conflict not of an international character" (International Criminal Court 2021c). This case was the first verdict at the ICC,

rendered in 2012—10 years after it began its operations (BBC News 2012a). This monumental occasion was celebrated by many individuals and organizations, including Human Rights Watch and Amnesty International. The United Nations' Navi Pillay "welcomed the convictions as the 'coming of age of the ICC'" (BBC News 2012a).

However, there were also many criticisms of the Lubanga case, especially the failure to include any charges of sexual and gender-based crimes. Many claim that this criticism and lessons learned from it drove future behavior by the Court. Activists are given some credit for this push. For example, ICC expert Louise Chappell argued that the issue of gender was put back on the agenda at the ICC, for both NGOs and the Court alike, after the Lubanga trial. She stated, "I think gender waxes and wanes. I think it was not important [to the Court] at all initially […] I think Lubanga just blew the lid right off it" (interview with author). She went on to suggest that it was after that failure that civil society began to push to put gender back on the Court's agenda and spoke of dialogue between the Court and civil society around that. A former legal adviser at Amnesty International spoke of issues that "hadn't been addressed properly" in the Lubanga trial (interview with author). In 2012, upon Lubanga's conviction, Human Rights Watch published an article on the trial in which made several points about the lack of sexual violence charges. Overall, it criticized the lack of sexual violence charges in the case, stressing the importance that the OTP "bring charges that are representative of victimization" (Human Rights Watch 2012). As the trial was closed at the time, this was clearly meant to direct further OTP decisions. Criticism was also levied against the OTP for the length of Lubanga's trial proceedings, centered on concerns for Court efficiency and the preservation of the right to a fair and expeditious trial (Bosco 2014; Schabas 2020). Sarah Williams (2020) credits civil society for lessons learned from the Lubanga trial, stating the trial "shows the value of civil society intervention in trials,

with the criticism directed at the Prosecutor no doubt influential in subsequent decisions to include charges in other cases and in the adoption of a specific policy on SGBV […] In particular, Lubanga shows the utility of the amicus curiae mechanism, even if an application is not ultimately [accepted], in drawing attention to sexual violence and keeping the pressure on court actors to recognize and prosecute such violence" (Williams 2020, 356). Although that criticism was also applied to other trials, the Court has not seemed to expedite trial proceedings, at least for the Bemba and Ntaganda trials.[10]

Structural Roles in the ICC

The Four Main Organs

The institutional design of the ICC is important for understanding where decisions are made and how external influence in the form of NGOs and transnational activists might be part of that decision-making. Although Prosecutors may be the "face" of the Court, all departments of the Court are responsible for the prosecution of war crimes and crimes against humanity. There are four "primary organs" of the ICC, within which are housed all Court roles and personnel (American Bar Association, n.d.) However, there are also structural roles that account for participation of those outside of the Court (e.g. civil society). The four main organs are: the Presidency, The Judicial Divisions (more commonly referred to as "The Chambers"), the Office of the Prosecutor (OTP), and the Registry. The Judicial Divisions are made up of three divisions: the Pre-Trial, Trial, and Appeals Divisions. Each division has a president, a judge from among them who is elected to that position (American Bar Association, n.d.). The Registry supports the other organs of the Court. Many of the support organizations for victims and witnesses exist

[10] From confirmation of charges to verdict, the length of the Lubanga, Bemba, and Ntaganda trials respectively were: 6 years, 5 years, and 5 years.

within the Registry, discussed below. The Registry, importantly, "maintains [a] list of experts who may be called to provide services at any time for any organ of the Court or to be participants in Court proceedings. Qualified experts will be placed on the list for a 5-year term, renewable for one additional term upon the expert's request" (International Criminal Court, n.d.c). These experts are paid if "the expert is called to provide services" (International Criminal Court, n.d.c). There is an open application via the ICC website to apply for the status of an ICC expert. The OTP has special advisers, a very interesting and under-studied role within the Court, to which I devote a good deal of focus in this study. This is also a place where we can clearly see norm fortification.

The Presidency is the administrative organ of the Court, including an elected President and Vice-Presidents, who are judges at the ICC. The Presidency assigns judges to cases at the ICC. It is also the public-facing organ of the ICC, in charge of public relations on the international scene. The Judicial Division, which I will generally refer to as "the Chambers," is home to the 18 judges who are divided into the Pre-Trial, Trial, and Appeals divisions. The Pre-Trial Division grants leave for the Prosecutor to initiative preliminary investigations and confirms charges against defendants. The Trial Division is the body that actually hears cases and makes judgments. The Appeals Division, understandably, hears all appeals on verdicts rendered by the Trial judges. Judges from each division are assigned to cases in the form of Chambers—it is these Chambers, subsets of their divisions, that hear individual cases. For example, Trial Chamber III heard and ruled on Bemba's case, at the time composed of Judges Steiner, Aluoch, and Ozaki (International Criminal Court 2016g).

The ICC is unique in the power granted to the Office of the Prosecutor (OTP) to investigate crimes *proprio motu*—on his own impulse. While states and the United Nations

Security Council can refer cases to the ICC, the Office of the Prosecutor is particularly important for the prosecution of the "gravest breaches" because of *proprio motu* as well as the immense burden placed upon it to bring cases to trial. This also means that if activists or victim advocates wish to demand the Court hear a case, they have an avenue outside of states and the UNSC, if the OTP is willing to listen. This was a divisive issue during the preparatory committee (PrepComm) for the Rome Statute, but one that civil society insisted upon resolving. The Coalition for the International Criminal Court (CICC), an NGO coalition created for the purpose of participating in the creation of the ICC and monitoring its implementation, insisted upon the ability of an independent prosecutor to bring her own investigations (Glasius 2002, 137).

Sadat, Crane, and Scharf (2018) refer to the Prosecutor as the "gatekeeper of the Rome Statute system" because of the many roles and responsibilities of the office (Sadat, Crane, and Scharf 2018, 112). For example, the Prosecutor is responsible for "collect[ing] and disclos[ing] both incriminatory and exonerating evidence" (International Criminal Court, n.d.d). In other words, the burden of proof in both directions is on the OTP. This, of course, comes after the Prosecutor has fulfilled the obligation to conduct a preliminary examination to determine that the ICC has jurisdiction over the crimes committed. This includes addressing the issue of complementarity with domestic courts, as well as ensuring there is sufficient evidence of crimes committed to go to trial. (International Criminal Court, n.d.d). The judges work with the OTP by issuing arrest warrants, confirming charges, and making judgments. The Prosecutor is assisted in their work by three divisions and their heads: the Jurisdiction, Complementarity, and Cooperation Division; the Prosecutions Division; and the Investigations Division. They also rely on special advisers, who are appointed to work directly with Prosecutors to advise, write policy, and provide recommendations.

Within the Office of the Prosecutor: Special Advisers

In 2008, Catharine MacKinnon was appointed the first Special Adviser on Gender Crimes by Prosecutor Moreno Ocampo five years into his tenure as Chief Prosecutor of the ICC. The responsibility to appoint these advisers comes from Article 42, section 9 of the Rome Statute. The Article states specifically that "[t]he Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children" (International Criminal Court 2011a, 21). As former Prosecutor Bensouda describes, "[t]he role of the Special Gender Adviser is to assist the Prosecutor to integrate a gender perspective into all areas of the OTP's work" (Bensouda 2014, 539). MacKinnon was one of four such advisers appointed by Moreno Ocampo, with others holding portfolios in International Law, Crime Prevention, and International Humanitarian Law (International Criminal Court 2008; International Criminal Court 2010). In 2022, Prosecutor Karim Khan appointed twenty such advisers, more than either of the previous prosecutors (International Criminal Court 2021). Former Chief Prosecutor Fatou Bensouda writes that "this is not only a statutory obligation but also a requirement for effective investigations and prosecutions that take into account the interests of victims" (Bensouda 2014, 539). Part of this pursuit included the early creation, in 2003, of the Gender and Children Unit (GCU) that housed advisers dealing with the particular impact of conflict violence on children, as well as sexual and gender-based crimes. The GCU and its experts and advisers work directly with the Prosecutor throughout the entire process, from investigation to prosecution (Bensouda 2012).

The specific role of each adviser is determined by the individual and the Prosecutor under whom they serve—the ICC itself is very vague on the position. Interestingly, there is no mention in the Rome Statute about the role of these advisers beyond the single sentence from Article

42(9). We know that "[s]pecial advisers to the OTP are persons with recognized expertise in their field, who provide advice to the Prosecutor at her request or on their own initiative on training, policies, procedures and legal submissions. They work on a pro-bono basis and like all ICC staff, are required to sign a confidentiality agreement" (International Criminal Court 2012c). Communications regarding these advisers often contain a brief disclaimer explaining that advisers "are bound by the 'Standards of Conduct' stipulated in, inter alia, Annex I to Administrative Instruction ICC/AI/2016/002" (International Criminal Court 2021a).

The Annex I to Administrative Instruction does not use the term "adviser" at all. Instead, it refers to "consultants" who "shall have the legal status of an "expert" for the purposes of the Headquarters Agreement between the International Criminal Court and the host State ("Headquarters Agreement") and the Agreement on Privileges and Immunities of the Court ("APIC")" (International Criminal Court 2016a). The Agreement is not intended to outline the obligations of any individual but rather is an agreement between the Netherlands, as the host of the ICC, and the ICC on treatment of personnel either directly or indirectly affiliated with the Court for the purposes of fulfilling its duties. The Headquarters Agreement neither names advisers *nor* consultants, but instead refers to "'visiting professionals' [which] means persons who, not being members of staff of the Court, have been accepted by the Court into the visiting professional programme [sic] of the Court for the purpose of providing expertise and performing certain tasks for the Court without receiving a salary from the Court" which we must assume covers the special adviser or expert (Headquarters Agreement between the International Criminal Court and the Host State).

The Annex to Administrative Instruction provides this statement regarding the experts:

> The contractor shall neither seek nor accept instructions from any Government or authority external to the Court in connection with the performance of his or her obligations under the contract. Should any Government or authority external to the Court seek to impose any instructions on the contractor regarding the contractor's performance under the contract, the contractor shall promptly notify the Court and shall provide all reasonable assistance required by the Court (International Criminal Court 2016a).

This dictates that the special advisers are expected to remain independent from any outside influence, including NGOs, academics, activists, etc.[11] Former Special Adviser MacKinnon said she "didn't pay attention" to any public outcry regarding the Bemba trial, demonstrating that independence (interview with author). When asked if special advisers work with any external parties, including NGOs, the Office of the Prosecutor's news desk ceased responding to this author's emails. It is important to note, however, that the individuals who hold these posts are often leaders in NGOS and/or academics who study the ICC. For example, Brigid Inder was appointed Special Adviser on Gender by Prosecutor Bensouda in 2012 even as she held the post of Executive Director of Women's Initiatives of Gender Justice, the group created to monitor the implementation of the ICC's mandate to prosecute sexual and gender-based violence (International Criminal Court 2012b). Further, Juan E. Méndez served as president then president emeritus of the International Center for Transitional Justice at the same time he served as Special Adviser on Crime Prevention at the ICC from 2009-2011 (International Criminal Court 2009a). An interviewee, whose confidentiality is being protected here, wondered at the "dual role" in which Inder served, questioning the ability of one person to both hold the Court accountable for prosecuting SGBV while serving within the OTP, which is tasked with prosecuting SGBV

[11] The same is required of the of the Prosecutor: "The prosecutor acts independently and cannot seek or receive instructions from any external source" (Moreno Ocampo 2010).

(interview with author). However, this can also be viewed another way: as an advocate working from within the institution to advocate for change.

This demonstrates a structural relationship between transnational advocates and the institution that is both guided by policy and determined by norm. This dual role of advocate-insider means that advocacy can still have profound influence on the institution but *from within*, rather than through public pressure. Instead, advocates can lend their advice and expertise through formal positions housed within the OTP. Figure 1 in the appendix helps to show that many of the special advisers held positions within humanitarian or human rights NGOs or related law and policy clinics before, during, and/or after their tenures as special advisers.

Interviews reveal that the role of the special advisers can vary widely, depending upon the individual, their portfolio, and the prosecutor under whom they serve. Alix Vuillemin explains that "their mandate is to be fully independent of the office, they are special advisers, like independent expert givers" (interview with author). However, former Special Adviser Diane Amann described the role, pointing to the difference in involvement of each special adviser. She explained that "each adviser had a different set of rules […] and many of them did more in the nature of internal advising than I did" (interview with author). She said of former Special Adviser Patricia V. Sellers that "Patty Sellers had already been the gender adviser at the ICTY. She kind of knew everybody already and they, even if they knew her personally, they kind of knew her as an insider, if you will, in that community. And I think that that made the work she performed far different than mine" (interview with author). Amann went on to explain that the role played by special advisers, in terms of the work they did, whether it was providing feedback on decisions or helping to develop policies, was shaped, at least in part by those individuals' relationships with the Court *before* their appointment, as well as their physical proximity to the

Hague (interview with author). To summarize, Amann stated "The role was relatively unstructured. There was an appointment. There was a one-year contract, […] the special advisers are *pro bonos* and there weren't issues about that. If we were on mission, there were per diem payments. But other than that, it was largely an empty vessel to fill, as seemed appropriate in the circumstance" (interview with author). Special Adviser Patricia V. Sellers herself described the role in this way: "[t]he [special advisers] work on specific issues with lawyers and investigators in the OTP as well as broader strategy issues, such as development of the Gender Persecution Strategy Policy. That might entail meetings, legal memos, analysis of evidence or commentary on certain situations […] Some [special advisers] conduct or participate in training sessions for the OTP staff. These are internal and not assisted external persons unless they are specifically invited as experts" (email with author).

Former Legal Adviser at Amnesty International Jonathan O'Donohue has a long-standing relationship with the Court, having been stationed in the Hague and frequently attends meetings and events there. When asked about the role of special advisers, he could not provide a clear definition of the duties or activities but stated that although there "seems to be some structure to it [the position]" it was unclear in which direction the relationship flowed (interview with author). He explained that he was unsure "whether the court reaches out to them or they reach out to the court when [they've] got an issue or it works the other way around, but it does seem like there's ongoing research as well with those staff members, [that] they're looking at particular issues and doing research and developing sort of inputs" to the OTP (interview with author). My interviews with Vuillemin and ICC expert Louise Chappell confirmed that the role of the special adviser was ambiguous and seemed to depend upon the individual, including the perceived importance of their own area of expertise. Although there is ambiguity about the specifics of the

job, all seem to agree that the special advisers play an important role within the Court. As Ba states, appointing special advisers "is a good step in the right direction because it brings in different perspectives [in] the work of the Prosecutor's office" (interview with author).

The first Special Gender Adviser (SGA) was Catharine A. MacKinnon, appointed by Chief Prosecutor Luis Moreno Ocampo in 2008. MacKinnon is a lawyer and professor of law, as well as a prolific writer on legal theory, sexual and gender-based crimes, sex, and feminism. Further, with co-counsel she successfully represented Bosnian victims in the *Kadic v Karadzic* case under the Alien Tort Act in a civil claim under international law in the United States. This case was monumental, not only for the $745 million in damages, but also because it was the first time that rape was theorized to be and legally established as an act of genocide, an important example for later cases (University of Michigan 2021). The specifics of her work in the role as SGA at the ICC, however, are less concrete. This is not surprising, considering the level of confidentiality to which the post of special adviser is held. The press release announcing her appointment states that "Professor MacKinnon will assist Prosecutor Moreno Ocampo and Deputy Prosecutor, Fatou Bensouda - the OTP focal point for gender issues – and work with the Office's Gender and Children Unit, the specialized unit working on gender issues across all the Office's cases. Her immediate priority will be to further develop the approach to gender crimes in the Office's cases. Professor MacKinnon will also be working on Office-wide strategic approaches to gender issues" (International Criminal Court 2008). The details of this work are few, however, beyond this quote from her faculty profile: "she implemented her concept of 'gender crime'" (University of Michigan 2021). An interview with MacKinnon did not reveal many further specifics, as again, these advisers are bound by confidentiality agreements. She did tell me that she felt Prosecutor Moreno Ocampo was attentive to pursuing the statutory goals

concerning sexual and gender-based violence and seriously considered her assessments of the sexual and gender aspects of each case, an idea she echoed in a speech at the 2009 Consultative Conference on International Criminal Justice (interview with author; MacKinnon 2009). On that occasion, she made note of the Prosecutor's vision and work:

> our hope, our vision, and actually our plan, under the inspired leadership of the Prosecutor and the Deputy Prosecutor, is to pursue the gender crimes the Rome Statute defines wherever they happen of concern to the international community, and in the process to develop effective procedures and reality-based legal doctrines that respond to the practical imperatives for their effective prosecution. In order to stop these crimes and end this longest-running war (MacKinnon 2009).

In addition to MacKinnon as Special Adviser on Gender, Prosecutor Moreno Ocampo appointed three others as special advisers. Between 2009 and April 2010, Juan Méndez was appointed as Special Adviser on Crime Prevention; José Alvarez was appointed as the Special Adviser on International Law; and Tim McCormack was appointed as the Special Adviser on International Humanitarian Law (International Criminal Court 2010). Méndez served as a special adviser on genocide for Kofi Annan at the United Nations, after having been adopted as a "prisoner of conscience" by Amnesty International during his two-year detention and torture in Argentina from 1975 to 1977 (International Criminal Court 2009a). He later went on to work at Human Rights Watch for approximately 15 years (Washington College of Law, n.d.). José Alvarez, before his appointment, was a pre-eminent scholar on international law, having published on the ICTY and ICTR, as well as the role of international organizations in lawmaking (International Criminal Court 2010). An ICC press release describes this role as follows: "Professor Alvarez will focus on any public international law questions that arise in the course of the Prosecutor's duties. This may include, for example, the relationship between the Security Council and the International Criminal Court" (International Criminal Court 2010).

MacKinnon served until 2012, when Brigid Inder was appointed by Prosecutor Bensouda to serve as SGA. As noted above, Inder was also, at that time, serving as Executive Director of the Women's Initiatives for Gender Justice (WIGJ), formerly the Women's Caucus for Gender Justice. This organization was started at the Preparatory Committee for the ICC in 1997 and was deeply involved in the creation of the ICC. In fact, significant credit is given to the Women's Caucus for the gender perspective that is foundational to the ICC (see Copelon 2000). Later, it submitted amicus briefs for several cases and situations in the ICC, including the trial of Jean-Pierre Bemba. Inder was instrumental in creating the 2014 Policy on Sexual and Gender-Based Crimes through her role as special adviser. The policy paper notes that "…the Prosecutor has appointed advisers with legal and other expertise on specific issues-including sexual and gender violence- to develop the capacity of the Office further, and expand the expertise available to advise on its work," reiterating the Court's commitment to having SGBV experts on hand (International Criminal Court 2014c).

Patricia V. Sellers, international criminal and human rights lawyer, replaced Inder as the Special Gender Adviser in 2017. A press release announcing the appointment stated that "Sellers will, *inter alia,* provide advice to the Prosecutor. Her immediate priority will be to further strengthen the Office's approach to a range of gender issues and, support office-wide strategic responses to sexual and gender-based crimes under the Rome Statute," reflecting the same vague description of duties of the role (International Criminal Court 2017a). Before then, Sellers had served as the Special Adviser on International Criminal Law Prosecution Strategies to the Prosecutor, beginning in 2012, having been appointed by Bensouda. This followed her role as gender adviser at both the ICTY and ICTR. Later, Sellers acted as legal counsel to the aforementioned WIGJ, signing and submitting an amicus brief on the organization's behalf to the

Court for the trial of Jean-Pierre Bemba. Even more recently, Sellers was appointed by the current Chief Prosecutor as the Special Adviser on Slavery Crimes (International Criminal Court 2021a). Again here, we see an intimate relationship between advocacy and institutional work. Sellers moved between the two worlds, bringing her expertise from one to the other.

The current OTP has a wider range of special advisers than at any other period of the ICC's operation. At the time of writing, there is no "Special Gender Adviser" *per se* in the OTP, at least as it existed previously. There are several new portfolios related to gender and sexual violence, however. The current Chief Prosecutor Karim A.A. Khan appointed 17 Special Advisers in September 2021. Several are appointed without portfolios, mostly with international criminal law expertise. Others have specific portfolios, or areas of interest. For example, Tim McCormack continued his position as Special Adviser on War Crimes, after having served in that role for both Moreno Ocampo and Bensouda, although his portfolio under Moreno Ocampo and Bensouda was "International Humanitarian Law." Leila Sadat continued in her role as Special Adviser on Crimes against Humanity, a role held since 2012. Sadat was also on the Preparatory Committee for the creation of the ICC and at the Rome Conference. She continues to publish on the issue of SGBV, including a piece regarding the Jean-Pierre Bemba trial. Sellers was appointed as the Special Adviser on Slavery Crimes.

An interesting development in the office is the appointment of Kim Thuy Seelinger as Special Adviser on Sexual Violence in Conflict, a new portfolio. Thuy Seelinger submitted an *amicus curiae* brief for Chadian dictator Hissène Habré's case in Senegal[12]. Further fulfilling the requirement in 42(9) that OTP appoints someone with expertise pertaining to "sexual and gender

[12] Patricia V. Sellers did as well.

violence" is Lisa Davis, the current Special Adviser on Gender Persecution. Davis, like many of the aforementioned advisers, has a background in both criminal law and activism, further demonstrating the grey area between external influence and insider when it comes to the post of Special Adviser at the ICC. Davis is the co-director of Human Rights and Gender Justice Clinic and a former student of Rhonda Copelon.[13] Davis has been instrumental in establishing a new OTP policy paper on gender persecution. An ICC press release explains "[Davis], who assists the Prosecutor and the Office in developing this policy, underlined: 'Sexual and gender-based crimes are one of the gravest under the Rome Statute. The new OTP policy paper intends to contribute to the systematisation [sic] and development of innovative approaches in the investigation and prosecution of these heinous crimes.'" (International Criminal Court 2022). Several interviewees referred to the importance of Davis in developing this policy, citing her strong commitment to justice in that area of law.

Significantly, there exists a relationship between civil society and activist organizations and the Special Advisers. There is a great deal of crossover between the individuals serving as advisers and activists that lobbied for the creation of the ICC, the prosecution of SGBV at the Tribunals and the ICC, and even in the trial of Jean-Pierre Bemba. The literature on international justice for SGBV is full of references to the work of these activists: Leila Sadat, Patricia V. Sellers, Diane Amann, Richard Goldstone (former Chairperson for the Coalition for the ICC, former member of the International Group of Advisers of the International Committee of the Red Cross, and Chief Prosecutor for the ICTR and ICTY), who played direct roles in the creation of

[13] Rhonda Copelon was a true champion for women's rights, especially in international law. She was one of the founders of the Women's Caucus for Gender Justice (later Women's Initiatives for Gender Justice), a member of HRW, advocated for the prosecution of rape during war as a war crime, and many-time amicus of the ICTR and ICTY (Gormley 2010).

the ICC. Trainings and meetings within the OTP can include special advisers and civil society, including NGO leaders or experts. The Venn diagram of activists and advisers is not a perfect circle, but there is significant overlap.[14] This again demonstrates the connection between the humanitarian and human rights transnational activist networks and the institution of the ICC, as well as the possibilities for activism from within the Court.

Civil Society at the ICC

The lack of formal description of roles and duties of special advisers is in stark contrast with the way the ICC documents and describes the role of civil society organizations, including women's and human rights groups. The literature on the creation of the ICC never fails to mention the role of civil society organizations and women's groups for specific characteristics of the ICC. The ICC itself acknowledges the role of activists, stating on its website that "civil society organisations [sic] played a key role in advocating for the creation of the ICC, and NGOs continue to be important intermediaries for the Court in helping to raise awareness about the ICC worldwide and advocating for the universal acceptance of the Rome Statute" (International Criminal Court, n.d.b). An email exchange with the OTP's "news desk" yielded several links to ICC webpages regarding the role of civil society. The sender also included information on Article 15 of the Rome State which explains communications to the Court about crimes. Specifically, the sender stated that:

> "[u]nder article 15 of the ICC Statute any person or group can send information ("communications") on alleged crimes to the ICC Prosecutor. The Prosecutor is legally required to keep that information confidential […] The information and allegations in such communications, in case not manifestly outside the Court's jurisdiction, are further assessed by the Office and can lead to the

[14] See Figure 1 in appendix for a visual representation of this web of connections between NGO representatives, scholars, amici, and special advisers.

> opening of a preliminary examination. The information may also relate to an already ongoing investigation […] The Office has additionally created a portal—the OTP Contact Pathway—in case individuals want to contact OTP regarding ongoing investigations and ICC suspects at large" (email to author).

The Coalition for the ICC (CICC) a major force in the PrepComm which established the ICC, still coordinates accreditation for NGOs who wish to engage in the biannual ICC-NGO roundtables or act as court intermediaries with domestic institutions. The CICC's website describes the relationship between civil society and the ICC in the following way: "[w]hile at all times maintaining independence from both the ICC and its member states, global civil society plays an indispensable role in helping the Court deliver truly global justice" (Coalition for the International Criminal Court, n.d.a). It then goes on to describe six different ways in which NGOs "help the ICC fulfill its mandate to end impunity for the world's worst crimes" (Coalition for the International Criminal Court, n.d.a). NGOs hold the Court accountable in the following ways: through courtroom monitoring; submission of amicus curiae briefs; "institutional monitoring" which it describes as "monitor[ing]the development of the ICC as an institution, its policies and strategic direction, offering unique expertise in order to effect reform when necessary"; serving as intermediaries between local groups and the Court; providing evidence about conflicts, human rights violations, or other situation-related information gathered during preliminary examinations; and "liaising between the ICC and victims and communities affected by crimes under its jurisdiction" (Coalition for the International Criminal Court, n.d.a). The role of NGOs in gathering evidence and documenting violations for preliminary examinations is examined in Chapter Four.

Victim Participation at the ICC

The Rome Statute more explicitly creates space for the participation of victims, or those described by the ICC as "those who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court" (International Criminal Court, n.d.f). Victims can be individuals, groups, or organizations. Article 68(3) of the statute accounts for the participation of victims. The ICC website states that "during judicial proceedings, victims have the right to present their views and concerns directly to the ICC judges [and] victims may exercise their participatory rights throughout all instances of judicial proceedings, including appeals" (International Criminal Court, n.d.f). Primarily, the work is done through a legal representative (the "Legal Representative for Victims" as they appear in court documents and reporting) who may present oral or written submissions on behalf of the victims, so victims do not appear in person before the Court. They also have the right to information about the trial. The Court has an Office of Public Counsel for Victims, housed within the Registry, but victims are also free to choose their own legal representatives who attend hearings, make opening and closing statements, cross-examine witnesses or bring their own witnesses during trials (International Criminal Court, n.d.g, 14-15). Victims can receive reparations, if granted, upon conviction of a guilty party.

These victims may also testify as witnesses, taking what is called "dual status," but most do not. Victims chosen to testify typically do so after the Prosecution case and before the start of the Defense case. They can be called by the Prosecution, Defense, or the victims' legal representatives. They may answer questions from both the Prosecution and Defense. Because they testify in person before the Court, they are granted an opportunity to present their story in a way that differs from the role of a witness. Participating as a victim is voluntary and includes

legal representation by the Legal Representative for Victims. Serving as a witness, however, is involuntary, as the witness is called to "serve the interests of the Court and the party that calls them" (International Criminal Court, n.d.g, 14).

According to HRW, victims played a key role in the Lubanga trial. The organization stated that:

> "Victims made a significant contribution. For example, victims' representatives raised concerns about the limited nature of the charges against Lubanga. They brought a motion asking the judges to change the legal characterization of some of the facts presented during the trial to better reflect sexual violence against female child soldiers. In January 2010 the trial chamber also heard from three victims who were allowed to appear before the court and tell the judges in person what happened to them. This testimony—initiated not by the prosecution but solely on behalf of the victims as part of their recognized right to tender evidence against the accused—was a significant development" (Human Rights Watch 2012).

This shows that the Court, by design, has a particular emphasis on the needs of victims.

Other types of witnesses include fact witnesses, who testify about the facts of the case or the crimes that were committed and may or may not be victim-witnesses. Insider witnesses are those who have direct links or relationships with the guilty parties and are able to provide insider information. Expert witnesses lend their expertise to analyses of the cases at hand (International Criminal Court, n.d.h; International Criminal Court, n.d.c). A list of these experts is held within the Registry to call upon where necessary. Experts remain on the list for 5 years and are eligible for payment to account for travel to the Hague to testify before the Court (International Criminal Court, n.d.c). Finally, there are overview witnesses, which are similar to expert witnesses in that they generally are not direct witnesses to the commission of crimes but instead "help establish facts about the context in which a conflict occurred, and can include, for example, professors or

NGO representatives" (International Criminal Court, n.d.h). Witnesses generally do not have legal representation.

The statute also explicitly accounts for the creation of a particular unit, the Victims and Witnesses Unit, to be housed within the Registry. The "vulnerability status" of witnesses is determined by expert staff within the Registry to provide guidance to the Chambers on how to solicit testimony from witnesses who are deemed vulnerable, or "at increased risk of psychological harm or who may experience difficulties testifying before the Court" (International Criminal Court, n.d.h). Specifically, it states that "[t]his Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling [sic] and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence" (International Criminal Court 2011a, 21). The role of these staff members and the protective measures is to ensure that witnesses are safe to give their testimony and are not at risk of re-traumatization by their involvement with the Court. Written "vulnerability protocols" were published for both the Bemba and Ntaganda trials (along with several others), providing specific instructions regarding witness protection and vulnerability status (International Criminal Court, n.d.h).

There exists the Victim Participation and Reparations Section to help victims with applications for reparations. Where reparations are not paid by the guilty party (in cases of defendant indigence), the Trust Fund for Victims (TFV) exists, in order to "complement the Court's work on reparations, an independent Trust Fund for Victims was established. The ICC judges may ask the TFV to help to carry out its orders of reparations against a convicted person.

In addition, the Fund can use the contributions it receives through voluntary contributions from States and others to finance projects for the benefit of victims" (International Criminal Court, n.d.g, 15).

Assembly of States Parties

The Assembly of States Parties (ASP) is "the management oversight and legislative body of the International Criminal Court" (Assembly of States Parties to the Rome Statute, n.d.). Each member-state has a representative chosen by their head of government or state or the minister of foreign affairs. This body makes decisions about budgets, elects judges and the chief and deputy prosecutors, and engages in other activities of governance for the ICC. Importantly for the purposes of this study, the ASP also hosts annual meetings where civil society is deeply involved. The Coalition for the International Criminal Court (CICC), the umbrella organization for a lot of human rights and humanitarian organizations that have been involved in the creation and implementation of the ICC, explains that "serving as the governing body of the Court, the ASP meets in full plenary once a year to discuss and decide upon matters key to the future functioning of the ICC. Civil society is there every step of the way, monitoring sessions and interacting with delegates, in order to advocate for a fair, effective and independent ICC" (Coalition for the International Criminal Court, n.d.e). In fact, one interviewee* suggested that it is through the ASP that civil society has the most engagement with the Court (interview with author).

The outcomes of these meetings are some of the most transparent happenings at the Court. The ASP website is a repository of information from previous meetings, including

* denotes confidential interview; identity protected.

documents containing resolutions in several languages; transcripts of statements made by states, Court personnel, and civil society; and even budget documentation (Assembly of States Parties to the Rome Statute 2021). Author interviews with NGO representatives and other activists revealed that the "side events" at the ASP are crucial moments for activists to create and maintain relationships with representatives from states parties whom they view as *their* advocates within the Court system in many ways. The ASP is organized even in these extracurricular meetings, with clear guidelines on their conduct. The Bureau of the ASP—the executive board, if you will—explains that "side events are organized in the margins of the official meetings of the Assembly. The topic of the side event should be relevant to the work of the International Criminal Court/Assembly of States Parties […] Side events should be sponsored by a State Party. Side events not sponsored by a State Party are to be held in the two rooms allocated to non-governmental organizations, in direct consultation with the Coalition for the International Criminal Court [CICC]" (Assembly of States Parties to the Rome Statute 2022, 1). This clearly demonstrates not only the link between NGOs and the ASP, but the institutionalization of this link.

International Justice from the "Outside": Transnational Activism by Human Rights Actors

Expectation of the efforts and activities for the human rights organizations that framed this paper are based upon the extant literature surrounding transnational activism, à la Margaret Keck, Kathryn Sikkink, Martha Finnemore, and others. First, we must understand who transnational activists are, what general strategies they employ, and why they are successful. A brief discussion of this process is included. Finally, I will demonstrate how we would expect the same pattern to unfold vis a vis the ICC trials of Jean-Pierre Bemba and Bosco Ntaganda.

Ultimately, I find that the activists did not engage in the public lobbying to the degree that I had anticipated.

Given the literature on issue emergence and adoption, we know the process through which transnational activist networks and the actors within apply pressure on major targets—states, international organizations, Conferences—to enact legislation, sign treaties, or change behavior. We know, thanks to Keck and Sikkink (1998), that transnational activist networks are particularly effective in advocating for international change regarding "bodily harm to vulnerable individuals" (Keck and Sikkink 1998, 27). This, of course, includes the double jeopardy of vulnerability for women and children in conflict zones. We also know that in order for activism and advocacy to be successful, we need to have both actors to engage in the activism as well as targets who have the potential for response to such activism (Keck and Sikkink 1998, 28). When applied to the case of the International Criminal Court, we have human rights organizations in the former category, with the Office of the Prosecutor (OTP) as the group "vulnerable to persuasion or leverage" (Keck and Sikkink 1998, 28). Particularly, the targets within the ICC are vulnerable to "moral leverage" arising out of the "sensitiv[ity] to pressure because of gaps between stated commitments and practice" (Keck and Sikkink 1998, 29). The ICC was created in part to address human rights violations *especially* against women and children, so a failure to address sexual and gender-based violence in conflict would be such a "gap." In other words, failures in implementation can provide the impetus for action by humanitarian and human rights advocates.

It becomes clear that the work surrounding conflict-related sexual and gender-based violence is a transnational activist network (TAN) when we examine Keck and Sikkink's (1998) definition of this type of activism and the reason behind their success. They write that "influence

is possible because the actors in these networks are simultaneously helping to define the issue area itself, convince target audiences that the problems thus defined are soluble, prescribe solutions, and monitor their implementation" (Keck and Sikkink 1998, 30). We know that many of the same organizations were working within and advocating for outcomes in the ICTY/ICTR, in writing the Rome Statute and calling for its ratification, in gender advising in the International Criminal Court throughout its tenure, and in submitting *amicus curiae* briefs. In fact, many of the same *individuals* were engaged in all this work. These actors "aim to use information and beliefs to motivate political action and to use leverage to gain the support of the most powerful institutions" (Keck and Sikkink 1998, 30). In other words, they coordinated efforts to create the "political will" to prosecute sexual and gender-based violence, including wartime rape for the first time in 2016 with the trial of Jean-Pierre Bemba, but again throughout other trials. However, the level to which they engaged in this behavior is lackluster and they do not seem to have an impact on specific trial outcomes.

CHAPTER TWO: CONTEXT OF CONFLICT: WARS IN MIDDLE AFRICA

Jean-Pierre Bemba and Bosco Ntaganda were convicted of a combined total of 23 counts of war crimes and crimes against humanity, including the crimes of murder, rape, pillaging, persecution, and the conscription of child soldiers. Although they were convicted for crimes committed in different countries and different conflicts, their paths are rooted in the same context: the aftermath of the Rwandan Civil War. The context of violence stemming from the Rwandan Civil War shaped the lives of both warlords, leading them to careers of politics, military service, and ultimately, sitting before a panel of judges in the Hague. The following is a discussion of the conflicts in both the DRC and CAR, including the entry of both Bemba and Ntaganda into lives of violence. From there, I will trace the two men's journeys to—and through—the ICC trial process. A central theme runs through both trials: the need to balance efficiency for the Court itself, while ensuring a fair and expeditious trial for both the victims and the accused.

Spillover from Neighboring Conflicts: The Rwandan Civil War and Genocide

Both Bemba and Ntaganda led complicated existences in the Democratic Republic of Congo (DRC) as their lives were entangled in conflict, political ambitions, international relationships, and enriching enterprises. Ntaganda was born in Rwanda but fled to the DRC as a child to escape the violence in his home country (Dale 2019). Similarly, Bemba was a native Congolese, but he spent more time in Europe than in his country of origin during his childhood. Bemba's father was a wealthy businessman and well-connected in DRC politics; Bemba would follow in his footsteps in that way. Both defendants were impacted greatly by the fighting that spilled over from the Rwandan Civil War and genocide into the DRC. Both formed or joined rebel groups that centered on protecting their respective communities from the same set of

violent actors—state actors and rebel groups like—and did so in the same regions of the country. It is unclear to what extent Bemba and Ntaganda personally knew each other, although it stands to reason that they may have, given (a) the movement of their troops, (b) their uneasy, and often conflictual, relationships with the DRC Kabila administration, and (c) the eventual support given to Ntaganda's troops by Bemba's forces.

The story of the Rwandan Civil War and subsequent genocide of ethnic Tutsis is one that has been told many times before and it certainly deserves greater attention than I am able to give here.[15] I must, however, highlight the specific actors, events, and dynamics of that era that contributed directly to both the First and Second Congo Wars—the context for the upbringing and military/political training of both Jean-Pierre Bemba and Bosco Ntaganda that led to their (alleged) commission of war crimes and crimes against humanity in the CAR and DRC, respectively.

The Rwandan Civil War[16] began in 1990 as a result of internal tensions that were heightened by colonization, then politicized and played upon post-independence in the early 1960s. Tutsis, who had been favored by their European colonizers, fled Rwanda as independence became imminent and anti-Tutsi sentiment became more vitriolic among those espousing "Hutu Power." Thousands of Rwandans settled in the neighboring Democratic Republic of Congo. Many were Tutsis resettling in Goma, in North Kivu near the Ugandan and Rwandan borders. These people were referred to as *Banyarwanda* (the people of Rwanda) as they came from Rwanda and spoke *Kinyarwanda* (Stearns 2011; Van Reybrouck 2010). Refugees also settled in South Kivu, in the town of Mulenge and referred to themselves as *Banyamulenge* (the people of

[15] See Van Reybrouck (2010); Stearns (2011); Meredith (2011)
[16] See Map 1 in Appendix for map of Rwanda and surrounding countries

Mulenge). Meanwhile, Rwandan Hutus, who had been largely marginalized by colonizers, assumed control of the political institutions in Rwanda. They instituted anti-Tutsi policies, including barring Tutsis from citizenship, confiscating Tutsi-owned property, and even forced expulsion. Tens of thousands were massacred during this time (Van Haperen 2002, 101-102). Juvenal Habyarimana, Hutu president until his assassination in April 1994, turned to extreme policies in the late 1980s and early 1990s to appease hard-liner anti-Tutsi political factions. Estimates of Rwandan refugees number in the hundreds of thousands. Refugees in Uganda formed the Rwandan Patriotic Front (RPF), a rebel group intent on overthrowing Habyarimana and ending Tutsi persecution at home and abroad (Van Haperen 2002, 102). Rwandan-born Bosco Ntaganda fled to the DRC when he was 17 to escape the violence at home (Dale 2019). He was among those who joined the RPF in Uganda. In October 1990, the RPF entered Rwanda from Uganda, its main backer. This escalated the anti-Tutsi/pro-Hutu sentiments and the violence as well.

The first several years of the 1990s were years of violence in every sense of the word—physical, political, structural, etc. Habyarimana established his own paramilitary apparatus, which later became the main perpetrator of the Rwandan Genocide, the *Interahamwe* (Van Haperen 2002, 102). October 1993 saw the assassination of Burundi's Hutu president Melchior Ndadaye, after which tens of thousands of Hutus fled from Burundi to the DRC (Stearns 2011). Only 7 months after Ndadaye's assassination, on April 6, 1994, Habyarimana's plane was shot down; with him was Hutu Burundian president Cyprien Ntaryimana. Ntaryimana had served for only 2 months-the same as Ndadaye before him.[17] The assassination of Habyarimana served only to further fuel the anti-Tutsi violence; countless Tutsi elites and moderate Hutus were killed in

[17] Several men served in that role between Ndadaye and Ntaryimana in transitional positions.

the *hours* after Habyarimana's death was announced (Van Haperen 2002, 109-110). The (previously planned) massacre continued for months as the Hutu Power extremists aimed to kill as many of its (perceived) rivals as possible, including civilians. As Stearns (2011) reports, between April and June 1994, approximately 800,000 Rwandans were killed. Most of the victims were Tutsis and most of the perpetrators were Hutu extremists (Stearns 2011, 13).

The Rwandan Civil War and subsequent genocide meant that there were at least tens of thousands of refugees fleeing the violence in Rwanda and neighboring Burundi. After the genocide, when political power shifted from the Hutu Power administration to the Tutsi RPF led by Paul Kagame, members of the former Rwandan army, the *Interahamwe* (non-state but state-endorsed death squads), and Hutu civilians fled the country to avoid retribution. The total number of Rwandan refugees created by the violence is estimated at 2 million (Eastern Congo Initiative, n.d)

Foreign Involvement in the DRC: Overthrowing the Dictator Mobutu Sese Seko & Increased Ethnic Tension

The DRC was governed at this time by Mobutu Sese Seko, a Congolese dictator and political opponent of pan-Africanist Prime Minister Patrice Lumumba. Xenophobia intensified under Mobutu Sese Seko's DRC, with increasingly anti-Rwandan policies in the 1980s, including policies denying citizenship to descendants of Rwandan immigrants. Children of Rwandan immigrants and their families began to self-identify as *Banyamulenge*[18] to stress that they were, in fact, Congolese (Stearns 2011; Van Reybrouck 2014; Human Rights Watch 1997).

[18] The term *Banyamulenge* is often incorrectly used to describe Congolese militias or violent armed groups, rather than to a Rwandan identity group; even amongst Congolese there is disagreement about who are *Banyamulenge*. This conflation served to confuse the international community about the specific dynamics of the conflict in the DRC. Stearns (2011) succinctly describes the *Banyamulenge* as a "small community of Tutsi, the minority ethnic

By 1996, the Mobutu[19] administration was attempting to expel all foreigners, calling for the expulsion of all *Banyamulenge,* a reversal of the support he had shown them just two decades before. As a result of the anti-Tutsi violence, many members of the *Banyamulenge* joined officially with the RPF under Kagame and the Alliance of Democratic Forces for the Liberation of Congo (AFDL) under Congolese revolutionary Laurent Kabila. Kabila was a protégé of sorts of Patrice Lumumba, revolutionary in ideals and practice—a 26-year-old Kabila and his troops were directly supported by Che Guevara in the mid-1960s (Meredith 2011, 149-150). Kabila was backed by both Museveni-led Uganda and Kagame-led Rwanda as Mobutu's replacement (Stearns 2011; Van Reybrouck 2010; Human Rights Watch 1997; Meredith 2011). Fighting between the AFDL and Mobutu's forces in 1996 led to the defeat of Mobutu, who was successfully ousted in May of 1997. By November 1997, Laurent Kabila was the recognized president of the DRC, thus ending the first Congo War.

Bemba fled the country for Europe in the fall of 1997. Bemba's father, who once was one of the richest men in the DRC and another political associate of Mobutu, was arrested by the Kabila administration. All of the Bemba assets were seized, leaving the family without political connections in the country and without their wealth. Bemba was consequently a young man with a vendetta against the Kabila administration and was well-connected outside of the DRC. When Mobutu was overthrown by Kabila, Bemba committed himself to opposing the new regime (BBC News 2018b; Meredith 2011). With the help of international allies Bemba formed the Movement for the Liberation of Congo (MLC) in 1998 to fight against the Kabila regime in

group in Rwanda who emigrated from Rwanda and Burundi to the Congo between the eighteenth and nineteenth centuries, settling in the remote highland pastures to the south of Bukavu [South Kivu]" (Stearns 2011, 58). But in witness reports of violence, folks often use the term more loosely to identify perpetrators.

[19] At this time, Mobutu's personal assistant was none other than Jean-Pierre Bemba. Bemba's father was a Congolese businessman who was closely connected to the dictator (BBC 2018b).

Kinshasa. The MLC had its own armed faction sometimes referred to as the Army for the Liberation of Congo (ALC). Bemba's rebellion against Laurent Kabila was just one piece, albeit a very important one, of the puzzle that became the Second Congo War.

The Second Congo War came just a year and a half after the first had ended. By August 1998, the Second Congo War began, with the "sides" of the conflict looking quite different from the preceding war. Laurent Kabila, who was put into power by the Rwandan and Ugandan states, proved to be harder to control than his backers had hoped. His biggest crime, at least in their eyes, was his refusal to rid eastern Congo of the Rwandan *Interahamwe* and other armed factions of Hutu extremists responsible for the genocide, collectively known as the *genocidaires*. The fact that Kabila, who had once fought against these forces when he was with the RPF, did not immediately work to expel those forces was unconscionable for Kagame and Museveni (Meredith 2011; BBC News 2012c). The Hutu extremists "continued to use Congo as a base from which to launch attacks on Rwanda" as well as Uganda (Meredith 2011, 538). Throughout this period, Rwandan refugees in the Congo were returning to Rwanda from the eastern part of the state, particularly the Kivu regions (see Maps 2 and 3). Notably, Bosco Ntaganda had been fighting with the RPF in Uganda, Rwanda, and the DRC since 1990, when he joined at age 17 (Dale 2019). Ntaganda was likely in the DRC in the late 1990s as these dynamics were taking shape.

Kabila must have sensed growing frustration from Uganda and Rwanda, because he went so far as to recruit former *genocidaires*—men that he had fought against during his time with the AFDL—to protect him from any potential coup threats coming from his former supporters (Meredith 2011). Kabila proved correct, as Kagame and Museveni did in fact plan to overthrow him. In July 1998, Kabila ordered all of Kagame's Rwandan troops still in the DRC pursuing

former *genocidaires* to return to their home country—a move that greatly displeased the Rwandan president. At the same time, Congolese people who had had enough of foreign aggression and occupation were largely glad to see the Rwandans go (Meredith 2011).

Kabila was now allied with former members of former Rwandan president Habyarimana's Hutu army, the ex-FAR, as well as Zimbabwe, Namibia, Chad, and Angola. Rwanda and Uganda were now united with Burundi against Kabila, with forces internal to the DRC, operating as the Rally for Congolese Democracy (RCD).[20] Although the composition of each opposing side was different, the dynamic was largely the same as in the previous Congo war: a DRC leader was fighting to maintain control and relied on foreign support, causing tensions between forces that were domestic with strong support from foreign actors. Bemba was still at the helm of the Ugandan-supported MLC, one of the primary combatant forces in the conflict. This brutal fighting continued until July 1999, when an agreement was signed in Lusaka, Zambia between Angola, DRC, Zimbabwe, Namibia, Uganda, and Rwanda (Taulbee 2018, 361). Bemba was "the first of the Congolese rebel leaders to sign the Lusaka peace accord" (The New Humanitarian 1999). David Van Reybrouck (2010) explains "…the Lusaka Peace Agreement […] did a great deal, but brought no peace" (Van Reybrouck 2010, 442). Several more ceasefires and peace agreements were needed beyond Lusaka to actually end the active violence.

The Lusaka Agreement established Inter-Congolese Dialogue, a series of negotiations that included belligerents in the conflict, as well as civil society groups. Bemba's MLC was one of the groups included in the dialogues. However, Laurent Kabila was not committed to this

[20] This group itself split into two main factions, a proxy for the eventual animosity between Rwanda and Uganda. Figure 4 in the appendix shows the oft-changing relationships between the various factions.

process, seeing any attempt at establishing a power-sharing agreement as a threat to his position. He was assassinated by one of his bodyguards in 2001 and replaced by his son, Joseph (Meredith 2011). Joseph Kabila proved far more willing to engage in the peace talks and work with other parties in order to establish peace, although many believed his role as president was temporary—a stopgap until a new president was chosen (Apuuli 2004). He also appeared to be more intentional with his political appointments, choosing qualified individuals who had not been involved in the previous violence (Stearns 2011, 316).

Peace talks throughout 2002 and the subsequent agreements reached by the governments of the DRC and Rwanda excluded important proxy groups for Rwanda and Uganda, including the UPC and the Rwandan-backed Rally for Congolese Democracy in Goma (RCD-Goma) (Van Woudenberg 2003). This made lasting peace difficult to negotiate. Despite the challenges, the Sun City peace accord between the DRC government in Kinshasa and Congolese militias, the MLC and one branch of the RCD, was signed in April 2002, followed by bilateral agreements with Rwanda (Pretoria I Agreement July 2002) and Uganda (Luanda Agreement September 2002). The exclusion of several armed groups had severe consequences, especially for the contested region of Ituri, DRC, where the conflict was still active.

Despite another peace agreement signed in December 2002 by the MLC, RCD-N, and RCD-ML, the violence continued. So, too, did the peace negotiations. The Global and Inclusive Agreement of December 2002 (the Pretoria II Agreement) set up a plan for transitional government in the DRC and included seats in political positions for leaders of the major factions, including Bemba. This marked an official end to the Second Congo War— "[a]fter five years of war and millions of deaths, the country was unified once again" (Stearns 2011, 318). However, violence picked right back up in the eastern part of the country, in the Ituri and Kivu regions in

the early months of 2003. In March 2003, additions were made to the Pretoria II Agreement, calling for the withdrawal of Rwandan and Ugandan troops and a ceasefire was called for on March 18, 2003, although the UPC was again excluded from this (Kiwanuka 2003). Finally, The Global and Inclusive Agreement, the Sun City II Agreement (also known as the "Final Act") of April 2003 was signed, intended to finally create peace between all parties.

And yet, Uganda had not withdrawn its troops citing the lack of "alternative security arrangement [in place] in accordance with the Luanda Agreement" (Kiwanuka 2003). Human Rights Watch portrays the continued involvement of Uganda a little more negatively, explaining that "[i]n their involvement in continuing political feuds among Congolese party leaders, in local ethnic conflicts, and in extracting wealth, Ugandan actors have furthered their own interests at the expense of Congolese whose territory they are occupying" (Human Rights Watch 2001). Uganda forced the UPC, recently allied with Uganda's now-enemy Rwanda and Rwandan-backed RCD-G, out of Ituri in March 2003, in response to UPC violence against Ugandan forces there. The UPC returned in May 2003. A Human Rights Watch (HRW) report from 2003, several months after the "end" of the Ituri conflict, states that the "UPC Hema militia slaughtered hundreds of civilians in Bunia in early May [2003]" (Human Rights Watch 2003). Soon after, however, the transitional government, including Jean-Pierre Bemba as one of four vice presidents, was formed and there was a halt in violence in the region. Throughout this period, Ntaganda was part of the UPC and continued to commit crimes throughout the region, as did the UPC's leader, Lubanga. Both were later indicted by the ICC, with Ntaganda avoiding detention for over half a decade. Details on his arrest are to follow in an upcoming chapter.

The events and decisions of 2002-2003 structured a path for Bemba and another for Ntaganda, each beginning with Praetoria and ending at the ICC. Between the Fall 2002 and

Spring 2003, three things were happening simultaneously: Bemba's troops had become involved with the conflict and were committing crimes in the neighboring country, Central African Republic (CAR); Ntaganda and his troops were committing crimes in DRC, despite the peace agreements and peace talks were again underway for the Congo War. These events need to be untangled a bit in order to follow the individual path of each man to the ICC. I will track Ntaganda's, then Bemba's, journey from the years *before* the peace talks to their indictments, arrests, then trials at the Court. Some dynamics of the Congo war, and each man's role in them, will be revisited in the upcoming section to show the path of each man from warlord-in-action to deposed leader in ICC custody.

Simmering Tension in Ituri

The title of a 2003 Human Rights Watch report on Ituri (see Map 2) summarizes the 8-month long conflict with gruesome accuracy: "Covered in Blood" (Van Woudenberg 2003). It is for crimes committed in the 2002-2003 Ituri conflict that Bosco Ntaganda was brought before the ICC, although he is known to have been involved in far more instances of violence throughout the Congolese and Rwandan Wars. Similarly, although Bemba's MLC troops certainly committed crimes throughout the DRC, it is only for crimes committed in the CAR from 2002-2003 that he was indicted by the ICC. The following is a summary of the roots of the Ituri conflict, a largely ethnic-based conflict over resource-rich land that includes the intrusion of foreign entities. I will demonstrate how Ntaganda came to be involved in the Ituri conflict specifically and show that the two cases of interest in this dissertation have more in common than the ICC: Bemba's MLC, also backed by Uganda, supported Ntaganda's forces in the region (Stearns 2011, 229).

The situation in Ituri is conventionally characterized as an ethnic conflict, with violence generally between two ethnic groups in the eastern DRC region of Ituri, the Hema and the Lendu (Human Rights Watch 2009b). The Open Society Justice Initiative (2015) reported that "the fighting initially stemmed from localized land conflicts between the two ethnic groups, dating back to the Belgian rule over Congo in the late-nineteenth century and intensifying in 1994 when the disputes became intertwined with the Hutu-led genocide of Tutsis in neighboring Rwanda" (Open Society Justice Initiative 2015, 3). Unsurprisingly, the immediate causes of conflict were material. The competition for control over this area was partly due to the vast resource wealth of the region, as "Ituri is one of the richest areas of Congo with deposits of gold, diamonds, coltan, timber and oil" although violence increased in the region for several reasons (Van Woudenberg 2003).

While resources and local conflict are relevant, Human Rights Watch reported in 2003 "[t]he war in Congo has been misdescribed as a local ethnic rivalry when in fact it represents an ongoing struggle for power at the national and international levels" (Human Rights Watch 2003). The competition to control the region's resources invited international interests and led to increased conflict, especially between the Rwandan and Ugandan forces there to support the Tutsi *Banyamulenge* and other anti-Hutu groups. The ethnic Lendu people allied with the Hutu and the Hema with the Tutsi, thus "exacerbating the longstanding conflict between the Lendu and Hema ethnic groups" (Open Society Justice Initiative 2015, 3). It is therefore no surprise that Bosco Ntaganda's Union of Congolese Patriots (UPC) later supported the Hema. This internal violence between the Hema and Lendu also included foreign armed groups. The Ugandan military under President Museveni (Uganda People's Defense Force or UPDF) and the Ugandan-backed UPC supported the Hema side of the conflict (Amnesty International 2003, 4; Human

Rights Watch 2006). Van Reybrouck (2010) goes so far as to describe the UPC as a "major Hema militia" even though we know many members of the UPC were of other ethnic groups (Van Reybrouck 2010, 459).

Ugandan forces at that time had already occupied the DRC region of Ituri, near Uganda's western border, for some time, with the newly formed Union of Congolese Patriots (UPC) very much in evidence there. Prior to 2002, the DRC government had very little presence in the region at all (Human Rights Watch 2003). The DRC government needed the cooperation of the UPC to end violence in the region and secure its control there, so it sent a delegation to negotiate peace with the leader of the UPC, Thomas Lubanga. Instead, Lubanga's men took the delegates hostage in August 2002 to arrange a prisoner swap. The United Nations Mission in the Democratic Republic of Congo (MONUC) worked to arrange this swap and within days, all prisoners were freed. The UPC then established a rebel government in Bunia, the capital city of Ituri, as a rival to Kabila's (Kinshasa-based) administration. Lubanga assumed control of the region, and his chief of military operations Bosco Ntaganda was made the Assistant Minister of Defense (Van Woudenberg 2003). The man who took the delegates hostage, Chief Kahwa, was made Lubanga's presidential adviser (Van Woudenberg 2003).

In August 2002, the UPC oversaw Bunia and worked with Ugandan government forces to expel the RCD-ML from the region's capital city after a failed push by the DRC government to regain control of the region and wrest it back. In addition to the RCD-ML, the DRC army also trained and armed various Lendu militias and indigenous groups. In November 2002, the UPC attempted—for the second time that year—to take control of the nearby city of Mongbwalu, an Ituri city not too far from the Ugandan border in northeastern DRC and site of a lucrative gold mine. The difference this time, though, was they had help from another powerful Congolese,

Ugandan-backed militia—Bemba's MLC (Van Woudenberg 2003). Van Woudenberg, a Human Rights Watch investigator and Senior Adviser in the Africa Division, wrote that "Bemba's MLC forces had been in the area for several weeks along with troops of Lumbala's RCD-N troops, trying to push out RCD-ML[21] […] The co-operation between Bemba's MLC and Lubanga's UPC was new. The UPC may have been exploring the possibility of a real alliance with the MLC" (Van Woudenberg 2003). The MLC had arrived in Ituri in October, attacking that month, as well as November and December 2002. Their opponents were trained by FAC—the Congolese Army. While in the region, the MLC committed atrocities against local civilians, sometimes intentionally targeting the local Pygmy population. Crimes included rape, murder, and cannibalism.

Violence in the region has fluctuated over time in Ituri but was significantly escalated between July 2002-March 2003. Ntaganda's involvement in the region there seems to have begun at that time[22]. While in Bunia, the UPC was responsible for extreme levels of violence against civilians, including rapes, murders, and lootings. Human Rights Watch (HRW) estimated soon after that approximately 5,000 civilians were killed between July 2002 and March 2003 (Van Woudenberg 2003). However, the UPC did not act alone in Ituri. Essentially separated from the rest of the country and effectively annexed by neighboring Uganda, the populations were subjected to the control of both the Ugandan state military and its proxies. The region was nominally controlled by a Kabila-friendly militia, the Rally for Congolese Democracy-Liberation Movement (RCD-ML), although it was clear that the region was under Ugandan influence. The MLC often backed the UPC, including in its bid for control of Bunia (Van Woudenberg 2003).

[21] Another faction of the Rally for Congolese Democracy, this one based in northern Ituri, supported by Uganda and especially by the MLC.
[22] Incidentally, so did the ICC's—the Court's jurisdiction began on July 1, 2002.

In January 2003, while the fighting was ongoing, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) investigation into the region revealed many human rights violations by the MLC, RCD-N, and UPC leading to the United Nations Security Council condemning the MLC on January 15 and adopting a resolution about other groups in Ituri on March 20, 2003. In this resolution, the UN makes clear that it:

> [c]ondemns the massacres and other systematic violations of International Humanitarian Law and human rights perpetrated in the Democratic Republic of the Congo, in particular sexual violence against women and girls as a tool of warfare and atrocities perpetrated in the Ituri area by the [MLC] and the Rassemblement Congolais pour la Démocratie/National (RCD/N) troops, as well as the acts of violence recently perpetrated by the Union des Patriotes Congolais (UPC) forces (United Nations 2003, 2).

In 2006, Ntaganda left the UPC and assumed the role of military chief of staff of the National Congress for the Defense of the People (CNDP), a "Tutsi-led rebel group in North Kivu province, backed by Rwanda" (Human Rights Watch 2015b). Ntaganda and his forces continued to inflict violence upon opposition groups and civilians well into 2008. In March of 2009, an agreement was reached between the governments in Rwanda and DRC, which entailed integrating Ntaganda and his militia forces into the formal Congolese military. After years of fighting against the government and its army, Ntaganda was given control of military forces in "strategically important and mineral-rich areas of North Kivu" with soldiers numbering approximately 50,000 (Shepherd 2011; Human Rights Watch 2015b; Dale 2019; Human Rights Watch 2019).

The March 23, 2009, peace agreement between various Congolese forces, including the government, did result in a reduction of violence generally. And yet, "[f]rom 2009 to 2011, Ntaganda led a brutal campaign against perceived military and civilian opponents, recruited child soldiers and thwarted efforts to demobilize them, blocked judicial investigations into violations

by people loyal to him, and used his influence in the military to confiscate land and increase his wealth" (Human Rights Watch 2019). The violence is likely a reflection of the internal armed conflict left unresolved and masked over by power-sharing and militia integration within the military. Despite these structural concessions, disagreements and perceptions of maltreatment reportedly continued. A key difference was, however, that now factions of opposition groups could utilize resources from within the state, as they had been incorporating into the military as "compromise."

Armed conflict broke out again in 2012—again with Ntaganda wielding power and making combat decisions. The leader and several hundreds of his troops formed a new rebel group, M23, so named for the aforementioned March 23 peace agreement (Al Jazeera 2013). M23 claims that its members were unhappy with their treatment under the Congolese Army claiming that the Congo state was not upholding its end of the peace agreement (Open Society Justice Initiative 2015, 9; Dale 2019; Al Jazeera 2013). However, "Congolese government officials and analysts say the mutiny began when the government came under pressure to arrest Ntaganda and hand him over to the ICC" (Al Jazeera 2013). Whatever the motivation *behind* M23's formation and its activities, what we know is that group committed gross human rights violations against Congolese civilians in North Kivu, near Ituri.[23]

A Quick Trip North: The Conflict in the Central African Republic, featuring DRC's own Jean-Pierre Bemba

The story of the Central African Republic in 2001 mirrored that in the DRC: violence, civil conflict, and coups plagued the country. Chronologically, there is quite a bit of overlap as

[23] This was happening at the same time that Lubanga was convicted by the ICC for his role in the 2002-2003 Ituri conflict—and Ngudjolo was acquitted for the same (Open Society Justice Initiative 2015).

well. The conflict in the CAR began when the country gained independence in 1960. Human Rights Watch reports that "almost without exception, every ruler of the CAR since independence […] either came to power or was ultimately overthrown in a military coup. In this last decade alone, the CAR has witnessed at least 10 military coup attempts and army mutinies, and an almost constant state of rebellion" (Human Rights Watch 2007).

As pro-Democracy movements spread throughout the world in the early 1990s, calls were made in the CAR to open politics to a multiparty system. It should come as no surprise that then-leader General Kolingba was resistant to this at first, although he "eventually agreed to free elections, after having come under pressure from 'countries like the United States and France, but also agencies and organizations like the UN'" (Douglas-Bowers 2015). The 1993 election finally put Patassé in a position of power, although that position proved tenuous (BBC News 2018a; Douglas-Bowers 2015; Freedom House 2004). Several coup attempts followed, three in 1996 alone. This led to Patassé forming a coalition government with former president General Kolingba's supporters.

A coup attempt in May 2001 spelled the beginning of the end of Patassé's reign as president. Patassé held onto power a bit longer, thwarting this coup, but only with the help of outside forces, including Bemba and his Congolese armed group, the Movement for the Liberation of Congo (MLC). Recall, the MLC was started in the late 1990s with the support of Museveni's Uganda in the effort to fight against Kabila in the DRC. By 2001, "the MLC, led by Bemba, controlled most of the Equateur region in the DRC, bordering the CAR, including the country's capital city, Bangui" (Ndahinda 2013, 483). After the fall of his patron Mobutu and the freezing of his assets by Kabila, Bemba rebuilt much of his wealth through smuggling between the DRC and Bangui, Central African Republic (Taulbee 2018, 361). In fact, Bangui, the capital

of CAR, was "just across the river from one of Bemba's bases" (Stearns 2011, 230). So, when Patassé came under threat during a 2002 coup, Bemba sent an estimated 700 of his troops to support the effort to defend Patassé, a "key ally of the MLC in the DRC conflict at that particular time" (Ndahinda 2013, 483).

One year later, Patassé again called upon Bemba for help in retaining his power when he faced yet another coup attempt. Bemba and Patassé knew each other as powerful players in central African politics and fellow rich men in the region. The MLC had also "recruited heavily" in the CAR (Prunier 2009, 232). However, Stearns (2011) makes Bemba's motivation in supporting Patassé clear when he quotes "an MLC official" discussing Bemba's troops in the CAR: "'He [Bemba] was getting reckless […] We were broke and had engaged in a massive recruitment drive in the expectation of joining a national army, so we needed money to feed our soldiers'" (Stearns 2011, 230). Stearns continues to explain that "[i]t was purely a mercenary affair, with Patassé paying Bemba cash in return for sending 1,000 troops[24] to help ward off the attack" (Stearns 2011, 230). Patassé again was able to hold onto his position, until 2003, when he left town and opposition leader Bozize invaded and assumed control of Bangui with only 1,000 troops (Douglas-Bowers 2015).

It was between approximately October 26, 2002, and March 15, 2003, and in the CAR that Bemba's troops committed the crimes for which he was indicted, charged, convicted, and acquitted at the ICC. The dates are important here: first, Bemba's troops most surely committed crimes before 2002; however, the Rome Statute was not in effect before 2002 so crimes committed before then were not under the jurisdiction of the ICC. Secondly, the crimes that

[24] Other sources say that 1,500 MLC soldiers went to the CAR, still others estimate 2,000-3,000

Bemba committed in the DRC, including in the lead-up to the power-sharing agreement with Joseph Kabila could not be part of his ICC trial, as his case was brought as part of the CAR situation. Therefore, although Bemba's trial was significant in many ways, there were many crimes committed by him and the MLC for which he would never answer.

The crimes committed in the Central African Republic between 2002 and 2003 were many. Witness 38, one of the 40 prosecution witnesses in the Bemba trial, described rapes, murders, and beatings that occurred in his hometown near Bangui, the capital of CAR. He stated testified that "'The people who were not physically beaten were psychologically attacked by Bemba's rebels. For example, a young person, a soldier asked him to take out his penis, then he poked at the person's genitals with the barrel of the gun. He was not physically assaulted but he was psychologically assaulted. There were several such incidents'" (Wakabi 2010b). Other witnesses detailed the murder of their parents and siblings, rape of their daughters, as young as 8 years old, and the theft of their belongings. These witnesses submitted themselves to cross-examination before the Court, often publicly. Details of the Bemba trial, including the various types of witness testimonies and details of crimes committed can be found in Chapter Three.

From Peace Talks to the ICC

Even as Bemba's troops were in the CAR committing the crimes that would bring him to the ICC, he was negotiating peace in his home country. As the Inter-Congolese Dialogues progressed, much of the discussion centered on who led the government after Joseph Kabila's transitional government served its function. After nearly a year of discussion, "the government and the MLC shocked the conference. Following late-night meetings in a nearby hotel, the two delegations announced that they had reached a bilateral agreement, making Joseph Kabila president and Jean-Pierre Bemba prime minister in the joint government" (Stearns 2011, 316).

The details of the Pretoria Agreement are important, because they explain both Bemba's rise to power, as well as the rise of Bosco Ntaganda's militia group. According to the agreement, the transitional government would include Joseph Kabila as president, with four vice presidents from the various rebel groups and political opposition groups. It was at this time that Jean-Pierre Bemba became a vice president of the DRC, solidifying his position in DRC politics. The armed forces that had once fought to overthrow the government were included in the new, consolidated Congolese Army, including Ntaganda himself. The agreement also set the foundation for the upcoming 2006 election. In that election, Jean-Pierre Bemba lost the bid for president to Joseph Kabila in both the first round and the run-off election, despite the former's continued popularity amongst the Congolese people. Bemba, being a successful businessman and now a powerful government leader, began developing an important network outside of the DRC. One such relationship is particularly important for the story of Bemba: that between himself and then-president of the CAR, Ange Felix Patassé. Patassé later called upon Bemba and his MLC troops to fight on his behalf in the CAR, leading to the perpetration of mass atrocities and Bemba's prosecution for them.

CHAPTER THREE: JEAN-PIERRE BEMBA GOMBO AT THE ICC

Interactions between the ICC and future defendants can begin years before the start of the trial. For Bemba, calls were made to investigate crimes committed by his troops as early as 2004, when the CAR referred its situation to the ICC (Human Rights Watch 2010b). Bemba was indicted on three counts of crimes against humanity for: rape, torture, and murder; as well as five counts of war crimes: rape, torture, murder, committing outrages upon personal dignity, and pillaging a town or place (International Center for Transitional Justice 2009). The rape and torture charges were an important step forward for the ICC in prosecuting sexual and gender-based violence which Prosecutor Moreno Ocampo himself was committed to prosecuting, in line with the ICC's mandate (interview with author). The first warrant for his arrest was issued on May 23, 2008, to the authorities of Belgium, where Bemba was living and had lived for much of his youth (International Justice Monitor 2020b; BBC News 2008). Soon after the first, a new arrest warrant with additional charges was issued. On May 24, 2008, Bemba was arrested by Belgian authorities, followed shortly by his transfer to the ICC in July (International Justice Monitor 2020b).

Jean-Pierre Bemba Gombo made his first appearance before the Court in July 2008. The trial continued through his conviction in March 2016 and his sentencing three months later, as well as his appeal thereafter. He was convicted on five of the eight charges listed in his arrest warrant, although he was acquitted on those five charges upon appeal. The Defense fought the admissibility of charges from the beginning on the bases of complementarity, gravity, and fairness. It argued that the ICC did not have jurisdiction over this case, as the Central African Republic would have been able to prosecute the case. Additionally, it argued that the ICC did not have jurisdiction over the case because the crimes were not of sufficient gravity to warrant

involvement of the ICC. Finally, the Defense cited several issues with the way the case was brought about, including a lack of transparency in the issue of his warrant for arrest in Belgium. Throughout the process, the Defense also maintained that Bemba was not in control of his troops in the CAR, often citing then-CAR president Patassé as the guilty party for any misdeeds by MLC troops on his territory.

On the other hand, Prosecutors highlighted the evidence including the looting, the murder victims, and the many men, women, and children raped by MLC troops—identified as such by witnesses, by nature of the perpetrators' language and mode of dress. The Prosecutor maintained that evidence showed Bemba was in communication with, and in control of, his troops in the CAR, even visiting the country during the conflict. The Prosecutor also assured the Court that it did have jurisdiction over the crimes, given the status of the CAR as a state party to the ICC and the gravity of the crimes committed by the MLC. This was confirmed by the Pre-Trial Chamber, which granted the Prosecutor permission to investigate the CAR and Bemba as a defendant. The decision to charge Bemba as a commander, rather than using some other mode of liability, was suggested by the Chamber to the Prosecutor to amend in Bemba's list of charges. The Article 28 (command responsibility) charge was one of many ICC "firsts" in the Bemba trial, showing the Court's learning curve and the nature of ad-hoc decision-making at the ICC.

In addition to describing and analyzing how questions of guilt and command responsibility were addressed in the years-long trial, I will demonstrate that the Court had not yet established clear procedures for trial proceedings, which led to several challenges throughout Bemba's trial. I will also show the points in time at which transnational activists used formal mechanisms to engage with the Court regarding these trials, as well as public attempts to draw attention to the trial proceedings or put pressure on the Court. What should be clear is that the

Bemba trial, although not the Court's first, was far from a perfect trial, if such a thing exists. The Court's last-minute decision-making, the difficulty securing witnesses and bringing them to the Hague for testimony, and the process for approving victim participants show that the Court had a great deal of room for improvement at that time. Many of these same issues would later plague the Ntaganda trial, discussed in Chapter Four. That having been said, there are differences that demonstrate improvement and growth across the trials, as well.

Bemba first appeared before the ICC on July 4, 2008. At this initial meeting, the OTP under Chief Prosecutor Luis Moreno Ocampo asked the defendant to confirm his identity, then explained to Bemba the charges against him (Simons 2008). At that time, Bemba maintained his innocence, even though he was not asked to enter his plea right away. His confirmation of charges hearing, at which stage the ICC reads all official charges after having determined the appropriateness of the charges against the accused, was scheduled for November 2008. It is through this confirmation of charges process that prosecutors determine the mode of liability with which to charge the accused, although the Chamber ultimately decides on that issue. That is, the prosecutor had to determine whether Bemba himself was a perpetrator of crimes either directly or indirectly or if he was guilty of failing to prevent troops under his command from committing crimes of which he had knowledge. The Chamber had a different idea of the appropriate mode of liability for Bemba in this case. The OTP must also assure the Court judges and the Defense that there was no potential for cumulative charging (where multiple charges for the same offenses might be lodged without unique evidence) where inappropriate and address other issues. In short, the confirmation of charges trial exists to ensure that charges are legitimate and there is sufficient evidence to potentially convict or exonerate the accused after a panel of judges has already determined that the ICC has jurisdiction over crimes committed by that

defendant at that time. This can help to eliminate so-called "political trials"[25] in which there is no evidence as well as the unlawful detention of those who did not commit any crimes.

Bemba's confirmation of charges hearing was initially delayed due to Defense claims of requiring more time but was finally held from January 12-15, 2009. The OTP, Defense, and Legal Representatives of Victims presented information over the course of those three days for the Pre-Trial Chamber (International Justice Monitor 2020a). The Pre-Trial Chamber determines whether or not a preliminary investigation can be initiated, if situations fall within the jurisdiction of the court, issues arrest warrants, and decides whether or not to confirm charges against defendants before the Court (American Bar Association, n.d.).

Three months later, the judges asked the Prosecutor to amend charges against Bemba from direct responsibility as a co-perpetrator under Article 25(3) of the Rome Statute to command responsibility under Article 28, deeming it more appropriate based on the evidence already given. This was the Court's first use of Article 28 of the Rome Statute—in other words, the first time a defendant was charged on the basis of command responsibility. Later, this tactic was called into question by critics of the court. A former Special Adviser to the Prosecutor told me that they saw the change to command responsibility as a major failure by the Court (interview with author). The choice of mode of liability demonstrates an interesting dynamic in the Court—it is the responsibility of the Prosecutor to conduct investigations, bring charges against defendants, and try them. And yet, the judges have the authority to recommend changes to the Prosecutor, as they did in the Bemba trial in regard to the charge of command responsibility. In the OTP document outlining the charges against Bemba, the Prosecutor

[25] Sikkink (2011) gives the example of the Romanian trials for Nicolae Ceaușescu and his wife, Elena Petruscu.

maintained the charges on the basis of co-perpetration but included the additional command responsibility mode of liability. The Pre-Trial Chamber, however, decided only to confirm charges on the basis of command responsibility. Therefore, Bemba was neither charged nor tried on the basis of co-perpetration as the Prosecutor had intended. This became the first of many criticisms of the Chambers' handling of the Bemba trial.

The judges determined, in addition to limiting the mode of liability to that of command responsibility, that there was enough evidence at that stage to justify a trial for some of the counts brought by the Prosecution, but not all. Rape as torture[26]—both a war crime and crime against humanity—was dropped due to lack of evidence, as was the war crime charge of outrage upon personal dignity (Inder 2010). This meant that the following five charges were confirmed against Bemba: murder, rape, and pillaging as war crimes; murder and rape as crimes against humanity (International Justice Monitor 2020a). These charges were formally confirmed and announced on June 15, 2009. That summer, Bemba was ordered to be released until his trial, which was scheduled to begin April 27, 2010—nearly a year after the confirmation of charges. The Prosecution immediately appealed, successfully, so Bemba was held in custody until the start of his trial, as defendants before him had been (Wakabi 2010f).

In February 2010, several months after the confirmation of charges and still prior to the start of the trial itself, Bemba's Defense team appealed the decision on admissibility made by the Pre-Trial Chamber, continuing to claim that the case should be tried domestically in the CAR, rather than the ICC. This led the Trial Chamber to announce the delay of the trial start date to allow judges to review the grounds for appeal and issue a decision. This was the first of many

[26] The ICTY established that acts of rape can constitute torture and the Rome Statute permits such a charge, so it is interesting that all torture charges were dropped.

delays that occurred throughout the Bemba trial, demonstrating that the Court was not operating on a strict timeline, nor was the machine "well-oiled" at that time. In March 2010, the Chamber announced the trial would begin on July 5, 2010 (fewer than three months after the original start date). One month before the July 5 start date, however, the Chamber announced another administrative delay, pushing back the first day of hearings. For months, the Defense was still appealing the decision on the admissibility of the case on the same "three major questions: complementarity, gravity, and fairness of proceedings" (Sesay 2010). In October, the first day of hearings was rescheduled to November 22, 2010. The judges ruled that the ICC had jurisdiction over the case that was not being faithfully tried in the CAR and Bemba's rights as a defendant had been respected. In other words, they dismissed the Defense's concerns and the appeal failed. The trial for Jean-Pierre Bemba Gombo of the Democratic Republic of Congo, accused of three counts of war crimes and two counts of crimes against humanity by way of command responsibility of his MLC soldiers, finally began.

The Prosecutor, then, had to demonstrate that Bemba's troops committed crimes in the CAR, that he had knowledge of those, *and* failed to punish them accordingly. In Prosecutor Moreno Ocampo's words "'the evidence shows that the troops were always under the authority, command, and control of Jean-Pierre Bemba and […] that is why, according to the evidence, we charged Jean-Pierre Bemba'" (Wakabi 2010e). Although Moreno Ocampo's statement makes the process seem so simple, the Bemba trial proved to be anything but that. The slow start to the trial was an omen of things to come. Further delays were caused by both sides of the trial, the judges themselves, and even the witnesses at times. A close inspection of daily trial proceedings brought several patterns to the forefront, particularly regarding these delays but already regarding the central question here: transnational activists have impact, if not in the way we might have

forecasted. First, the trial demonstrated the importance of different types of witness testimonies and how witnesses can *also* contribute to stalls in trials. Secondly, it is clear that the Court was new to bringing cases and many decisions were made at the last minute—again causing delays in the trial proceedings—whether by Court design or by unforeseen circumstances. Thirdly, we must acknowledge those points in the trial where transnational activists asserted their role as ICC watchdog groups or simply as parties interested in international justice through formal and informal means.

Witnesses at the ICC: Bemba Trial

Witnesses are integral to any court system and the ICC upholds that principle. There are different types of witnesses[27] who testify before the ICC. Most of these witnesses are likely fact-based or crime witnesses: those who can testify about the specific commission of crimes. Often, these witnesses are also victims and can serve that dual role of victim and witness. The existence of this dual role status is unique to the ICC and helps to emphasize its commitment to victim-centered justice. Overview witnesses are similar but mainly they "help establish facts about the context in which a conflict occurred" (International Criminal Court, n.d.h). Overview witnesses may also witness crimes directly or can speak to specific crimes under consideration in the trial. Prosecution witnesses are called first in the trial, followed by witnesses called by the Legal Representatives for Victims, thereby leaving Defense witnesses to be called last in a trial. Witnesses were generally called one after the other, with a few days given for testimony. The Court often made testimony-related scheduling decisions in support of the principle of a fair and expeditious trial, central to many legal systems, including the ICC. Later, we learned that this

[27] Discussed in detail in Chapter One "Structural Roles" section.

was not always possible, especially when Defense witnesses disappeared and failed to complete or even commence testimony, causing delays in the trial.

Much of the witness testimony in Bemba's trial was focused on assigning blame for the conduct of the MLC, given that he was being charged under command responsibility. The Prosecution, of course, argued that Bemba was in control of his MLC troops even while they were in the CAR and, therefore, was individually criminally responsible for their conduct. The Defense countered this claim, arguing that he was not always in control of his troops—that while in the CAR they were under control of the CAR president—and that when he *was* in control, he did his best to faithfully punish wrongdoing, clearing him of any guilt for their conduct. It was clear that MLC troops were in the CAR and that crimes were committed, including the rapes of men, women and children; the pillaging of villages; and the murder of civilians. It was less clear that Bemba was in charge of the MLC troops while they were in the CAR, and this is the crux of the command responsibility charge, after all. If Bemba, in fact, had no knowledge of the illegal actions of his troops nor control over said troops and aware of the crimes they committed in Bangui, CAR and surrounding areas, he could not be found guilty of their crimes via command responsibility. Expert and insider witnesses for the Defense presented evidence that many of the crimes allegedly committed by Bemba's troops were in fact committed by other rebel groups or troops of the CAR, or that Bemba did attempt to punish his MLC when he heard of wrongdoing.

The first witness in the Bemba trial, "Witness 38," an overview witness, testified with the standard in-court protective measures—face and voice distortion and the use of a pseudonym. "Witness 38" spoke to the situation in the CAR and the reason Bemba's MLC was there to assist CAR president Patassé, stating "'I believe that at that time, president Patassé felt that he had been betrayed by his army and that's why he called on the […] rebels of Mr. Bemba […giving

them] all the leeway to act. This means that the rebels were sort of the leaders of our own army'" (Wakabi 2010d). This witness referred to several crimes committed by Bemba's troops, including robbery, beatings, threats, and the rapes of young girls (Wakabi 2010d). This testimony was valuable because it spoke to the fact that the MLC were there by invitation and not as intruders; the Prosecution had to establish that it was clear that Bemba's troops were there by invitation from Patassé *and* that they were acting independent of the CAR military. Had they been under CAR control, they would ultimately have been under the command of President Patassé, as the Defense contended. "Witness 38" underwent cross-examination by lawyers from the Legal Representatives for Victims, as well as by the Defense team, consistent with ICC procedure. His entire testimony took nearly seven days in court, with much of his testimony given in private session, keeping many details of his testimony out of public reach.

Other crime witnesses testified about crimes they witnessed and/or experienced. "Witness 22" recounted how soldiers of the MLC stormed her house, raped her, stole ducks and goats, and shot the family dog (Wakabi 2010c). "Witness 22" was given the same protective measures as "Witness 38", including the opportunity to give much of her testimony in closed session. Not only was the courtroom closed to the public, but information released to the public, including reporters, was edited to ensure the safety of the witnesses. The same rights were granted to many witnesses throughout the Bemba trial (and others at the ICC). This might happen, for instance, if part of the testimony required the witness to provide information about their family or residence that might reveal their identity. The use of closed session was especially common for the victim-witnesses who wished to keep the details of their victimization from their communities for social desirability/stigma reasons. When it came to the cross-examination of "Witness 22" and other victim-witnesses like her, the judges directed the lawyers to exercise caution and tact while

asking questions in order to avoid the embarrassment and re-traumatization that may occur as a result of cross-examining questions related to her rape testimony.[28] This decision came in December 2010, after the protocol for the treatment of vulnerable witnesses had already been established. This further demonstrates the nature of decision-making at the ICC during the Bemba trial—despite an established, published, and official plan, adjustments to court proceedings were ordered by the judges.

"Witness 87" testified about being gang-raped by MLC troops, as well as the looting of her house and the murder of her brother. An "especially important" witness testified completely in closed session for twelve days and the record of their testimony that was released to the public was edited and reviewed by the Court before its release (Wakabi 2011c). Due to the nature of the closed testimony, as well as the extreme redactions in the court transcript, it is unclear precisely what makes this witness unique to the other witnesses. Like others, this witness spoke to the identity of the troops and the movement of the soldiers throughout Bangui and environs (International Criminal Court 2011b). Other witnesses were called to testify about the occurrence of crimes in the CAR committed by MLC soldiers. One witness deemed especially vulnerable testified with a psychologist and an in-court assistant from the Victim and Witnesses Unit (VWU).

Throughout Bemba's trial, many of the Central African Republican witnesses referred to his MLC soldiers as the *Banyamulenge*—the journalist monitoring the trial clarified in his

[28] Witnesses are granted different levels of vulnerability status: that status determines what in-court protective measures might be afforded to the witness. The Registry, which houses the Victim and Witness Unit, determines this vulnerability status. This decision was made in October 2010, before the trial had commenced.

articles that this meant "Congolese soldiers" further proving that the term *Banyamulenge* came to be rather muddled in common parlance. Ndahinda writes that:

> Bemba's Defense acknowledges that there were individuals of Banyamulenge ethnicity among the MLC troops. It nonetheless contends that the designation of MLC fighters as Banyamulenge coupled with the criteria used to identify them […] displayed, at the very least confusion over who among some nine different groups participating in the hostilities was responsible for numerous atrocities committed in the CAR. The prosecution equally acknowledges that 'MLC troops were composed of soldiers from several ethnic groups from the Democratic Republic of Congo, including an ethnic group called Banyamulengue.' It contends, however, that the term was used 'in a generic way to describe the MLC combatants as a whole irrespective of their actual ethnic affiliation' (Ndahinda 2013, 482).

During this ongoing Prosecution witness testimony, practices by the OTP's investigators were called into question by the Defense. There were several witnesses with inconsistencies between their witness statements (provided before the trial during the investigation phase) and their court-given testimonies. These witnesses claimed that differences came down to confusion at the time of providing statements, the fact that investigators wrote their statements for them due to illiteracy or language barriers, and other legitimate reasons. Some of these witnesses, though, claimed that ICC investigators instructed them to inflate their damages or to mischaracterize events as crimes in order to inflate potential reparations granted them. This information generally came out during the Defense's cross-examination.

One such case arose with "Witness 73", who said during his defense cross-examination that the ICC investigator with whom he spoke instructed him to say that his daughter was raped, rather than say the relationship she had with their MLC captor was consensual and therefore not

chargeable as rape.[29] No information was provided to the public about the identity of the ICC investigator or any actions taken to determine whether ICC investigators were unduly influencing victim and witness statements or subsequent court testimony (Wakabi 2011d). In other words, evidence of the investigator instructing that victim, or any other, to lie was not released.

The Prosecution also called four expert witnesses, who "testif[ied] about matters within the field of their expertise" (International Criminal Court, n.d.h). Expert witnesses provide knowledge on specific topics of interest in the case. In the Bemba trial, expert witnesses gave testimony regarding sexual and gender-based violence; trauma and Post-Traumatic Stress Disorder (PTSD); the languages of CAR and DRC; and military knowledge. Dr. Akinsulure-Smith, an expert on gender crimes and PTSD testified for two days in court about her work conducting evaluations of victims in the CAR "at the request of the prosecution and victims participating in the trial" and discussing the implications of the types of sexual violence inflicted upon the civilians impacted by the crimes allegedly committed by Bemba's MLC troops in the CAR (Wakabi 2010a). During her testimony, Dr. Akinsulure-Smith stated that "[t]here was extensive sexual violence that involved mainly women but also men. 'The types of sexual violence involved multiple gang rapes, at least two or more perpetrators towards an individual,' she said. 'The type of sexual violence involved anal, vaginal, oral penetration and witnessing acts of sexual violation against another individual'" (Wakabi 2010a). Another expert witness,

[29] There are issues with this argument, given the Rome Statute's definition of rape which does not center on formal consent but rather allows for rape even where consent is given in an environment which would prohibit non-consent, such as a conflict environment. Said differently, men and women in conflicts can be raped even if consent is given or implied by the victim, considering the context of a conflict might make it impossible to withhold such consent.

André Tabo, confirmed that rape was used as a weapon of war by the MLC troops (Wakabi 2012e).

The Prosecution called another expert witness to lend credibility to eyewitness and victim-witness accounts who claimed they knew the troops committing crimes in their area were MLC troops based on the language they were speaking. Witnesses claimed that they heard the troops speak Lingala, a language spoken in the DRC, rather than Sango, the language spoken in that region of the CAR. Therefore, these witnesses deduced that the troops were of the MLC. This language expert, Dr. Samarin, was a linguistics expert who had done extensive research on languages spoken in the CAR. He confirmed that even those who could not speak Lingala, the primary language of the MLC, would recognize the language as such. In other words, the expert stated that it was reasonably safe to say that the troops committing crimes in the CAR were speaking Lingala, and that victims and witnesses would know it as such, and therefore were MLC troops and not soldiers of another nationality from another fighting group (Wakabi 2011a). Later, a linguistics expert called by the Defense contested this claim.

The final expert witness, a military expert, was called by the Prosecution and testified regarding the military command structure of the MLC. General Daniel Opande also attested to the ability of Bemba to communicate with and control his troops. He claimed after reviewing "witness statements and other literature" given to him by the OTP that "Bemba had direct control over his troops that were deployed in the [CAR], and he had the capacity to stop them from committing the crimes over which he is on trial" (Wakabi 2011b). The conclusion was consistent with claims made by other witnesses, including many of the insider witnesses—including one witness who briefly lived with Bemba—who asserted that it was Bemba, not Patassé, who was in control of the MLC, even when they were in the CAR. Further, these witnesses collectively

asserted that although Bemba made claims of rules of conduct for the troops and held trials to punish wrongdoers, no *serious* effort was made to curb their behavior by Bemba, who was at all times in command of these troops, having frequent communication with them via radio.

Prosecution witnesses, 40 in total, provided evidence to the Court through March 20, 2012, roughly 16 months after the start of the trial. They underwent questioning and cross-examination by the Prosecution, Legal Representatives of Victims, and Defense. They read reports, watched videos, and provided commentary on photos. These witnesses provided vulnerable testimony about crimes committed against their friends, family members, and selves, even putting their families at risk in doing so. Collectively, their testimony provided evidence of crimes committed by the MLC in and around Bangui, CAR. They attested that Bemba was in control of his troops in the CAR and that he was in direct contact with his commanders and was aware of actions of his troops, even going so far as to initiate military trials against wrongdoers, although witnesses suggested that these were sham trials. Prosecution witnesses denied Defense claims, made through cross-examination: that crimes witnessed or experienced where actually the work of Central African, Chadian, or Libyan soldiers; that the MLC troops were under orders of the CAR president or army of the CAR; that Bemba was unaware of crimes committed by the MLC in the CAR; and that Bemba attempted to control his troops behavior in good faith. Overview witnesses provided context for the crimes, crime witnesses detailed what crimes were committed and by whom, while the expert witnesses provided expert knowledge on the commission of these crimes, military command structures, the trauma caused by sexual and gender-based violence during conflict, and the ability of victims to identify their attackers through language alone.

Another important category of witness is that of the dual-status victim, or a witness that is also a victim participant in the trial. Such witnesses can give testimony as a witness while also claiming the status of a victim, which does not necessarily require testimony. At the start of the Bemba trial, 775 victims were granted the right to participate in the trial in some capacity—they were granted the status of victim-participant. Submission and decisions on applications for victim participation continued throughout the Prosecution's case. By the time the Prosecution completed its testimony, over 4,000 victims had been granted victim-participant status. Victims who are granted the right to participate in the trial *may* be called as witnesses by the Prosecution, Defense, Legal Representatives for Victims, or the Chamber, but most are not. Victims may also choose to present personally before the Court, as five victims did in the Bemba trial.[30] The majority, though, of victim participants choose to apply for this status so that their views and concerns can be represented throughout the trial via their legal representatives.[31] They also have the benefit of being officially informed of trial proceedings by the Court. Many of these victims also choose to apply for reparations upon conviction of the defendant, although those requesting reparations need not participate throughout the trial phase.

These dual-status victims testified after the 40 Prosecution witnesses who were not classified as victims, beginning in May of 2012. Victim 0866/10 testified without protective measures about being gang-raped by MLC soldiers. She was cross-examined by the Defense as well. Victim 0866/10 was asked why she decided to participate in the trial, to which she responded that "it was an opportunity to tell the International Criminal Court (ICC) and the whole world what she had suffered. 'I was treated like an animal, and I cannot live normally. I

[30] The Legal Representatives for Victims requested that all 17 of the designated dual status victims be allowed to give testimony, but the Chamber only approved 5 of these.
[31] See Chapter One "structural roles" section.

was a woman with dignity but I lost my dignity. I suffered inhuman treatment' […]" (Wakabi 2012h). This woman told the Court that she was gang-raped multiple times in front of her community, and that she witnessed acts of pillaging, murder, and even the castration of a male resident. Another victim testified about the looting and rapes he witnessed, including "'several cases of rape of girls of 10 years of age'" and the gang-rape of one woman by 20 soldiers (Wakabi 2012f). The remaining victim-witnesses presented their testimony to the Court via video link and were not subject to questioning or cross-examination. These statements were unsworn, not given under oath and therefore did not "form part of the evidence of the case" (Wakabi 2012g). They are nonetheless consistent with the ICC's goal of providing a voice to victims as well as with policy, as Article 68(3) of the Rome Statute allows for the participation of victims in such a way (International Criminal Court, n.d.f).

Defense witnesses were called, providing overview, insider, evidence-based, and expert testimony that Bemba could not be held criminally responsible for acts committed, if any, by the MLC troops in the CAR. Expert witnesses included military expert Jacques Seara, who presented expert testimony that president Patassé was in command of the MLC. This mirrors the Prosecution's expert witness on military operations, Daniel Opande. Like General Opande, Seara was given information by those who called him in to testify. Specifically, his conclusions were "based on an analysis of documents availed to him by the defense and statements of senior officials in the Central African army and the accused's Movement for the Liberation of Congo (MLC). Most of the officers he interviewed played central roles in the conflict" (Wakabi 2012c). A linguistics expert was also called to refute the Prosecution's claim that it is possible and reasonable to identify soldiers as Congolese based on the use of Lingala, which was a central part of the Prosecution case. The Defense expert claimed that given the shared border between

the DRC and CAR, as well as the proximity of the locations of the crimes to the DRC, it would be unreasonable to assume that all speakers of Lingala were MLC troops.

Other witnesses for the Defense testified throughout August and September of 2012. Issues with witness availability, however, plagued the Defense case and ultimately changed the course of it. A Defense witness, "Witness D04-07," testified for three days but disappeared from his hotel room and never returned to complete his testimony. The next witness slated to appear never boarded his plane that was meant to bring him to the Hague. Neither witness provided any information to the Court about unavailability, needs for postponement, etc.—they simply disappeared. The case continued, but the Court soon learned that D04-11 was part of a broader witness tampering scheme. It is likely that D04-11 was unable to meet his Court commitments given his work in acting as a go-between for Bemba, his Defense team, and witnesses, including coaching their testimonies and encouraging false witness (International Criminal Court 2016h). By October 2012, the Prosecution had "expressed concern about the expeditiousness of the defense's presentation of evidence. Noting that five witnesses had been presented over the course of 60 days, prosecution lawyer Petra Kneur said that it may take up to 30 months for all of the defense witnesses to appear" showing a markedly longer timeline for the presentation of evidence than originally allotted (Wakabi 2012i).

The Defense continued to call witnesses and hear testimony, however slowly. By 2013, more witnesses were withdrawn from the case, bringing the total number of witnesses to testify on behalf of Jean-Pierre Bemba to 45 (down from the 63 originally approved). Witness testimonies continued to center on assigning culpability for the crimes committed in Bangui and other areas not to Bemba and his MLC, or even to CAR's Patassé, but to Central African rebel Bozize and his troops. The presentation of evidence was closed in April 2014. In all, 34

witnesses gave testimony for the Defense, compared to the 40 Prosecution witnesses. With the two victim-witnesses who gave sworn testimony, as well as one judges' witness, 77 total witness transcripts were entered into evidence for the Bemba trial (Wakabi 2014e). This also included "704 items of documentary evidence" presented over the course of 3.5 years (Wakabi 2014e).

After witnesses gave testimony, Bemba took the stand, providing unsworn testimony pursuant to Article 67(1) of the Rome Statute regarding the "Rights of the Accused" (International Criminal Court 2011a). Expert Jerry Norton (2010) explains that "[t]his right, commonly found in Civil Law countries, gives the accused the right to make a statement without being subject to cross-examination or perjury prosecution. It also relieves the defense attorney of the ethical responsibility for assessing the credibility of his or her client in making such a statement" (Norton 2010, 89). Prosecutor Bensouda filed a request to question Bemba, since he took the stand, but the Chambers denied the request. They pointed to the Rome Statute for justification, stating that there is no provision within the Statute that grants the right to question an unsworn statement. They argued that cross-examining Bemba would be tantamount to asking him to testify, which the accused has a right *not* to do, per the Rome Statute. Therefore, Bemba was able to give his unsworn statement without questioning, consistent with Article 67(1)(h) of the Statute as the last part of the Defense case.

The ICC as a Work-in-Progress: Learning Curves in the Bemba Trial

The ICC is not known for the efficiency or efficacy of its proceedings. Legal expert and British representative at the Rome Statute's Preparatory Committee Elizabeth Wilmshurst stated in June 2019 that "[t]he court's proceedings are cumbersome and lengthy. Many of the accused are still at large, including Omar al-Bashir, the former president of Sudan. Some €1.5 billion has been spent, and there have been only three convictions for the core international crimes"

(Wilmshurst 2019). The Bemba trial perfectly demonstrates the first point: his trial can only be described as *slow*, prolonged, and full of last-minute decisions that changed the course of the trial and served to delay the proceedings. The fault for this certainly falls at the feet of all sides: the Prosecution, the Defense, the Chambers, and perhaps the Registry, whose job it is to get witnesses to the Hague for testimony. The last-minute decision-making is an important point within the larger story told by the Bemba trial.

Some decisions were administrative in nature. For example, decisions about witness testimonies were often made only one day in advance. Witnesses could be called to begin testifying the next day. The Court often made scheduling decisions such as this in support of the principle of a fair and expeditious trial, central to many legal systems including the ICC. However, this was not always possible, especially when Defense witnesses disappeared and failed to complete or even commence testimony. This caused many delays in the Bemba trial, when witnesses were called sooner than expected because of other witnesses' availabilities.

There were also administrative decisions that impacted the trial. As one witness testified about Bemba's troops raping her and stealing her ducks and goats, the court was simultaneously considering a petition filed by Bemba that he be released from ICC detention during the December court recess. It is not uncommon for those in detention to be released for recess, as the ICC has a procedure for such a thing. These decisions are made as each scheduled recess approaches, as even those accused of war crimes and crimes against humanity who are not flight risks may be released from ICC custody for long weekends. However, the Trial Chamber determined that Bemba was a high flight risk, considering the amount of money at his disposal. His assets—including yachts, airplanes, and homes—had been frozen earlier by the Court as well

as by the states of Portugal, Belgium, and the DRC. Several attempts were made for Bemba to be released during ICC recesses, but none were granted.

Other administrative tasks about the time limit allowed for questioning, closing statements, and other in-court activities were also done *ad hoc*. For the anonymous "especially important" witness, extra time was given to both the Prosecution and the Defense. The Defense asked to question this "Witness 169" for 12 hours, not 8 as it had earlier proposed, after the prosecution asked judges for more time. The Trial judges ruled that the Prosecution would only get the initially granted 8 hours, whereas the Defense would get 10, and the two Legal Representatives for Victims would have one hour between them for cross-examination. Later, the Court scheduled a February 2012 status conference to review the timeline moving forward as the Prosecution's case ended. In particular, the conference was to determine the estimated time needed for the Defense to prepare and complete investigations, the expected number of witnesses it planned to call, protective measures that may be needed for the witnesses, and other such logistical issues. That same month, Bemba's lead counsel, Kwebe Liriss, passed away. In light of this, the Defense requested leave to postpone the scheduled status conference. This leave was granted, postponing the status conference to mid-March. Judges also ordered the Prosecution to call its last witness no later than March 13, 2012, after nearly a month's postponement due to the witness's availability issues.

Yet another status conference, held a few months later, was held to discuss how to "streamline" the witness testimonies for the Defense in the effort to call all witnesses in a timely manner, given the aforementioned delays. Wakabi (2012) reported that "[f]or its part, the prosecution expressed concern about the expeditiousness of the defense's presentation of evidence. Noting that five witnesses had been presented over the course of 60 days, prosecution

lawyer Petra Kneur said that it may take up to 30 months for all of the defense witnesses to appear" showing a markedly longer timeline for the presentation of evidence than originally allotted (Wakabi 2012i). Judges allowed a change to the schedule of proposed Defense witnesses and granted permission for some witnesses to testify via video link, rather than provide in-person testimony at the Hague. Although this was allowable within existing ICC rules, in most trials many efforts are made to encourage in-person witness testimony.

The changing of schedules and mode of testimony shows the desire of the Court to ensure a fair and expeditious trial, to protect the rights of the accused but also to ensure a full presentation of evidence. Despite these changes, no further testimony was heard for nearly three weeks, constituting a "three-weeks' hiatus" from the entire trial due to the disappearance of witnesses.[32] The unavailability of the next witnesses caused an order by the judges for the Defense to call its Europe-based witnesses next, to expedite the case (Wakabi 2012b). Near the end of the Defense's case, the Court announced that it would sit for extended hours to hear witness testimony for the rest of the trial. This was done in order to ensure that the Defense, despite all of the delays throughout its case, would get nearly the same amount of time to present its case as the Prosecution, even though the Prosecution's case occurred over 16 months compared to the Defense's 14. Even that timeline was extended with the judges granting an extension of two weeks to the Defense, further delaying a trial that was already moving at a snail's pace. Weeks later, the judges denied yet another Defense request for an extension, stating their concerns that the remaining witnesses would not be brought to testify in a timely manner.

[32] These were the aforementioned D04-07 and D04-11

This meant that Bemba's own testimony, originally intended to take place during the Defense evidence phase, was moved to the Defense's closing statement.

Although of course many of these issues—the death of Bemba's lawyer, the inability of witnesses to get to the Hague, the lack of available translators in the appropriate languages—were not *necessarily* the fault of the Court, it shows how malleable the timeline for the trial was considered. It also shows flexibility in the judges' decision to use mechanisms already within the Court's allowed procedures, such as the use of video link for testimony. However, judges clearly made *some* decisions with the intention to move the trial along.

Judges also made decisions in the midst of the trial that served to needlessly delay proceedings. On December 13, the ICC judges issued a suspension in trial proceedings until March 4, 2013, because it was "necessary for the accused's lawyers to undertake further investigation and preparations in view of a change judges might consider making to the 'legal characterization of the facts' of the charges" (Wakabi 2012d). The change to the characterization of the facts, initiated by the Trial Chamber itself, might seem small: the judges were determining in the case whether or not Bemba *should have known* what crimes his troops were committing. Up to that point in the trial, evaluations were being made on whether Bemba *knew*, in fact, what his troops were doing in the CAR. This decision was not surprising, considering the judges had announced in September that "after having heard all the evidence and when making a decision on the guilt or innocence of the accused, they may modify the legal characterization of the facts pursuant to Regulation 55 of the Regulations of the Court" (Wakabi 2012d).

There are reasons why the Court might take this route that generally center on ensuring convictions. Jennifer Easterday argues that:

> "[t]he pretense behind the regulation is to promote judicial efficiency and allow the trial chamber to fill impunity gaps that might arise if the prosecution's charges do not match the facts heard at trial. It is meant to avoid overburdening the judges with cases involving cumulative or alternative charges, allowing for more efficient, timely trials. It is also meant to avoid situations where an accused is acquitted even though there is proof beyond a reasonable doubt that he or she has committed a crime within the jurisdiction of the court (Easterday 2013).

Scholar Margaux Dastugue further explains that "[h]ailing from civil law tradition, Regulation 55 permits the ICC to modify the charges against an accused at any time—either during or after the trial—if the judiciary decides it cannot convict the accused on the original charges" (Dastugue 2015, 273). This paints the decision by the judges to take this route as anything but fair and impartial.

The Defense responded in October that in the confirmation of charges hearing, "[a] charge that Mr. Bemba "should have known" was explicitly rejected and the trial proceeded on that basis. The Prosecution did not seek leave to appeal the Pre-Trial Chamber's decision. Having failed to do so, and having complied with the Pre-Trial Chamber's decision, the Prosecution has renounced its ability to prosecute Mr. Bemba under that theory of liability and is now foreclosed from arguing that it should be permitted to do so" (International Criminal Court 2012d, 4-5). In short, the Defense argued that to take this step would unfairly burden his Defense and was not within the scope of charges that were confirmed by the Pre-Trial Chamber.

Although the Prosecution and Legal Representatives of Victims announced they did not need to change any part of their proceedings or cases, the Defense protested to the change in characterization, thus resulting in the judges' decision to suspend the trial to provide the Defense time to prepare its case for such a recharacterization (Wakabi 2012d). Interestingly, the Defense did not agree with the decision to suspend the trial, citing fears in further extending the trial, and even went so far as to appeal the decision. This appeal was rejected, so the Court officially

announced the suspension of the trial until March 4, 2013. This suspension, though, was lifted in February when the Defense waived its right to conduct further investigations or recall witnesses in preparation for the potential legal recharacterization. The Defense claimed that this would further delay the trial, leading the accused to spend even more time in detention, which they felt was prejudicial to him as a person who was meant to be considered innocent. Therefore, they claimed they wished to move on with the trial (Wakabi 2013b). Ultimately, the judges did not pursue the re-characterization, so Bemba was convicted on the basis that he *knew* the crimes were occurring (International Criminal Court 2016g, 37).

There was one major impediment to the conducting of a quick and efficient trial for Jean-Pierre Bemba: the issue of witness tampering and the second trial that emerged from it. Not only did the acts and events related to witness tampering cause delays in witness testimony, as the witnesses were encouraged to skip testimony, but the Court was forced to make decisions about Bemba's main trial that were impacted by the witness tampering investigation and subsequent trial. Mid-way through Bemba's trial, he, along with members of his legal counsel and several witnesses were indicted for witness tampering. Unbeknownst to the public, the Prosecution's cross-examination of witnesses early in the Defense case centered on potential witness tampering. The Prosecution asked questions about "coaching" of the witness or financial payments, demonstrating suspicions of witness tampering. Around this time the Prosecution had requested information about Bemba's telephone communications and emails, including those between himself and his lawyers. The judges granted approval for phone calls to be intercepted and monitored by ICC investigators. Later, an independent counsel reviewed these phone and email logs, writing reports to the Court demonstrating the existence of witness tampering.

On November 25, 2013, the lead of Bemba's Defense, lawyer Aimé Kilolo-Musamba—who had taken the lead position after the former head lawyer passed away in 2012 —was arrested for witness tampering. Arrested along with Kilolo-Musamba were: Mangenda Kabongo, the Defense case manager; Fidèle Babala Wandu, a sitting MLC member of the Congolese parliament; and Defense witness Narcisse Arido. The warrant for their arrest was issued by Judge Tarfusser of pre-trial Chamber II, a separate Chamber from that considering the main trial, on November 20.[33] Prosecutor Bensouda's statement read that Bemba "'has ordered, solicited and induced these attempts to pervert the course of justice in relation to his ongoing trial'" (Wakabi 2013c). This revelation threw yet another wrench into the gear of this trial that had already been ongoing for two years. At this point, Bemba had been detained by the ICC since 2008—around 7 years.

Soon after the arrest of his lead lawyer, Bemba made his first appearance in his second trial, that for witness tampering in relation to his ongoing war crimes and crimes against humanity trial (hereafter I will refer to the war crimes/crimes against humanity trial as the "main trial"). The Bemba Defense team for the main trial maintained his, and its, innocence, "call[ing] the new case 'strong-arm tactics' by Bensouda" (Wakabi 2013a). The defendants in the witness tampering case were charged with various combinations of "presenting evidence" or "ordering the presentation of evidence known to be false or forged" as well as "corruptly influencing witnesses by bribing and coaching to provide false testimony" or "aiding, abetting, and assisting in the crime of presenting false evidence" (Wakabi 2013a).

[33] At the same time, the Assembly of States Parties (ASP) was having its 12th annual meeting (November 20-28, 2013). The "structural roles" section discusses the importance of these meetings for the relationship between civil society and the ICC. In short, these events are important tools through which NGO leaders hold the Court accountable for its actions and announce their hopes for the upcoming year of Court operations.

This second trial presented a curious debacle for Bemba's main trial; his case manager and lead lawyer were detained for witness tampering. Further, Kilolo-Musamba's iPad and Blackberry were confiscated as evidence—devices which, according to Kilolo-Musamba, contained the entire Defense strategy. For the first few days of Kilolo-Musamba's detention, Bemba was not allowed to speak to his lead Defense lawyer. However, Judge Steiner, the presiding judge in the main trial, stressed that Bemba "had right to counsel in the main trial" so communication was opened up between the two, for thirty minutes a day via telephone (Wakabi 2013d). Bemba made an existing lawyer on his Defense team, Peter Haynes, the new lead lawyer for the Defense.

In January 2014, investigators revealed that Bemba "ran a 'criminal scheme' from his prison cell," providing evidence that payments were made to fourteen witnesses and that Bemba had even communicated with some of these witnesses directly, a clear violation of Court rules. In the early months of 2014, the Defense team responded to these claims by the OTP's investigators. It also filed to get information on the informant who tipped off the Prosecution about potential witness tampering, which judges granted on March 27, 2014. More specifically, judges ruled that the Prosecution had to turn over the evidence it was given that sparked the investigation, but not identifying information of the informant. Ultimately, Bemba and four others were convicted of "offenses against the administration of justice" (International Criminal Court 2018e). The guilty included Bemba, his former senior Defense lawyer Kilolo-Musamba, Wandu, and Arido[34] (Wakabi 2014b).

[34] Arido is generally thought to be witness D04-11, who was scheduled to appear in September 2012 but never boarded the plane to the Hague.

Importantly, judges ruled on April 2, 2014, that the evidence of witness tampering "would not be admitted into the case record for the main trial" (Wakabi 2014c). In other words, Bemba's main trial would finally be allowed to move forward. The conviction of Bemba, members of his legal counsel, and proposed witness Arido for witness tampering has obvious implications for the service of justice. If nothing else, the efforts to root out witness tampering and hold trials for it are a drain on the Court's already-limited resources.

Civil Society Interventions: Evidence, Amicus Briefs, and Public Pressure

NGO Evidence

NGO evidence can be submitted to the Court through by the Defense, Prosecution, and Legal Representatives for Victims, consistent with ICC procedures as well as practice outside of the Court. During the Bemba trial, a delay in the trial was caused by a debate regarding the admissibility of evidence from NGO reports by the United Nations, Amnesty International, and other related groups. The Prosecution wished to submit these existing reports as evidence. The Defense objected to the submission of these reports without the ability to call witnesses regarding them and expressed concerns about the burden these reports would pose on the Court if they were submitted in whole (Wakabi 2012a).The Defense also disapproved of the submission of several of these reports in particular, citing concerns about the lack of individual authors, and reported concerns about the data collection methods used to gather the information for the reports. The Prosecution responded that submitting these reports in lieu of calling witnesses was an efficient method of submitting evidence to the Court that was consistent with existing ICC procedures. In July 2013, judges admitted almost all these reports, citing the importance of them for providing evidence that could impact their decision in the trial and the general relevance of the information contained within (Wakabi 2013e). It seems to me that this ruling is consistent with the ICC's Rules of Procedure and Evidence and the very principles of

the Court which allow for the submission of evidence of crimes by NGOs, a practice that has occurred in nearly every trial. In fact, Article 15 of the Rome Statute specifically allows for the Prosecutor to receive evidence from "states, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate" (International Criminal Court 2011a, 9). It does not strike me as an attempt by civil society actors to influence the Court, as these documents were already published, although it is unclear whether the existence of these reports was made known to the Prosecution by the NGOs themselves.

Ultimately, the judges ruled to enter into evidence the aforementioned NGO reports from several external organizations, including International Federation for Human Rights (FIDH), Amnesty International (AI), the United Nations, and the BBC. Judge Ozaki was the one judge of three who dissented along with the Defense. This means that the process of approving those documents took over a year—from April 2012 to July 2013. This demonstrates not only the slow pace of a newly operating Court, but also the tensions between civil society participation in the service of justice. On the one hand, the Court has created broad opportunities for NGOs and other groups to cooperate with the Court, especially in information-sharing. And yet, the ability to submit evidence by one of these groups is not guaranteed as demonstrated by the debate over the admissibility of those documents.

Amicus Curiae

The submission of *amicus curiae* or "friend of the court" briefs is one method through which external actors can potentially influence court activities or decision-making. Carter, Elllis, and Jalloh (2016) state that "NGOs use the process of amicus curiae as a way to pressure courts on critical legal issues […] NGOs are able to advance their own agenda while acting on behalf of victims […] Amicus curiae briefs have influenced court decisions in many jurisdictions around

the world" (Carter, Ellis, and Jalloh 2016, 266; 268). This idea is echoed by Sarah Williams (2020). ICC expert Rosemary Grey, an *amicus* herself, explains that in her brief submitted for the Dominic Ongwen[35] trial that the goal is not to make judgments but rather to explain the law and jurisprudence and to make "legal points" about what is possible in certain cases (interview with author). However, at the ICC, these actors must seek leave (permission) to submit, which can either be granted or denied by the Trial Chamber. According to some experts, the granting of amicus is not very common at the ICC (Carter, Ellis, and Jalloh 2016, 271). In fact, they specify that at the time of their book (2016) 63 applications to submit amicus briefs had been made at the ICC, but only 21 had been accepted for a rate of approximately 30% (Carter, Ellis, and Jalloh 2016, 272). Further, both the Prosecutor and the Defense can respond to any points within the brief by submitting written responses (International Criminal Court 2019a). The Trial Chamber, in addition to granting leave to submit, also sets time limits for the submission and responses to the briefs.

There were two amicus briefs, one filed by Women's Initiatives for Gender Justice (WIGJ) and one by Amnesty International, during the Bemba trial. Interestingly, Human Rights Watch was not one of these groups, despite their mission to "investigate expose, [and] change" policies that are detrimental to human rights and their work on the related Bosco Ntaganda case. The Amnesty International brief was filed during the Pre-Trial period, in April 2009, on the subject of command responsibility[36]. In the decision on Amnesty's request to submit, the single judge (acting on behalf of Pre-Trial Chamber II as a whole) wrote:

[35] Dominic Ongwen was on trial at the ICC from 2016 to 2021 for crimes he committed as part of the Lord's Resistance Army in Uganda. Grey and several NGOs submitted an amicus brief for this case.
[36] Amnesty International used the terminology of "superior responsibility" in the brief, a synonymous term but one not used at the ICC. The brief still refers to the Article 28 mode of liability relating to commanders' responsibility for the actions of their troops.

> the proposed brief for which Amnesty International seeks leave to submit tends to present pertinent information on legal issues that the Chamber may find useful. Accordingly, [Judge Trendafilova] considers that granting the Request is desirable and appropriate for the proper determination of the case. However, the Single Judge underlines that Amnesty Intentional must confine its submission to the legal aspects outlined in the Request and refrain from making any indication or link to the specific facts of the case (International Criminal Court 2009b; see also Carter, Ellis, and Jalloh 2016).

The submitted brief explained how command responsibility could be used in the Bemba trial, given international criminal law and the Rome Statute and the threshold for charges. Carter, Ellis, and Jalloh (2016) tell us that the Chambers referred to Amnesty's brief, but "only once and as part of many references to support the argument" about Article 28 on command responsibility (Carter, Ellis, and Jalloh 2016, 286).

WIGJ filed an amicus brief to the court for the Bemba trial in July 2009. This made them "the only international women's rights organization to be granted such status (Women's Initiatives for Gender Justice 2009). This brief was written by Patricia Sellers, legal counsel of WIGJ, former legal adviser on gender at the ICTY, and Special Adviser on Gender at the ICC. This brief regarding the concept of cumulative charging[37] was submitted in 2009, during the pre-trial phase, although many groups attempted to collectively submit a brief on this same topic later in the Bemba trial. The Chambers later referred to the WIGJ brief but stated that it "did not accept the arguments of the amicus submission regarding the proper interpretation of the constitutive elements of the crimes and the general assessment of the evidence" (Carter, Ellis, and Jalloh 2016, 287). In other words, it is clear that the Court paid attention to this brief, although it did not agree fully with the arguments contained therein. The Association for the Promotion of Democracy and Development in the DRC (APRODEC) requested leave to submit

[37] Cumulative charging, according to Fiona O'Regan (2012) "refers to the process by which an accused can be charged with a number of different crimes based on the same underlying acts, with the charges being expressed cumulatively rather than alternatively" (O'Regan 2012).

three different times in the Pre-Trial phase throughout 2009 on various subjects related to Bemba's defense. These were all rejected.

Public Pressure & Monitoring

Human Rights Watch

Human Rights Watch (HRW) is a critical actor in international justice and the promotion of human rights. Their international justice page states that:

> Human Rights Watch considers international justice—accountability through fair trials for genocide, war crimes, and crimes against humanity—to be an essential element of building respect for human rights. The International Justice Program champions meaningful justice for victims and survivors of serious international crimes and due process for the accused. We look to the International Criminal Court, other international tribunals, and national courts, whether in the countries where crimes have been committed or through the principle of universal jurisdiction to carry out fair and impartial trials. We advocate for effective justice mechanisms and advance innovative and practical pathways to overcome roadblocks to justice, working to build the political momentum and state cooperation to support accountability in the long term" (Human Rights Watch, n.d.).

Human Rights Watch was involved in monitoring developments of the Bemba trial at the International Criminal Court. The organization put pressure on the ICC by publicly calling for changes in policy, for wider scope in prosecutions, and greater steps toward justice for victims in public reports. These reports are generally authored by multiple HRW writers and researchers and based upon primary research—often field-based research—and have provided evidence to the OTP in bringing other trials to the Court. In these reports, for example, they state that "Human Rights Watch *called on* [emphasis added] the court to pursue other senior officials" in addition to Bemba, though it did celebrate the investigation in Bemba specifically (Human Rights Watch 2008). We frequently see such language in these documents, stating that at various stages of the trial, HRW "repeatedly urged" and "repeatedly called on" ICC members-states and

actors within the ICC to pursue justice to the furthest extent possible and to hold actors accountable for egregious crimes against humanity and war crimes (Human Rights Watch 2009a; Human Rights Watch 2010a; Human Rights Watch 2013; Human Rights Watch 2016c). This is in addition to its regular Memoranda to the Assembly of States Parties, which is a document outlining its recommendations for how ICC member-states and the Court itself can achieve their stated goals. These Memoranda do not mention the Bemba trial specifically, but rather challenge the ICC as an organization to remember its mission statement, its jurisdiction, and the incredible power it can wield in the search for justice.

A review of all Human Rights Watch reports published on their website from the issuance of Bemba's arrest warrant (May 23, 2008) to his conviction in the first trial (March 21, 2016)[38] shows that HRW did not engage in any significant lobbying for particular indictments or charges, nor did it appear to pressure the ICC to hold Bemba specifically to account for crimes committed by the MLC troops in the Central African Republic. A closer look at the content of the articles that directly address Bemba does reveal a particular focus on the significance of the sexual violence charges. However, compared to other issues of the day, the frequency and content of HRW's voice on the trial is remarkably silent.

Then-HRW researcher Peter Bouckaert authored one of the few HRW reports to even mention Bemba. This article, originally published in *Foreign Policy*, focused on more recent crimes committed in the CAR, introducing the article with the following question: "Refugees who fled from brutal violence in the CAR can look across a river border and see the men who still want them dead. Will they ever be able to return home?" (Bouckaert 2014). At the end of a

[38] There were 644 reports published by HRW on its website under the "reports" tab in that timeframe.

more than 3,000-word piece, Bouckaert mentions the Bemba trial: "the ICC is trying the former Vice President of neighboring Congo, Jean-Pierre Bemba, whose troops […] committed grave crimes, including widespread sexual violence, against civilians" (Bouckaert 2014). It is significant that the only charge named in this article was sexual violence, a traditionally under-prosecuted crime. This is a pattern that can be traced throughout the monitoring of the Bemba trial by Human Rights Watch. After reporting his conviction, they write in a dispatch (press release) that this event "was both a victory for sexual violence victims and a stark warning to senior commanders who turn a blind eye while their troops rape and commit other atrocities" (Human Rights Watch 2016a). Again, they are specific only about the sexual violence charges, without explicitly naming the murder or pillage charges, for example. The title of the article is "Dispatches: High-Profile ICC Warning to Commanders on Rape" (Human Rights Watch 2016a). In the articles published regarding Bemba in the aforementioned time frame, the rape charges are most often mentioned first (see Bouckaert 2014; Human Rights Watch 2015a; Walsh 2016). In that same time frame, Human Rights Watch published exactly two Tweets[39] about Bemba, both linking to the same 2010 HRW "Q&A" article on the Bemba trial. By comparison, HRW published 34 Tweets on the human rights concerns around FIFA, the International Federation of Association Football.

Amnesty International

HRW is not the only human rights actor responsible for holding states, organizations, and individuals accountable for the violations of human rights. Amnesty International is an important player in this space as well. A search of its website reveals two Bemba-related documents.

[39] See Figure 2 in Appendix for table comparing Bemba and Ntaganda Tweets

Amnesty Tweeted about Bemba exactly zero times. In other words, while Bemba—a former vice president of the DRC—was on trial, a major human rights organization made no Twitter mentions of him whatsoever.

News Media and Social Media

In terms of LexisNexis news articles, the numbers are bleak: there are far fewer mentions of Bemba's trial than I expected. The date range for these articles, as with searches of other sources, is the full range of Bemba's main trial: May 23, 2008, through March 21, 2016. In that eight-year period, there were 96 articles published about Bemba. Duplicate titles were not counted, but the same articles published under different titles are a possibility.

A Twitter search of news outlets, human rights organizations aside from HRW and Amnesty, and individual activists shows a similar pattern in attention. Again, the search was limited to the duration of Bemba's main trial and the search term was simply "Bemba." We can see that several sources mentioned Bemba, although much of the focus was on his trial for witness tampering. Four organizations failed to Tweet even once about Bemba. So, what does this tell us about the attention the media placed on trials for wartime rape at the ICC? To put it in the words of John-Allan Namu, founder of Africa Uncensored, in his sole Tweet about Bemba, "Jean-Pierre Bemba trial on now, not a journo [journalist] in sight to cover it #ICC" (Namu 9/1/2011 Tweet). I did not find overwhelming evidence of public-facing transnational activism, suggesting that the role played by such activists does not reflect the traditional understanding explained in the literature. This led to my pursuit of a comparison case, to determine if the general lack of public pressure directed at the Court was unique to the Bemba case. This stark landscape was unexpected, given the scholarship reviewed above regarding the influential voice and activism of NGOs in building an international justice system. It led me to take on a second,

comparative case, that of the trial of Bosco Ntaganda. The following chapter on Ntaganda's trial will provide details of comparisons between activist attention between the Bemba and the Ntaganda trial.

Summary of Bemba Trial and Conclusions

On May 26, 2014, judges set the final court schedule, including closing briefs from both sides and responses, culminating in the final oral submissions to be submitted on November 10, 2014. From May to November, several witnesses were called again to testify about potential witness leading, "corruption, and ill-treatment" by the Prosecutors, which ultimately came to nothing. In November, closing arguments were presented. Of course, the Prosecution implored the judges to convict Jean-Pierre Bemba Gombo for the war crimes and crimes against humanity committed by his MLC troops in the CAR between 2002-2003. The Defense asked judges to acquit Bemba, stating that the Prosecution failed to prove Bemba's solders were responsible for the crimes or that Bemba failed to respond accordingly if and when he knew of soldier wrongdoing. Several days later, judges confirmed the charges for Bemba's second trial for the corruption of 14 witnesses between 2011 and 2013. That trial then opened September 29, 2015. At the same time, judges from the main trial were deliberating their verdict, to be delivered in March 2016.

On March 21, 2016, Jean-Pierre Bemba was found guilty, unanimously, on two counts of crimes against humanity for murder and rape and three counts of war crimes for murder, rape, and pillaging by Trial Chamber III. The sentencing hearing was held May 16-18, with judges sentencing him to 18 years in prison in June. Per ICC rules, the years spent in custody awaiting trial and during the trial are counted towards the accused's sentence. In other words, as of 2016, Bemba had already served 8 of his 18-year sentence.

This trial demonstrated important dynamics at play within the International Criminal Court in terms of policies and procedures, but also politics. Bemba's trial began in November 2010, a delay from its original April 2010 start date. That pattern of delays, of a trial unfolding in fits-and-starts, continued until the date of conviction in March 2016. Witnesses, many of whom were corrupted by the Defense, were unavailable and much of their testimony was given in private session. This is unremarkable given the subject matter but does pose questions for legitimacy and transparency purposes. We can see that although much may change throughout the trial—lawyers, witnesses, legal characterization, etc.—charges are neither added nor dropped beyond the confirmation of charges hearing (although not all charges yield convictions, of course). Even the legal recharacterization proposed by the judges was challenged by the Defense on the basis that such a change would put Bemba up against unconfirmed charges. This suggests that the only opening for influence on charges and other trial outcomes lies in the Pre-Trial phase.

Alternatively, if we think activists have an impact on the prosecution of SGBV at other stages in specific trials, particularly in a public-facing "PR-style" campaigns, we must assume that the influence is on judges' decisions. A reading of the daily unfolding of this trial yields *no* evidence of this. In fact, NGOs had little formal engagement with the Court regarding the Bemba trial if the International Justice Monitor can be considered a reliable source—and it is. Two amicus briefs were submitted, one by Amnesty International and one by Women's Initiatives for Gender Justice, both during the Pre-Trial phase. Of the two, the Chambers only requested the submission from Amnesty. Association for the Promotion of Democracy and Development in the DRC (APRODEC) requested leave to submit three briefs, which were denied. Another brief, written by International Women's Human Rights Law Clinic, was also denied. This shows that

the Chamber was generally neither publicly seeking advice or input from NGOs, nor did it allow such input in most cases. No references to sit-ins, protests, or Gbowee-esque sex strikes exist in the public record. In short, I did not find evidence of public activism by NGOs or other transnational activists and therefore cannot find that judges were swayed by such. My takeaway from a close analysis of this trial is that the Court was *new,* and it was *learning*, and that these and other case-specific dynamics were entirely internal to the Court. It was not swayed by the public pressure of NGO twitter or press campaigns.

Precisely two years later, however, Bemba was acquitted of the charges pursued in his main trial and was released on June 18, 2018. The Defense maintained that Bemba did not have effective control over his troops and therefore a conviction on the basis of command responsibility was inappropriate. Wakabi (2018) explains that "The defense appeal against conviction focuses on the level of control Bemba had over the troops in the CAR, whether he knew about the crimes, what actions he took to deter and punish them, and whether his group had an organizational policy to attack civilians. Furthermore, the defense has argued that, even if the conviction is upheld, Bemba's sentence was disproportionate, and the 10 years he has already spent in ICC detention was sufficient time served" (Wakabi 2018b). The majority of the Appeals Chamber agreed: after the appeals hearing, they determined that Bemba acted appropriately to stop and/or prevent crimes committed by his troops where he knew of them and was able to (International Criminal Court 2018d; Wakabi 2018a).

The acquittal of Jean-Pierre Bemba Gombo was seen as a devastating blow for international justice, especially for sexual and gender-based violence and the victims of such crimes. What was in 2016 a success for a newly established court focused on the most heinous of crimes and a particular focus on sexual and gender-based violence became an example of the

subjectivity in crime and punishment. We witnessed a trial that began in fits and starts, delayed by the inability to call witnesses according to schedule, as well as a simultaneous witness-tampering trial that ultimately ended in the acquittal of the former Vice President. There was evidence of some pressure by civil society actors. However, a former Amnesty International leader explained that the organization did not closely monitor the Bemba trial, saying "I think at that point, I think we were still getting to terms with how we were going to be following these trials et cetera. So obviously you know, we knew the trial was going on. We knew some of the issues and some of the key aspects of it, especially given that they hadn't been addressed properly in Katanga and Lubanga and so we were definitely alive to the significance of the case. But I'm not sure at that point we were engaged constructively enough in what was happening during the actual proceedings" (interview with author). The lesson learned from this trial centers on the Court itself and the adjustments it makes from one trial to the next. New policies also show how the Court adapts and grows. Norm fortification is a process, it is iterative, and it takes time. A comparison between the Bemba trial and that of Ntaganda clearly displays that learning curve.

CHAPTER FOUR: BOSCO "THE TERMINATOR" NTAGANDA AT THE ICC

In the US, one might think of Arnold Schwarzenegger upon a mention of the "Terminator." In the Democratic Republic of Congo, however, the Terminator is less likely to evoke images of Hollywood characters. Instead, the victims of war crimes and crimes against humanity during the 2002-2003 Ituri conflict are stricken with memories of the vile atrocities committed upon their families by Bosco Ntaganda, Congolese militiaman and former army deputy chief of staff, known as "the Terminator." Ntaganda and his FPLC/UPC soldiers were responsible for the deaths of civilians, conscription and enlistment of child soldiers, rape and sexual slavery committed in Ituri (Human Rights Watch 2019). Ntaganda, unlike Bemba, was charged as a direct perpetrator of crimes, including the murder of a priest (Burke 2019). Ntaganda was convicted of 18 counts of war crimes and crimes against humanity in 2019. At the time, that was the only final conviction for sexual and gender-based crimes at the ICC, after Jean-Pierre Bemba's acquittal in 2018.[40] Although Ntaganda was charged with far more crimes than many defendants before him, including Bemba, the global activist community still criticized the narrow scope of the charges against him. As the Open Society Justice Initiative states, "[t]he human rights community has criticized the limited geographic and temporal scope of the charges, in light of the widespread allegations that Ntaganda led summary executions, rape, and forced recruitment of child soldiers throughout the DRC's North Kivu province between 2006 and 2012" (Open Society Justice Initiative 2015, 2). Although there is no evidence that the Court

[40] Since, Ugandan Dominic Ongwen was convicted for sexual and gender-based crimes, including rape and sexual slavery in 2020. The conviction was upheld.

adjusted its behavior on the basis of these criticisms, it does suggest that transnational activists monitor court decisions and publicize their opinions on individual trial decisions.

The Ntaganda case was another instance of many "firsts" for the ICC and presents a great comparative case study for the Bemba trial in terms of both media attention and human rights activism. However, there are also many similarities between the two cases in terms of trial process and procedure. The dissatisfaction of the international community with the narrow scope of charges brought against the defendants considering the breadth of crimes for which there is evidence is present in both cases. Both trials are characterized by delays, last-minute decisions, and other symptoms of a Court findings its footing.

Ntaganda's first arrest warrant was issued in 2006. He neither surrendered himself nor was he arrested and surrendered to the ICC. While evading detention, he continued to commit crimes in the region and the investigation into his actions and the DRC situation more broadly continued. This ongoing investigation revealed further evidence of Ntaganda's role in the violence and led to the issue of a new arrest warrant in 2012 with expanded charges for the 2002 Ituri conflict. These expanded charges importantly included rape and sexual slavery, amongst other charges beyond the previous charges related to child soldiers (Open Society Justice Initiative 2015). This second warrant was unsealed, likely creating further pressure to turn Ntaganda over to the ICC. On April 11, 2012, DRC president Joseph Kabila called for the arrest of Ntaganda, but "stopped short of promising his extradition to The Hague" (Reuters 2012). Instead, Kabila announced his intention to try Ntaganda at home, stating ""I do not work for the international community. What I want to do is for the Congolese population'" (Reuters 2012). This reaction is unsurprising, coming just a few months after African Union president Jean Ping

criticized Prosecutor Moreno Ocampo for unfairly targeting Africans[41] (Lough 2011). Kabila also claimed that Ntaganda was integral to the peace in DRC and that arresting him and shipping him to the Hague would disrupt that peace (Reuters 2012). However, in 2013 after some in-fighting within the M23, an offshoot of Ntaganda's former CNDP, "Ntaganda lost out to loyalists of his rival, Col. Sultani Makenga, and apparently fearing death, he walked into the US embassy in Kigali, from where he was transferred to The Hague…" (Dale 2019).

Ntaganda first appeared before the ICC on March 25, 2013. His confirmation of charges hearing was scheduled for September 2013, but was later rescheduled by Pre-Trial Chamber II to February 2014, allowing the Prosecutor "additional time to ensure the protection of witnesses and effective disclosure of evidence to the defense" (International Justice Monitor 2021). The Chamber especially noted that "…the case had been dormant for several years [… and] 'where the suspect is evading justice for many years, it is neither possible nor reasonable to impose on the Prosecutor a permanent stand-by availability of the teams for years" (International Justice Monitor 2021). Although it caused a delay in trial proceedings, I think this move speaks more to the Court's pragmatism than a reluctance or inability to prosecute in this case. After all, the Court continued to devote resources into investigating Ntaganda. It also suggests the Court learned from previous trials that convicting a defendant on the basis of charges that were not confirmed is not a solid prosecutorial strategy. It is important to remember that Bemba was acquitted upon appeal, partly for that exact reason.

In mid-February 2014, Ntaganda's confirmation of charges hearing was held in The Hague. At these hearings, the OTP presented evidence that Ntaganda and the UPC/FPLC militia

[41] See the discussion about this in the literature review.

under his command committed war crimes and crimes against humanity. The Defense took issue with the expanded number of these charges brought against Ntaganda from his March 2013 appearance to the start of the confirmation hearings—from 10 to 18 charges, including additional modes of liability (Wakabi 2014d). The main point for Defense at that time, though, was to stress that Ntaganda's attacks "were not against civilian populations" but rather against enemy combatants (Wakabi 2014d). This was consistent with the "protector" role that the Defense was portraying of Ntaganda.

While the Prosecution portrayed Ntaganda as a vile criminal and violator of human rights, the Defense countered that Ntaganda and the FPLC actually provided security and protection for the people in the region (Wakabi 2014a). Interestingly, both the Prosecution and Defense used the same video footage to support these contradicting viewpoints. The content allowed the Prosecutor to show the commission of violence by armed actors associated with the Hema ethnic group against another particular group—the Lendu people[42]—though the Defense argued that crimes were not committed and that Ntaganda's violence against combatants was justified (Wakabi 2014a). The evidence submitted to the judges was designed to allow them "to determine whether to commit the case to trial" (Wakabi 2014a).

After months of deliberation, the judges did just that. On June 9, 2014, Pre-Trial Chamber II unanimously confirmed all eighteen charges against Bosco Ntaganda: thirteen war crimes and five crimes against humanity (Open Society Justice Initiative 2015, 2; Wakabi 2014d). Some of these charges were novel—for example, the charges of sexual slavery. Ntaganda was the first to be charged with sexual slavery. These charges demonstrated a

[42] There were crimes committed against other groups.

commitment by the Court to prosecute a range of sexual and gender-based crimes beyond rape. This is norm fortification in action—the practical implementation of the commitment to prosecuting SGBV at the ICC where the crime of sexual slavery had not yet been tried successfully. It is surely no accident that the OTP's policy paper on SGBC was published that same month. Additionally, "the pre-trial chamber found that there [were] substantial grounds to believe that Ntaganda bears individual criminal responsibility pursuant to different modes of liability for different crimes. Ntaganda is charged with direct perpetration and indirect perpetration […] and with ordering and inducing the commission of a crime […] Ntaganda is also charged with any other contribution to the commission or attempted commission of crimes [… and] as a military commander for crimes committed by his subordinates" (Open Society Justice Initiative 2015, 2). Therefore, for several crimes, Ntaganda was charged under several modes of liability (International Criminal Court 2014f: 35).

The opening[43] statement by the Prosecution was heavily focused on the issue of sexual violence. The narrow charges against previous defendants likely served as impetus as this. Wakabi (2015h) reported that "Bensouda said rape and sexual enslavement of soldiers were so prevalent in Ntaganda's armed militia that these girls were referred as 'guduria', a Swahili word for a large communal cooking pot. They were 'reduced to objects which soldiers and commanders would pass around and use for sex whenever they pleased'" (Wakabi 2015h). The opening statements also centered on demonstrating that Ntaganda, as well as Lubanga and Floribert Kisembo "were the top commanders of the UPC" and that it was the UPC/FPLC that were committing crimes in Ituri (Wakabi 2015h). At the same time, HRW published an article

[43] Arguments were made on behalf of holding the opening statements *in situ*, in the DRC for the Ntaganda trial, as with the Bemba trial. This recommendation was denied by the judges and will be discussed later in this section.

about the trial of Ntaganda, both celebrating the start of his trial and its impact on impunity for crimes committed in DRC, and also criticizing the scope of charges and number of defendants in the case. Then-director for international justice advocacy at HRW Géraldine Mattioli-Zeltner stated, "'Ntaganda's blood-stained path to the ICC demonstrates the terribly high price that civilians pay for impunity,'" Mattioli-Zeltner said. 'ICC and Congolese authorities should redouble their efforts and work together to arrest and bring to justice others responsible for grave crimes and their backers who are complicit in them'" (Human Rights Watch 2015c). This provides an example of the public ways in which human rights actors can call for Court action during a trial, without calling for specific trial outcomes. Norm fortification can happen in this way, by encouraging the Prosecutor to consider other defendants or cooperate to finally bring at-large defendants to trial.

Ntaganda's Defense team set out to show that he was actually "a [r]evolutionary, not a [k]iller" and served to bring peace to the region (Wakabi 2015g). Ntaganda, in an unsworn statement[44], claimed that he joined the UPC "to restore security and protect civilians," using the military instruction he received from Ugandan and Rwandan "'military experts'" (Wakabi 2015g). Ntaganda stressed his commitment to protecting Tutsis that he claimed the government was targeting (International Justice Monitor 2015). He spoke about the existence of ethnic conflict in Ituri that began in 1998, citing this as the reason he joined the UPC in 2002. He asked the Court "to make a distinction between a revolutionary rebel and a criminal" (International Criminal Court 2015c, 75). In the final judgment, the trial judges responded to these claims, stating:

[44] Similar to Bemba's, made in accordance with Article 67(1)(h) of the Rome Statute

> the Chamber does not find Mr. Ntaganda credible when he affirms that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general in Ituri and that this revolutionary ideology was governing the functioning of the UPC/FPLC. The Chamber observes that this statement is clearly contradicted by the other available evidence on the record which shows that at least a part of the civilian population in Ituri, in particular the Lendu, was actually the target of violent acts by the UPC/FPLC in 2002 and 2003 (International Criminal Court 2019b, 113).

A main part of the Defense's case related to the liability of command responsibility—Ntaganda denied that charge from the outset of the trial and maintained throughout that he was not the commander. Ntaganda argued that he was not the leader of the UPC because, as Deputy Chief of Staff, he was "subordinate to the UPC's chief of general staff, Floribert Kisembo. He added that he was also subordinate to Thomas Lubanga who was the group's political leader" (Wakabi 2017e).

Witnesses in the Ntaganda Trial

The first prosecution witness began their testimony on September 15, 2015. This witness was the first of the more than 80 that the Prosecution proposed at that time, including some who had testified in the Lubanga trial. Witness P805 testified about the ethnic massacre of Lendu Congolese, referencing the "tribal war between the UPC and the Lendu tribe" (Wakabi 2015i). The standard protective measures were granted to this witness, including the obvious use of a pseudonym, as well as facial and vocal recognition. Cross examination by the Defense included questions about discrepancies between the witness's court testimony and their witness application. Similar lines of questioning occurred during the Bemba trial. And as in that first trial, the witness pointed to issues of translation by the intermediary taking the oral application statements (Wakabi 2015i).

Throughout September and October, witnesses continued to testify for the Prosecution. Crime witnesses testified to various heinous crimes committed by Ntaganda and his troops, including the mutilation of a pregnant woman and her fetus and the command use of child soldiers.

Insider witnesses testified to the experience serving in the UPC. Among these witnesses was a former member of the UPC who could confirm that Ntaganda was the "Senior commander in the UPC and its militia, the FPLC" and that he was giving orders in Ituri (Wakabi 2015d). A former child soldier was scheduled to testify but failed to do so on her first scheduled day due to discomfort at being in the same room as Ntaganda. She took the stand but refused to answer questions, so court was adjourned. The witness, identified as P-010, only testified about her rape by FPLC commanders after Ntaganda agreed to attend court proceedings remotely (Wakabi 2015b). The Defense unsuccessfully sought to impeach this witness, citing issues with her victim status in the Lubanga trial and discrepancies between her witness applications for each trial (Wakabi 2015f). Ultimately, her testimony was allowed to stand as judges rejected the Defense's arguments.

The Prosecution in the Ntaganda trial called 12[45] expert witnesses (compared to the 4 called in the Bemba trial). Expert witnesses included a former UN Special Rapporteur for the UN Commission for Human Rights, Roberto Garretón, who was the first expert witness to testify. His testimony from the Lubanga trial was accepted into evidence as well, providing contextual and conflict-related information about ethnic conflict in Ituri (Wakabi 2015e). Expert witness Dr.

[45] Wakabi, who provided daily reporting on the Ntaganda case through the *International Justice Monitor* reported at the time that the Prosecution called 11 witnesses. A count of all names and the Defense's response to the Prosecution's request to call these experts reveals there were 12 called.

John Charles Yuille[46], a forensic psychologist who testified about PTSD and trauma for victims, especially victims of sexual assault (Wakabi 2016b). Similarly, Maeve Lewis testified based on her assessment of four individuals allegedly raped by UPC troops in Ituri. She wrote reports, which were submitted as evidence in the trial, with those assessments of their "psychological harm or consequences" as a result of the violence committed against them (Wakabi 2017l). Dr. Sophie Gromb Monnoyeur also reported on trauma experienced by alleged victims of UPC attacks. Dr. Lynn Lawry testified about sexual violence in Ituri. Wakabi (2016) reported that "[a]ccording to Lawry's report, which prosecutors tendered into evidence, 40 of the households sampled in Ituri, or one in every seven households, reported that they suffered abuses at the hands of UPC fighters. Five of the alleged brutalities by UPC rebels were rape. The study had another 13 respondents reporting rape by combatants from other groups" (Wakabi 2016i). Several experts were called to testify about various issues related to crimes or crime scenes, including a satellite imagery specialist as well as several experts on exhumations (Wakabi 2017m). One such expert was Dr. Derek Congram, "[a] forensic anthropologist who conducted excavation and exhumation at sites where local residents said victims of mass murders by Bosco Ntaganda's militia were buried says his team did not find mass graves at most of the sites" (Wakabi 2016a). He did not dispute that some evidence pointed to wrongful deaths, especially considering the shallowness of some victims' graves.

There were several victim-participants who gave witness testimonies in the Ntaganda trial. One such dual-status witness (both a victim and a witness) was slated to testify but he refused to take the stand when the judges did not grant full protective measures (International Criminal Court 2015d). The day before his testimony was set to begin, the Prosecution applied

[46] Yuille was chosen from the Registry's list of experts and approved by the Defense and the judges.

for standard in-court protective measures, but these were denied by the judges (Wakabi 2015c). In court, "Judge Fremr explained to Witness P-886 that the information judges possessed showed no immediate risk and they believed the use of a pseudonym was sufficient for his protection. Moreover, said the judge, testimony by the witness had no direct linkage to Ntaganda, the former Congolese militia commander on trial for war crimes and crimes against humanity" (Wakabi 2015c). Ultimately, this witness agreed to testify with the approved protection of a pseudonym and the ability to testify in closed session where his identifying information may be discussed.

Other victim-participants "presented views" during the trial. These victims also asked for reparations. This is consistent with the Rome Statute Article 68(3) which reads: [w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial" (International Criminal Court 2011a, 33). As Wakabi (2017) writes "the practice at the ICC has been for victims to make their presentations, or to give evidence, just after the close of the prosecution case" (Wakabi 2017c). This was the case for the Bemba trial as well. For the Ntaganda trial, a sixth witness was scheduled to present their views and concerns but failed to appear. The remaining three victims authorized to go before the Court gave evidence in court (International Criminal Court 2017b; Wakabi 2017c; Wakabi 2017n; Wakabi 2017b). Several victims recounted rape by UPC soldiers, while others discussed murders and general attacks on their villages (Wakabi 2017c; Wakabi 2017n; Wakabi 2017b).

The Defense called various types of witnesses as well. Some of these individuals had also testified during the Lubanga trial, so "these witnesses either appeared briefly before judges or had their previous testimony admitted into the evidence in the Ntaganda case without having to

testify afresh" (Wakabi 2018f). An insider witness testified about the makeup of the UPC vis-à-vis the conscription and enlistment of child soldiers. "Witness D017" denied that any soldiers were under the age of 18 and testified that several people were turned away from a training camp for being underage. He further testified that "that sexual relations among female and male recruits, as well as between recruits and instructors at the camp, were 'strictly prohibited'" (Wakabi 2018c). Although many of the Defense witness testimonies were held in closed session and therefore not available to the public, it seems that much of their testimony is related to the age of UPC soldiers with employees from local schools serving as witnesses (Wakabi 2017a).

Ntaganda himself, unlike Bemba, took the stand as the second witness in his Defense, testifying for more than 120 hours from June 14 to mid-September 2017. He was originally granted, upon request to the Chamber by the Defense, 40 hours for testimony and examination by the Defense. The Chamber also granted, "as per the usual practice" the same amount of time for cross-examination. Upon request for extra time by both the Prosecution and Defense, an extra 16 hours were granted to each side, as well as another 8 hours given to the Defense for re-direction (International Criminal Court 2017f; International Criminal Court 2017g). The Legal Representatives for Victims also questioned Ntaganda at this time. This was a far cry from Bemba's testimony, for which he was not cross-examined. According to Ntaganda's lawyer, the decision to testify in such a way before the Court came partly in response to the portrayal of Ntaganda in the media by the Prosecution. Bourgon told Wakabi that "[t]h evidence adduced by the prosecution often went far beyond the scope of the charges against Mr. Ntaganda and the prosecution focused its strategy on Mr. Ntaganda's reputation in the media, which prompted Mr. Ntaganda to lay bare his actions and conduct, and place his story in the broader context of historical events, and of his life experiences" (Bourgon 2019). Bourgon also stated that "[f]or

Mr. Ntaganda, even though the final decision was delayed to ensure this was the best strategy in the circumstances, the ultimate decision was clear and simple" (Bourgon 2019). In other words, the Defense reacted to the Prosecution's strategy and made the decision in the midst of the trial, rather than at the outset. This caused a delay in the trial proceedings but presented a unique moment for Ntaganda, as neither Bemba nor Lubanga chose to testify in their own defense.

Ntaganda's testimony began with his recollection of his upbringing in Rwanda and experiences of the Rwandan civil war and genocide, stressing that witnessing the violence in Rwanda directly led to him joining the AFDL militia under Laurent Kabila in the mid-1990s (Wakabi 2017f). Defense Lawyer Bourgon asked of the defendant: "Mr. Ntaganda, the genocide that you witnessed, did it contribute to transforming you into the person that you are today and, if so, in what way?" To which Ntaganda responded: "I remember that when we put an end to the genocide in Rwanda, our superiors told us that what we had just seen, those of us soldiers, if possible, we had to do everything to prevent this from happening again in Africa. And this was in my mind wherever I went. I testified about that. And I told myself that I do not wish to see any community, any other community experience what my own community went through" (International Criminal Court 2017d, 41).

Ntaganda reiterated his claim that he was a "revolutionary" rather than a murderer or war criminal and claimed to have been inspired by Uganda's Museveni to fight for the liberation of his country (Wakabi 2017g). He spoke of the ideals and principles espoused by the RPF, under which he served in Rwanda, as well as the Congolese armed groups of which he was a part upon returning to the Congo. He stressed that his goal in both countries was "liberation" of the people and the country (International Criminal Court 2017e). Ntaganda also reiterated, from the opening of the trial, that he did not allow crimes to go unpunished by his troops, when he was aware of

such crimes being committed, and that the UPC did not accept child soldiers (Wakabi 2017h). He claimed these were things he ensured given his military training as a "revolutionary" and "rebel," again taking care to distinguish between those roles and that of a criminal (International Criminal Court 2017e, 51). Ntaganda concluded his testimony in September 2017.

The availability of further Defense witnesses turned out to be a significant issue for the Defense case. At the outset of the trial, the Defense planned to call over 100 witnesses—another record for the ICC. In the end, the Defense called only 19 witnesses. The primary issue in witness availability seemed to be related to the logistics of in-person testimony, as we saw with the Bemba case. Witnesses are generally expected to travel to the Hague for testimony, requiring visas and other such documentation. Some require permission from their governments to do so. An alternative to testifying in-person before the Court is to testify via video link, but there is a caveat: they must do so from approved locations, generally courts in their home country. This requires the coordination of government officials there, who may be unwilling or unable to cooperate in this regard. In short, witness testimony is crucial to a fair trial but is extremely difficult to provide with efficiency in an international court. However, Ntaganda's lawyer did not express concerns at the reduced number of witnesses. He told journalist Wakabi that:

> [calling fewer witnesses than originally intended] is not uncommon in adversarial proceedings. Throughout the trial, the defense assesses on an ongoing basis what evidence needs to be called based on the strength of the prosecution case as it unfolds in court. The presentation of the case for the defense is tailored on whether there is really a genuine need for additional or corroborating evidence. In this case, as explained in our [closing] briefs but also during oral arguments, the testimony of Mr. Ntaganda as it unfolded was a determining factor in reducing the number of witnesses the defense called to testify" (Bourgon 2019).

In the end, there were only 4 Defense witnesses that testified in-person before the Court, while 8 provided testimony via video link and 7 submitted prior testimony under Article 68 (Wakabi 2018e). The total number of Prosecution witnesses called was 71, the most witnesses

called in any ICC trial to date (Wakabi 2016j). For comparison, the Prosecution called 40 witnesses in the Bemba trial.[47] Ntaganda, however, provided a considerable amount of testimony on his own behalf as part of the Defense case as well.

The disparity between the number of Prosecution and Defense witnesses in the Ntaganda trial set it apart from other trials. The ratio of Prosecution to Defense witnesses was 71:19. Comparatively, we saw 40:34 in Bemba[48] (Wakabi 2018e). The presentation of Defense witness testimony lasted only until February 2018, a shorter timeline than expected, as Defense lawyer Bourgon stated would be the case when his team filed for Ntaganda to testify (Wakabi 2017j). This justification was used when Bourgon requested extra time for Ntaganda's testimony and redirection after the Prosecution's cross-examination of the defendant (International Criminal Court 2017f; International Criminal Court 2017g).

Closing statements began on August 28, 2018, at the Hague, despite previous efforts by the Judges to again hold court proceedings *in situ* in Bunia, DRC. As with the attempt to do so for the opening statements, this was made impossible to due court costs and safety concerns in the DRC (Wakabi 2018d; Wakabi 2018g). Ntaganda gave a statement during closing arguments, stressing the role he felt he and his men played in protecting the citizens and civilians of Ituri. He stated,

> "I am a Congolese national whose objective has always been to make it possible for all Congolese to live in peace and harmony, irrespective of their ethnicity. As such, and having observed the situation from the inside, I feel great compassion as a result of all the suffering and harm visited upon the civilian populations of all the ethnic groups. The objective of the UPC/RP was to resolve the problems plaguing Congo and to protect the civilian population by putting an end to all acts of ethnically motivated violence. In spite of the accusations that have been made against me, I can take comfort in the knowledge that the UPC/RP, the FPLC and

[47] The Prosecution called 36 and 25 witnesses for the Lubanga and Katanga trials, respectively.
[48] The ratios of Prosecution to Defense witnesses in other trials were 36:24 in Lubanga, and 25:28 in Katanga

> myself made every effort possible to achieve that effort, that goal" (International Criminal Court 2018c, 67).

He referred to the expulsion of Mobutu as evidence that he and his fellow soldiers freed DRC. Ntaganda also claimed that he, with the FPLC, worked to protect the Hema and Tutsi populations from discrimination (Wakabi 2017i).

His lawyers maintained that the evidence provided by the Prosecution failed to show Ntaganda was guilty of the crimes for which he was charged, due to insufficient evidence and unreliable witnesses (International Criminal Court 2018c). The Prosecutor's closing argument centered on Ntaganda's guilt as "the Terminator"—a war criminal who targeted civilians, even children, with murder, rape, pillaging, and more. She argued that the evidence demonstrated Ntaganda's guilt beyond doubt for all charges, citing witness testimony regarding gang-rapes, sexual enslavement, and brutal murders. The Legal Representatives for Victims spoke on behalf of victims of specific village attacks and of the child soldiers, pointing to the psychological damage inflicted upon noncombatants by the UPC and Ntaganda (International Criminal Court 2018a; International Criminal Court 2018b).

The ICC as a Work-in-Progress: Learning Curves in the Ntaganda Trial

It is clear that the ICC was still learning to deal with issues of witness availability, threats of witness tampering, and debates about the admissibility of evidence. Last-minute decisions were made throughout the Ntaganda trial as well, although it seems that perhaps these are part-and-parcel of a criminal trial, rather than any shortcoming of the Court. Early in the Ntaganda trial, as in the Bemba trial, there was a debate about the appropriateness of holding some part of the trial *in situ*. The Prosecution, Defense, and the Legal Representatives for Victims all agreed that "holding part of the proceedings in the State concerned is both in the interests of justice and

most likely to 'provide maximum access to a large public and the victims'" (International Criminal Court 2015b, 9).[49] For this reason, the trial was scheduled to begin in June 2015 in Bunia, DRC. The trial chamber assigned to his case suggested that the opening statements should take place *in situ*—in the original place—in the DRC. The judges affirmed that "it is with the intention of bringing the judicial work of the Court closer to the most affected communities that it is making this recommendation to the Presidency" and further noted "the fact that all of the parties and participants expressed support for holding a part of trials close to affected victim communities as a general principle" (International Criminal Court 2015a, 11). The same argument was made on behalf of holding part of the Bemba trial *in situ* as well and was denied. In short, all parties were in favor of at least conducting some part of the Ntaganda trial, most likely the opening statements, in the DRC.

However, this proved difficult to achieve. First, some victims expressed concerns through the Legal Representatives for Victims for their safety, as well as fears of violence in Bunia if Ntaganda was to be moved there for any part of the trial (Wakabi 2015a). Ultimately, the Presidency rejected the judges' request and announced that the trial would take place in the Hague due to security and safety risks and the economic cost of holding the proceedings in Bunia (International Criminal Court 2015b, 8-11). After several further delays, caused by logistical difficulties and Defense requests for postponement, opening statements commenced on September 2, 2015.

There were concerns of witness tampering in the Ntaganda trial as well. However, the Court's response to those concerns yielded far different results in the Ntaganda trial than the

[49] This quote comes from the Legal Representative for Victims (LRV) although the Prosecution and Defense used nearly identical language to this.

Bemba trial. Allegations of witness tampering were later made public, although no charges were brought against Ntaganda or his team for this. Despite this, the judges still ordered restrictions on Ntaganda's communication with friends and family members after a request by the Prosecution to do so. This request was granted and Ntaganda's communications were restricted. After more than two years of this, Ntaganda initiated a hunger strike. For two weeks, he also refused to attend his own court proceedings—and at one point was declared unable to, for medical reasons—for the same reason and going so far as to "[refuse] to authorize any member of his defense team to represent him during his absence" (Wakabi 2016d; Wakabi 2016g). Ntaganda claimed to be suffering psychological distress as a result of restrictions placed on him in response to witness tampering allegations. He explained with no small amount of drama that "I have never been mistreated at a psychological level in the way that I have been since I have been in The Hague. For me, it's worse than harassment. That's the reason why I prefer, rather, to die than to suffer such treatment" (International Criminal Court 2016f: 8). He went on to explain that the basis of his mistreatment was related to the accusations of witness tampering and the restrictions placed upon his outside communications as a result. He continued with his lament: "[n]ow I know, I have understood, it is the end, there is no way out. My despair is directly linked to the fact that you the Judges have taken all these decisions on the basis of non-investigated allegations which are unverified, unadjudicated for which there have been no trial and against which I've never been able to defend myself. I don't even have the right to see the allegations of these witnesses" (International Criminal Court 2016f, 11-12). Judges ordered Ntaganda's lawyers to continue to represent him, despite his absence and his lack of authorization for his Defense team to do so, and the trial continued with witness testimonies. Ntaganda ended his hunger strike after fourteen days. He agreed to move forward with the trial and "signed a waiver

requesting to be excused from attending proceedings until Thursday, September 29, to enable him to attend a family visit and recover from the hunger strike. [His lawyer] said the accused had given the defense team instructions to represent him" (Wakabi 2016g).

In November 2016, the Prosecution claimed that its review "of approximately 450 of these telephone conversations reveal[ed] Ntaganda's involvement in a broad scheme to pervert the course of justice, including by coaching potential Defence witnesses, obstructing Prosecution investigations and interfering with Prosecution witnesses" (International Criminal Court 2016c). This caused the Defense to file a "stay of proceedings" so halt the trial, "[a]rguing that the prosecution abused the court's processes by inappropriately accessing critical defense information" (Wakabi 2017k). The judges ordered that the Prosecution could not use any of that evidence in the trial against Ntaganda unless authorization was given to do so at the time by the Chambers.

These decisions came alongside the Defense's request for an extension to the deadline for filing a "no case to answer" motion on Ntaganda's behalf. A "no case to answer" allows for the judges to stay proceedings against an accused and acquit them before convicting them. This typically happens after the Prosecution has finished its case and before the presentation of the Defense case (Disimine 2021). According to a decision on that subject, the judges explained that "[w]hile the Court's legal texts do not explicitly provide for a 'no case to answer' procedure in the trial proceedings before the Court, it nevertheless is permissible. A Trial Chamber may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion" (International Criminal Court 2017c). Several ICC defendants were acquitted in such a way, including the Ruto and Sang cases just the year before (International Criminal Court 2016i). The Court saw criticism for its interpretation of the "no case to answer" function in the

Ruto and Sang case, although it would later acquit Blé Goudé and Gbagbo on the same basis, so it does not stand that criticism explains the failure to acquit Ntaganda in this way. The judges explained their justification for denying some of these major requests by the Defense—the stay of proceedings and the "no case to answer" motion—with a simple reason. They argued that although the ICC statute allowed a "no case to answer" acquittal, as given in the Ruto and Sang case, and that precedent for such a thing had been set in cases at other tribunals or courts, they did not find that the evidence presented in the case thus far warranted such an action (International Criminal Court 2017c). Furthermore, they did not find that the right to a fair trial was being denied by Ntaganda and therefore, they ordered the trial to continue.

Decisions such as that which denied the "no case to answer" motion were often made over the course of several weeks or months, including appeals of the judges' decisions. However, not all decisions are made with that level of deliberation at the Court. In fact, tracking ICC court cases shows that many decisions are made in the 11th hour. Witness preparation takes place prior to individuals taking the witness stand. The process involves taking witnesses through material related to previous dealings with court officials. Witnesses also have the opportunity to make corrections and clarifications to prior recorded statements" (Wakabi 2016h). The Prosecution and Defense are required to submit preparation notes 24 hours before the witness appears, per court protocol (Wakabi 2016f).

Another last-minute decision was made, not based on protocol but rather at the judges' discretion. Wakabi (2017) explains that "[a]ccording to a June 8 ruling, judges did not consider that the court's Witness Preparation Protocol, which allows the calling party to assess and clarify the witness's evidence, applies to the testimony of an accused person, compared to a witness who may have had limited contact with the calling party. Further, they determined that since

Ntaganda's consultations with his lawyers were subject to counsel-client privilege, it would not be appropriate to apply the protocol to these meetings in the lead-up to his testimony" (Wakabi 2017d). The judges made this determination on how to handle Ntaganda's witness testimony mere days before it began. This is to say nothing of the postponement of filing submissions made due to "new software being installed" at the Court, slamming many administrative tasks to a halt (Wakabi 2017k).

Civil Society and the Ntaganda Trial

NGO Evidence

The role of civil society has less to do with public advocacy than expected. Instead, NGOs and activists participated in the Ntaganda trial by providing expert testimony and evidence and submitting amicus briefs (or trying to do so). This goes beyond what these actors do to help the Court create and revise policy. In the Ntaganda trial, a prominent activist from Human Rights Watch, Anneke Van Woudenberg[50] testified about a prior statement she had given to OTP investigators in 2013 about the existence of child soldiers amongst Ntaganda's troops. According to Wakabi, "[e]xtracts of the statement, some of which were read out in court, included accounts of victims of sexual violence perpetuated by all armed groups in Ituri – including the UPC – and the presence of armed children who 'looked 12 to 15 years old' in Lubanga's personal guard" (Wakabi 2016c). This statement and written reports were admitted into evidence, speaking to the widespread sexual violence committed by all groups in the conflict. Van Woudenberg stated during testimony that she saw children who "were small in stature. They looked extremely young. I had a close look at a couple of them because they were

[50] Van Woudenberg is the author of the oft-mentioned HRW report "Covered in Blood."

right beside me as I was sitting in the car and they were outside the door. I remember personally thinking, 'Gosh, these children look very young'" (International Criminal Court 2016e).

Van Woudenberg also testified about her research in the DRC, including a meeting with Ntaganda himself. Van Woudenberg explained to the Court that "Human Rights Watch had published information connected to individuals that Mr. Ntaganda was targeting in the city of Goma" (International Criminal Court 2016e, 75). As a result of this, Ntaganda and some of his men allegedly began to threaten the HRW office in Goma, DRC. Van Woudenberg coordinated a meeting with Ntaganda to discuss his reaction to the publication. It is the details of that meeting which Van Woudenberg related to the Court during much of her testimony at the ICC (International Criminal Court 2016e; Wakabi 2016c). She also discussed the methodology of HRW research into humanitarian law and human rights violations in conflict areas. In general, she explained how HRW researchers were able to be sure that the subjects of the reports on the DRC conflict were the groups named therein, how interviews are conducted in the field, etc. Van Woudenberg's testimony provides a unique example of norm fortification in the context of the Ntaganda trial—the commitment to submitting all relevant evidence, in this case evidence from a reputable NGO, while maintaining an efficient trial. Van Woudenberg's HRW reports were submitted as evidence without the need to question her on every point within them or to provide extensive in-person testimony, preserving the Court's time for other witnesses.

An interesting rejection of witness testimony came when Radhika Coomaraswamy was denied the opportunity to testify as an expert witness for the Prosecution; her report on child soldiers was also denied entry into evidence (Wakabi 2016e). Coomaraswamy had long been involved in international human rights, especially concerning women and children. She served as the UN Special Rapporteur on Violence Against Women, the Under-Secretary General of the

United Nations under Kofi Annan, and the Special Representative on Children and Armed Conflict (United Nations, n.d.a). She had testified at the Lubanga trial and submitted an *amicus* brief for that trial. However, the Defense in this trial questioned her impartiality, claiming that she went so far as to "'[provide] a legal opinion on certain elements of the crimes charged'" (Wakabi 2016e). The Chamber ruled that her testimony "fell 'within the chamber's own competence'" and found that the report's focus on her legal opinions was not needed. Therefore, her testimony and evidence were rejected for the Ntaganda trial (Wakabi 2016e). In other words, the Court determined her expertise was redundant. Given the focus on sexual violence at the outset of the trial, this decision is surprising. However, the Prosecution had another sexual violence expert to testify as an expert witness whose report *was* accepted as evidence which speaks, perhaps, to the redundancy of Coomaraswamy's testimony (Wakabi 2016i).

Amicus Curiae

There were three attempts to submit amicus briefs during Ntaganda's trial phase, up to the point of his conviction—all three were rejected.[51] REDRESS filed for leave to submit, once on its own accord and the second time with *Avocats sans Frontières*, both in 2014. The submission by REDRESS was intended to provide information about charges related to sexual violence as torture and the way in which they can be charged given existing jurisprudence. Specifically, the group intended to provide information to the Court "which demonstrate[d] the ways in which facts justifying charges of rape and sexual violence may, in particular circumstances, also properly support charges of torture, and when these crimes may be charged individually, cumulatively or alternatively" (International Criminal Court 2014e, 3). The co-

[51] Many more submissions were attempted and granted during the Appeals phase.

submission by REDRESS and *Avocats sans Frontières* regarded the victim application process. The third submission attempt was by international law expert and professor Dermot Groome on the subject of "pending jurisdictional issue of whether Article 8 (2)(e)(vi) of the ICC Statute (rape and sexual enslavement) applies to crimes committed by members of an armed force against children under the age of 15 who were unlawfully incorporated into the same armed force" given Ntaganda was charged for crimes against his own soldiers, a first at the ICC (International Criminal Court 2016d). All of these applications to submit were rejected, so no amicus briefs were filed during the Ntaganda trial.

Public Pressure & Monitoring

In conducting research on documentary evidence, it became clear that Bosco Ntaganda garnered at least as much media attention as Bemba. Although there was some chronological overlap in their trial processes, for much of the time period during Bemba's trial, Ntaganda was outside of ICC custody. In order to compare the treatment of each defendant by two major human rights organizations—Amnesty International and Human Rights Watch—I searched each organization's website, Twitter, and conducted a LexisNexis news search to determine the number of articles mentioning each defendant. This was restricted to the period of Bemba's trial process only, meaning from the issuance of his arrest warrant in May 2008 to his conviction in March 2016. A preliminary examination of the Ntaganda-related articles also shows a different type of publication regarding Ntaganda than Bemba. This must also take into consideration that Ntaganda was charged (and ultimately convicted) with many more counts, and of different types of crimes, than Bemba. Further, Ntaganda was also charged on the basis of individual criminal responsibility as a direct perpetrator, as well as an indirect perpetrator, whereas Bemba was charged on the basis of command responsibility. In other words, it is possible that Ntaganda's

alleged guilt for committing crimes *himself* is the reason for a greater deal of attention to his trial. His catchy nickname and the almost decade between the release of his first arrest warrant to his appearance before the Court might also explain the attention garnered by his trial.

A search of the HRW website yielded 15 results related to Ntaganda. It is telling that a special search "tag" exists for Bosco Ntaganda, not for Jean-Pierre Bemba. In the same year as Bemba's confirmation of charges hearing, Executive Director of HRW Kenneth Roth wrote a letter to President Kabila of the DRC demanding that Ntaganda be arrested. No such letter was written about Bemba. As for Amnesty International, a search of the website reveals 20 Ntaganda documents compared to 2 for Bemba during the period of Bemba's trial. Again, I think it is essential to note that this does not include the full range of Ntaganda's own trial. We can see from this initial data that far more public attention is given to Ntaganda during the Bemba trial than Bemba himself. A deeper look into individual pieces is needed in order to truly compare the nature or the content of these articles, however.

News Media and Social Media

A Twitter search of the accounts of major news outlets, other human rights organizations, and individual activists shows a similar pattern in attention. Again, the search was limited to the duration of Bemba's main trial. Search terms were limited to "Bemba" and "Ntaganda" and duplicate entries were not counted. During the time period of interest, HRW issued 15 tweets regarding Ntaganda, compared to 2 regarding Bemba. Amnesty tweeted about Bemba exactly zero times, while Ntaganda was mentioned twice. This is especially interesting, as these social media mentions of Ntaganda were made before his trial had even begun. We can see that 5 of the 18 organizations placed higher emphasis on Bemba generally, including mentions of his witness tampering trial. Four organizations failed to tweet even once about either Bemba or Ntaganda,

while seven mentioned Ntaganda more times than Bemba. This left 2 occasions on which the number of tweets was exactly equal.

Finally, a LexisNexis search for news in English during the Bemba trial reveals far fewer articles about Bemba than Ntaganda. In the effort to determine the level at which human rights organizations were making mention of the trial in the news media, my search terms included both the defendant's full name "Bosco Ntaganda" and "Human Rights Watch" as well as "Amnesty International." The search for Ntaganda-HRW yielded 923 results, compared to 261 for Bemba. The search for Ntaganda-AI yielded 163 results, compared to 96 for Bemba. Many of these are duplicates of each other, although we can assume that since the same periodicals are included that roughly the same number of duplicates exist for each defendant.

Summary of Ntaganda Trial and Conclusions

Once the trial ended, it took just under a year for a verdict to return, a timeline on part with previous ICC trials; on July 8, 2019, Bosco Ntaganda was convicted unanimously by Trial Chamber VI, the panel of judges assigned to hear his case, for all 18 counts of war crimes and crimes against humanity. This was—and remains—the highest number of counts for any ICC conviction (Wakabi 2019a). He was charged with the direct perpetration of murder as both a war crime and crime against humanity, as well as persecution as a crime against humanity; the remaining 15 crimes were those for which he was convicted as an indirect perpetrator. International law expert Kerstin Carlson wrote of the decision: "[t]he absence of bombshells reflects the plain vanilla successes of the Ntaganda decision. The case involved the ICC methodically, even dully, setting out the proof and rationale for its conviction in more than 500 pages. The judgment is evidence of the ICC acting as a court, and nothing more. This quiet, plodding, judicial work is the correct way forward for the institution. It may also show the

strategy outlined by the ICC's second (and current) prosecutor, Fatou Bensouda, is bearing fruit" (Carlson 2019).

A few months later, in November 2019, Ntaganda was handed another ICC record—the highest penalty ever at the ICC with a prison sentence of 30 years. Incidentally, this is nearly the highest penalty that the ICC can give, per the Rome Statute which allows "[i]mprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person" (International Criminal Court 2011a, 38). This prison sentence included, as is standard at the ICC, the time he had already spent in detention, which was 6.5 years at that time (Wakabi 2019b). Ntaganda was given different prison sentences for the many different charges, but ICC rules stipulate that "when a person is convicted of more than one crime, the total period of imprisonment shall not be less than the highest individual sentence pronounced" (Wakabi 2019b). Like Bemba, Ntaganda appealed the conviction, claiming he did not receive a fair trial. The Defense also claimed that he was convicted for crimes that were outside the scope of the charges confirmed at the start of the trial. This was the same grounds for appeal presented by Bemba's lawyers in that trial. Ntaganda also appealed the sentencing to no avail: despite several delays in favor of the response and then due to the Covid-19 global pandemic, Ntaganda's conviction was upheld on all counts and the 30-year sentence remained. This contrasts with Bemba's appeal, which was successful and led to his acquittal on all counts. After Covid-19 delays, the reparation hearings in March 2021 set his liability for reparations at $30 million (USD) (Wakabi 2021; Wakabi 2021a). The task of implementation was left, per standard ICC operation, to the Trust Fund for Victims (Wakabi 2021b; International Criminal Court 2021b).

The Ntaganda trial demonstrates that the Court, even after the Bemba trial, had many lessons to learn. Issues that plagued the Bemba trial, such as the change to the legal characterization of the crimes, as well as the change in the mode of liability, did not occur in the later Ntaganda trial. Perhaps this is an example of the Court learning to make concrete decisions ahead of the trial. It is also likely that these decisions were made in advance given there was advance preparation for Ntaganda—he was out of the Court's hands for seven years after this first arrest warrant was issued. It is interesting that Ntaganda was not charged on the basis of command responsibility, even though he was clearly in control of troops in the DRC. Is this a lesson learned from the failure of the Article 28 charge of Bemba? Ntaganda's trial tested the limits of the Court's commitment to its stated principle that "the ICC does not try individuals unless they are present in the courtroom" when proceedings continued during Ntaganda's hunger strike (International Criminal Court, n.d.e). This shows that the Chambers, which ruled that the Defense case would continue with testimony while Ntaganda refused to attend, have considerable space to make decisions that might even contradict the mission of the Court.

Similarities between the two cases can be drawn as well. The logistical nightmare of bringing witnesses to the Hague for testimony was not solved between Bemba's trial and Ntaganda's. It appears that Ntaganda's decision to take the witness stand in his own defense, unlike Bemba, is partly a response to the failure to secure witnesses for the Defense testimony. Both defendants were accused of witness tampering, although charges were never brought against Ntaganda for such. Ntaganda's case also included charges of rape as both a war crime and a crime against humanity. Additional sexual violence charges, though, were levied against him—he was found guilty of sexual slavery as a war crime and crime against humanity as well. ICC expert Rosemary Grey points to the significance of the upheld convictions for sexual

violence in the Ntaganda trial, pointing out that "the law hasn't changed […] so what has changed is the practices themselves. It's the same Rome Statute that was being applied in Lubanga and Bemba" (interview with author). *That* is norm fortification. A review of civil society activity surrounding the Ntaganda trial demonstrates that greater attention was paid by certain organizations and individuals to Ntaganda than to Bemba. However, the evidence of public pressure on behalf of *either* trial was lackluster.

CHAPTER FIVE: NORM FORTIFICATION AT THE ICC

In this work, I sought to explain the role of activism directed at the ICC, specifically on trials regarding sexually and gender-based violence, using two case studies of ICC defendants' trials: those of Jean-Pierre Bemba and Bosco Ntaganda. Bemba was the first ever conviction for wartime rape at the ICC, although he was acquitted upon appeal two years later. Ntaganda's case ended with the second conviction for wartime rape (or any other sexual and gender-based crime) in 2019, which was upheld upon appeal. In tracing the development of these trials over time, two things become clear— first, the Court is learning. And second, the ICC continues to be the target of activism in action, if in different ways than we have seen in the past. This is extremely important in our understanding of the Court and its outcomes.

I argue that we have entered the next phase of the "justice cascade," (see Sikkink 2011) which I call "norm fortification" and succeeds the dynamics explained by Sikkink (2011). Ba claims we see the "justice cascade" related to SGBV through "some staggering effects over, you know, decades of people paying more and more attention to specific kinds of crimes. Those crimes, they become qualified into these international statutes and also [become] domesticated at the local level" (interview with author). He discusses the role of norm entrepreneurs in this work. The norm of holding individuals criminally responsible for human rights violations, war crimes, and crimes against humanity was established through military tribunals in Latin America, the International Criminal Tribunals of Yugoslavia and Rwanda, and special courts such as those in Sierra Leone and Cambodia. After a slow start characterized by a lackluster track record, the ICC has contributed to the consolidation of this norm. Over time, in part as a response to the tireless efforts of transnational activists, the Court has become more successful in this endeavor, in terms of both policy and the service of justice (convictions). This continues to strengthen the norm of

individual criminal accountability for violations of international humanitarian law. Norm fortification is the step that comes after a norm is established and adopted. In other words, how do institutions reinforce this in policy and practice? Beyond judgments made by the Chambers, changes in Court behaviors, procedures, policies, and personnel also signal a commitment to the fortification of the norm of prosecuting sexual and gender-based violence.

There are two overlapping sets of lessons derived from this research. In fact, it is nearly impossible to discuss one without the other. The fortification of norms we have witnessed at the ICC has been deeply influenced by the work of transnational activists, often by the Court's own design. This refers to the growth and development of the ICC, an institution hardly into its second decade of existence and yet continues to advance the goal of ending impunity for the most egregious violations of international humanitarian law. Many of the crimes enumerated in the Rome Statute had been codified long before that treaty was written in 1998 yet remained under-prosecuted. In some cases, such as the crime of gender persecution, the ICC showed a commitment to expanding our understanding of what can or cannot be done in the context of war. We have moved beyond the need to justify calling wartime rape a crime. Now, we are committed to prosecuting it wherever we see it, using jurisprudence—precedent and Court policy—to do it.

Secondly, we learn something important about the role of transnational activists in furthering international humanitarian law. As elsewhere, these norm entrepreneurs have created or taken advantage of opportunities created for them to ensure that the Court fulfills its mandate. In other words, transnational activists play an active role in norm fortification. Although I do not find evidence of NGOs impacting specific court cases or the outcomes for particular defendants, my research shows that transnational actors are involved on many occasions of decision-making

at the ICC, through several different channels. Often, this work is not through the public advocacy that we see in other venues but through meetings and consultations that occur in private, though not necessarily in secrecy.

In this chapter, I will discuss my important findings about the role of transnational actors in advocating for change at the ICC, especially where it relates to the prosecution of sexual and gender-based violence. I will also discuss the implications of my findings outside of academia: how might this information be of use to the transnational activist community in which I am interested? I conclude with my plans for future research beyond the scope of this dissertation.

Not Convictions but Conduct: NGO Activism and the Impact on ICC Policies and Procedures

"Raising the alarm is very, very important, even if it doesn't have an impact on a particular case" (interview with author).

The impact of NGO activism on the outcomes for those accused of SGBV is more complex than predicted and the "black box" remains largely unopened—so much of the advocacy is private. Yet the research conducted here did yield some important findings. Surveys of public activism during the two cases presented here demonstrate very little public-facing activism. NGOs are not using public pressure as leverage to influence court outcomes. Instead, many interviews included discussions about the importance of personal relationships. The interpersonal linkages are also evident in the submission (and acceptance) of *amicus* briefs and expert testimony. Moreover, the timing matters—NGOs appear to have certain time periods and areas of focus for their advocacy efforts: there is an emphasis on bringing investigations in the first place and ensuring that a wide scope of charges is brought to the pre-trial phase.

Importantly, these findings indicate an evolution in the ways and means of NGO influence, rather than a decline in significance. I found that the Court is, in fact, paying attention to the calls by human rights activists, even if those calls are not directly producing changes in convictions or sentencing in specific trials. Indeed, the norm fortification of the court has included evolving and important relationships between advocates and institutional officials. Significantly, it is not just the NGOs themselves that see the efficacy of their advocacy, although several interviewees acknowledged the tendency of NGOs to overstate their influence. Interviews with special advisers, ICC experts and academics, and representatives from the major human rights organizations mentioned throughout this dissertation make several things clear that are not explicitly demonstrated by the documentary analysis.

- First, the space that the ICC has created for NGOs is much greater than the Court advertises. The opportunities for relationship-building between Court officials and NGO leaders are many but are generally neither publicized nor public. It appears that the opportunities for this are somewhat dependent upon the individual Prosecutor, although the OTP is certainly not the only venue for interaction with the Court.
- Secondly, activists tend not to focus on the outcomes of particular trials once they have begun—they are not advocating for judges to make specific decisions, nor do they appear to lobby Prosecutors to amend charges once they have been confirmed. The NGO representatives spoke of a deep respect for the independence of judges' decision-making.
    - It is clear, however, that activists are concerned with Court policies and are quick to provide information, expertise, and ideas—solicited or otherwise—around those policies. A discussion with former Special Adviser Diane Amann, quoted below, perfectly demonstrates this. These groups play a key role in providing information and evidence for the preliminary examination phase and perhaps in determining what charges may be brought against whom.
    - The data also indicate that Court personnel, including and perhaps especially, members of the OTP develop personal relationships with members of NGOs. This is unsurprising once one learns that many of these groups have field offices in the Hague and there are frequent meetings between the Court and civil society actors, including human rights NGOs, academics, and experts.
    - Another avenue through which activists can access the Court and influence its development is via the Assembly of States Parties (ASP). The ASP includes members of civil society at its annual meetings and several sources pointed to the crucial events that are the "side events" at those ASP meetings. Activists are able to cultivate relationships with individuals at these meetings, sometimes held in

> New York instead of the Hague, creating space to lobby states parties to push for change in policies and procedures at the ICC.

When asked specifically if she responded to calls from human rights organizations, Former Special Gender Adviser under Prosecutor Moreno Ocampo, Catharine A. MacKinnon said, as noted above, that she "didn't pay attention" to any public outcry regarding the Bemba trial (interview with author). She did stress, though, that Moreno Ocampo "listened to [her]" (interview with author). From that conversation, I also gained the understanding that Prosecutor Moreno Ocampo himself had a commitment to prosecuting wartime rape and sexual and gender-based violence as specified in the Rome Statute (interview with author). This speaks to something that came up in several different conversations: the individual Prosecutor had a great deal of impact on the role of special advisers and the work that special advisers completed[52], as well as the relationship with NGOs.

Almost all interviewees suggested that the personality of the Prosecutor impacted the level of openness between the Office and NGOs. ICC expert Oumar Ba explained that the OTP was "less responsive at first" to calls by NGOs. The Advocacy Director for WIGJ agreed that strategies, as well as receptivity to criticism, depended upon the individual prosecutor. One activist* spoke of the differences between current prosecutor Karim Khan and previous prosecutors. According to this interviewee, Khan claimed that he saw the OTP's relationship with NGOs as a source of "potential threat" to the independence of the OTP, a fear that the interviewee expressed to be unnecessary but worth considering (interview with author). Between the direction set by Prosecutors and their appointments of different special advisers—and the role given to these advisers by each prosecutor—and the receptivity of the prosecutors to NGO

[52] See "structural roles" section of chapter one.
* denotes confidential interview; identity protected.

critique or advice, actors in this space see a change from one prosecutor to the next. This change is not always expressed as a positive step forward for the Court.

Another interviewee* suggested that there has been a recent change in the level to which prosecutors seek official communications from civil society at the preliminary examination phase. They spoke of a former OTP practice of publishing "an annual report on its preliminary examinations" (interview with author). They went on to say that "[t]hey were a signaling tool of 'here's what we know, here's what we don't know.' Which in a way is sort of a prompt to all potential actors, government, other countries, [and] civil society to then make use of the communication—the Article 15 communications channel—to provide information. So, I think there was like a signaling, you could say there was initiative by the Office of the Prosecutor" (interview with author). This is important, not just for demonstrating the perception of a change over time in the practices of the OTP, but also just to show that some of the relationship between civil society actors and the OTP was driven by the OTP itself. This is another example of norm fortification.

Further interviews suggest something that requires further research: the *stage* at which these actors feel the most capable of influence is the same stage at which the Court has created the most space for the involvement of NGOS. Specifically, the preliminary examination phase is a key moment in which activism can play an important role. Interviews with these actors demonstrated this focus, as all mentioned the importance of information-gathering for the Prosecutor and their role in providing evidence with which to bring investigations. It is in the preliminary examination phase at which "the situation in which crimes under the ICC's

* denotes confidentiality; identity protected.

jurisdiction appear to have been referred to the ICC Prosecutor by a State Party or the UN Security Council [or a] situation in which information about alleged crimes under the ICC's jurisdiction is sent to the ICC Prosecutor, who may seek to start proceedings on his own initiative *(proprio motu)*" (International Criminal Court, n.d.g).

It is the latter which is most relevant here—the information about crimes, the whereabouts of perpetrators, etc. *often* comes from civil society, namely human rights NGOs. Author interviews with human rights actors show that these actors strongly feel that the information they send to the Court, specifically to the Office of the Prosecutor, makes a difference in Court activity by providing information necessary to bring about situations, cases, or specific charges. In the "Communications at the ICC" episode of the podcast *Asymmetrical Haircuts*, Janet Anderson and Stephanie Van den Berg discuss the role that NGOs play in communicating information to the court (Anderson and Van den Berg 2023). The conversation centers on Article 15: sometimes the communications go straight to the Prosecutor and are not publicized, and other times, groups will publish the same information, seemingly to bring attention to their own work. The hosts say, "We understand why NGOs would use the ICC to publicize their work. Not all do. Some also just send straight communications to the ICC and then later when we have people on the podcast, they're like 'oh yes, because we said this and this and this in communication'" (Anderson and Van den Berg 2023). She goes on to say that "[s]ome kind of play it up for attention and others are working diligently [in] providing real work to the Court" (Anderson and Van den Berg 2023). The hosts also highlight the incredible number of communications the ICC receives (more than 15,000 over the last 20 years) and how many of those have resulted in investigations (5 of them) (Anderson and Van den Berg 2023). This conversation suggests that communications about Court goings-on *only* happen in the context of

providing information to the Court in the preliminary examination phase (the only phase which logically leads into an investigation). The hosts also say that they, as journalists, are more likely to write about NGO press releases concerning the ICC by "serious groups" about "serious cases" (Anderson and Van den Berg 2023). In other words, what NGOs have to say about the Court matters to journalists who follow Court activities, at least when it comes to the preliminary examination phase. Further, interviews conducted by this author show that the Court often allows input—perhaps even *seeks* it in some cases—when it comes to broad strategies or policies.

So, if NGOs are not always advocating publicly for certain outcomes, then what role do they play in holding the ICC accountable in its goal of ending impunity for grave breaches of international humanitarian law? Human rights actors and ICC experts spoke at length about the "private" ways that NGOs advocate for changes in the Court. WIGJ's Vuillemin explained, in relation to the situation in Georgia[53], that [Women's Initiatives] didn't do anything public" but went on to relate several examples of activities in which they engaged directly with the Court (interview with author). This advocacy comes in two forms: bilateral relationships between Court personnel and activists—who often become special advisers within the Court—and formalized meetings with Court personnel, states parties, and other actors via the Court's own mechanisms. Neither of these forms generally involve the public "naming and shaming" or public-facing lobbying that other forms of advocacy require. Instead, it is about cultivating relationships and using official mechanisms to gain access to Court actors, such as the meetings of the ASP, the use of the Rome Statute's Article 15, and internal OTP trainings by experts.

[53] An investigation into the crimes committed in South Ossetia in 2008 by the Georgian armed forces, the South Ossetian forces, and the Russian armed forces" was initiated in 2015 by the OTP (International Criminal Court 2016b).

Meetings, "Side Events", and Roundtables

The ICC hosts several formalized meetings with NGOs and activists throughout the year. Nearly all interviewees mentioned these meetings. There are bi-annual[54] ICC-NGO roundtables described by the CICC as "Since its establishment, the ICC has consulted with NGOs in many different fora. The ICC-NGO Roundtable is a vital forum to exchange views, updates and strategic ways forward within the Rome Statute system of international justice" (Coalition for the International Criminal Court, n.d.c). Members from all organs of the Court attend to meet with NGOs to discuss a range of topics, including victims' rights, prosecutorial strategies, and previous Court activities (Coalition for the International Criminal Court 2015). The current prosecutor announced early in his tenure that he planned to "further strengthen the role of civil society in our work" (International Criminal Court 2022). He explained in the press release that he intended to introduce an additional "two thematic roundtables with non-governmental organisations [sic] each year" relating to "the implementation of effective investigations and prosecutions and in the development of the broader policy framework" of the Court (International Criminal Court 2022). This contradicts several of my interviewees' interpretation of his actions and statements related to civil society. Vuillemin compared Khan to the previous prosecutor, Fatou Bensouda, stating that although he seems less open to critique from civil society, he does seem open to information from it (interview with author).

The ASP annual meeting is also a great place for transnational activists to engage with Court actors. These meetings, reportedly held in either New York or the Hague, allow civil society actors to designate important topics for discussion and host meetings about them with

[54] The ICC website says these are bi-annual, but many other sources say these are annual. An interviewee clarified that these meetings were once held every six months but are now held once a year.

other activists, members of the Court, and representatives of the member-states. Vuillemin also described meetings specifically between the OTP and NGOs (interview with author). Jonathan O'Donohue of Amnesty International spoke of those meetings as a way for the Court to solicit feedback and for NGOs to pursue their own goals of increasing visibility for certain issues or whatever their mandates might require (interview with author).

In addition to these regular and routine meetings, there are often consultation meetings around policy papers. One activist* mentioned these meetings, stating: "So I would say there is a receptivity by the Office of the Prosecutor for civil society input, which you can see in the consultation processes that are often launched around policy papers" (interview with author). Former Special Adviser Amann spoke of these meetings as well-attended in both number and in representation of both Court and NGO actors. She stated that for the consultation regarding the Policy on Children seven members, including the Prosecutor, from the OTP were in attendance, in addition to "about two dozen experts, most of them from academia or NGOS" (interview with author). Later, the paper was submitted to the public for comment, and she said that 40 NGOs were present for that part of the consultation. Several other interviewees talked about these consultations, demonstrating that these meetings are known in the space, even if the ICC does not advertise them. In fact, I found no mention of any of these from the ICC itself. I asked Vuillemin if she had an explanation for why the Court is not as open about *specific* ways in which it relates to these organizations, she surmised that perhaps they just do not find it interesting or worth publicizing. This author disagrees.

* denotes confidential interview; identity protected.

Bilateral Relationships

WIGJ's Vuillemin summed up the nature of interpersonal relationships at the Court perfectly: that's the nature of politics—it all happens in the corridors" (interview with author). When I asked if the Court operated like the American television show "The West Wing" she laughed and nodded in agreement. She mentioned "the discussions and always the coffee being drank etcetera…and that's where it all happens" (interview with author). Another interviewee* also clarified that for activists there may be "bilateral engagement with […] the Office of the Prosecutor" (interview with the author).

The goal of this chapter has been to describe the way in which human rights and humanitarian activists interact with the International Criminal Court and, to some extent, hold it accountable through public pressure. Much credit is given to these individuals and organizations for advancing the norm of individual criminal accountability for war crimes and crimes against humanity. I seek to understand more about the work that is done in pursuit of that goal. The documentary evidence and analysis here show that human rights actors do put pressure on the Court at certain moments, largely through reports in which they state they are putting pressure on the Court. These organizations, and the Court itself, keep very quiet about what pressure may exist behind closed doors. However, interviews with human rights actors and Court officials conducted by this author show that although there is a great deal of access for certain NGOs and individuals—and that bilateral relationships do matter—suggest that outcomes at the Court, at least in terms of specific trials, are rather a function of the Court establishing stronger and better practices and precedent. In other words, we have witnessed the fortification of the norm of

* identity protected.

criminal accountability for violations of international humanitarian law. In future research, I want to further explore the role of the Prosecutors themselves and their specific, personal goals for the Court, to determine if that has an impact on specific trial-related outcomes.

Referring to the 2016 conviction of Jean-Pierre Bemba for wartime rape at the International Criminal Court, New York Times writer Marlise Simons wrote that "[l]argely because of pressure from human rights advocates and women's groups, organized or mass rape is increasingly being recognized and prosecuted as a weapon of war, not as a by-product" (Simons 2016). This is not the only occasion on which credit for justice outcomes such as that of the Bemba trial is given to the tireless efforts of transnational activists, both organizations and individuals, despite the Court's emphasis on its insulation from all politics and pressure. So much is already understood about the International Criminal Court (ICC) and transnational activism.

Much has been said about the link between transnational activism and the work of former international criminal tribunals, the creation of the ICC, and the ratification of the Rome Statute. There is no question about the role legal experts, scholars, and representatives of major human rights and humanitarian organizations in drafting the Rome Statute and pressuring states to join the Court. In reading about specific cases and policies—we can call this the implementation phase of the ICC—less is known. Journalists, academic literature, and the activists themselves tout the impact that activism has on Court functions—but how does this work? What space has the Court made for this sort of influence? Conventional literature on transnational activist networks and social movements, as well as within international relations more broadly, demonstrate the power of "naming and shaming." Yet, data indicates that this is not a significant dynamic or influence on the established and independent court. We do know that the Court, at

the very least the OTP, is listening to what critics of the Court—including NGOs and other human rights activists—have to say. ICC expert Oumar Ba, in discussing the more recent trial for Dominic Ongwen, states that "there is some progress that is being made in terms of prosecuting […] rape and gender-based violence as crimes against humanity and war crimes, which is a response to […] a lot of push from a lot of NGOs and [others] that try to push the prosecutor to actually focus on those type[s] of crimes which was not the case initially" (interview with author). However, this does not appear to impact decisions made once individual trials have begun. As noted above, former Special Adviser MacKinnon implied that public pressure was not at all relevant to her work. Instead, it appears to have an impact on how the Court conducts investigations and pursues charges. Importantly, Ba claims that the ICC seems to have become more inclined to pursue charges of SGBV, partially as a result of NGO efforts to "try to push the Office of the prosecutor to undo some of the early mistakes" (interview with author). It is clear that the Court is evolving, creating more and better policies, and that these changes are yielding better results in the form of charges and convictions for sexual and gender-based violence. This is taking place in the phase of what I call "norm fortification."

The Assembly of States Parties is an important entry point for NGOs, activists, and other civil society actors. Alix Vuillemin of WIGJ explains her role vis-à-vis the ASP in the following way:

> "[i]n relation to advocacy, or 'external relations' […] that concretely means that I spend a lot of time talking to diplomats that I meet through attendance of conferences of the Assembly of States Parties […] They invite civil society to participate in their meetings. So, I attend those meetings. In the margins of those meetings, I meet diplomats there and they invite me to their receptions and they're where you go to try to have bilateral discussions as well. So that's sort of how you create that network of state diplomat and state party stakeholders" (interview with author).

The relationship between civil society and the ICC is centered on personal relationships between individuals and members of the Court and built upon habitual and continued meetings. Vuillemin explains that the CICC is deeply involved in coordinating relationships between civil society and the Court. She states that "what they [the CICC] do is organize, once a year or twice a year […] big roundtable meetings between [the] ICC and civil society and so that gives us the opportunity again to meet relevant staff members of the Court and […] build a very strong relationship with them where you just got and meet to discuss, etcetera" (interview with author). She goes on to say that "what the ICC does […] on a very regular basis, which is not in the public eye but not secret either, is that they engage very, very regularly and consistently with civil society […] and they sit down with them as well, and that's everybody from the OTP investigative teams, but also their external relations cooperation teams, sometimes the judges as well, and they're very open to that" (interview with author). Vuillemin clarifies what "very, very regularly" means later when she states that "I'm sure there's a civil society delegation in its largest form maybe once every two weeks at least" (interview with author).

Another interviewee* offered a similar perspective with an important caveat. They acknowledged that "civil society played […] a really important role in campaigning for the creation of the court. But even beyond that, there was a lot of engagement between NGOs and state parties about […] specific provisions of the statute" (interview with author). However, the openness to civil society is not as simple as others present it, according to this interviewee. Despite continued ASP "receptivity" to NGO actors, openness and cooperation with NGOs is "something that we continue to have to fight for […] the space isn't there for the taking, I would

* denotes confidential interview; identity protected.

say […] I mean the more time that goes by, I think the more have to really continue to assert the importance of civil society engagement in the Rome Statute system" (interview with author).

The OTP has developed several policies that show a commitment to greater justice, especially when it comes to prosecuting sexual and gender-based violence. The 2014 Policy Paper on Sexual and Gender-Based Crimes was largely developed by Brigid Inder, who was at that time both the Executive Director of WIGJ and the Special Adviser on Gender under Fatou Bensouda. That paper is currently being amended (interview with author). Former Special Adviser on Children in and Affected by Armed Conflict developed the Policy on Children in 2016, which is also currently in the process of being updated (interview with author). More recently, the Special Adviser on Gender Persecution, Lisa Davis, wrote the Policy on the Crime of Gender Persecution, which was published in December 2022. This was the first policy of its kind and shows a commitment to broadening the scope of sexual and gender-based crimes that the Prosecutor pursues in its cases. These policies serve to provide direction for the entire Office of the Prosecutor on specific topics, although Bensouda publicly expressed hope that the Policy Paper on Sexual and Gender-Based Crimes (hereafter SGBC policy) would direct domestic courts and other bodies of international justice (International Criminal Court 2014d; Oosterveld 2018).

As with many aspects related to the ICC, these policies are developed with the cooperation of experts, including special advisers but also members of the public. As Bensouda noted upon announcing the SGBC policy, "[…]the Office's Policy Paper on Sexual and Gender-Based Violence is the product of extensive external consultations, including with relevant agencies of the UN, States Parties to the ICC, civil society and academia" (International Criminal Court 2014a). Oosterveld (2018) quotes then-Special Gender Adviser Brigid Inder in describing

the record of the ICC and the promise of the SGBC Policy: "[t]here is still much more to be done […] including: strengthening the presentation of evidence of sexual and gender-based crimes; identifying gender aspects within non-sexual violence crimes and the context within which these crimes occur; persuasively arguing individual criminal liability for sexual and gender-based crimes-beyond direct perpetrators of these crimes; and always being attentive to gender issues in every case and every policy" (Oosterveld 2018, 456). The Policy was announced to a group of civil society representatives, also attended by Inder, and was sponsored by Open Society Justice Initiatives.[55] Bensouda also announced a side event at the upcoming ASP that would discuss details of the implementation of the SGBC Policy (International Criminal Court 2014b).

Amann confirmed this process when speaking of the policy she developed while serving in her role as Special Adviser on Children. In an interview with the author, Amann explained that after writing a draft of the policy, several working groups were formed to work out details and include outside members for consultation. She further explained that there were:

> individuals from every office of the OTP that help[ed] line by line draft and edit the document […] We had two consultations with NGOs in the preparation of the document […] We met with people from the United Nations, etc. We opened the document for public comment […] And we had consultations with people who had been in a conflict, in probably about 5 of them around the world. And so, there was a lot of opportunity to […] really set that in the agenda there. And as a special adviser, my role was to conceptualize what a policy might look like, how it might come together (interview with author).

She specified that around 40 NGOs were invited for the public comment phase.

There are two lessons to draw from this discussion of policy papers: first, it provides evidence of norm fortification concept. The Rome Statute already clearly defined sexual and

[55] Open Society Justice Initiatives is the organization responsible for the International Justice Monitor, the ICC monitoring publication, responsible for most of the day-to-day details regarding the Bemba and Ntaganda trials for this study.

gender-based crimes, as well as crimes against children. And yet, members of the OTP saw the need to develop policies to outline its strategies in pursuing those crimes. These policies are two of eight that have been developed and published by the OTP between 2007 (the Policy Paper on the Interests of Justice) and 2022 (Policy on the Crime of Gender Persecution). These policies explain the issue area and provide specific ways that the Court will address these issues, using the Rome Statute and jurisprudence as support for the procedures described therein for moving forward. As Oosterveld (2018) succinctly explains: "[b]etween 2002-2014, the Office of the Prosecutor brought 57 charges of sexual and gender-based violence in 20 cases, which represents a solid level of attention to these crimes in most cases. 35 of these charges proceeded to the preliminary Confirmation of Charges stage, but only 20 of these charges were actually confirmed. At the judgment stage, the Prosecutor failed to secure a single conviction on these charges" (Oosterveld 2018, 443). Bensouda said in 2014 that 70% of cases had "specific charges of sexual violence" but the announcement of the SGBC Policy at that time shows an even stronger dedication to the prosecution of SGBV, one that is perhaps in response to the lack of convictions than any potential lack of charges (International Criminal Court 2014a). Again, it is less about the ability to achieve a "win" or two for the prosecution of sexual and gender-based violence—evidence of norm implementation—but the pursuit of achieving true justice at all levels, which I call norm fortification.

The second lesson is perhaps more clear: civil society is unquestionably involved in the development of those OTP policies and that is by design. Remember that the architects of the two aforementioned policies, the SGBC Policy and the Policy on Children, might both be considered members of civil society. Inder was, at the time of writing the SGBC Policy, the Executive Director for Women's Initiatives for Gender Justice. Amann was a renowned legal

scholar and former public defender and law clerk to US Supreme Court Justice John Paul Stevens, well known for her publications on International Law and Human Rights. These individuals wrote policies in close consultation with members of civil society and solicited public comment on the policies before they were finalized. The SGBC Policy's announcement event was sponsored by a human rights organization, Open Society Justice Initiative, and activists and NGO representatives were present. The influence of these activists on ICC policies and procedures is evident. Relatedly, these policies demonstrate the importance of the special advisers.

Conclusion Summary

In this study, I have used newspapers, published reports, amicus curiae briefs, social media posts, and other documents to compare the levels of activism during each trial, showing that although human rights organizations were active during each, that important work paints an incomplete picture of what yields positive outcomes at the ICC. It is here that we must look to the Court itself—at how it has changed over time and how these changes are buttressed by the work of advocates for progress and justice. That work is made possible because the Court has created opportunities for activists to engage with its processes. That is what explains increased efficacy in the prosecution of sexual and gender-based violence, specifically wartime rape, at the ICC. Interviews with members of the Office of the Prosecutor and major human rights organizations involved in justice advocacy with the ICC help to show the clear link between organizations and the Court and explain how these organizations are able to make a difference in Court functions. They also demonstrate the key function of certain Court personnel who can serve as agents of change from within that I trace over the course of the two aforementioned trials. I conclude that we must not only look to the institution itself but to external pressure and

relationships with external actors in order to understand changes in justice outcomes for wartime rape at the ICC over time.

APPENDIX

LIST OF USEFUL ACRONYMS

AFDL= Alliance of Democratic Forces for the Liberation of Congo. Coalition of forces including Rwandan RPF and Ugandan troops, plus other armed groups in support of Laurent Kabila overthrowing Mobutu in the DRC. Led by Laurent Kabila who would become president.

AI= Amnesty International. Human rights organization.

ALC= Army for the Liberation of Congo; armed wing of Bemba's MLC (see MLC).

CAR= Central African Republic. The state in which Bemba's crimes were committed, for which he was prosecuted at the ICC.

CNDP= National Congress for the Defense of the People, Tutsi DRC militia of which Bosco Ntaganda became military chief of staff in 2006. Backed by Rwanda.

DRC= Democratic Republic of Congo, formerly known as Zaire. The state in which Ntaganda's crimes were committed, for which he was prosecuted at the ICC.

FAC= Armed Forces of the Democratic Republic of Congo, the Congolese military. Also, FARDC.

HRW= Human Rights Watch. Human rights organization.

MLC= Mouvement de Libération du Congo/Movement for the Liberation of Congo. Led by Jean-Pierre Bemba, Congolese politician and Vice President. Convicted and acquitted of war crimes in the ICC for crimes committed in the Central African Republic. Heavily supported by Uganda. Armed wing known as the ALC (Army for the Liberation of Congo). Often in conflict with DRC government under Kabila (Bemba's political enemy)

RCD= Rally for Congolese Democracy. A political party that eventually split into several different factions with different and often opposing leaders and goals.

> RCD-G= Faction of the RCD supported by Rwanda, had formal alliance with the UPC
>
> RCD-ML= Also known as RCD-K. Initially backed by Uganda. Led by Mbusa Nayamwisi. Received support from DRC. In conflict with the MLC.
>
> RCD-N= Faction of the RCD supported by the Ugandan government, often allied with the MLC. Led by Lumbala, based in northern Ituri (eastern DRC). In conflict with RCD-ML.

RPA= Rwandan Patriot Army; armed group for the RPF (see RPF)

RPF= Rwandan Patriotic Front. Tutsi militia led by Paul Kagame that ousted Hutu-led government under Habyarimana and committed genocide in Rwandan against the Tutsis. Its armed wing known as the RPA (Rwandan Patriot Army). Often closely allied with Uganda and Burundi.

UPC= Union des Patriotes Congolais/Union of Patriotic Congolese. Militia from Ituri (eastern) region of DRC, supported first by Uganda then later Rwanda. At times supported by MLC. Led by Thomas Lubanga (another ICC defendant) and chief of military operations Bosco Ntaganda

UPDF= Uganda People's Defense Force. The Ugandan military. Supported many militias and rebel groups in DRC, including Ntaganda's UPC.

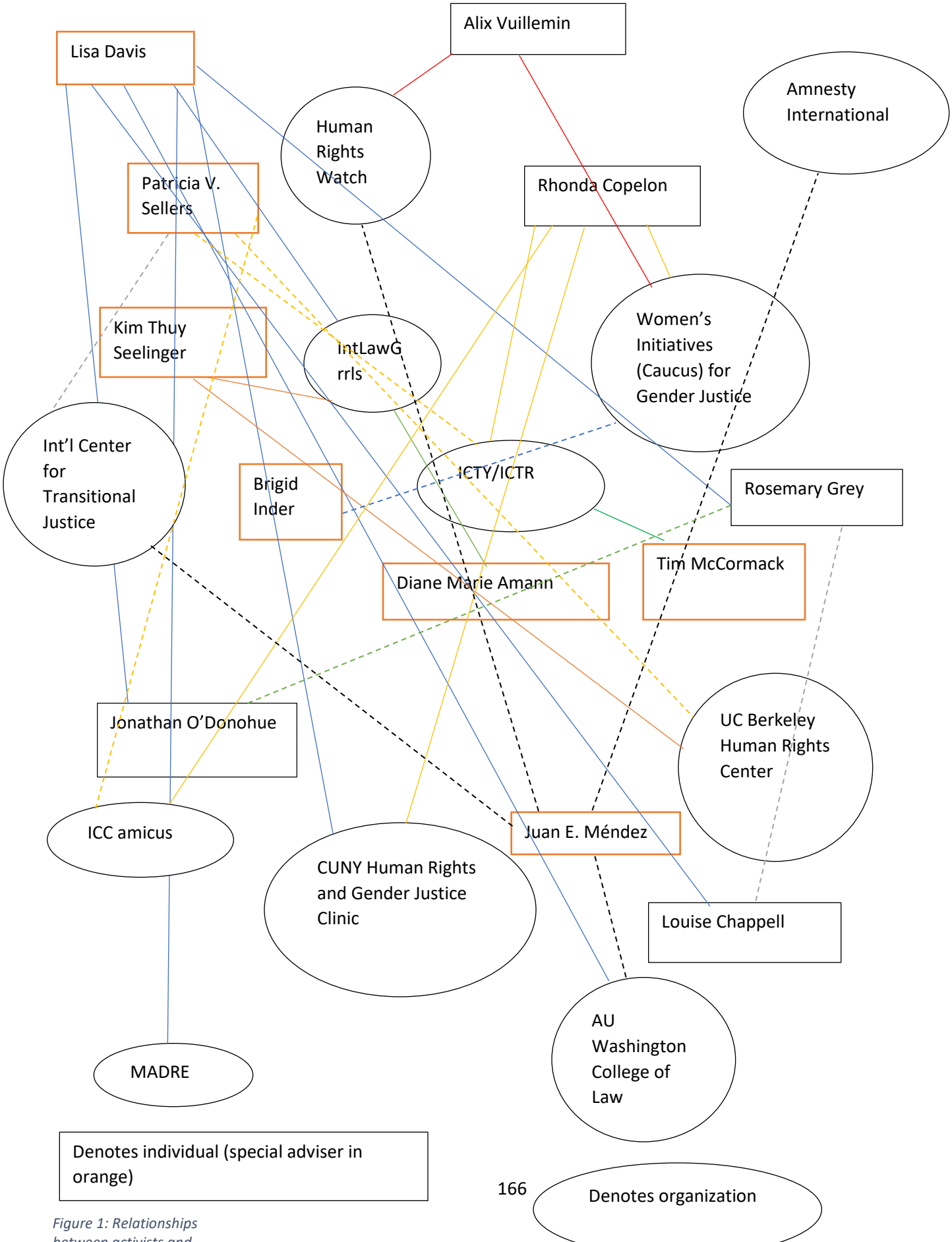

Figure 1: Relationships between activists and special advisers

Organization (5/23/2008-3/21/2016) Tweets	"Bemba"	"Ntaganda"
Women's Initiatives for Gender Justice (WIGJ)	46 (incl et al)	50
International Criminal Court (ICC)	50 (mainly et al)	50
Int'l Federation for Human Rights (FIDH)	14	4
Int'l Committee Red Cross (ICRC)	0	0
Int'l Federation of Red Cross (IFRC)	0	0
Justice Info.net	1	0
Trial Int'l	0	1
Anneke Van Woudenberg (former HRW)	0	5
Int'l Justice Monitor	46	46
UN Human Rights Office of the High Commissioner	0	0
UN Human Rights Council (Account of the Secretariat)	0	0
Elise Keppler (Assoc Dir of HRW)	0	1
REDRESS	7	12
Coalition for the ICC (CICC)	32	27
Anna Holligan (BBC News)	5	50
Open Society Justice Initiative	29	8
William Hague (of PSVI)	0	1
John-Allan Namu (of Africa Uncensored)	1	0

Figure 2: Tweets from Transnational Activists

Figure 3: Map of Rwanda and Surrounding Countries

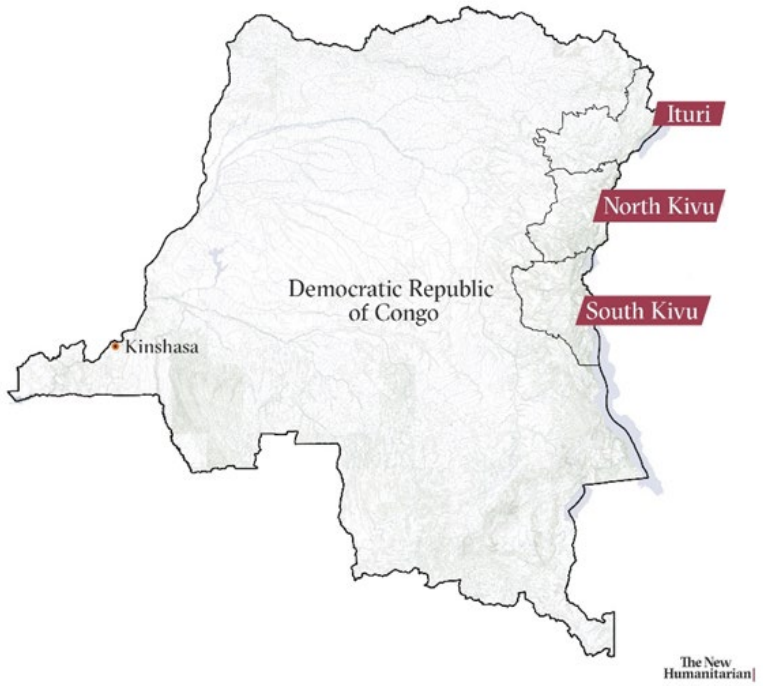

Figure 4: Map of Ituri and Kivus, DRC

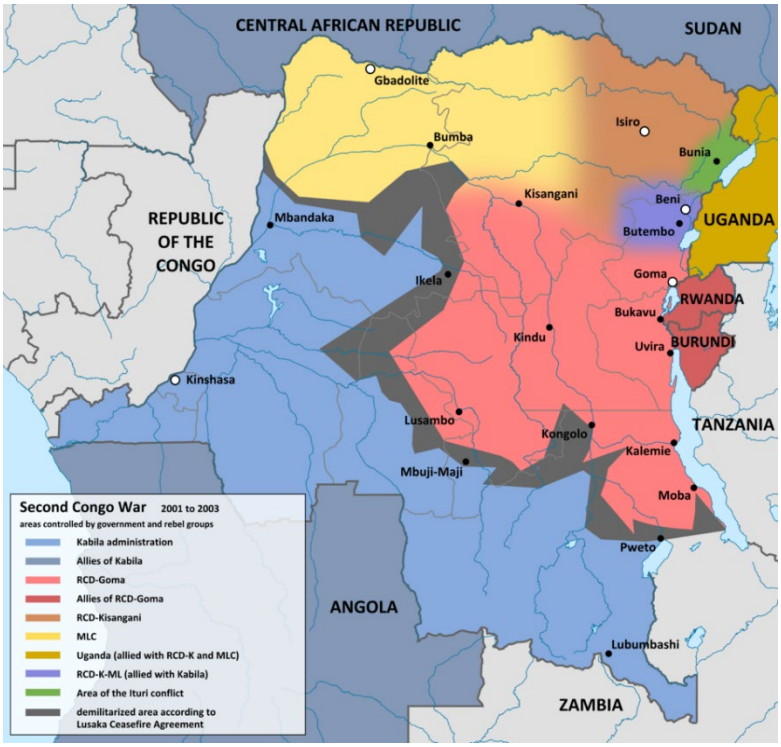

Figure 5: Map of the Second Congo War (Armed Groups)

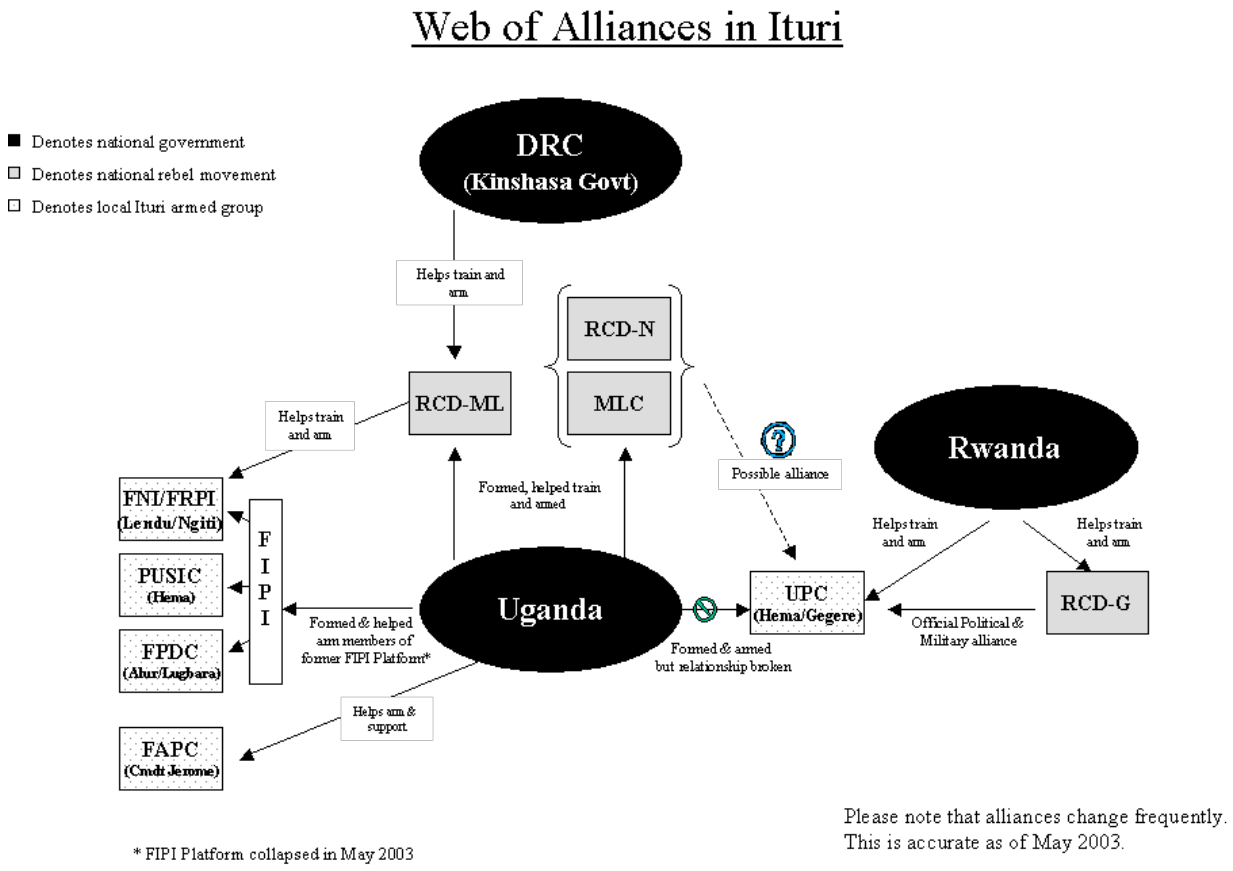

Figure 6: Web of Alliances in Ituri, DRC (Human Rights Watch 2003)

List of Interviews (anonymized)

1. Interview 001 (telephone) June 2019
2. Interview 002 (telephone) April 2022
3. Interview 003 (email) March 2022
4. Interview 004 (Zoom) January 2023
5. Interview 005 (Zoom) January 2023
6. Interview 006 (Zoom) January 2023
7. Interview 007 (email) January 2023
8. Interview 008 (Zoom) February 2023
9. Interview 009 (Zoom) February 2023
10. Interview 010 (Zoom) March 2023
11. Interview 011 (Zoom) March 2023

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