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### Rule of Law For Whom? Strengthening Rule of Law as a Solution to Sexual Violence in the Democratic Republic of Congo

Ryan S. Lincoln

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# Recent Developments

## Rule of Law for Whom?:

### *Strengthening the Rule of Law as a Solution to Sexual Violence in the Democratic Republic of the Congo*

Ryan S. Lincoln<sup>†</sup>

#### ABSTRACT

This article suggests that programs designed to strengthen the rule of law in general are unlikely to be effective against the widespread problem of sexual violence in the Democratic Republic of the Congo. I argue that while weak rule of law perpetuates sexual violence, only rule of law programs designed specifically with respect to the needs, risks, and cultural norms pertaining to Congolese women can help curb this problem. The article begins with a brief history of conflict in the Great Lakes region of Africa to provide context for a discussion of the scope of sexual violence in the eastern provinces of the DR Congo. It then introduces the notion of “rule of law” before evaluating the ways in which weak rule of law in the eastern DR Congo contributes to the problem of sexual violence. Finally, the article makes four arguments to support the central claim that strengthening the rule of law will be effective against sexual violence only if specifically tailored in the ways noted above.

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<sup>†</sup> J.D. Candidate, 2011 University of California, Berkeley School of Law; M.T.S., Harvard Divinity School; A.B., University of Missouri. I would like to thank Professor Kate Jastram for valuable guidance and consistent encouragement on this project. My colleagues in the Global Migration Seminar at Berkeley were excellent discussion partners and offered helpful feedback. Kerry Gough, Elizabeth Hawkins Lincoln, Stephen Rosenbaum and Ernesto Verdeja each put a critical eye to various drafts of this paper. Finally, thanks to Alison Mollman and the excellent staff of the *Berkeley Journal of Gender, Law & Justice* for their keen editing. I welcome comments, questions, corrections and other correspondence about the subject of this article; I can be reached at [ryanlincoln@post.harvard.edu](mailto:ryanlincoln@post.harvard.edu).

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## INTRODUCTION

For over a decade, women in the Democratic Republic of the Congo (DR Congo) have been caught in a “war within a war.”<sup>1</sup> Throughout two international armed conflicts and amidst protracted regional fighting, women have suffered unprecedented levels of sexual violence. Despite several peace agreements between warring states and parties, a democratically elected government, reformation of laws, a refashioned constitution, and the presence of the world’s largest United Nations peacekeeping force and dozens of non-governmental organizations, the rule of law in the DR Congo remains weak. Sexual violence, too, continues unabated, leaving the security of nearly every woman in the eastern DR Congo at risk.<sup>2</sup>

Many entities operating in the DR Congo suggest that strengthening the rule of law can help alleviate the sexual violence problem.<sup>3</sup> Yet the prevalence

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1. HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO* (2002).
  2. The Rome Statute of the International Criminal Court defines sexual violence—a crime against humanity if widespread and systematic—as “an act of a sexual nature against one or more persons or [causing] such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.” Rome Statute of the International Criminal Court, art. 7(1)(g), July 17, 1998, 2187 U.N.T.S. 3.
  3. An abbreviated list of those calling for rule of law reform includes: The German Government, <http://www.auswaertiges-amt.de/diplo/en/Laenderinformationen/01-Laender/KongoDemokratischeRepublik.html>; The International Foundation for Electoral

of sexual violence continues despite numerous efforts to strengthen the rule of law. This article uses the rule of law as a framework to examine sexual violence in the DR Congo. I argue that weak rule of law in the DR Congo is a significant factor in the perpetuation of sexual violence, but that focusing on strengthening the rule of law in general, without specific reference to sexual violence and those it affects, is unlikely to be an effective solution to the problem. This claim is buttressed by four arguments, each of which must be taken into account by rule of law practitioners if rule of law programs are to succeed in curbing sexual violence.

First, rule of law efficacy is limited in certain conflict situations, which undermines generalized efforts to strengthen the rule of law. Second, prevailing rule of law theory is more effective as an *evaluative tool* for analyzing contributory factors to problems such as sexual violence than it is as a *wholesale solution* to those problems. Third, this tension may be overcome, and strengthening the rule of law can become a measure against sexual violence in the DR Congo only if rule of law programs are designed with respect to the specific needs of women. Fourth, strengthening the rule of law must go beyond the boundaries typically proscribed by rule of law theory and must attempt to change cultural norms where necessary.

The article proceeds in four sections. Section I briefly summarizes the history of conflict in the DR Congo, discussing the actors involved and the toll taken by the fighting. Section II charts the contours of the sexual violence problem in the eastern DR Congo. Section III presents a concise overview of rule of law theory and introduces a rule of law framework that is then used to evaluate the strength of the rule of law in the DR Congo. Section IV advances the main claim of the article—that strengthening the rule of law can only be an effective solution to the problem of sexual violence if pursued in light of the needs of women and if it addresses norms that underscore the problem.

## I. A BRIEF HISTORY OF CONFLICT IN THE GREAT LAKES REGION

The persistent fighting in the DR Congo has been the most lethal armed conflict since World War II. The International Committee of the Red Cross currently estimates the number of dead at 5.4 million people.<sup>4</sup> The two Congo Wars—the first occurring from 1996 to 1997 and the second from 1998 to 2002—are irreducibly complex. Land, language, ethnicity, migration, access to natural resources, and national security are the most prominent of a host of fac-

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Systems, [http://www.ifes.org/drc.html?page=project\\_36](http://www.ifes.org/drc.html?page=project_36); The United Kingdom, <http://www.mod.uk/defenceinternet/defencenews/trainingandadventure/congotrainingofferschanceforabrightfuture.htm>; Comfort Lampter, UN Gender Advisor, <http://www.womensenews.org/story/090524/new-fighting-escalates-rape-in-eastern-congo>; The United Nations Development Program, [http://www.undp.org/cpr/we\\_do/security\\_reform.shtml](http://www.undp.org/cpr/we_do/security_reform.shtml).

4. Int'l Comm. of the Red Cross, *The ICRC in the Democratic Republic of the Congo*, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/congo\\_kinshasa?OpenDocument](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/congo_kinshasa?OpenDocument).

tors that contribute to this protracted conflict.<sup>5</sup>

The Rwandan genocide was the catalyst to the conflict. In 1994 approximately 800,000 Rwandan Tutsis were killed in a genocide perpetrated by key Rwandan power brokers, members of the Rwandan Armed Forces (FAR), armed groups known as *interahamwe*, and other ad hoc militias.<sup>6</sup> In July 1994 the Rwandan Patriotic Front (RPF)—a group of mostly Tutsi exiles operating out of Uganda—took the Rwandan capital of Kigali, bringing an end to the Hutu-sponsored killings. When the RPF seized power, over one million Rwandan Hutus fled, fearing reprisals from both civilians and the new, Tutsi-led government. Most of the Rwandan Hutus sought refuge across the border in the eastern region of the DR Congo (then Zaire). Hutu extremist leaders, ex-FAR soldiers, and *interahamwe* used these camps to regroup, rally support for their positions, and launch reprisals back across the border against surviving Rwandan Tutsis.<sup>7</sup>

The region into which the Rwandan Hutus fled was, itself, the scene of longstanding ethnic tensions that often erupted in violence between Kinyarwanda-speakers and Congolese of other ethnic groups who thought the Kinyarwanda-speakers were not true Congolese.<sup>8</sup> Into this context spilled nearly one million Hutus, exacerbating the preexisting ethnic tensions and land conflicts and eventually leading to more violence that forced approximately 38,000 Congolese Tutsis to seek refuge in Rwanda in 1995.<sup>9</sup>

In 1996, Rwanda, citing national security and regional stability concerns in the face of Hutu extremism, backed a rebellion in the DR Congo led by Laurent Desire Kabila that overthrew Mobutu Sese Seko to begin the First Congo War. Supported by Uganda and Burundi, Rwanda helped train and arm Banyamulenge (Kinyarwanda-speaking) fighters recruited to Kabila's rebel group, the Alliance of Democratic Forces for the Liberation of Congo (AFDL). The AFDL joined regular armed forces from Rwanda and Burundi, launching attacks against refu-

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5. See Int'l Crisis Group, *Congo: Four Priorities for Sustainable Peace in Ituri, Africa Report* 140 (2008), [http://www.crisisgroup.org/home/index.cfm?action=login&ref\\_id=5425](http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=5425). For additional background to the conflict, see, for example, MICHAEL NEST, FRANCOIS GRIGNON & EMIZET F. KISANGANI, *THE DEMOCRATIC REPUBLIC OF THE CONGO: ECONOMIC DIMENSIONS OF WAR AND PEACE* (2005); THOMAS TURNER, *CONGO WARS: CONFLICT, MYTH AND REALITY* (2007); Severine Autesserre, *Local Violence, National Peace? Postwar "Settlement" in the Eastern D.R. Congo (2003-2006)*, 49 AFR. STUD. REV. 1 (2006); Symposium, *Challenges of Peace Implementation: The UN Mission in the Democratic Republic of the Congo*, S. AFR. INST. FOR SEC. STUDS. (2004); Médecins Sans Frontières (MSF), *Photo Timeline*, <http://www.condition-critical.org/photo-timeline/> (last visited Nov. 18, 2010).
  6. See, e.g., ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY* (1999); MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* (2002); FILIP REYNTJENS, *THE GREAT AFRICAN WAR: CONGO AND REGIONAL GEOPOLITICS, 1996-2006* (2009); TURNER, *supra* note 5.
  7. See REYNTJENS, *supra* note 6, at 23-33 (giving an excellent overview of the conflict).
  8. For example, in March 1993 a conflict between several of these ethnic groups killed 6000 people and displaced another 350,000 people. See Médecins Sans Frontières, *supra* note 5.
  9. *Id.*

gees living in the camps in Eastern DR Congo.<sup>10</sup> These groups continued to target refugees in the East while advancing on the capital of Kinshasha. In 1997 they succeeded in ousting Mobutu and installing Kabila as president, thus ending the First Congo War.

By 1998 tension between the Kabila government, Rwanda, and Uganda led to a new round of armed conflict that lasted until 2002.<sup>11</sup> Rwandan and Ugandan-backed rebel groups again launched attacks in the East, this time with the goal of deposing Kabila. Angola, Namibia, and Zimbabwe came to Kabila's defense by sending regular armed forces, and the conflict eventually encompassed over twenty-five separate armed groups.

In 1999 a ceasefire was signed in Lusaka, Zambia, and the United Nations deployed the United Nations Mission in the Democratic Republic of the Congo (MONUC) in 2000 to help ensure the agreement.<sup>12</sup> Fighting continued on a large scale—especially in the East—despite the ceasefire. President Kabila was assassinated in 2001 and his son, Joseph, assumed the presidency.

This conflict persisted until another peace agreement was signed between the government of the DR Congo and the rebel groups in 2002, marking the end of the Second Congo War.<sup>13</sup> Rwanda agreed to withdraw its troops from the region in exchange for a promise from the DR Congo to pursue, disarm, and arrest Rwandan Hutus who had committed genocide.

Despite the agreement, interregional fighting has continued since 2002. The democratic elections mandated by the Lusaka Agreement were finally held in 2006, and Joseph Kabila was formally elected president. Under his authority, and in accord with several agreements, the various rebel groups—known as “mai mai”—were to be grafted into the regular Congolese armed forces (FARDC). Kabila, however, has done little to integrate these rebel groups, many of which persist in fighting in order to maintain control over lucrative mineral mining operations.<sup>14</sup>

More recent peace agreements—the Nairobi Communiqué<sup>15</sup> between the DR Congo and Rwanda, signed in 2007, and the Goma Agreement between the DR Congo and rebel leader Laurent Nkunda, signed in January 2008<sup>16</sup>—have

10. TURNER, *supra* note 5, at 4.

11. At the time of their withdrawal in 2002, Uganda and Rwanda had, respectively, 10,000 and 23,000 regular soldiers operating in the DR Congo. See Dennis M. Tull, *Peacekeeping in the Democratic Republic of Congo: Waging Peace and Fighting War*, 16 INT'L PEACEKEEPING 215, 216 (2009).

12. *Id.*

13. The U.N. Mission to the Congo attributed the protracted fighting to warring among armed groups over exploitation of gold, diamonds, and coltan. See Interim Report of the United Nations Expert Panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. DOC. S/2001/49 (Jan. 16, 2001).

14. *Id.*; see also THE GREATEST SILENCE: RAPE IN THE CONGO (Jackson Films 2007).

15. See Neil Campbell, *Reinforcing What? The EU's Role in Eastern Congo*, REUTERS (Nov. 17, 2008), <http://www.crisisgroup.org/home/index.cfm?id=5779>.

16. See Lydia Polgren, *Congo Agrees to Peace Deal with Rebels*, N.Y. TIMES (Jan. 22, 2008), <http://www.nytimes.com/2008/01/22/world/africa/22congo.html>.



not stopped the fighting, atrocities, or civilian toll wrought by the conflict. As of February 2008 an estimated 6,000 to 7,000 foreign, non-state armed groups were active in eastern DR Congo.<sup>17</sup>

The vast majority of the estimated 5.4 million deaths are, however, attributed to causes other than fighting.<sup>18</sup> Most loss of life comes from food shortages and malnutrition, the collapse of healthcare infrastructure, poor access to potable water, and disease—all problems exacerbated by the crisis of displacement caused by armed conflict.<sup>19</sup> The scope of the displaced persons problem is massive. In 1996, during the beginning stages of the First Congo War, the International Committee of the Red Cross (ICRC) prepared for a relief operation that would provide supplies for up to 525,000 displaced persons per month, and food for approximately 250,000.<sup>20</sup> Over ten years later the ICRC relief operations still serve around 300,000 internally displaced persons every month.<sup>21</sup> The peak of displacement came in 2003, with 3.4 million persons displaced.<sup>22</sup>

The qualitative range of violence is similarly extensive. Rebel groups, Congolese regular armed forces, and other foreign armed groups have consistently targeted civilians.<sup>23</sup> Armed groups have routinely abducted and used children as soldiers.<sup>24</sup> Congolese regular armed forces and rebel groups alike often pillage homes,<sup>25</sup> and all parties to the conflict have used torture.<sup>26</sup> The extent to

17. Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Mission to the Democratic Republic of the Congo, Addendum* ¶ 2, 8, U.N. DOC. A/HRC/7/6/Add.4 (Feb. 28, 2008).
18. For extensive firsthand accounts by survivors of sexual violence, see MSF, *CONDITION CRITICAL*, <http://www.condition-critical.org/category/eyewitness>; *THE GREATEST SILENCE*, *supra* note 14; LUMO (Goma Film Project 2006).
19. See Int'l Crisis Group, *Mortality in the Democratic Republic of the Congo: An Ongoing Crisis* (2007), <http://www.theirc.org/resource-file/irc-congo-mortality-survey-2007>.
20. Press Release, Int'l Comm. of the Red Cross, Zaire: ICRC Operation Gets Under Way (Nov. 15, 1996), <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JN9P>.
21. Press Release, Int'l Comm. for the Red Cross, Democratic Republic of the Congo: ICRC Steps Up Efforts to Help Displaced People and Their Host Communities (May 15, 2009), <http://www.icrc.org/web/eng/siteeng0.nsf/html/congo-kinshasa-news-150509>. Amnesty International states that in North Kivu, by the end of 2009, one out of four people will have been displaced by conflict. AMNESTY INT'L, *INTERNATIONAL REPORT 2009*, <http://report2009.amnesty.org/en/regions/africa/democratic-republic-congo>.
22. Tull, *supra* note 11, at 221.
23. *Id.*
24. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06; see also HUMAN RIGHTS WATCH, *RELUCTANT RECRUITS: CHILDREN AND ADULTS FORCIBLY RECRUITED FOR MILITARY SERVICE IN NORTH KIVU* (2001), available at <http://www.hrw.org/legacy/reports/2001/drc3>; HUMAN RIGHTS WATCH, *RENEWED CRISIS IN NORTH KIVU* 48 (2007), available at <http://www.hrw.org/en/reports/2007/10/22/renewed-crisis-north-kivu> (reporting that between 2003 to 2006, 30,000 child soldiers were reintegrated into civilian life).
25. See *DR Congo: Hold Army to Account for War Crimes*, HUMAN RIGHTS WATCH (MAY 19, 2009), <http://www.hrw.org/en/news/2009/05/19/dr-congo-hold-army-account-war-crimes>.
26. See AMNESTY INT'L, *DEMOCRATIC REPUBLIC OF THE CONGO: TORTURE AND KILLINGS BY STATE SECURITY AGENTS STILL ENDEMIC* (2007), <http://www.amnesty.org/en/library/asset/AFR62/012/2007/en/45cad2e8-d374-11dd-a329-2f46302a8cc6/af620122007en.pdf>; *DR Congo: Executions, Torture By Armed Groups in*

which sexual violence has been used against Congolese women, however, has become one of the most pervasive and egregious aspects of the conflict.

## II. THE CRISIS OF SEXUAL VIOLENCE

### A. Scope of the Crisis

Few conflicts are as well known for the sheer number of incidents of sexual violence as is the conflict in the DR Congo.<sup>27</sup> High levels of sexual violence characterized both the Rwandan genocide and also the conflict in the former Yugoslavia.<sup>28</sup> But in the DR Congo, particularly in the eastern provinces, the rate of sexual violence has been singularly staggering. The regular armed forces of all nations involved in the two wars and the numerous rebel groups have widely used rape as a weapon of war.<sup>29</sup> Combined, the Congolese regular army (FARDC) and the Congolese National Police Force (PNC) account for close to 20 percent of the sexual violence.<sup>30</sup> The integration of former militia members into regular armed forces, with no mechanism for excluding human rights violators, has contributed to the problem.<sup>31</sup> Those in positions of governmental authority are also among the perpetrators,<sup>32</sup> and even UN peacekeepers have committed acts of sexual violence.<sup>33</sup>

While ex-combatants often bring sexual violence with them upon returning

*Ituri*, HUMAN RIGHTS WATCH (Oct. 21, 2004), <http://www.hrw.org/en/news/2004/10/21/dr-congo-executions-torture-armed-groups-ituri>; OXFAM, WAKING THE DEVIL: THE IMPACT OF FORCED DISARMAMENT ON CIVILIANS IN THE KIVUS, (July 2009), <http://www.oxfamamerica.org/files/waking-the-devil.pdf>.

27. Reports of sexual violence in the DR Congo appear so frequently that many of the reports relied on during the writing of this will appear dated by the time of publication. See, e.g., Jeffrey Gettleman, *Mass Rapes in Congo Reveals U.N. Weakness*, N.Y. Times (Oct. 3, 2010), <http://www.nytimes.com/2010/10/04/world/africa/04congo.html>; Michael J. Kavanaugh, *Congo's 'Horrible' Rape Toll Rises to More Than 300, United Nations Says*, BusinessWeek (Sept. 24, 2010), <http://www.businessweek.com/news/2010-09-24/congo-s-horrifying-rape-toll-rises-to-more-than-300-un-says.html>; Anne Mawathe, *Haunted by Congo Rape Dilemma*, BBC News (May 15, 2010), <http://news.bbc.co.uk/2/hi/8677637.stm>; see also International Crisis Group, *DR Congo*, Crisis Watch Database, Dec. 1, 2010 (reporting over 650 rapes occurring in DR Congo-Angola border since September 2010).
28. See Mark S. Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L L. 225, 226 (estimating that up to sixty thousand women were raped during the Yugoslavia conflict between 1991-1995); Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350 (2003).
29. Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 2.
30. Press Release, Human Rights Counsel, UN Expert on Violence Against Women Expresses Serious Concerns Following Visit to Democratic Republic of Congo, UN Press Release (July 30, 2007), <http://www.unhchr.ch/hurricane/hurricane.nsf/0/B5D0053875B01B8CC1257328003A8FEE?opendocument>.
31. *Id.*
32. Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 13.
33. *Id.* at ¶¶ 47-54 (reporting that one media investigation found "a pattern of sexual exploitation" that involved UN peacekeepers propagating acts of prostitution with Congolese women and girls as young as 13 and stating that MONUC reported 176 allegations of peacekeepers engaging in sexual exploitation or abuse in 2006).

to communities, rates of sexual violence perpetrated by civilians have also risen in the midst of the fighting.<sup>34</sup> UN Special Rapporteur on Violence Against Women Yakin Erturk argues that “such widespread use of sexual violence in the armed conflict seems to have become a generalized aspect of the overall oppression of women in the [DR Congo].”<sup>35</sup>

Numbers tell part of the story. MONUC reported 13,000 new cases of rape in 2005, 14,000 new cases of rape in 2006 (out of a total of 27,000 sexual assaults)<sup>36</sup> and 4,500 new reported cases in the first half of 2007 in the province of South Kivu *alone*.<sup>37</sup> The most current report puts the number of rapes in the two provinces of North and South Kivu in excess of 7,500 through September of 2009.<sup>38</sup> One report put the total number of rapes at 200,000 since 1998.<sup>39</sup> Given that most rape victims live in outlying rural areas and that many, if not most, cases are not reported, the true numbers are likely much higher. Women of almost all ages are targets, and young girls may face an even increased risk due to a cultural belief that sex with a virgin can cure HIV.<sup>40</sup> The Médecins Sans Frontières hospital operating in the eastern Ituri district, for example, reported that girls under age 12 received 17 percent of all rape-related treatment in the first half of 2007.<sup>41</sup>

The immense brutality of the violence reveals the full scope of the problem. Sexual violence in all forms is abhorrent, but its manifestation in the DR Congo is grotesque, and there is no end to accounts of atrocities. Gang rape, sexual slavery, genital mutilation,<sup>42</sup> and forced abortion are all common acts of sexual violence.<sup>43</sup> Erturk’s observations are characteristic:

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34. *Id.* at ¶ 15.

35. See Press Release, Human Rights Counsel, *supra* note 30.

36. See PATRICK VINCK ET AL., LIVING WITH FEAR: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE AND SOCIAL RECONSTRUCTION IN EASTERN DEMOCRATIC REPUBLIC OF CONGO 34 n.29 (2008); Jeffery Gettelman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES (Oct. 7, 2007), <http://www.nytimes.com/2007/10/07/world/africa/07congo.html>.

37. Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 17.

38. Bill Varner, *Congo Might Expel UN Officials in Dispute Over War, Envoy Says*, BLOOMBERG (Dec. 15, 2009), <http://www.bloomberg.com/apps/news?pid=20601116&sid=akc7u0p6Nz1c>.

39. George Lerner, *Rape a Weapon of War in Congo, Activists Say*, CNN, (Oct. 17, 2009), <http://www.cnn.com/2009/WORLD/africa/10/16/amanpour.congo.rape.documentary/index.html>.

40. Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 16.

41. *Id.* Although beyond the scope of the paper, men are also experiencing increased rates of sexual violence as a result of the conflict. See Jeffery Gettelman, *Symbol of Unhealed Congo: Male Rape Victims*, N.Y. TIMES (Aug. 4, 2009), [http://www.nytimes.com/2009/08/05/world/africa/05congo.html?\\_r=1](http://www.nytimes.com/2009/08/05/world/africa/05congo.html?_r=1).

42. This refers to intentional, violent mutilation of female genitalia through the use of foreign objects, tools, or weapons. However, it is necessary to note that some would not characterize genital mutilation as a form of sexual violence.

43. Other forms of severe violence against women have also been reported, including limb amputation and live burials. See Social Institutions and Gender Index, <http://genderindex.org/country/congo-dem-rep>.

The atrocities perpetrated by these armed groups are of an unimaginable brutality that goes far beyond rape. The atrocities are structured around rape and sexual slavery and aim at the complete physical and psychological destruction of women with implications for the entire society. . . Women are brutally gang raped, often in front of their families and communities. In numerous cases, male relatives are forced at gun point to rape their own daughters, mothers or sisters. Frequently women are shot or stabbed in their genital organs, after they are raped. Women, who survived months of enslavement, told me that their tormentors had forced them to eat excrement or the human flesh of murdered victims.<sup>44</sup>

Congolese women who survive such assaults must bear not only the physical, emotional, and psychological consequences of the attack but also socio-cultural effects that extend well beyond the act of violence itself.

### **B. Socio-cultural Implications of Sexual Violence**

The socio-cultural consequences of sexual violence often have the twin results of further jeopardizing the already precarious position of Congolese women and perpetuating regional and societal instability. First, many sexual violence survivors face severe stigma as a result of the crime.<sup>45</sup> Communities, families, and even spouses often reject sexual violence survivors.<sup>46</sup> In 2008 researchers found that over 20 percent of sexual violence survivors in the province of South Kivu had been rejected from their household or community.<sup>47</sup> Male spouses of a sexual violence survivor often consider themselves dishonored, based on a widespread cultural perception that the woman consented to the act.<sup>48</sup> The wife may be thrown out of the house, or she may be allowed to remain, but relegated to a subordinate position if the husband determines this to be cause for taking a second wife.<sup>49</sup>

When the victim is a child or an unmarried woman, she may be forced by her family to marry the perpetrator to avoid stigma since losing her virginity makes her less valuable in Congolese village culture.<sup>50</sup> Family or community members may also send the woman away out of fear that she contracted HIV during the attack.<sup>51</sup> Becoming pregnant from rape, too, is stigmatizing. In 2008

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44. Press Release, Human Rights Counsel, *supra* note 30.

45. Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 107; *see also* AMNESTY INTERNATIONAL, DEMOCRATIC REPUBLIC OF THE CONGO: SUBMISSION TO THE UN UNIVERSAL PERIODIC REVIEW 5, (Nov.-Dec. 2009).

46. Press Release, Human Rights Counsel, *supra* note 30.

47. VINCK, *supra* note 36, at 34.

48. *See* Press Release, Human Rights Counsel, *supra* note 30.

49. *See* MSF, CONDITION CRITICAL, *supra* note 18; HUMAN RIGHTS WATCH, WAR WITHIN THE WAR, *supra* note 1, at 65.

50. *Id.* at 64.

51. *Id.* at 65.

researchers found that only 65 percent of respondents in a survey in the three eastern provinces would accept a survivor back into their community who had given birth following an assault.<sup>52</sup> Stigma compounds the physical and emotional trauma, and such ostracism puts the very survival of these women at risk.<sup>53</sup>

Sexual violence does often leave a survivor infected with HIV, and some estimates suggest that 60 percent of combatants in the DR Congo are HIV-positive.<sup>54</sup> Survivors also face other physical, psychological, and emotional injury.<sup>55</sup> Fistulas, incontinence, internal bleeding, complications from pregnancy, other sexually transmitted diseases, and numerous other injuries are all common physical consequences of sexual violence.<sup>56</sup> Emotional and psychological trauma almost always accompanies the acts of sexual violence,<sup>57</sup> and access to trauma counseling services is severely limited.<sup>58</sup> All of these problems are compounded by extremely restricted access to medical facilities and services, which, even if accessible, are often inadequate.<sup>59</sup> Finally, survivors may suppress or hide physical and psychological injuries, or attempt dangerous self-help remedies from fear that seeking help will alert others to the assault and subject the survivor to stigma.

While economic insecurity is a fact of life for most Congolese women, sexual violence survivors typically face even more dire economic circumstances.<sup>60</sup> Many survivors are forced to relocate after being ostracized from family or community, after which it can be extremely difficult to find adequate housing or earn a living.<sup>61</sup> Childbearing responsibilities only increase these desperate situations and implicate, too, the well being of children under the care of the mother, or children born as a result of rape. For unmarried women, the stigma of sexual violence can reduce the chance of getting married, relegating them to a marginal place in Congolese society.<sup>62</sup> Abortion is illegal under Congolese law, even in cases of rape, which further curtails options for female survivors of sexual violence.<sup>63</sup>

Such widespread sexual violence should not be viewed as either a by-

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52. VINCK, *supra* note 36, at 35.

53. HUMAN RIGHTS WATCH, *SEEKING JUSTICE: THE PROSECUTION OF SEXUAL VIOLENCE IN THE CONGO WAR* 41, 47 (2005); *see also* Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 61.

54. UNITED STATE INSTITUTE FOR PEACE, *SPECIAL REPORT: AIDS AND VIOLENT CONFLICT IN AFRICA* 5 (2001), [www.usip.org](http://www.usip.org).

55. *See* Mary Kimani, *Congolese Women Confront Legacy of Rape*, 20 AFR. RENEWAL 4 (2007).

56. HUMAN RIGHTS WATCH, *WAR WITHIN THE WAR*, *supra* note 1, at 67.

57. *See, e.g.*, JUDITH HERMANN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1992).

58. *See* Press Release, Human Rights Counsel, *supra* note 30.

59. HUMAN RIGHTS WATCH, *SEEKING JUSTICE*, *supra* note 53, at 46.

60. *See* Press Release, Human Rights Counsel, *supra* note 30; *see also* Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 15.

61. HUMAN RIGHTS WATCH, *WAR WITHIN THE WAR* *supra* note 1, at 65.

62. *Id.* at 66.

63. *Id.* (citing to Congolese penal code arts. 165, 166).

product of armed conflict nor considered only a practice peculiar to combatants. Rather, it has emerged as a complex problem in its own right, with significant implications for the broader Congolese society, and as such, warrants specific and deliberate efforts to overcome it.

### III. RULE OF LAW IN THE DR CONGO

Many attribute the rampant sexual violence to the problem of impunity, a symptom of the deeper failure of the rule of law in the DR Congo.<sup>64</sup> Without the rule of law, the common argument goes, there can be no accountability for perpetrators and no redress for victims of sexual violence. In short, there is simply no justice. This is, it seems, a correct assessment of the problem. However, the solution is not as simple as strengthening the rule of law. The remainder of the paper explores the rule of law in the DR Congo with regard to the sexual violence problem and argues that certain limitations to strengthening the rule of law can be overcome by focusing on the needs of Congolese women and addressing cultural norms when fashioning rule of law programs. Only then can the rule of law hope to properly address—much less solve—the sexual violence problem.

This section begins by briefly describing what is meant by “rule of law,” then evaluates the strength of the rule of law in the DR Congo in light of the sexual violence problem.

#### A. Defining the Rule of Law

For over a decade the rule of law has been at the forefront of policy discussions and development agendas as a proposed solution to innumerable international problems.<sup>65</sup> Government officials, NGOs, civil society groups, and others have invested much faith (and much money) in rule of law initiatives with high expectations about the range of problems that the rule of law can address, especially in regions transitioning out of conflict.<sup>66</sup>

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64. See Dominique Soguel, *New Fighting Escalates Rape in Eastern Congo*, <http://www.womensenews.org/story/090524/new-fighting-escalates-rape-in-eastern-congo> (“The notion that a peacekeeping mission can solve the problem in DRC is the wrong starting point,” Comfort Lampeter, a gender adviser for the U.N.’s department of peacekeeping operations told Women’s eNews. ‘What we have to do is put emphasis on really trying to help the government restore the institutions and mechanisms that can ensure the rule of law.’”).

65. See, e.g., Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998) [hereinafter Carothers, *Rule of Law Revival*]; Thomas Carothers, *Rule of Law Temptations*, 33 THE FLETCHER F. OF WORLD AFF. 50 (2009) [hereinafter Carothers, *Rule of Law Temptations*]; Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347, 1347 n.1 (2007) (citing numerous calls for rule of law as a “panacea” to non-Western, post-conflict problems).

66. See Rajagopal, *supra* note 65, at 1347 (“Finally [in the post-Cold War consensus] there is now a focus on the rule of law as the tool that will help achieve the goals of development, security, and human rights.”); see also David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29 (2006).

The rule of law as a concept is notoriously difficult to define and often means different things to different people. Many approach the rule of law from a visceral perspective, what Jane Stromseth calls the problem of “I know it when I see it.”<sup>67</sup> For most, the rule of law entails commitments to notions like equality, justice, and access to legal systems. These notions are applied to institutions and actors such as courts, police forces, prison systems, and legal professionals. In this way, says Stromseth, the rule of law operates as a “shorthand” term that refers to a complex bundle of commitments and institutions.<sup>68</sup>

There is, however, a rich discourse that attempts to parse this shorthand.<sup>69</sup> Some commentators draw distinctions between formal aspects of the rule of law that encompass procedural norms and focus on rules. These “thin,” formal definitions emphasize the principles of equality before the law, that the law be publicly knowable and predictably applied, that it serve as a check on state power, and that legal mechanisms be transparent and accessible.<sup>70</sup> Substantive definitions, on the other hand, attempt to provide specific content to the formal aspects of the rule of law by emphasizing normative commitments to concepts like human rights or gender justice.<sup>71</sup> Also known as “thick” definitions, substantive definitions give life to the skeletal body created by formal definitions and attempt to ensure that the rule of law serves proper ends. Without substantive content many argue that formal rule of law can go awry, Nazi Germany being perhaps the paradigmatic example of strong, yet unjust, rule of law.<sup>72</sup>

The rule of law, however, ultimately refers to conditions on the ground, and as such the terms of the rule of law discourse are necessarily embodied in institutions and social relationships. Translation—much less implementation—from concept to action is as challenging as defining the rule of law. Kleinfeld, citing the repeated failure of rule of law programs, argues that much of the problem of implementation comes from a conflation of the goals of the rule of law (comprised of the formal commitments referenced above, which she calls “ends”) with the institutions charged with embodying and achieving these goals.<sup>73</sup> Lack of precision regarding the relationship between these goals and institutions stagnates efforts to strengthen the rule of law. She writes:

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67. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 56 (2006).

68. *Id.*

69. For an excellent historical summary of the rule of law, see BRIAN J. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004); *see also* BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik Jensen & Thomas Heller eds., 2003).

70. STROMSETH, *supra* note 67, at 70.

71. *Id.* at 71.

72. For a helpful treatment of formal and substantive rule of law theory, see Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

73. *See* Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 36-44 (Thomas Carothers ed., 2006).

[B]ecause achieving such ends requires reform *across* institutions while institutional reforms are generally carried out *within* single institutions, institutional reform can be undertaken with no significant effect on rule of law ends. At the same time, definitions based on institutional attributes lead practitioners to measure the wrong things to determine success. Worse, poorly devised reforms of rule of law institutions can undermine rule of law ends.<sup>74</sup>

As a solution, Kleinfeld proposes a rule of law framework that isolates five rule of law goals, distinguishing them from the related institutions.<sup>75</sup> For practitioners, these goals are important benchmarks for identifying objectives, but also serve as criteria by which to evaluate the strength of rule of law in a given society. The following analysis adopts Kleinfeld's framework, using five rule of law goals—a government bound by law, equality before the law, law and order, predictable and efficient justice, and human rights—to evaluate the strength of rule of law in the DR Congo, with particular consideration for how weak rule of law correlates to the sexual violence problem.

### B. Rule of Law Programs in the DR Congo

David Tolbert and Andrew Solomon argue that rule of law programs for post-conflict societies differ from those employed in traditional development contexts.<sup>76</sup> Despite their differences, post-conflict societies share the common needs of reestablishing a functioning government; healing residual animosities and divisions within society; addressing problems of poverty, crimes committed during conflict, and corruption; and lack of legal infrastructure for which the rule of law has been suggested as a solution.<sup>77</sup> Yet the fact remains that the rule of law has been largely ineffective in producing the goals promised by its proponents.<sup>78</sup>

The DR Congo is one example where rule of law programs have failed to yield the promised outcomes. Following the peace agreements and democratically elected government of 2003, the country has been the target of several rule of law reform projects,<sup>79</sup> many of which are directed principally at the problem

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74. *Id.* at 34.

75. *Id.* at 35. While Kleinfeld's framework is unique, the ends and institutions she includes in her analysis are commonly recognized in rule of law discourse. *See, e.g.*, Tolbert, *supra* note 66; Rajagopal, *supra* note 65.

76. Tolbert & Solomon, *supra* note 66.

77. *Id.*

78. Jane Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, 18 MINN. J. INT'L L. 415, 417 (2009).

79. Lauren-Hélène Piron, *Time to Learn, Time to Act in Africa*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 286 (THOMAS CAROTHERS ED. 2006) (highlighting the number of actors involved in evaluating the rule of law and potential for rule of law intervention). In 2003 a joint donor assessment, led by the European Commission and including help from the UNHCR, UNDP, Belgium, France, the United Kingdom, and MONUC reviewed several institutions commonly falling under the rule of law purview in preparation for initiating aid intervention.



of sexual violence. The DR Congo, however, remains one of the least developed countries in the world,<sup>80</sup> and the problem of sexual violence continues unabated.

UN Resolution 1291 in February 2000 created the United Nations Mission in the Democratic Republic of Congo (MONUC), which has subsequently been extended by three additional resolutions.<sup>81</sup> With a goal of “attaching the highest priority” to the situation in the Kivus and strengthening the rule of law, MONUC has over 16,000 troops, 692 military observers, 1,088 police officers, 1006 international civilian staff, and over 2,500 local staff on the ground.<sup>82</sup> The MONUC rule of law section has been operating since 2004 and its mandate highlights, in particular, “heinous crimes against civilians and rampant sexual violence” and impunity that, it says, cannot be stopped without functional and “efficient judicial mechanisms.”<sup>83</sup> Under this mandate, it promotes the dissemination of criminal, judicial, and military codes; trains judges and judicial staff; holds “days of discussion” at the Law Faculty of Kinshasa on issues of democracy and judicial reform; supports prison condition reform; and tries to work with Congolese military justice authorities, giving particular training regarding sexual violence.<sup>84</sup> MONUC has come under severe criticism for contributing to the problem and sexual violence crimes have been committed by UN peacekeepers. Most recently, Human Rights Watch alleged that MONUC knowingly supported abusive military operations carried out by the regular Congolese Army.<sup>85</sup>

On a smaller scale, numerous other organizations are engaged in rule of law work in the DR Congo. The American Bar Association’s (ABA) Rule of Law Initiative in the DR Congo specifically addresses gender-based violence.<sup>86</sup> In January 2009 it received a 5.2 million dollar grant from the Dutch government to launch a judicial sector training and infrastructure program. This program employed mobile courts in one eastern province, with the goals of trying cases that would otherwise not be heard before a court and to providing *pro bono* representation to sexual violence survivors.<sup>87</sup> In addition to training judges, lawyers, and

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80. DR Congo ranks 176 out of 182 on the 2009 United Nations Human Development Index. HUMAN DEVELOPMENT INDEX—2009 RANKINGS, <http://hdr.undp.org/en/statistics/>.

81. DEMOCRATIC REPUBLIC OF THE CONGO, MONUC MANDATE, <http://www.un.org/en/peacekeeping/missions/monuc/mandate.html>; see Tull, *supra* note 11 (evaluating MONUC’s progress in the DR Congo).

82. DEMOCRATIC REPUBLIC OF THE CONGO, MONUC FACTS AND FIGURES, <http://www.un.org/Depts/dpko/missions/monuc/facts.html>.

83. MONUC, UNITED NATIONS MISSION IN DR CONGO, MANDATE, <http://monuc.unmissions.org/Default.aspx?tabid=1892>.

84. *See id.*

85. Press Release, Human Rights Watch, Eastern DR Congo: Surge in Army Atrocities: UN Peacekeeping Force Knowingly Supports Abusive Military Operations (Nov. 2, 2009), <http://www.hrw.org/en/news/2009/11/02/eastern-dr-congo-surge-army-atrocities>; see also Varner, *supra* note 38.

86. AMERICAN BAR ASSOCIATION (ABA), RULE OF LAW INITIATIVE [http://www.abanet.org/rol/africa/democratic\\_republic\\_congo.html](http://www.abanet.org/rol/africa/democratic_republic_congo.html); see also Jeffery Gettelman, *Rape Victims Words Help Jolt Congo Into Change*, N.Y. TIMES (Oct. 17, 2008), [http://www.nytimes.com/2008/10/18/world/africa/18congo.html?\\_r=1](http://www.nytimes.com/2008/10/18/world/africa/18congo.html?_r=1).

87. Press Release, ABA Extends its Programming in the DRC (Jan. 2009)

members of the police force on gender-based violence and women's rights issues, as well as providing representation, the ABA also established a legal aid clinic in one of the hospitals in Goma. This increased accessibility to survivors and provided some amount of trauma counseling.<sup>88</sup> From early 2008 to March 2009 the ABA provided free legal counseling to 300 survivors of sexual violence, filed over 100 complaints, and secured 25 convictions.<sup>89</sup>

In 2008 the United Nations Development Program (UNDP) began a \$390 million governance program, one prong of which is designed to address judicial reform, security force capacity-building, and corruption.<sup>90</sup> In addition, the UNDP rule of law program in the DR Congo is attempting to build a network of 50 lawyers and 150 paralegals to provide free legal aid and advice to internally displaced persons with the goal of improving access to justice systems.<sup>91</sup>

The European Union and the European Commission also have governance programs in the DR Congo that address many rule of law issues, particularly by supporting REJUSCO—a program implemented by the Belgian Government that focuses on reformation of the justice system in the eastern provinces.<sup>92</sup> REJUSCO works on infrastructure for both tribunals and prisons, trains judges and police, helps provide transportation services for justice-sector needs, funds local bar associations, and works in communities to sensitize people to human rights issues.<sup>93</sup> Another Belgian NGO, *Avocats Sans Frontières*, also focuses on the rule of law, pursuing access to the justice system through mobile court and legal clinic initiatives, and addressing impunity for war crimes and sexual violence.<sup>94</sup> Other entities involved in the DR Congo with some connection to strengthening the rule of law include the Defense Institute of International Legal Studies, DPK Consulting, and RCN Justice et Démocratie.<sup>95</sup>

### C. Sexual Violence and the Rule of Law in the DR Congo

While no empirical research has been conducted to evaluate the impact of these rule of law programs on the sexual violence crisis, it is clear that failure of the rule of law underscores the sexual violence problem. An analysis of five rule of law goals—a government bound by law, equality before the law, law and or-

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[http://www.abanet.org/rol/news/news\\_drc\\_aba\\_rol\\_expands\\_programming.shtml](http://www.abanet.org/rol/news/news_drc_aba_rol_expands_programming.shtml).

88. See ABA Rule of Law Initiative, *supra* note 86.

89. Press Release, ABA, *supra* note 87.

90. INTERNATIONAL BAR ASSOCIATION, REBUILDING COURTS AND TRUST: AN ASSESSMENT OF THE NEEDS OF THE JUSTICE SYSTEM IN THE DEMOCRATIC REPUBLIC OF THE CONGO 41, available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=6C2BE523-F512-48C1-B09C-FC9A8B1D0AAB>.

91. See Maarten Barends, *Fighting Impunity: Addressing Sexual Violence in Eastern Democratic Republic of the Congo*, UNDP CRISIS PREVENTION AND RECOVERY NEWSLETTER, [http://www.undp.org/cpr/newsletters/2009\\_2\\_spring/article1.html](http://www.undp.org/cpr/newsletters/2009_2_spring/article1.html).

92. INTERNATIONAL BAR ASSOCIATION, *supra* note 90, at 42.

93. *Id.* at 42.

94. *Id.* at 43.

95. *Id.* at 43-44.

der, predictable and efficient justice, and human rights—and key institutions with regard to their role in the sexual violence problem supports this claim. The following section explores each goal, and the pertinent Congolese institutions and their relationship to the sexual violence problem, before turning to a final series of claims that evaluate strengthening the rule of law as a solution to sexual violence.

### 1. Government Bound by Law

A government bound by law is essential to preventing the arbitrary application of the law and the proliferation of a class immune from the dictates of the law.<sup>96</sup> Sexual violence perpetrators in positions of state authority enjoy widespread impunity.<sup>97</sup>

This issue is complicated by the presence of several sources of authority—both regular Congolese army units and militias whose authority rests on force or the threat of force—in the eastern region, none of which is bound by law. For example, toward the end of the Second Congo War, Human Rights Watch found widespread impunity for members of the rebel group Rally for Congolese Democracy (RCD) and Rwandan armed forces operating in the eastern provinces of the DR Congo.<sup>98</sup> When the RCD became the *de facto* authority in the region, victims and community members believed that justice was particularly unlikely if the perpetrator was a member of the RCD or the Rwandan Patriotic Army.<sup>99</sup>

More recently, Erturk found that political interference at all levels of criminal trials was common, especially in cases involving state security forces.<sup>100</sup> She also found pervasive problems within FARDC and the PNC.<sup>101</sup> Superiors often shielded accused soldiers by deploying them to other regions without notifying judicial officials or by abusing rules that require prosecutors to obtain permission from commanding officers before pursuing cases against soldiers in war zones.<sup>102</sup> Armed groups frequently used threats and intimidation in response to allegations of misconduct.<sup>103</sup>

In 2005 Human Rights Watch researchers found problems of accused soldiers being transferred, with commanders taking advantage of the time lag between the filing of a complaint and its receipt at the military prosecutor's of-

96. Kleinfeld, *supra*, note 73, at 36-38.

97. *See, e.g.*, HUMAN RIGHTS WATCH, *SEEKING JUSTICE*, *supra* note 53, at 38-42 (detailing numerous instances of impunity); Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 75.

98. HUMAN RIGHTS WATCH, *WAR WITHIN THE WAR*, *supra* note 1, at 81.

99. *Id.*

100. Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 75.

101. *Id.*

102. *Id.* at ¶ 76.

103. *Id.* at ¶ 77 (reporting, as an example, an incident in which a FARDC Naval Commander allegedly raped a girl, and when a local authority brought the claim to the officer's superiors, the accused officer threatened the local official with a firearm).

fice.<sup>104</sup> Reluctance to prosecute accused soldiers was widespread, and for the very few sexual violence cases that actually went to military trial, even fewer resulted in conviction. The researchers concluded that this result was likely due, in part, to the fact that the prosecutors were from the same institution as the accused.<sup>105</sup>

## 2. Equality Before the Law

This goal refers to access, equal application, and enforcement of the law for all people regardless of social distinction. This rule of law element has special bearing on the situation of marginalized groups within societies and covers both facial equality of laws and discriminatory effect.<sup>106</sup>

Gender inequality permeates Congolese law. On each point—equal access, application, and enforcement—there is little equality before the law. Most tellingly, Article 448 of the Congolese Family Code requires a woman to get her husband’s permission to go to court.<sup>107</sup> The Criminal Code does not specifically prohibit rape within marriage.<sup>108</sup> The Congolese Family Code states that men are the head of the household and requires that women obey their husbands.<sup>109</sup> The legal age for marriage is 15 for women and 18 for men.<sup>110</sup> While polygamy is neither legal nor practiced per se, a custom called the “second office” is prevalent. Under this custom men carry on extramarital relationships with several women, who may consider themselves spouses (even carrying identification cards), but who do not enjoy any legal status as a wife.<sup>111</sup> Women do not have the legal ability to sign many legal acts or contracts without consent from their husbands.<sup>112</sup> While women and men can own and inherit land equally, a widow must share the management of the household with the nearest male relative upon the death of her husband.<sup>113</sup> Finally, the low social status of women in the DR Congo means that both judicial and law enforcement authorities fail to treat sexual violence as a serious crime, creating an obstacle for women seeking legal redress in court.<sup>114</sup>

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104. HUMAN RIGHTS WATCH, SEEKING JUSTICE, *supra* note 53.

105. *Id.* at 42.

106. Kleinfeld, *supra* note 73, at 38-39.

107. HUMAN RIGHTS WATCH, SEEKING JUSTICE, *supra* note 53, at 29; Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 97.

108. HUMAN RIGHTS WATCH, SEEKING JUSTICE, *supra* note 53, at 29.

109. Social Institutions and Gender Index, *supra* note 43.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. See, e.g., HUMAN RIGHTS WATCH, SEEKING JUSTICE, *supra* note 53, at 30 (noting the problem of judicial and police willingness to appropriately pursue sexual violence charges).

### 3. Law and Order

Law and Order is primarily concerned with personal security and the security of one's property.<sup>115</sup> Here, little additional evidence is necessary to demonstrate the utter lack of security women in the DR Congo face. A recent report surmised that lack of perceived security is so pervasive in eastern DR Congo that it "seems to affect normal functioning of individuals and also the society as a whole."<sup>116</sup> Human Rights Watch reports that in 2005, "tens of thousands of women and girls in the eastern part of the country [had] suffered crimes of sexual violence,"<sup>117</sup> and that number has likely continued to rise in the last four years. Section III above discussed the scope of the sexual violence problem, providing documentation that there is no semblance of law and order for women in the DR Congo who are almost constantly at risk.

### 4. Predictable and Efficient Justice

Kleinfeld says, "A predictable and efficient legal system allows businesses to plan, enables law-abiding citizens to stay on the correct side of the law, and provides some level of deterrence against criminal acts."<sup>118</sup> An important supplementary point to this rule of law aspect is that people view the legal system as a realistic and effective means of dispute resolution.<sup>119</sup>

Researchers have found that, in the DR Congo, authorities do not prioritize cases of sexual violence, resulting in procedural inconsistencies and failures to fully investigate allegations of sexual violence.<sup>120</sup> Domestic Congolese law provides that a case of sexual violence must be heard within three months, but this is almost never achieved in practice.<sup>121</sup> The population of the DR Congo vastly outnumbers judges, and dockets are overflowing. Coupled with the lower social status of women and the low priority placed on sexual violence, this time limit is almost never enforced. Finally, field research also documents the lack of faith that victims and others have in the judicial system.<sup>122</sup> A study of three eastern provinces in August 2008 found that only 22 percent of respondents thought that holding perpetrators accountable was a role of the judicial system, which researchers concluded could demonstrate lack of trust in the system.<sup>123</sup> Widespread impunity means that the justice system has almost no deterrent effect.

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115. Kleinfeld, *supra* note 73, at 39-42.

116. VINCK, *supra* note 36, at 26.

117. HUMAN RIGHTS WATCH, *SEEKING JUSTICE*, *supra* note 53, at 1.

118. Kleinfeld, *supra* note 73, at 42.

119. *Id.* at 43.

120. HUMAN RIGHTS WATCH, *SEEKING JUSTICE*, *supra* note 53, at 29.

121. Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 69.

122. *See, e.g.*, VINCK, *supra* note 36.

123. *Id.* at 42.

## 5. State Violation of Human Rights

The DR Congo is party to the Convention on the Elimination of All Forms of Discrimination against Women.<sup>124</sup> The human rights pertaining to women as enumerated under this convention have widespread, international agreement. Women in the DR Congo, however, do not enjoy these rights amidst the sexual violence problem. The restriction on married women from bringing claims to court without permission from their husbands violates articles 1 and 5 of the Declaration.<sup>125</sup> Furthermore, the second-class status of women in the DR Congo is contrary to the object and purpose of the Convention.<sup>126</sup>

The DR Congo is also party to the International Covenant on Civil and Political Rights (ICCPR)<sup>127</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),<sup>128</sup> both of which prohibit the type of abuse FARDC, PNC, and state-backed militia have committed against Congolese women. The UN Special Rapporteur on Torture has recognized that rape, itself, can constitute torture,<sup>129</sup> and the ICTY trial in *Furundzija* also held that rape can amount to torture.<sup>130</sup> The use of rape as a weapon of war also violates International Humanitarian Law.<sup>131</sup>

While only states can be properly said to violate human rights, Catherine MacKinnon cautions that such a stance leaves out the vast majority of rapes.<sup>132</sup> In a context in which sexual violence extends well beyond its use as a weapon of war, becoming endemic within households and perpetrated by community members, sexual violence is not an inevitable by-product of conflict. Rather, it is a specific indication of the lack of human rights enjoyed by women, and, in this analysis, a significant indicator of the failure of the rule of law.

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124. UNITED NATIONS, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, STATES PARTIES, <http://www.un.org/womenwatch/daw/cedaw/states.htm> [hereinafter CEDAW].

125. *See Id.*

126. *See, e.g., id.*

127. DR Congo acceded to the International Covenant on Civil and Political Rights on November 1, 1976. *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>.

128. DR Congo ratified the Convention Against Torture in 1996. *Status of Ratification of Convention Against Torture*, OFFICE OF U.N. HIGH COMM'R FOR HUMAN RIGHTS, available at <http://www2.ohchr.org/english/law/cat-ratify.htm>

129. Special Rapporteur on Torture, Report Submitted Pursuant to the Commission on Human Rights Resolution 1992/93 ¶ 9, E/CN.4/1995/34 (Jan. 12, 1995).

130. *Prosecutor v. Anto Furundzija*, I.C.T.Y., Judgment, IT-95-17/1-T, Dec. 10, 1998, ¶ 171.

131. *See* Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993).

132. *See* Catherine A. MacKinnon, *Rape Genocide and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 14 (1993); *see also* Doris E. Buss, *Rethinking "Rape as a Weapon of War"*, 17 FEMINIST LEGAL STUD. 145 (2009).

## 6. Rule of Law Institutions

Rule of law inadequacies in the judiciary also contribute to sexual violence. Lack of resources, corruption, and interference by other governmental bodies greatly impede the Congolese judiciary's ability to provide justice in cases of sexual violence. First, the judiciary is woefully understaffed and underfunded.<sup>133</sup> Both judicial staff and judges are routinely unpaid or irregularly paid, and as a result, many judges earn a living through corruption.<sup>134</sup> One resident of Goma told a researcher, "In court cases today, whoever has the money wins."<sup>135</sup>

Problems within the police force also contribute greatly to the crisis. Chief among contributing factors is the fact that police are among the perpetrators of sexual violence and face little consequence for their actions.<sup>136</sup> In addition, police are charged with investigating all accusations of sexual violence, but lack of resources and inadequate training often result in cases that go without investigation or receive inadequate investigation.<sup>137</sup> Poor public perception of police officers, corruption, and gender barriers also mean that police officers are not often considered allies or sources of help for victims of sexual violence.

The prison system, too, exacerbates the sexual violence crisis. Again, resources and corruption plague the prison system and often undercut prison sentences given to perpetrators of sexual violence. Extreme overcrowding and poor resources often mean that sentences go unenforced.<sup>138</sup> One report from 2008 found that prisoners were often let out at night to forage for food and water because the prison could not provide sustenance for the inmates, and many took this opportunity to escape.<sup>139</sup> Bribes allow sentenced perpetrators to serve little, if any, prison time, and it is not uncommon for sexual violence perpetrators to return almost immediately to their home communities after being sentenced.<sup>140</sup> These structural failures hamper any specific or general deterrent effect that criminal convictions might have and help foster a sense of impunity.

## IV. CREATING A VIABLE RULE OF LAW SOLUTION

This rule of law analysis of sexual violence in the DR Congo raises several issues for both broad rule of law discourse and also for rule of law practitioners working on the specific problem of sexual violence. It is not enough to strengthen the rule of law in general and assume that this will address the sexual

133. HUMAN RIGHTS WATCH, *SEEKING JUSTICE*, *supra* note 53, at 42-43; AMNESTY INTERNATIONAL, *Democratic Republic of Congo*, *supra* note 45, at 4.

134. HUMAN RIGHTS WATCH, *WAR WITHIN THE WAR*, *supra* note 1, at 79.

135. *Id.*

136. *Id.* at 80.

137. *Id.*

138. *See* Special Rapporteur on Violence Against Women, *supra* note 17, at ¶¶ 80-85.

139. Press Release, Human Rights Counsel, *supra* note 30.

140. Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 74 (citing MONUC estimation that 80 percent of alleged rapists are released on bail, "often under dubious circumstances," and never return to court).

violence problem. Instead, strengthening the rule of law must be done in specific ways, with awareness of its limitations and, most importantly, with primary concern for women at risk of sexual violence.

First, rule of law practitioners must be aware of the limitations posed by lack of development, geography, and armed conflict for strengthening the rule of law in the DR Congo. Second, practitioners must distinguish between the rule of law as an evaluative theory used to analyze causes of problems, and the rule of law as a set of social and legal conditions that can help solve those same problems. These aspects contain distinct lines of inquiry that must be combined in the proper way for the rule of law to be an effective solution. Third, rule of law efforts must be designed around the specific needs of women, taking into account the numerous ways weak rule of law contributes to sexual violence. Finally, strong rule of law depends heavily on culture, and practitioners must challenge cultural norms that subjugate women and impinge on the rule of law in order to reduce sexual violence.

#### **A. Limitations of Armed Conflict and Political Efficacy on the Rule of Law**

A host of factors contribute to an environment hostile to strong rule of law. Over 2,500 kilometers separate the capital of Kinshasha from the city of Goma in eastern DR Congo. This distance exceeds the country's total of 2,250 kilometers of paved roads, most of which have been in a state of continual deterioration for over ten years.<sup>141</sup> This physical distance is mirrored by administrative distance—the instability and lack of security caused by the armed conflicts are felt most acutely by those in the eastern provinces. The Kinshasha-based government has shown little political will and less ability to bring the conflict to an end or to implement the legal, judicial, administrative, and military reforms necessary to strengthen the rule of law. Without central government backing, rule of law reforms face severe challenges of implementation and sustainability.

The sexual violence problem highlights these issues. Despite constitutional reforms in 2006 that mandate gender equality, the Congolese government has been unable to implement these reforms, particularly in the eastern provinces.<sup>142</sup> In this region, armed conflict, in particular, undermines the rule of law. Perpetrators often enjoy impunity by virtue of affiliation with rebel groups, remain inaccessible in remote territory, and cast a shroud of fear over survivors who might bring claims against them. The Congolese government has been reluctant to pursue sending purported war criminals to the International Criminal Court. And, as noted above, bringing civilian perpetrators to justice is incredibly difficult given corruption, lack of resources, the cultural values surrounding rape, and numerous other obstacles to achieving law and order.

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141. UNITED NATIONS JOINT LOGISTICS CENTRE, DRC SNAPSHOT: ROADS IN THE DRC, 2005-2006, [http://www.unjlc.org/23003/DRC/land/roads/snapshot\\_roads/2006-07-25.0204384674/download](http://www.unjlc.org/23003/DRC/land/roads/snapshot_roads/2006-07-25.0204384674/download).

142. Press Release, Human Rights Counsel, *supra* note 30.



This suggests that strengthening the rule of law by implementing programs across institutions based on, and in pursuit of, rule of law goals faces significant challenges in certain contexts. If a stronger rule of law is a solution to the sexual violence crisis, then efforts to strengthen the rule of law must recognize and work around these obstacles. Conflict in an expansive country, ruled by a weak central government, with deteriorating infrastructure and very limited resources is a difficult environment in which to produce strong rule of law. Nevertheless, strengthening the rule of law is essential to combating the sexual violence problem. In order to move forward effectively, practitioners should structure their efforts around the following three arguments.

### **B. Rule of Law as Evaluative / Rule of Law as Creative**

The rule of law, in both theory and practice, ultimately refers to socio-legal conditions on the ground. The rule of law discourse therefore has two functions. First, the rule of law can function as an *evaluative tool* that analyzes the strength of the five rule of law goals and the functioning of legal institutions as discussed above. Second, the rule of law can function as a set of necessary conditions that leads to a tertiary goal. In other words, the rule of law also has a *creative* dimension, and it is this aspect to which practitioners refer when suggesting that strengthening the rule of law can be a solution to the sexual violence problem in the DR Congo.

First, the rule of law as an evaluative tool primarily asks “what” questions. This is the scholarly project in which commentators have offered formal and substantive, “thick” and “thin” definitions of the rule of law, and it is the question that Kleinfeld answers with her five-goal rule of law framework.<sup>143</sup> For practitioners using the rule of law in this evaluative capacity, it is proper not only to ask “what are the goals” of rule of law but also “to what extent” are these goals being met in a given society. For example, as applied to the sexual violence problem in section III.C above, a goal-by-goal analysis of the strength of rule of law in the DR Congo reveals not only weak rule of law in general, but also numerous ways in which weak rule of law exacerbates the sexual violence problem.

Second, in its creative dimension, the rule of law asks “how” questions. These questions are the domain of rule of law practitioners and programs, and they pertain largely to questions of strategy and implementation in reference to institutions. By and large, practitioners, however, are not concerned with strengthening the rule of law for its own sake but suggest the rule of law as a solution for problems such as sexual violence.<sup>144</sup>

While the “what” and “how” questions are inextricably related, one cannot

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143. See Kleinfeld, *supra* note 73, at 35.

144. See, e.g., Carothers, *Rule of Law Revival*, *supra* note 65; Carothers, *Rule of Law Temptations*, *supra* note 65.

be substituted for the other. Failure to properly distinguish these questions—and thereby separate the two functions of the rule of law discourse—leads to a common misconception: that strengthening the rule of law in general will lead predictably to the solution for any number of specific problems. Such a belief fails to recognize that the rule of law is a *necessary* but not always a *sufficient* condition to the remedy for specific problems.

The goal-by-goal rule of law analysis above of the sexual violence problem reveals the particular points of weakness that contribute to the overall problem of sexual violence in the DR Congo. The “how” questions must follow this type of evaluation and address the specific problems with specific solutions. A general effort to strengthen the rule of law, writ large, cannot solve the problem—to suggest otherwise conflates the two functions of the rule of law by trying to give a “what” answer to a “how” question. In other words, the evaluative dimension must precede the creative dimension by fully informing the means and methods by which practitioners try to strengthen the rule of law. Proper separation and sequencing of the evaluative and creative dimensions is essential if rule of law efforts are to have bearing on sexual violence or any other problem for which the rule of law is a proposed solution.

This point is underscored by the fact that people do not experience weak rule of law. Rather, as in the DR Congo, women experience rampant sexual violence in the absence of law and order. They forego pursuing justice because they lack confidence that a soldier will be held accountable by the government, or that a judge will render a verdict in favor of a woman. Or they find their complaint undermined by poor police investigation, corruption or a prison system that cannot keep a convicted perpetrator within its confines.

Proper distinction between the rule of law’s evaluative and creative dimensions—between the “what” and “how” questions—is of utmost importance, but that ultimately does not go far enough. In the case of sexual violence another question must be asked. If strengthening the rule of law is to be a solution, practitioners must also ask “for whom?”<sup>145</sup>

### C. Gender Issues and the Rule of Law

In order for strengthening the rule of law to be a solution to sexual violence, practitioners must give specific attention to the needs and concerns of

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145. For a general discussion on this issue, see Fionnuala Ni Aolain & Michael Hamilton, *Gender and the Rule of Law in Transitional Societies*, 18 MINN. J. INT’L L. 380, 381 (2009); see also Rajagopal, *supra* note 65, at 1349 (“[T]he invocation of the rule of law hides many contradictions among the different policy agendas themselves, such as between development and human rights or between security and human rights, that cannot be fully resolved by invoking the rule of law as a mantra. It is far more important to inquire into the real consequences of these agendas on ordinary people.”); Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 28, 25 U.N. Doc. S/2004/616 (August, 23 2004) (calling the participation of victims in post-conflict, transitional justice processes a “particularly important constituency” and stating that “special attention” must be given to groups most affected by conflict).

women. Women are those most at risk of sexual violence, and the challenges of strengthening the rule of law are heavily characterized by gendered issues that must be identified and addressed to create an effective solution.

Lori Handrahan's empirical work supports this assertion, demonstrating that in post-conflict situations, women's security concerns are different from those of men, and, in conflict situations, "[f]emale insecurity is so prevalent that it becomes invisible and accepted as the norm."<sup>146</sup> Gender should be a paramount concern in rule of law efforts, a point underscored by Cynthia Cockburn who argues: "[T]he differentiation and relative position of women and men is seen as an important ordering principle that pervades the system of power and is sometimes its very embodiment."<sup>147</sup>

This power imbalance is quite characteristic of the weak rule of law in the DR Congo discussed above and is not likely to be addressed by a strategy that seeks only to strengthen the rule of law in general. The gendered nature of the problem requires that rule of law efforts entail particular attention to the needs of women. Several examples illustrate this point.

First, as noted above, Congolese civil law prohibits a married woman from filing a legal claim without permission from her husband.<sup>148</sup> On its face, this law is discriminatory and violates not only the new Congolese Constitution, ratified in 2006, but also the CEDAW, which the DR Congo has also ratified.<sup>149</sup> In addition to its discriminatory character, this law stands as a barrier to women who wish to file a claim against a perpetrator. Moreover, it contributes to the cultural norm of silence regarding sexual violence and also perpetuates the stigma women face as survivors of sexual violence.

To effectively address the sexual violence crisis, rule of law reform must address all laws that apply unequally to women, not simply laws regarding sexual violence. Prohibiting married women from filing a legal claim adds yet another layer to the shield of impunity for sexual violence crimes that the Congolese judicial system already struggles to prosecute. The existence of this law likely influences the willingness of judges and prosecutors to pursue and adjudicate cases of sexual violence and deters police from investigating allegations of sexual violence. This legal prohibition is both directly contrary to several rule of law principles and contributes in other ways to rule of law failures.

Second, numerous problems exist within rule of law institutions that exacerbate the sexual violence problem. For example, assuming that a woman wishes to file a sexual violence claim against a defendant, problems with evidence often work against her claim. Police, who carry the primary responsibility of investigating allegations of sexual violence, often lack the willingness or investigatory

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146. Lori Handrahan, *Conflict, Gender, Ethnicity and Post-Conflict Reconstruction*, 35 SECURITY DIALOGUE 429, 430 (2004).

147. CYNTHIA COCKBURN, *THE SPACE BETWEEN US: NEGOTIATING GENDER AND NATIONAL IDENTITIES IN CONFLICT* 3 (1998).

148. HUMAN RIGHTS WATCH, *SEEKING JUSTICE*, *supra* note 53, at 41.

149. CEDAW, *States Parties*, *supra* note 124.

skill to pursue complaints.<sup>150</sup> Furthermore, poor training, lack of resources, and restricted access to medical facilities render proper gathering of evidence extremely difficult, especially in rape cases.<sup>151</sup> This lack of physical evidence can restrict the chances of conviction.

Additionally, witness protection for women is scant, and a woman is often forced to confront her perpetrator in court.<sup>152</sup> Officials have even attempted, in some cases, to transport both victim and perpetrator to trial in the same vehicle.<sup>153</sup> Often convicted persons are housed in facilities that fail to separate by sex, extending the opportunity for further abuse of other women.<sup>154</sup> Finally, given the stigma that accompanies sexual violence, women may often be uncomfortable reporting crimes to the police or other authorities. Due to the personal and private nature of the crime, women may struggle with relating details of the crime to predominately male officials.

Efforts to strengthen the rule of law must take these issues into account by providing increased witness protection, training police on investigative and interviewing skills, and equipping clinics and others with materials for proper evidence collection. General rule of law reform is likely to pass over these specific issues unless the “for whom” question is asked. Without this inquiry, the rule of law will miss the mark in addressing sexual violence.

Third, rule of law reform efforts must address remedies that sidestep, rather than address, the sexual violence crisis. For example, when an unmarried woman survives a sexual attack, her family or the threat of stigma may force her to marry the perpetrator. In some Congolese communities this is considered this to be an appropriate solution to the problem. However, from the perspective of the survivor this may mean a lifetime of further abuse. This contributes to the social oppression of women and acts as another layer of impunity for the perpetrator. Such a practice undermines equality before the law, inappropriately addresses problems of law and order with regard to sexual violence, and violates human rights standards. Ultimately, it further devalues the role of women in Congolese society and exacerbates, rather than ameliorates, the sexual violence problem.

In order for the rule of law to be a solution to the sexual violence problem, the rule of law must not only be strengthened but must also be made to work for women. Rule of law reform must extend to both public and private spheres that bear on the problem of sexual violence—an approach that is easily overlooked unless the “for whom” question is asked. It is possible for rule of law reform to be carried out in the name of ending sexual violence, while failing to address the specific obstacles that arise as a result of the gendered nature of sexual violence. Unless these obstacles are taken into account in rule of law efforts, it is unlikely

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150. See, e.g., HUMAN RIGHTS WATCH, *SEEKING JUSTICE*, *supra* note 53, at 42.

151. *Id.* at 46.

152. Private conversation with Congolese attorney in Goma, DR Congo (July 2009).

153. Private conversation with Rejusco intern and author in Goma, DR Congo (July 2009).

154. UN News Service, *'Inhumane' Congolese prisons need urgent overhaul, UN official says* (July 27, 2009), <http://www.unhcr.org/refworld/docid/4a8a732d1e.html>.

that strengthening the rule of law will positively affect the sexual violence problem and doubtful that rule of law efforts in general will succeed.

If strong rule of law depends upon the confidence of those protected by the law, the risk of sexual violence and impunity for perpetrators severely undercuts Congolese women's confidence in the law.<sup>155</sup> Without such measures, confidence in the justice system among women is likely to remain at very low levels, undermining rule of law, writ large, in the DR Congo.<sup>156</sup>

#### D. Rule of Law Must Take Norms Into Account

Rape as a weapon of war, combined with impunity for perpetrators and the already marginalized place of women in Congolese culture has destroyed the normative prohibitions of violence against women in the eastern DR Congo. Practitioners must acknowledge that standard rule of law programs cannot solve every aspect of this problem. A lasting solution to the problem of sexual violence will require a wholesale change in attitudinal and behavioral norms regarding women in the DR Congo.<sup>157</sup> Not only must this solution encompass changes regarding the permissibility of sexual abuse, including the perception and reality of impunity, but it must also extend to the full range of gender-based violence and cultural norms that subjugate women within Congolese society.

Rosa Brooks' work is instructive on this point.<sup>158</sup> She observes that rule of law efforts focusing on standard programmatic menus—law reforms, judicial and police training, constitution drafting—have often failed to reach their goals.<sup>159</sup> She writes:

What this type of formalistic approach fails fully to recognize or acknowledge is that creating the rule of law is most fundamentally an issue of norm creation. The rule of law is not something that exists 'beyond culture' and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law is a culture, yet the human-rights-law and foreign-policy com-

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155. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 2, U.N. DOC. S/2004/616 (Aug. 23, 2004) ("Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.").

156. Tolbert, *supra* note 66, at 45 ("The key institutions for the protection of the rule of law are not difficult to identify. However, they are exceedingly hard to build or re-build. In doing so, the key challenge is not so much the question of court buildings and technology, or even the passage of relevant laws, but rather of changing the attitudes of legal professions and society at large toward these essential institutions.").

157. Stromseth, *supra* note 78, at 418, 420 (arguing that rule of law reform must be accompanied by cultural change).

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

159. *Id.*

munities know very little—and manifest little curiosity—about the complex processes by which cultures are created and changed.<sup>160</sup>

Cultural norms permeate many of the factors that contribute to the sexual violence crisis. In fact, Erturk cautions against singling out sexual violence from the “continuum of violence that Congolese women experience” which seems “to be perceived by large sectors of society to be normal.”<sup>161</sup> Certain preexisting norms have helped create the problem by contributing to judges’ unwillingness to hear claims of sexual violence and the reluctance of police to investigate allegations. Cultural norms also prompt traditional self-help remedies such as forced marriage, that reify a woman’s second-class status in society.

Furthermore, the destruction of norms is also a powerful contributing factor of sexual violence. Men may return from armed conflict in which rape has been used as a weapon of warfare. Without any psycho-social support, they may bring this practice with them into the private sphere of communities and households.<sup>162</sup> Non-combatants are increasingly committing acts of sexual violence in a society in which the moral fabric is ragged from conflict and legal impunity. In this milieu, it is too much to assume that the rule of law, as Brooks says, “will lead reliably and predictably to the emergence of a robust societal commitment to the more substantive aspects of the rule of law.”<sup>163</sup> Finally, certain rule of law initiatives may even serve to entrench norms that work against a rule of law solution to the sexual violence problem.<sup>164</sup>

This point does not warrant outright rejection of the rule of law as a solution to the sexual violence crisis. Nor does it deny that laws do have some norm-creating capacity. Christine Bell writes, “in transitional societies, law must be both the subject and object of change: It must simultaneously both produce change and be changed itself.”<sup>165</sup> Most agree that impunity for perpetrators is a significant problem in the perpetuation of sexual violence, and appropriate laws can help alleviate this impunity by offering some measure of deterrence. In light of these considerations, practitioners should be aware of the limits of the rule of law and should focus on—or find partners who can invest in—efforts to change detrimental preexisting norms and rebuild norms that have been fractured by conflict.

Building norms in order to strengthen the rule of law, too, benefits from focusing on *whom* these efforts are designed to help. For survivors and women at risk of sexual violence in the DR Congo, efforts should focus on ways to reduce the stigma associated with sexual violence survivors. This can be accomplished

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160. *Id.* at 2285.

161. See Press Release, Human Rights Counsel, *supra* note 30.

162. See, e.g., *id.*

163. Brooks, *supra* note 158, at 2284.

164. See Aolain & Hamilton, *supra* note 145, at 388-89.

165. Christine Bell, Colm Campbell & Fionnuala Ni Aolain, *Justice Discourses in Transition*, 13 SOC. LEGAL STUD. 305, 309 (2004).

by educating communities as broadly as possible regarding women's rights and other issues that bear on sexual violence, including HIV/AIDS, the illegality of sexual violence, and options for legal remedy. Such efforts should also take into account the public and private dimensions of sexual violence and advocate for rights both at-large and within the private sphere.<sup>166</sup> Civil society organizations that unify women by increasing their voice and role in various institutions and across all aspects of the culture are vitally important. Faith-based organizations, too, are very important in this regard. Churches enjoy a prominent role in Congolese society and can help to empower women by using their position to speak out against sexual violence and by giving theological legitimacy to messages of equality and non-violence. Clinical legal education programs that simultaneously provide services to women survivors while sensitizing a new generation of legal practitioners to the rights of women can also help change culture in important ways.

Strengthening the rule of law must take a holistic approach<sup>167</sup> by finding ways to bring women into full participation in Congolese society. Women's rights in general must be bolstered so that women have equal access to education, economic opportunity, and full participation in democratic processes. Increasing access to basic and higher education for girls and women, efforts to train and support the income-generating activities of women, and fuller inclusion in decision-making processes at all levels of civil society are necessary to create a culture that values women and does not tolerate sexual violence.

Widespread gender-based discrimination also contributes to the sexual violence problem.<sup>168</sup> Handrahan notes that the social fractures wrought by conflict may present opportunities of empowerment for women.<sup>169</sup> In the wake of armed conflict, women may be required to run households, take leadership roles within communities, and unite with others in ways not previously possible. However, these opportunities may be quashed by violence or prevalent social norms that encourage women to relinquish these positions and to return to the domestic sphere when men return from fighting.<sup>170</sup> Where this has been the case, efforts should be made to maintain such advances.

It goes too far to say that laws have no bearing on norms. Certainly laws that relegate women to a lesser status in society—such as those enumerated in the Congolese Family Code—contribute to social norms that fails to give full value to women. While laws do have some shaping effect on norms, the rule of law cannot be achieved, nor can the sexual violence problem be adequately addressed, only through legal and institutional reform. Erturk arrives at a similar conclusion. She writes, “[b]ehavioral norms will therefore remain a serious prob-

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166. Secretary General, *supra* note 155, at ¶ 33.

167. See Stromseth, *supra* note 78, at 420.

168. Special Rapporteur on Violence Against Women, *supra* note 17, at ¶ 96.

169. Handrahan, *supra* note 146, at 433.

170. *Id.* at 439, 441.

lem in the future—regardless of the security situation, unless Government and society are willing to make a serious effort to fundamentally change prevailing gender relations that subordinate and devalue women.”<sup>171</sup>

Ultimately, strengthening the rule of law in a way that affects the sexual violence problem should go beyond simply addressing the needs of women. A change in norms can alter the level of violence perpetrated against women, but it can also bring them to a fuller inclusion in all aspects of society. Full inclusion strengthens not only the rule of law but the transformation of a conflict-torn society as well.<sup>172</sup>

### CONCLUSION

Sexual violence in the DR Congo demands response. Until the crisis has been curbed, thousands of women and girls remain at constant risk. While there may be no single measure that will halt the violence, a nuanced effort to strengthen the rule of law can help alleviate the problem. Weak rule of law is undoubtedly a significant contributing factor to the problem. However, efforts to strengthen the rule of law in general are unlikely to make a significant impact on the sexual violence problem. Rather, programs are needed that aim to strengthen the rule of law in specific ways. Rule of law theory must be applied in a rigorous manner that allows the evaluative function of the theory to inform its creative function. Also, practitioners must fashion rule of law programs around the specific needs of women and the particular barriers they face in relation to sexual violence. Finally, efforts to strengthen the rule of law must entail efforts to rebuild cultural norms destroyed by armed conflict and rampant sexual violence and attempt to change norms that underscore the violence. A general approach to this specific problem will not do. Only a nuanced and specifically targeted solution can hope to overcome the complex host of factors that leave Congolese women at risk of sexual violence.

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171. See Press Release, Human Rights Counsel, *supra* note 30.

172. See Bell, Campbell & Aolain, *supra* note 165, at 321; see also, e.g., Elaine Zuckerman & Marcia E. Greenberg, *The Gender Dimensions of Post-Conflict Reconstruction: The Challenges in Development Aid*, in *MAKING PEACE WORK: THE CHALLENGES OF SOCIAL AND ECONOMIC RECONSTRUCTION* (Tony Addison & Tilman Brück eds., 2009) (discussing the importance of women in development following armed conflict.).