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Showing Its Teeth: The International Criminal Court Takes On Child Conscription in the Congo, But Is Its Bark Worse Than Its Bite?

Justin Coleman*

I. Introduction

Imagine living with your family in a country that has been gripped by a violent war for several years. The war has exhausted the country's resources and depleted its population through the slaughter of hundreds of thousands of civilians and soldiers. Until now, you have protected your thirteen-year-old daughter and ten-year-old son from the violence surrounding them, but one night that all changes. While you and your children sleep, several soldiers enter your home, point guns at your family, and take your children into the night. Your children have been forcibly recruited to contribute to the war effort as child soldiers.

You learn your children have been taken to a military encampment to undergo training and initiation. Here your daughter catches the eye of a commanding officer. The officer decides to take her as one of his wives or mistresses as he has done with numerous other girls. As a result, she is sexually assaulted several times and will likely become pregnant before she is fourteen. Additionally, your daughter is responsible for contributing to the war effort in other ways, including manual labor (e.g., cooking and carrying supplies). Later, your pregnant daughter may even be armed and forced to kill.

Your son, even at the age of ten, will not be spared the harsh treatment. Initially, the militants force him to take various drugs to lower his inhibitions and make his mind easier to mold. They systematically beat him in order to harden him for the life as a soldier. Next, he is forced to kill someone close to him or from his community. In order to further desensitize your son to war-time violence, he is required to take

part in other forms of cruel behavior, including killing civilians, raping women and girls, and beating other captured children.

Atrocities like these occur everyday in all parts of the world—especially in Africa, and are particularly problematic in the Democratic Republic of the Congo ("Congo"). These terrible crimes have happened to countless children in the Congo, just as they happened to Fabrice, Jeanne, and Lambert.

Fabrice was ten, and in the sixth grade when soldiers killed his parents.\(^1\) He was abducted shortly thereafter, trained, armed with a weapon, and told to avenge them.\(^2\) Fabrice saw combat on multiple fronts before he reached the age of thirteen.\(^3\)

Jeanne was eleven when she was abducted while on her way home from school.\(^4\) She explained her "recruitment" like this:

I came across some soldiers who were pretending to mend their broken down vehicle, but in fact it was a ploy. They called me and some other children over, and when we went up to them, they grabbed me, threw me into their vehicle and took me off to a training centre. I was trained there and then we began the march towards Kinshasa.\(^5\)

Even now, Jeanne has no knowledge of what became of her parents.\(^6\)

For Lambert, age twelve, the recruiters came right through his front door: "I was taken from my home... I was with my young sister, my cousin and my mother, who died after some days because of what the soldiers did to her.... My young sister couldn't [follow] because she was sick, so they raped her and left her."\(^7\) The soldiers took Lambert and trained him to torture and kill.\(^8\)

For Fabrice, Jeanne, Lambert, and hundreds of thousands of children like them, violence is their reality. It is for these children that the International Criminal Court ("ICC") takes action. In its fourth year, the ICC has started its first trial, which specifically targets child conscription in the Congo.\(^9\) The Court charged a Congolese warlord

\(^{2}\) Id.
\(^{3}\) Id.
\(^{5}\) Id.
\(^{6}\) See id.
\(^{7}\) REDRESS, supra note 1, at 18.
\(^{8}\) See id.
\(^{9}\) See STEPHANIE HANSON, COUNCIL ON FOREIGN RELATIONS, AFRICA AND THE
with using child soldiers during that country’s civil war.\textsuperscript{10}

This Comment focuses on child conscription in the Congo, which the ICC began investigating in March 2006.\textsuperscript{11} Specifically, this Comment analyzes the ICC’s first case, against Thomas Lubanga Dyilo ("Lubanga"). First, this Comment defines child conscription in Section II and looks at the various ways it has occurred and continues to occur in the world. Subsection A addresses the when, where, and how child soldiers are used, as well as reasons behind the widespread practice of this war crime. Subsection B turns to a description of the Congo and the child conscription practices that have occurred there. Additionally, the development and treatment of child conscription under international law is included. Subsection D focuses on the ICC as created by the Rome Statute.

Next, Section III analyzes the ICC’s first case: The Prosecutor v. Lubanga.\textsuperscript{12} This section includes a description of Lubanga’s criminal conduct with regards to child conscription. Additionally, an analysis of the advantages and disadvantages associated with this case is discussed. This Comment suggests possible ways to deal with some of the issues the ICC has faced in Lubanga’s case. Finally, this Comment concludes that despite the many concerns, it is important that prosecution of Lubanga for the crime of child conscription continues in the ICC.

II. Background

A. What is Child Conscription?

Child conscription involves the use of children in any armed conflict.\textsuperscript{13} Individuals under the age of adulthood, normally eighteen,\textsuperscript{14} may be considered “children” for purposes of child conscription.\textsuperscript{15}

\textsuperscript{10}International Criminal Court, \url{http://www.cfr.org/publication/12048/africa_and_the_international_criminal_court.html} (last visited Mar. 21, 2008) [hereinafter Council on Foreign Relations].
\textsuperscript{11}Id.
\textsuperscript{15}See Optional Protocol, supra note 14, at 2.
However, the term conscription is more typically attributed to those individuals who are under the age of fifteen. Many military groups and organizations engage in the use of child soldiers, (soldiers under the age of fifteen) including government armed forces, paramilitary groups, guerrilla operations, and other "armed opposition groups."

The use of child soldiers has taken place and continues to take place in over thirty countries, primarily in war-zones. Currently, children are being used as soldiers in nearly thirty-three conflicts around the world. Furthermore, nearly 300,000 children have been involved in military operations worldwide, both voluntarily and involuntarily. These conflicts have included children as young as the age of nine who have been recruited to fight by military organizations.

Military recruiters in war-torn regions employ various tactics in order to obtain child soldiers. Normally force is the tool of choice. Any choice that a child may have regarding armed conflict is eliminated when they are forced to join. Military groups will often grab children right off of the street, or any place they can be found. These children are forced to comply with every instruction given to them under threat of violence to themselves or those close to them.

While many children are forced into military service, several join voluntarily. However, it is questionable how any child in these situations could make a "voluntary" choice. Often, these children's countries have been ravaged by war, and because of this destruction the

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16. Id.
18. Id.
19. Id.
20. Id.
24. Id.
26. Id.
27. See Hearings, supra note 21.
29. See Hearings, supra note 21.
basic functions of society have broken down around them. With their communities breaking down, children turn to military groups for survival because they offer the security and stability lacking in their lives. Homeless children who are without their families are especially drawn to that promise of stability. An extreme level of anxiety contributes to their willingness to join the armed conflicts that surround them as a large majority of these children lack access to education, jobs, shelter, supervision, and food sources. However, most child volunteers lack a basic understanding of the battle they join and are unable to formulate a rational decision with regard to the conflict. For those young combatants, there is no other clear means of meeting their basic needs.

Still, some children join the fight for other reasons. Violence becomes a perpetuating cycle as some youths join the fight in order to avenge the deaths of family members. Many young military recruits join after witnessing, first hand, the torture or murder of loved ones. Other reasons, including social pressure and a sense of adventure, influence the decision to join for some children.

Regardless of whether children used in warfare are there voluntarily or involuntarily, they tend to come from similar backgrounds. Children from upper class families are generally not involved in the conflicts. Instead poor, uneducated, and disadvantaged children fill out the military ranks. The recruiters in these conflicts are not selective about the gender of their young recruits; they are happy to take both boys and girls.

30. Id.
31. Id.
33. Id.
36. Id.
38. See Security Council Briefing, supra note 32, at 3.
39. See Udombana, supra note 25, at 64.
40. Id.
42. See Children’s Rights, supra note 28.
There are a few key reasons why military commanders increasingly turn to children to populate their armies. When conflicts are drawn out, causing high numbers of casualties, child soldiers fill a pressing need for manpower. In turn, both sides of the conflict turn to the conscription of children in order to carry on the battle.

Children are easily obtained and widely used as soldiers by military groups. Today’s wars take place away from traditional “battlefields,” which are typically outside of population centers. Instead, these battles are occurring in the heart of urban neighborhoods. Subsequently, recruiters are placed in a prime location to snatch prospective “soldiers” from traditional safe places, such as schools and playgrounds.

Military leaders believe children make good soldiers because they are considered “more obedient, do not question orders and are easier to manipulate than adult soldiers.” Furthermore, children have a sense of fearlessness commanders can exploit in battle by putting them in the front lines.

Many children are subjected to atrocious acts while being initiated into the ranks of armed forces. At times, such acts consist of killing family members or someone they know in order to dissolve all outside ties. This keeps the children firmly under the army’s control. Moreover, children are forced to commit or partake in further acts of violence, including “beheadings, amputations, rape, and the burning of people alive.” Most child soldiers are given drugs, such as marijuana and cocaine, during this process to further manipulate their minds and decrease their inhibition. Through such acts, children become desensitized to violence and transform into brutal and hardened soldiers to carry out further orders.

There is no end to the list of jobs awaiting child soldiers after the initiation process. Children are not only used as traditional soldiers, but

43. Id.
44. Id.
46. See Jimmy Carter, Kid Soldiers a War’s Most Tragic Victim, USA TODAY, June 30, 1998, at 11A.
47. Id.
48. Id.
50. See id.
51. See Hearings, supra note 21.
52. Id.
53. Udombana, supra note 25, at 63.
54. See David Ott, Under Age and Under Arms, THE HERALD, Jan. 12, 1999, at 11 (revealing that leaders give boys drugs to make them more efficient killers).
55. See id. at 64.
also to fill other military needs (e.g. labor, intelligence gathering, scouting, assassination, and sexual slavery). Often times, child soldiers are given lighter jobs at first, such as cooking or running messages. Eventually, most children end up on the front lines and participate in some of the heaviest fighting.

Today, children can take the place of traditional adult soldiers like never before due to advancements in technology. High-powered assault weapons are lightweight and simple to operate. Because of their ease of operation, semi-automatic weapons can be carried and used with deadly accuracy by small children. However, due largely to their inexperience, child soldiers tend to suffer higher casualty rates in battle than adults. They are commonly ordered into unexplored areas, such as minefields, ahead of adult soldiers and are even used for “suicide missions.” Moreover, children have been used as first-strike troops for ambush assaults because of their relative fearlessness.

The conscription of girls creates another realm of abuses. Female recruits are often used in the same roles as boys, but additionally endure various forms of sexual abuse committed against them. Military leaders can take the young girls as their wives whenever they choose. Human Rights Watch learned of one instance in Uganda where a girl gave birth to her commander’s baby and was then forced into battle while the baby was tied to her back. Moreover, many girls are made sex slaves and forced into prostitution. Military groups even solicit females with the intention to use them as wives for their male soldiers.

Child conscription has a devastating effect on the children compelled to fight. Severe physical injury is likely even if the children survive combat. Children placed in the thick of battle receive gunshot wounds, lose arms and legs, and sustain major psychological trauma,

56. See Udombana, supra note 25, at 64.
57. See Hearings, supra note 21.
58. Id.
60. Id.
61. Id.
62. Id.
63. Hearings, supra note 21.
64. Expert Report, supra note 34, at 17.
65. See Fact Sheet, supra note 17.
67. Id.
69. Id.
70. See Udombana, supra note 25, at 59.
trauma that haunts them for life. Many children who are unable to avoid military service are uneducated, unemployed, and homeless. Subsequently, even those children who break away from military life often remain violent and are easily drawn back into the conflict they escaped.

The use of children in armed conflict is rampant in almost every substantial military conflict in the world. Groups that use child soldiers include those that are government-supported, as well as rebel groups within war-torn countries. The conflicts in which children are used tend to be located in areas with limited resources and in regions contained within political boundaries.

Some countries, such as Afghanistan, have seen seemingly unending armed conflict where children were used as soldiers. In Colombia, tens of thousands of children have been forced into service, some as young as eight. Girls in Uganda are forced not only to fight but also to be sex slaves. Nearly one-third of the child soldiers used in conflicts in El Salvador, Uganda, and Ethiopia are girls. The use of child soldiers in Asia, South America, the Middle East, and Europe makes it clear that the problem is not limited to any one region of the world.

Although child conscription is a serious issue throughout the world, the problem is especially prevalent in Africa. In Africa, as many as 100,000 children are currently participating in armed conflicts. The United Nations ("UN") has singled out four African countries for the high number of child soldiers being used there: Burundi, Liberia, Somalia, and the Congo. The UN has made it clear that, while

AFR620342003ENGLISH/$File/AFR6203403.pdf [hereinafter Amnesty International].

72. Id.
73. Id.
74. See Udombana, supra note 25, at 60.
75. See Amnesty International, supra note 71.
76. Id.
77. See Becker, supra note 22, at 16.
78. Id.
79. See Fact Sheet, supra note 17.
80. Id.
81. See Hearings, supra note 21.
83. Id.
84. Id.
85. See Becker, supra note 22, at 18.
86. See Fact Sheet, supra note 17.
87. Id.
88. See Udombana, supra note 25, at 62.
prevalent throughout the world, Africa requires special attention in order to address the child conscription problem.89

B. Child Conscription in the Democratic Republic of the Congo

Amnesty International reports the Congo as "one of the countries of the world with the largest number of child soldiers."90 Economic,91 social,92 and political factors have contributed to the high use of child soldiers there.93 In the Congo, the average income is barely one dollar per day.94 Additionally, children make up a high percentage of the Congolese population.95 Militias find children under the age of fifteen to be an especially prime group from which to obtain soldiers because they make up roughly forty-seven percent of the total Congolese population.96

A lack of education on the part of the general public in the Congo concerning the use of children in armed conflicts also contributes to their use.97 Most Congolese do not understand that the international community considers using children to fight in military conflicts a war crime.98 Children who have fought in some of the conflicts are considered military heroes who were fighting against "external aggressors."99 Mostly, any charges against militiamen who have used child soldiers are met with surprise because people in the Congo are unaware it is a war crime.100

The Congo has been ravaged by a succession of wars,101 which have lead to a large loss of military personnel and created a need for more soldiers.102 Many military groups have been involved in conflicts since 1996103 and each has used child soldiers.104 Watch List reports that the Alliance of Democratic Forces for the Liberation of Congo-Zaïre ("AFDL"), a multi-ethnic group composed of out-of-state factions, abducted thousands of children while they were "coming home from

89. Id.
91. See REDRESS, supra note 1, at 7.
92. Id.
93. See Amnesty International, supra note 71, at 28.
94. See REDRESS, supra note 1, at 7.
95. Id.
96. Id.
97. Id.
98. See id. at 18.
99. See REDRESS, supra note 1, at 18.
100. Id. at 22.
101. See id. at 17.
102. See id.
103. See id. at 18.
104. See REDRESS, supra note 1, at 18.
school, church, the market place\textsuperscript{105} and from refugee and internally displaced person camps.\textsuperscript{106}

Throughout many wars in the Congo, children have made up a high percentage of all militants used in combat.\textsuperscript{107} It is estimated that children accounted for up to seventy percent of military personnel in some groups.\textsuperscript{108} The \textit{Rassemblement Congolais pour la Democratie} (Congolese Gathering for Democracy) used children to make up thirty-five to forty percent of their armed forces.\textsuperscript{109} Nearly 10,000 children were used by the AFDL in the 1996 opposition to the Mobutu.\textsuperscript{110} Some groups used children to make up over fifty percent of their ranks.\textsuperscript{111} These military groups included the Union of Congolese Patriots ("UPC"), which was commanded by Thomas Lubanga.\textsuperscript{112}

The experience for children conscripted in the Congo is as appalling as in other regions. They are initiated into the ranks, sometimes through a "welcoming ceremony."\textsuperscript{113} One observer to such a ceremony explained how the young girls would be "hand picked at the ceremony by the commanders and other high-ranking soldiers as their 'wives.'"\textsuperscript{114} The young soldiers are put through rituals, including "magical rites" where the children are forced to use drugs and are convinced that bullets cannot harm them.\textsuperscript{115}

The situation in the Congo has not improved in recent years. In 2002, the Joint Army Commission of the UN ("Joint Commission") obtained lists of all combatants involved in the warfare during negotiations.\textsuperscript{116} At that time, children accounted for fifty percent of the 350,000 total soldiers being used.\textsuperscript{117} Of that high percentage of children, it was estimated by the Joint Commission that "10% were under 12, 30% were between 12-15 and 20% were between 16-18."\textsuperscript{118} Furthermore, the UN Mission in the Congo ("MONUC") determined there were still nearly thirty thousand child soldiers being used in 2004.\textsuperscript{119} As a result of using such young combatants in these conflicts, MONUC reports "tens

\begin{thebibliography}{99}
\bibitem{} Id.
\bibitem{} See id. at 19.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} See \textit{REDRESS, supra} note 1, at 21.
\bibitem{} See id. at 19.
\bibitem{} Id. at 21.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} See \textit{REDRESS, supra} note 1, at 21.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} See id.
\bibitem{} Id. at 21.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} See \textit{REDRESS, supra} note 1, at 19.
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of thousands of women have been raped. Countless acts of torture have been reported. Fleeing the conflict, hundreds of thousands of civilians have been driven from their home” to flee the violence.120

C. International Law and Child Conscription

The international community has viewed child conscription as immoral and illegal for many years. As far back as 1924 there has been an international focus on children’s rights.121 At that time, the League of Nations approved the Declaration of the Rights of the Child (“Declaration”) in response to the violence that many children suffered during the First World War.122 However, the Declaration did not address the use of children in warfare explicitly.123

Greater international attention has been focused on child conscription since the approval of the Declaration in an attempt to protect children. Although the Geneva Convention of 1949 did not specifically address the use of child soldiers, later actions by the UN did.124 In 2000, the UN adopted the Optional Protocol to the Convention on the Rights of the Child (“Optional Protocol”).125 The Optional Protocol made the use of soldiers under the age of eighteen expressly illegal.126 Furthermore, the Convention on the Rights of the Child127 provides that “violations of customary international law and human morality result whether children become soldiers voluntarily or as a result of forced recruitment.”128

The Optional Protocol creates a positive obligation on the part of countries to not recruit children who are younger than eighteen, and decline children who “voluntarily” seek to enlist.129 The Optional Protocol also takes a very stringent position towards non-state participants.130 Non-state participants are groups that are not a part of any states’ armed forces.131 The Optional Protocol proclaims that these groups “should not, under any circumstances, recruit or use in hostilities

120. Amnesty International, supra note 71, at 1.
122. Id.
123. Id.
125. See Optional Protocol, supra note 14.
126. Id.
127. See Convention, supra note 126.
128. Id.
129. See Optional Protocol, supra note 14.
130. Id.
131. Id.
persons under the age of [eighteen] years."  

Additionally, numerous international organizations have taken steps to prevent the use of child soldiers. In 1999, the International Labour Organization ("ILO") defined child conscription as "one of the worst forms of child labour" and forbade the "forced or compulsory recruitment of children under the age of [eighteen] for use in armed conflict." The ILO views the involvement of children in warfare, both forcibly and voluntarily, as more "hazardous and injurious" than any other form of child labor.

Regional affiliations have taken steps to decrease the use of child soldiers. In Africa, the African Charter on the Rights and Welfare of the Child of 1999 ("Charter") made eighteen the minimum age of conscription. The Charter, using the Optional Protocol as a guide, requires signatories to take steps that will "ensure that no child shall take a direct part in hostilities." Even though the Charter allows children to be used in support functions, it specifically calls for countries to avoid "recruiting any child." That provision of the Charter is meant to include both forced and willful recruitment. Since the Charter is considered a "human rights treaty," it applies to the recruitment of children in times of peace as well as during war.

D. The Rome Statute and the International Criminal Court

The UN has created further avenues to combat child conscription. The UN has established the use of child soldiers as a war crime through the Rome Statute (1998). One hundred and four countries have signed the Rome Statute, including the Congo. However a few countries, such as the United States, undermine the ICC's authority by refusing

132. Id.
133. Security Council Briefing, supra note 32, at 3.
134. Id.
135. Id.
137. See REDRESS, supra note 1, at 25.
139. See id.
140. Id.
141. See REDRESS, supra note 1, at 25.
142. Id.
143. See id.
144. See Rome Statute, supra note 13, at art. 8.2(a)(xxvi).
to sign the Rome Statute.\textsuperscript{147}

The non-signing countries, including the United States, have several concerns with regards to the court.\textsuperscript{148} The United States is concerned that the Rome Statute would provide for the trial of Americans by the ICC, which would challenge the United States' sovereignty.\textsuperscript{149} Regardless of the reasons for not signing the Rome Statute, the ICC will struggle to gain legitimacy so long as major players on the international stage remain non-committal.\textsuperscript{150}

The Rome Statute specifically makes the “conscripting or enlisting of children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” a war crime.\textsuperscript{151} Additionally, the Rome Statute gives the ICC jurisdiction to prosecute war crimes of this nature.\textsuperscript{152}

Prosecutions of war crimes in the ICC, including child conscription, are not typically initiated through victims or local officials.\textsuperscript{153} The processes for pressing charges are set out in the Rome Statute under Article 13,\textsuperscript{154} which allows three parties to initiate the prosecution of war crimes.\textsuperscript{155} State parties and the UN Security Council can refer matters to the ICC prosecutor for investigation\textsuperscript{156} and the prosecutor can initiate an investigation based on information he has received.\textsuperscript{157} However, cases may only be initiated for crimes that have occurred since the date of the Court’s inception in 2002.\textsuperscript{158} Furthermore, the ICC operates on the principle of “complementarity,”\textsuperscript{159} which holds that the court will not act unless a governmental body “lacks either the will or the capacity to prosecute a crime committed within its jurisdiction.”\textsuperscript{160}

There have been four referrals to the ICC since its creation.\textsuperscript{161} Uganda,\textsuperscript{162} the Congo,\textsuperscript{163} and the Central African Republic\textsuperscript{164} referred
circumstances that had occurred within their borders. The UN Security Council referred the matter of Darfur, Sudan to the ICC. Within the last year two possible cases were dismissed, and five other “situations” are currently being investigated.

III. The ICC’s First Case: The Prosecutor v. Lubanga

A. Lubanga and Child Conscription in the Congo

The ICC began investigating the situation in the Congo upon referral by the Congolese government. Specifically, the court began to focus on the war crime of child conscription in connection with its civil war. In February 2006, the ICC prosecutor issued an arrest warrant for war leader Thomas Lubanga Dyilo. The warrant charges Lubanga with recruiting children, age fifteen and under, to fight in his militia during the civil war. By March, the Congolese government surrendered him to international authorities. A hearing began in November to decide if the case will continue to a full trial.

Lubanga led the military group Union des Patriotes Congolais (“UPC”) in the northeast of the country during the civil war. Reportedly, Lubanga issued a command that “every family contribute a cow, a goat[,] or a child to the resistance effort.” In November 2002, Lubanga led the UPC when they purportedly recruited an entire fifth grade class from a school in Mudzi Pela, Ituri to serve in his military. The US State Department reports that at one-point children made up close to fifty percent of the soldiers under Lubanga’s control.

165. Id.
166. See id. (cases concerning the United States and Venezuela were dismissed by the ICC last year).
167. Id.
168. See COUNCIL ON FOREIGN RELATIONS, supra note 9.
169. Id.
170. See generally Warrant, supra note 12.
171. Id.
172. See COUNCIL ON FOREIGN RELATIONS, supra note 9.
174. See REDRESS, supra note 1, at 21.
175. Id. (emphasis added).
176. Id. at 17.
B. Analysis of the ICC's First Case

Several avenues of criticism are leveled at the ICC for its trial against Lubanga. One such criticism is a lack of communication. The lack of education about child conscription in the war-torn areas, such as the Congo, requires a greater level of communication from the international community. Communication continues to be difficult in the Congo due to sustained warfare. Where the trial will take place in the Hague, a substantial distance from the Congo, there is increased difficulty in communicating the nature of the trial to the Congolese people. In turn, any lapse in communication hinders the deterrent effect of the ICC's trial.

Deterrence is an important function of the ICC. International organizations, such as Amnesty International, assert that "with international support and cooperation the court will help to deter the most horrific crimes by ensuring that those responsible will be brought to justice either in the [court] or, under the principle of complementarity, in national courts." This theory assumes that awareness of high profile cases, such as Lubanga's, will be communicated throughout the country. However, communicating information with individuals in unstable regions of the world, such as the Congo, is difficult. If the Congolese people, and others in the world, are informed of Lubanga's prosecution, then this case will succeed in creating awareness of the crime of child conscription.

The issue of sovereignty continues to be a major question concerning the court. However, proponents of the court argue the ICC will not supersede the authority of any country. Article 17 of the

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179. See REDRESS, supra note 1, at 18.
180. Id.
181. Id.
182. Id.
183. Id.
185. See Q & A, supra note 178, at 6.
186. Id.
188. See COUNCIL ON FOREIGN RELATIONS, supra note 9.
Rome Statute provides each nation’s court with original jurisdiction. The principle of complementarity allows the ICC to act only if it is clear the crime will not be prosecuted through any other means. Thus, local courts must either take action or not in the first instance. Additionally, nations must first agree to the Rome Statute in order for the court to have jurisdiction over them. The Congo is a signatory to the Rome Statute and is responsible for the instigation of the ICC’s involvement, so in Lubanga’s case sovereignty is not a concern.

Several countries in Africa, including the Congo, have not implemented the Rome Statute’s provisions into their laws, despite ratifying the Statute. By not implementing the Statute’s provisions, countries run the risk of creating greater need for ICC intervention. This brings international authority in where a country’s own courts may have been unable to deal with a situation effectively. As noted above, the Congolese government sought the ICC’s involvement in Lubanga’s case, so their failure to implement the Rome Statute’s provisions has no effect.

Another concern surrounding the case is the limited nature of the charges against Lubanga. The charges do not include rape or torture. Citizens in the Congo have suffered years of rape, murder, and torture, as well as the destruction of property. Therefore, it is very difficult for the Congolese people to comprehend that child conscription is the only, or even most serious, crime committed. Several organizations assert that by not including other serious crimes, the court is conveying the idea that those who commit such crimes will not be punished.

189. See Rome Statute, supra note 13, at art. 17
190. Id.
191. Id.
192. Id.
193. Id.
194. See State Parties, supra note 145.
197. Id.
198. Id.
199. See id.
200. See Warrant, supra note 12, at 4.
201. Id.
202. See REDRESS, supra note 1, at 18.
203. Id.
204. Human Rights Watch, D.R. Congo: ICC Charges Raise Concern, Joint Letter to
The prosecution’s choice of charges has been attributed to prosecutorial strategy. The strategy focuses on individual crimes and keeps the trials shorter and more efficient. Furthermore, prosecutors are still committed to bringing other charges in other proceedings. As Luis Moreno-Ocampo, Chief Prosecutor of the ICC, explained in an ICC Newsletter, “this does not exclude the continuation of investigations into other crimes allegedly committed by Mr. Lubanga Dyilo after the current proceedings are closed.

Prosecutors also hope to increase awareness about child conscription by focusing on it before prosecuting Lubanga for other crimes. Deputy Prosecutor Fatou Bensouda described child conscription as “one of the least-reported crimes that is happening globally, and of course the least punished.” By focusing on child conscription, the ICC’s prosecutors have ensured that the people of the Congo will become aware that it is indeed a war crime to use children in warfare. Moreover, if the child conscription charges had been included in a set of several charges leveled against Lubanga, there would be substantial risk that the conscription charge would be overshadowed and have little deterrent effect.

Another troublesome aspect of this case is that the ICC may not be the most appropriate or convenient forum in which to bring these charges. This principle is generally known as forum non conveniens. A forum may be inappropriate for several reasons, including the unavailability of witnesses and the inability to obtain physical evidence.

Signs the ICC may not be the appropriate forum for this case already exist. The trial has seen postponements due, as Chief Prosecutor Moreno-Ocampo explains, to the fact that violence in the Congo has meant, “the safety of witnesses and victims could not be guaranteed.”

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206. Id.

207. Id.

208. Id.

209. See COUNCIL ON FOREIGN RELATIONS, supra note 9.

210. Id.


212. Id.

213. Id.

Furthermore, the ICC is located at The Hague, in the Netherlands.\textsuperscript{215} This location has caused investigative, procedural, and logistical burdens on both the prosecution and defense because of the distance between the court and the country where the crime took place.\textsuperscript{216}

The ICC loses other advantages by not having the trial in the Congo. As Professor Antonio Cassese\textsuperscript{217} notes in “International Criminal Law,” local trials “[expose] the local population to past atrocities, with the two fold advantage of making everybody cognizant of those atrocities, including those who sided with the perpetrators.”\textsuperscript{218} In other words, a local trial would contribute to the court’s deterrent ability.

The prosecution seems to be dealing indirectly with the issue of \textit{forum non conveniens} by focusing on one charge at a time.\textsuperscript{219} By doing so, Ocampo claims there will be shorter trials, which “will also mean the more efficient use of resources.”\textsuperscript{220} He further explains this approach will “contribute to limiting the number of witnesses needed for each trial.”\textsuperscript{221}

There are other important reasons for not holding the trial in the Congo. In a neutral setting, such as the Hague, security is far less difficult to ensure. In the Congo, as in other conflict zones, it is difficult to ensure the security of important players in the judicial process.\textsuperscript{222} Prosecution and defense counsel, court staff, and trial witnesses could be at risk of death or bodily injury during any proceeding held there.\textsuperscript{223} This danger could lead to a breakdown of judicial process at its core.\textsuperscript{224} Furthermore, the risks involved with participating in the trial may even discourage important witnesses from coming forward.

As in Uganda, the Court’s actions could aggravate the current conflict and frustrate the ongoing peace process.\textsuperscript{225} In Uganda, the ICC is investigating charges against military leader Joseph Kony.\textsuperscript{226} These

\begin{itemize}
\item \textsuperscript{215} See id.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Former Judge and President of the UN International Criminal Tribunal for the Former Yugoslavia.
\item \textsuperscript{218} \textsc{Antonio Cassese}, \textsc{International Criminal Law} 345 (Oxford U. Press 2003).
\item \textsuperscript{219} See Newsletter, supra note 205, at 2.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} See \textsc{Cassese}, supra note 218, at 344.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} See id. at 346 (“[I]t is obvious that the dangers following hatred, resentment, and social conflict festering in those countries may pose a serious risk to those working in the judicial process.”).
\item \textsuperscript{226} Id.
\end{itemize}
charges include child conscription, mass murder, and acts of sexual violence. Recently, the opposing parties in the Ugandan conflict attempted to establish a peace agreement in which Kony sought immunity from any criminal charges in Uganda and international courts. In light of Kony’s demands and despite requesting the ICC’s involvement, the Ugandan government asked the ICC to back off. The Ugandan government believes the peace process is more important than any criminal trials and by further pursuing the charges the ICC is threatening their chances of obtaining peace.

Others, like Cassese, assert these cases will have the opposite effect than what has been seen in Uganda. Cassese notes that by, “bringing to trial those responsible for serious crimes [the] post-conflict peace-building process” will be assisted. Furthermore, he argues reconciliation is better served by prosecuting these crimes. Despite the problems in Uganda, the ICC has not faced similar problems in Lubanga’s case. However, the way in which the ICC handles Uganda’s situation my have an indirect effect on the court’s legitimacy that could have consequences in the prosecution of Lubanga.

C. Going Forward

The prosecution must stay true to its commitment to prosecute all of the gravest crimes committed by Lubanga, including torture and murder. To address the concerns surrounding the limited focus of this trial, the prosecution should amend the charges to include those associated with the sexual violence committed against the conscripted children. By adding these charges the prosecution would assert that child conscription and sexual crimes, such as sexual enslavement, often coexist and neither will be tolerated. Judicial efficiency would be served because much of the same evidence and witnesses would be used for each of these crimes.

There continues to be a need for international pressure in order to get non-participating countries to agree to the Rome Statute, especially the United States. However, international pressure must also be brought to bear on those countries that have signed the Rome Statute, yet have

227. Id.
228. Id.
229. Id.
230. International Court in Crisis, supra note 225.
231. See CASSESE, supra note 218, at 344.
232. Id.
233. Id.
234. See Joint Letter, supra note 204.
235. See REDRESS, supra note 1, at 21.
236. See id.
neglected to implement the Statute’s requirements.\textsuperscript{237} If those State parties ratify the Rome Statute’s provisions into their own laws they would strengthen their domestic prosecutions. In turn, ratification would lead to domestic prosecution of war crimes such as child conscription.\textsuperscript{238} Thus, the need for ICC intervention within their borders would be reduced.\textsuperscript{239}

Giving into concerns for the peace process will only undermine the court’s authority and weaken its deterrent effect.\textsuperscript{240} The court must continue to prosecute conscription cases, even in the face of opposition from the host country, in order to make it clear that perpetrators will not go unpunished.\textsuperscript{241} This is especially true when the situation was recommended to the court by the host country, then later resisted by that same country (as the Ugandan situation demonstrates).\textsuperscript{242} Criminal actors’ attempts to negotiate away their culpability in the name of peace further demonstrates there is great need for the ICC to stay committed to its mission and ensure that war crimes will not be tolerated.\textsuperscript{243}

The ICC must also ensure strong lines of communication with the Congo concerning various aspects of the case. This may require that live press conferences from The Hague to the Congo be presented and that other forms of communication are made readily available in a way that can be accessed by the Congolese people.\textsuperscript{244} Any form of communication would be proper so long as it reaches individuals in the Congo and increases awareness of the trial.

IV. Conclusion

While there are legitimate concerns surrounding the ICC, the positives in this case outweigh any apprehensions. If the prosecution of Lubanga had been left to the Congolese government, the charge of child conscription may have been buried amongst a plethora of other charges or forgotten entirely. These dangers are especially true where the Congolese people have little understanding of the crime of child conscription. By making child conscription the centerpiece of their first case, the ICC has ensured that awareness of the crime of child conscription will be increased, not only in the Congo, but also

\begin{itemize}
\item \textsuperscript{237} See Bekou & Shah, supra note 196, at 509.
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} See International Court in Crisis, supra note 225.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id.
\item \textsuperscript{244} See Rome Statute, supra note 13, at pmbl.
\item \textsuperscript{245} See Q & A, supra note 178, at 6.
\end{itemize}
throughout the world. Increased awareness will likely have a substantial affect in deterring future violations of this crime.

Child conscription is an under-prosecuted war crime that affects the most vulnerable individuals on our planet: children. As such, the ICC prosecutors should be commended for taking action where so often the world has turned its back. It is important that the ICC follow through with this case despite the hurdles it must overcome in prosecuting it. Let this case stand as an example to those who would use children as weapons, that the international community will not tolerate such action.