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The Weaponization of Rape: Conflict-Related Rape and The International Criminal Court

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Introduction

War has long been accompanied by the use of sexual violence as a means of terrorizing and punishing enemy populations; in the words of Kelly Dawn Askin, "Almost since the existence of humankind, there has been war, and where there is war, there is always sexual assault" (Askin 1997: 1). While conventional wisdom has long suggested that conflict-related sexual violence is an inevitable byproduct of war, international criminal law has developed a reconceptualized understanding of wartime rape as an intentional act and a war crime. This reconceptualization was initially spurred by the historic decisions of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia to prosecute wartime rape and establish its use as an instrument of genocide in the early 1990s. The conclusion of these tribunals then ushered in the era of the Rome Statute of the International Criminal Court beginning in 1998, which recognized the potential for rape to constitute a crime against humanity, a war crime, and even a crime of genocide. The International Criminal Court (ICC) has effectively picked up where the tribunals in Rwanda and the former Yugoslavia left off in terms of prosecuting conflict-related rape and setting important international precedents that counter impunity, but the record of prosecution of sexual violence by the ICC is greatly varied and does not necessarily speak to a consistent motivation to achieve comprehensive justice for rape survivors.

In order to effectively deter conflict-related rape, combatants must understand the costs of engaging in sexual violence—in this sense, ICC prosecutions for conflict-related rape have the potential to illustrate that, regardless of their rank or political prestige, perpetrators are not above the law and will be subject to punishment. But when ICC judgments fail to convict an individual for rape despite evidence that it occurred, or when alleged perpetrators are acquitted due to

deficient prosecutorial strategies regarding sexual violence, the international community fails to communicate the costs of engaging in sexual violence to the world. Due to the Court's structural limitations that force it to rely on state cooperation to get perpetrators into custody and allow for ICC intervention, it has largely failed to secure the rape convictions necessary to deter combatants from engaging in sexual violence.

In their recent analysis of ICC jurisdiction efficacy in deterring the use of sexual violence, Broache and Kore find that, contrary to optimistic perceptions of the Court's impact, "ICC jurisdiction, sexual violence cases, and global actions do *not* prevent sexual violence by state forces in intrastate conflicts," and that general ICC interventions—including preliminary examinations and investigations—may in fact increase sexual violence committed by state forces (Broache & Kore 2023: 86). They note that while "highly public" ICC prosecutions of sexual violence have the potential to "challenge the broader gender norms underlying understandings of conflict-related sexual violence as acceptable," the ICC's limited success in prosecuting conflict-related sexual violence by state actors, combined with its lack of high-profile arrests and convictions for sexual violence, contribute very little to deterrence efforts (Broache & Kore 2023: 80).

Broache and Kore's findings are significant, as they point to the continued failures of the ICC to hold perpetrators accountable and, subsequently, to a continued narrative of sexual violence impunity that perpetuates the crime. Additionally, Binningsbø and Nordås (2022) find that ICC trials during conflict are in fact weakly associated with an *increase* in sexual violence as committed by rebel groups, noting that a substitution effect for sexual violence could be at play; when ICC trials ignore or deprioritize evidence of wartime rape and sexual violence, this can

"indirectly lead to adaptation among rebel groups to use sexual violence as a tactical substitute for violence that is being punished" (Binningsbø & Nordås 2022: 1082).

To further understand why the ICC is failing to deter sexual violence and prosecute rape consistently, this paper compares six case studies of three member and three non-member states that have experienced conflict-related sexual violence as a major aspect of conflicts since 1998: the Court's intervention (or lack thereof) in the three ICC member states has produced a varied record of successes and failures in investigating and prosecuting rape, while three cases of non-member states point to potential for the ICC (as well as the UN Security Council) to do more in expanding its anti-impunity influence.

Although the International Criminal Court has made considerable progress in reversing the long-held narrative of impunity for wartime rape and contributing to the number of rape convictions for commanders and state officials who commissioned sexual violence, many of the Court's decisions have been disappointing, even concerning, in their lack of recognition of sexual violence. Additionally, this research will examine the relationship between the United Nations Security Council and the ICC, as the Security Council has presented significant obstacles to the ICC in conducting comprehensive investigations and prosecutions in non-member states suffering from extreme humanitarian crises. These six case studies reflect the wide variation among ICC interventions and referrals as well as the various manners and contexts in which wartime rape can be committed, and ultimately point to the ICC's failures to deter and to *consistently* prosecute conflict-related sexual violence in both its member and non-member states as a result of prosecutorial strategy failures, failings of ICC judges to prioritize conviction of rape, and a record that shows more acquittals than successful convictions for sexual violence charges.

In order to better understand the structures and contexts that allow for wartime rape to occur, Chapter 1 of this paper will examine the traditional narratives of rape inevitability in conflict, including the long-maintained biological justifications for wartime rape and the aspects of military-constructed masculinity that augment rape propensity in combatants. Chapter 2 will outline the various psychological and physical functions of wartime rape and analyze the debate between opportunistic rapes resulting from an environment that allows or encourages sexual violence, and systematic rape constituting a distinct weapon against civilians and ethnic groups; Chapter 2 will also analyze the occurrences of systematic and genocidal rape in Bosnia-Herzegovina and Rwanda in the early 1990s, as well as the potential for these crimes to be prosecuted under notions of command responsibility. Chapter 3 will examine the role of the International Criminal Tribunals for Rwanda and the former Yugoslavia in reconceptualizing and deepening legal understandings of systematic and conflict-related rape, and the shortcomings of the ICC's general structure and deterrence effects. Chapters 4, 5, and 6 analyze the mixed records of rape prosecution in the ICC member states of the Democratic Republic of the Congo, Sierra Leone, and Liberia, respectively; Chapters 7, 8, and 9 will then examine the potential, or lack thereof, for ICC interventions and rape prosecutions in the non-member states of Syria, Myanmar, and Sudan in addition to the efficacy of the ICC's anti-impunity message in non-cooperating states.

Considering the International Criminal Court may have negligible impacts on deterring conflict-related sexual violence according to Broache and Kore, understanding the structures and institutions that allow for and even encourage the use of wartime rape is key to contextualizing the obstacles faced by the International Criminal Court's prosecutorial strategies and judgments (Broache & Kore 2023). Igwe (2008) and Altunjan (2021) both note that while the ICC's nature

of complementarity and reliance on state cooperation certainly present obstacles to the Court's potential to deter conflict-related sexual violence, taking advantage of the opportunities offered by complementarity to promulgate the Rome Statute into domestic laws could create possible solutions to the Court's deterrence issue. There exists a wide gap between the prevalence of rape documented in ICC investigations and the number of perpetrators the ICC chooses to prosecute—as such, if ICC prosecutions continue to target only the highest-ranking officers under the notion of command responsibility, the Court misses significant opportunities to prosecute lower-level perpetrators who have less political prestige to protect them. Thus, the Court fails to signal the costs of engaging in wartime rape to *all* combatants at every level, which ultimately fails to deter combatants in general from using sexual violence.

By taking steps at the domestic level to recognize rape as a war crime and to hold low- and mid-ranking combatants accountable—perhaps through reforms of military penal codes or the alignment of sexual violence laws with the Rome Statute—the ICC's negligible influence could potentially become impactful (Igwe 2008; Altunjan 2021). This, however, depends upon state cooperation with the ICC and the willingness of governments to ratify the Rome Statute and promulgate it into domestic laws, which is feasible for very few ICC member states, and even fewer non-member states; according to Vinjamuri (2016), the ICC's structural dependence on states to enforce its mandate and arrest perpetrators significantly undercuts the Court's ability to manage its investigations and prosecutions (277).

Increased cooperation of states and a closer alignment with the Rome Statute in domestic laws as per ICC complementarity could help the Court to reverse its disappointing record of non-deterrence and unsecured convictions, but ultimately, the ICC has failed to deter both state and rebel forces from perpetrating wartime rapes, and ICC interventions may even be associated with

increased sexual violence (Broache & Kore 2023; Binningsbø & Nordås 2022). Binningsbø and Nordås (2022) maintain that when ICC trials are "unclear," garner few or no convictions for sexual violence, and only impact a small number of individuals, ICC trials "might even be interpreted as a sign that such abuses are de facto tolerated" (1082). In this sense, the shortcomings of ICC interventions and "unclear" trials are contributing more harm than good to the international community, and potentially increasing the prevalence of wartime rape—while the understandings of wartime rape and Elements of Crimes developed by the ICC are inherently valuable in their conceptualization of conflict-related rape as a distinct crime, perhaps the ICC is not the most appropriate setting to present these understandings. Rather, the ICC's jurisprudence can be used to inform better, more comprehensive courts, as will be evidenced in the examination of the Special Court for Sierra Leone in Chapter 5. If the International Criminal Court is to be successful in setting a precedent of countered sexual violence impunity and deterring the use of sexual violence in conflict, it is necessary that the Court secures more convictions for wartime rape to communicate a clearer message of non-tolerance to perpetrators—only then could the jurisprudence of the International Criminal Court have the potential to engender measurable change and successful deterrence on the global stage.

CHAPTER 1: Explaining Conflict-Related Rape and Sexual Violence

This chapter will begin by examining the biological justifications that have consistently characterized wartime rape as inevitable, as well as the more recent pushback by scholars against this narrative of an innate male drive for sexual violence (Gutmann 2021; Gottschall 2004). The examination will then shift to scholars' understandings of military institutions and the structures

of hierarchy within them that perpetuate wartime rape—in particular, this section will analyze the emphasis in military cultures of female subjugation that characterizes many combatants' actions, and the importance of commanders' ideals in molding combatants who are willing to rape (Weitz 2015; Reid-Cunningham 2008; Morris 1996). While recent gender-based theories of wartime rape are not necessarily generalizable to all occurrences of the crime—instances of sexual violence as committed by women and victims of sexual violence including men, boys, and gender-nonconforming individuals have been reported in various conflicts—it is important to recognize and criticize the clearly patriarchal structures of the military that lead to sexual violence being committed predominantly by male combatants against female civilians.

1.1 Biological Justifications: Boys will be boys?

The willingness to rape and commit sexual violence has also fallen victim to a narrative of rationalization—wartime rape is too often seen as an inevitable symptom of war, while male aggression and sexual desires are labeled as primal instincts and uncontrollable parts of the masculinity. Scholars like anthropologist Matthew Gutmann have argued that this notion of aggression as innate to masculinity is harmful, specifically in the context of sexual violence and propensity for rape. When rape-propensity is written off as some innate urge that is unleashed during combat, perpetrators are given an implicit free-pass. Ascribing the qualities of animals to soldiers also effectively removes any means of accountability for those soldiers who choose to commit war crimes like rape and sexual assault against civilians; this view of men as having an innate animality with no control over sexual or violent urges—and to have them awakened and heightened during combat—provides a weak justification for wartime atrocities in which perpetrators hold little responsibility for their actions (Gutmann 2021).

As previously discussed, Weitz maintains that aspects of military hypermasculinity, including competitiveness, physical strength, violence, and the denigration and objectification of women—all of which are hallmarks of rape-prone social contexts—become even more prevalent during deployment and combat (Weitz 2015). Combat zones fraught with danger and death are obviously stressful to the physical and mental wellbeing of combatants, and, finding themselves in a fragile, overwhelmed state, they may resort to violence as a means of sating these innate urges that comprise hypermasculinity—one avenue through which that immediate gratification can be achieved is rape. The "pressure cooker" theory prevalent in wartime rape scholarship "suggests that war rapists are the victims of irresistible biological imperatives and that the chaos of wartime milieu encourages men to vent their urges to terrible effect" (Gottschall 2004). This theory is controversial and obviously relies heavily on normalizing and justifying inborn male hypersexuality, but as Jonathan Gottschall notes, typical feminist criticism posed in opposition to the pressure cooker theory has similar flaws. In his words:

> The classic feminist orientation is to extend the so-called power hypothesis of rape into the wartime milieu. That is, rape in war, like rape in peace, is identified not as a crime of sexual passion but as a crime motivated by the desire of a man to exert dominance over a woman… However, the feminist theory of wartime rape is also a pressure cooker theory; in this case, however, the pressure that builds is not libidinal in nature but misogynistic. (Gottschall 2004: 130)

Pressure cooker theories rely predominantly on the notion that rape perpetrators are subject to irresistible urges that must be sexually (and forcefully) sated. These theories still characterize combatants (and men in general) as bombs of hypermasculinity detonated in combat. The particular feminist explanation outlined above ultimately still endows men this nature of animality and the ability to unleash these urges for power when placed in combat. The idea of a misogynistic pressure cooker driven by gender power dynamics shares the problematic assumption at the crux

of the issue: men (particularly male combatants in the context of wartime rape) have no control over themselves nor their urges, and there is little accountability for those who do lose control.

Gutmann criticizes characterizations of male biology as being inherently animalistic and fraught with rape propensity, but he observes that this fundamentally flawed rationalization for wartime rape remains common nonetheless. He notes that in cases of mass rape committed against Bosnian Muslim women during the early 1990s, the "men in that war were said to have a 'predisposition' for rape that came from their inborn male sexuality" (Gutmann 2021: 189). Instead of explaining wartime rape through this flawed "pressure cooker" theory of innate animality and uncontrollable urges for sexual gratification through violence, Gutmann focuses on the influence of social conditions and ideologies of masculinity that "trigger and target men" (190). Despite the fact that arguments rooted in biology remain common, scholars increasingly accept that gendered patterns of violence and aggression are socially constructed.

1.2 Military-Constructed Masculinity: What makes a man?

A number of scholars insist that it is vital to understand the intricacies and dynamics of military culture in order to conceptualize how soldiers are convinced to participate in large-scale campaigns of rape and other forms of sexual violence. These scholars have identified masculinity, as defined by the standards and expectations of male-dominated military culture, as one of the most important factors that explains why some militaries engage in rape during wartime. Because military environments encourage displays of strength, aggression, bravery, and violence in their soldiers, these factors become prevalent in the military's construction of masculinity. This militaristic hypermasculinity is then "characterized by competitiveness, physical strength, heavy alcohol use, violence, risk-taking, and the denigration and sexual

objectification of women… In addition, masculinist military culture inscribes gender differences as natural and positions masculinity both in opposition to and superior to femininity" (Weitz 2015). According to Rose Weitz, these characteristics are hallmarks of rape-prone social contexts and are heightened during deployment (Weitz 2015). Due to these characterizations being ubiquitous to military culture and the fact that military culture normalizes male dominance and aggression, Allison Reid-Cunningham argues that soldiers can easily become a product of this environment in which violence and virility are prized above all else (Reid-Cunningham 2008).

While the militaristic conception of masculinity places major emphasis on stereotypically "masculine" qualities like aggression, strength, and dominance, scholars like Weitz and Reid-Cunningham also note that this notion of masculinity relies heavily on contrasting conceptions of femininity—the hypermasculinity that is ubiquitous to military environments is not only defined by traits traditionally associated with masculinity and strength, but is also defined by its utter *rejection* of femininity and traditionally "feminine" qualities. In short, masculinity is defined equally by what a man should be—masculine and dominant—and what a man should not be—caring, effeminate, submissive, etc.

These scholars emphasize that the way in which femininity is conceptualized (and ultimately demonized) in many military cultures is a key component to this construction of hypermasculinity. Military training, as perceived by civilians, usually conjures images of archetypically cruel drill sergeants barking orders at young men, and, notably, using insulting language to break these young soldiers down in order to build them back up into quintessentially masculine men. One of the key aspects of this insulting language is the frequent comparison of male soldiers to women, most noticeably through the use of feminine nicknames and derogatory language used against women. In her study of rape by military personnel, Duke University Law

Professor Madeline Morris quotes journalist Randy Shilts on the particular definition of manhood taught in the military:

> The lessons on manhood [in the military]…focus less on creating what the Army wanted than what the Army did not want. This is why calling recruits…sissies, pussies, and girls had been a time-honored stratagem for drill instructors throughout armed forces. The context was clear: There was not much worse you could call a man. (Morris 1996: 717)

According to existing literature concerning the use of this vulgar and disempowering language, referring to males as females is a "typical method of ostracization, particularly in basic training…when they [soldiers] perform poorly" (Morris 1996). This effectively makes femininity synonymous with failed masculinity.

Thus, the military conception of hypermasculinity as both oppositional and superior to femininity combines with soldiers' fears of acting feminine and failing to be masculine enough in their militaristic roles to create a sense of potentially toxic masculinity. As described by historian George Mosse in his study of masculine stereotypes in Western culture, the explicit distinction between the sexes "was all-important in the construction of modern masculinity," which defines itself "against a countertype but also in connection with the differences between sexes" (Mosse 1998). This feminine villainization, along with strong notions of toxic masculinity like violence and aggression, is thus internalized by young men who join the ranks and find themselves inundated with standards of hypermasculinity and anti-femininity—a clear indicator of a rape-conducive environment. When men immersed in a military culture fail to see women as equals, and rather, place women beneath them and demonize factors inherent to femininity, the status of women in the eyes of military participants is disparaged, which may translate to rape propensity, or at least an increased willingness to exercise dominance over women.

Morris goes on to argue that the age of combatants is also important to consider—young, impressionable men who join the ranks are likely to absorb these notions of masculinity and find

themselves participating in a rape-conducive environment. Participation in the degradation of women—whether it be through wartime rape, engagement with prostitution, or the degradation of female military personnel—is often engrained into military culture and used as a sort of reward system for soldiers. Militaristic power structures and reliance on hierarchy can make it difficult for young men to refuse to participate in these acts (Morris 1996). According to Morris, "Within traditional military culture women are cast largely as the sexual adversary or target, while men are cast largely as promiscuous sexual hunters," and impressionable soldiers who are unable to extricate themselves from a rape-conducive culture can, and often do, internalize this idea of sexual predation as part of the military's conception of masculinity (Morris 1996).

The focus on military-constructed masculinity therefore explains rape as a way of displaying male dominance, and acts such as raping civilian women or engaging with activities like prostitution can serve as a rite of passage for young soldiers. Reid-Cunningham claims that the act of rape itself can validate the militaristic conception of masculinity, and it functions "as a ritualized validation of a soldier's male status and identity" (284). This linkage between the assertion of a young combatant's masculinity and the sexual domination and degradation of women is seen as a result of the pressure men feel in a militaristic setting surrounded by other men.

Although efforts in recent decades to incorporate women into military spaces have succeeded in many militaries, women are still not the majority in military environments—even the involvement of a growing percentage of women is not enough to change the fact that militaries are still largely male-dominated spaces. For example, Gutmann notes that while 15% of U.S. armed forces members are women, the institution of the military itself "is 100% masculine, male, and designed for manly violence" (Gutmann 2021: 191). Weitz argues that the

typical characteristics of military hypermasculinity, including aggression, competitiveness, and the denigration of women, "are further reinforced by the military's emphasis on male bonding and by the relative absence of outside monitoring" (Weitz 2015). In this sense, combatants ensconced in a military environment are internalizing and developing these characteristics to not only fortify their own senses of masculinity, but also to bond with fellow soldiers—in other words, soldiers' individually-developed and performed masculinities are just as much for each other as they are for themselves.

Military-constructed hypermasculinity is a compelling argument for the continued occurrence of wartime rape, however, it fails to address the wide variation of wartime rape as committed across armed conflicts. While some groups employ the weaponized use of rape violently and systematically, some militaries do not engage in sexual violence at all, and thus blanket generalizations about misogynistic military cultures always incurring the use of rape are insufficient (Wood 2014). Instead, the focus for wartime rape should begin with commanders who license and encourage the use of sexual violence—when the ideological agenda of a commander or prominent military figure includes female subjugation, ethnic cleansing, or civilian punishment, rape can become a prominent tool to effect these goals, as the hierarchical structures that characterize military environments can clearly augment combatants' willingness to perpetrate grotesque violence.

1.3 Hierarchy and Power: How do military leaders influence the behavior of combatants?

The nuanced conception of hypermasculinity as constructed by the military, however, cannot possibly be the sole explanation for why wartime rape occurs. Recent scholarship suggests that rape propensity in combat may additionally be determined by factors of

socialization, hierarchy, and internal discipline mechanisms, all key components to building combatants who are willing to engage in violence. In terms of how a combatant group dynamic translates to the widespread use of sexual violence including rape, Reid-Cunningham speaks to the idea of peer pressure in a militaristic or combat setting:

> Social pressure may function to spur on men's hyper-masculinized acts of sexual violence in an attempt to prove their manhood or to obtain the group's esteem. Analysis on gang rapes provides further corroboration of the role of peer pressure and social norms of masculinity in the etiology of rape. The main purpose of gang rape appears to be proving one's masculinity to the group through the display of sexual violence. (Reid-Cunningham 2008: 284)

In this context, the age and status of young men participating in a military organization is once again important to consider; the innate hierarchy associated with many military settings can encourage participation in sexual violence. With older, more experienced men at the top of the proverbial ladder, and younger, impressionable men at the bottom who are subject to the orders and norms of their superiors, higher-ups have the ability to enforce strong social and militaristic norms onto younger participants, and they can reinforce or encourage certain behaviors as they see fit (Reid-Cunningham 2008). Conversely, this point also speaks to the idea that military organizations can *discourage* certain behaviors as they see fit, which may explain why not all militaries engage in deliberate sexual violence. This system of hierarchy works to ensure that the goals and preferred patterns of violence of commanders are carried out by combatants, presenting an opportunity for those in charge to either encourage or discourage specific behaviors, particularly rape.

By attaching and submitting themselves to older, almost universally male leaders, young soldiers become vulnerable to the precedents and examples set for them by older members. If the higher-ups encourage the sexual objectification of civilian women (e.g., engaging with prostitutes,

denigrating and villainizing entire groups/races of "enemy" women, etc.), their subordinates will see this behavior as normal, maybe even encouraged. Reid-Cunningham maintains that the attachment of a male to peers or superiors who encourage these forms of violence, objectification, and abuse is "a predictive factor for males who abuse women sexually, physically, and psychologically" (Reid-Cunningham 2008). Because most—if not all—of the men involved in a military setting have been exposed to the same violent, anti-feminine construction of hypermasculinity, this contributes heavily to their decision to rape or forcibly dominate civilian women, especially during conflict when tensions are high and aspects of hypermasculinity are heightened (Reid-Cunningham 2008).

Peer pressure is a major factor influencing how individuals within a military culture choose to behave. After all, the decision of a soldier to rape a civilian woman (whether it be by his own accord or as the fulfillment of a command) is just that—a conscious decision. The culture in which military participants are instructed (and ultimately indoctrinated) plays a major role in shaping the views and decision-making abilities of individuals, especially when it comes to views on women; sexual violence committed by combatants can easily become normalized and be labeled as an inevitability when it is committed frequently in an environment that emphasizes female inferiority. Hierarchical peer pressure within the military, constructions of hyper-masculinity that emphasize female subordination, and the culture of war that exposes young men to systems of female oppression like prostitution and systematic rape all combine to explain why military personnel may be so comfortable or willing to perpetrate sexual violence against women during wartime.

Elizabeth Wood points to the powerful role of military socialization in teaching recruits to overcome their natural aversion to killing and argues that this applies to sexual violence as well. In her words:

> To forge combatants who are willing to fight, if not on behalf of the organization in the abstract then in defense of their brothers in arms, organizations must reshape combatant preferences to allow the wielding of violence. Most armed organizations do so initially through the induction of combatants into the organization through formal institutions such as boot camp and informal ones such as initiation rituals. In many State militaries, the powerful experiences of endless drilling, dehumanization and degradation at the hands of the drill sergeant and then 'rebirth' as organization members through initiation rituals mold recruits into combatants whose loyalties to the organization may be experienced as stronger than those to family. (Wood 2014: 467)

Wood also distinguishes a second factor that has the potential to sway a combatant's propensity for violence: the undisputed fact that war can profoundly impact the disposition of a soldier and his willingness to act violently. War can create a sense of moral disengagement for combatants, and desensitization to constant violence can lead to a willingness to engage in such violence. According to Wood, the uncertainty of combat, the constant exposure to—and even the wielding of—horrific violence that desensitizes combatants, and "the displacement of responsibility not only onto the organization but also onto the enemy, who 'deserve what they get' (blame attribution), are all powerful wartime processes of moral disengagement that tend to widen the repertoire (possibly including sexual violence), targeting and/or level of violence" (Wood 2014: 467).

A key component of Wood's argument concerns the indoctrination of combatants and existence of strong disciplinary institutions to ensure that soldiers' behavior will align with their commanders' preferences, namely the commanders' preferred patterns of violence. Military institutions must then "indoctrinate recruits so strongly that they internalize the commander's preferred pattern of violence (and perhaps even the commander's reasons for that choice)," creating ideal combatants who are willing to implement leaders' choices without question (Wood 2014: 468). But not all combatants can measure up to this ideal, and there is certainly an information gap between what is happening on the ground and what the commanders who are delegating orders are able to observe. In these cases, Wood claims, strong institutional discipline

is a strategy used to keep soldiers in line with their commanders' orders. If combatants stray too far from their commanders' preferences—refusing to commit certain violence according to personal reasons, for example—a commander can lose significant control of the situation at hand. Though the strength of disciplinary institutions varies among militaries, militaries with strong disciplinary mechanisms have a better chance of overcoming this "commander's dilemma"—in which commanders must make their combatants willing to commit violence, but must also rein in that willingness and keep it within the confines of the organization's agenda—and ensuring that their commanders' preferences are carried out by combatants on the ground. Thus, an operation's success relies on soldiers obeying commands, whether for fear of punishment or out of loyalty to the organization/cause. "Strong disciplinary institutions," as Wood calls them, are necessary to keep combatants aligned with commanders' preferences, notably when it comes to preferred patterns of violence (Wood 2014: 468).

Wood's ultimate claim when it comes to commander-ordered violence is that there is a clear correlation between the strength of indoctrination, intelligence, and disciplinary mechanisms within an organization and the likelihood of combatants aligning their preferences for violence with those of their commanders; strong disciplinary measures provide an additional means of ensuring that soldiers will adhere to commanders' preferences. Wood maintains that, so long as these mechanisms are sufficiently strong, "combatants will follow orders despite their own individual preferences...if the leadership chooses to promote rape of civilians, for example, combatants will rape with high frequency against the chosen target, and if the leadership chooses to prohibit rape, combatants will not rape (except in isolated instances). In short, if the organization's internal institutions are strong, it is possible to conclude that if sexual violence occurs, it is ordered, except for isolated incidents" (Wood 2014: 468).

1.4 Explaining Rape Propensity: Why soldiers are willing to commit acts of sexual violence

Excuses for wartime rape, though often weak, nonetheless persist as common understandings of why soldiers commit sexual violence. The idea that combatants are unleashed and give in to their violent urges within a "pressure cooker" environment, as well as the notion that all men have a predisposition for rape born from an innate animality, are not adequate explanations for why wartime rape occurs, nor can these theories justify the actions and conscious decisions of perpetrators. Some scholars, including Gutmann, instead maintain that rape as committed by soldiers is an attempt not only to prove virility, but also to prove a soldier's ability to conquer any and all territory of the deemed opponent. Considering women are largely viewed as property or territory when it comes to not only military masculinity, but also to the demonization of all those associated with the "enemy" in war, women are targeted as enemy territory and punished accordingly. Gutmann asserts that wartime rape is an opportunity for men to control and punish women, which once again relies on military-constructed components crucial to masculinity, including dominance over women and the reinforcement of binary gender distinctions (Gutmann 2021).

Although rape used as a weapon of war is not as common as its randomly or opportunistically practiced counterparts, it does still exist and present a threat to the safety of all women involved or associated with war. Rape goes beyond an isolated act of humiliation and violence. Strategic rape can engender genocide, psychologically damage entire populations, and subjugate targeted groups. Instead of justifying rape as an inevitable side-effect of war and allowing perpetrators to remain unaccountable, prosecuting rape as a crime against humanity and a factor of genocide can set a precedent for justice.

This paper will later highlight the difficulties in holding individual commanders and heads of state accountable for their commissioning of sexual violence, especially the obstacles faced by the International Criminal Court in getting these high-profile perpetrators into custody and proving their concrete involvement in the use of weaponized rape by their combatants. Because various aspects of military culture, including hierarchy, social dynamics, and patriarchal ideologies, are so deeply ingrained into combatants, commanders may not even have to be explicit in their orders to sexually violate a population—when sexual violence is implicitly assumed as part of this "total war" on the enemy regardless of whether or not it has been explicitly commanded, it can be incredibly difficult to find evidence that establishes commanders' individual liability in the commission of widespread sexual violence.

CHAPTER 2: Strategic and Genocidal Rape: The Cases of Bosnia-Herzegovina and Rwanda

2.1 Introduction to cases of systematic rape

Despite the tendency of military and political leaders to dismiss wartime rape as isolated acts by individual soldiers, rape has been employed on occasion as an intentional military strategy. In the words of Dorothy Thomas and Regan Ralph, "Rape has long been mischaracterized and dismissed by military and political leaders—in other words, those in a position to stop it—as a private crime, a sexual act, the ignoble conduct of the occasional soldier, or, worse still, it has been accepted precisely because it is so commonplace" (1994: 84). While it is critical to recognize that rape is not an inevitable byproduct of war, it is also important to understand the ways in which rape has been strategically employed as a weapon of war, and in some cases as an instrument of genocide. While it is rarer for ordered rape to occur as part of intentional military strategy, it does still happen, and examining cases in which rape has functioned as a deliberately employed method

of achieving military objectives is crucial to accurately characterizing rape as a weapon of war, as well as identifying the various motivations for such a command. Conceptualizing rape as a weapon of war also presents the opportunity to hold military and political leaders accountable for their failure to take responsibility for commands to rape, shattering the possibility of the plausible deniability endowed to opportunistic rapes and rapes as practice.

2.1 Rape Variation: Variations in motivation and willingness

As previously discussed, hypermasculinity, hierarchy, and internal disciplinary measures are all seemingly ubiquitous to a military environment, leading some observers to conclude that the combination of these forces invariably leads to wartime rape and sexual violence. In fact, studies of wartime rape and sexual violence show that the use of rape by armed combatants varies greatly, and, consequently, the motivations and justifications for its perpetration vary as well. Dara Cohen points out that there is little evidence to support the claim that rape is always employed as a mode of tactical warfare strategy (Cohen 2016: 20). Widespread rape may not be employed tactically or commanded specifically, and certainly not every case of wartime rape or massive-scale rapes involves a deliberate purpose for sexual violence. Cohen claims that, besides notable exceptions like those of Bosnia and Rwanda, "rape is rarely directed by commanders," and oftentimes is perpetrated not as explicit strategy, but for various motivations (Cohen 2016: 20). Because of the wide variation across wartime rapes—whether the crime is commanded or not, the number of perpetrators involved, etc.—distinctions must be made about the motivations or degree of premeditation surrounding rape as committed by combatants.

Strategic rapes and opportunistic rapes are distinguished by their motivations. Elisabeth Wood explains the distinction between the two, stating that "strategic rape" is employed as deliberate strategy in order to achieve an organization's objectives and is sometimes ordered by

commanders, while "opportunistic rape" is perpetrated by individuals for personal reasons other than the organization's objectives" (Wood 2014: 470). In addition to the traditional, binary categorizations of wartime rape as either strategic or opportunistic, Wood argues for a third category—that of rape as practice. Rape as practice is distinct from rapes committed strategically or opportunistically. The key difference that separates Wood's "practice" categorization from its counterparts is that it helps explain some of the larger systems at play within military and conflict environments: social hierarchy, hypermasculinity, and loyalty mechanisms. Combatants who rape as practice are neither explicitly nor implicitly ordered to do so, and thus have varying motivations for raping besides personal reasons; most importantly, the actions of these combatants are tolerated by commanders (Wood 2014: 471). Hierarchy, hypermasculinity, and loyalty mechanisms in military environments help to explain the motivations for rape as practice when it occurs, but they also serve to reinforce a lack of accountability for combatants—and their implicated commanders—who rape. By never explicitly ordering rape and turning a blind-eye to their combatants' behavior, commanders have the opportunity to escape culpability for the crimes their combatants commit, seeing as these rapes are arguably of the combatants' own volitions and not ordered as strategy.

Rape as practice also distinguishes itself from opportunistic rape in the sense that it is motivated less by individual reasoning and more by social interactions (Wood 2014: 471). Given that the rules that govern social dynamics within military environments typically emphasize group cohesion and loyalty to the organization, in addition to the recurrent themes of hypermasculinity and female subjugation that already exist in a male-dominated environment, social pressure to rape can be quite a significant factor in promoting cohesion. Additionally, consider the fact that a rape that occurs as practice is not subject to internal disciplinary measures to the same degree that, for

example, an opportunistic rape would be, making the risks much lower for perpetrators should they be caught. The collective tolerance of rape as practice and the force of social pressure within military units ultimately combine to create a virtually accountability-free way for combatants to punish their enemy. Wood argues that while strategic institutionalized rape is generally rare, and opportunistic rape is usually punished or addressed by the chain of command, the more common (and largely overlooked) pattern of sexual violence perpetration by combatants is a "strategy authorized not by explicit orders but by 'total war' or other permissive rhetoric" (Wood 2014: 471).

2.2 Strategic Rape: Bosnia-Herzegovina and the deliberate use of strategic rape

Following the outbreak of war in 1992, as the self-proclaimed Bosnian Serb Army launched a campaign to ethnically "cleanse" Croats and Muslims from broad swathes of Bosnia, reports circulated of mass executions, beatings, mutilations, and rape. In response, Radovan Karadzic, the Bosnian Serb leader, "denied any knowledge of widespread rape in Serb-controlled Bosnia: 'We know of some eighteen cases of rape altogether, but this was not organized but done by psychopaths.' Karadzic dismissed claims of mass rapes as the propaganda of 'Muslim mullahs'" (Thomas & Ralph 1994: 84). Karadzic's defense relied heavily on the concept of opportunistic rape, claiming a cluster of one-off instances of psychotic behavior—his excuse for mass rapes ultimately shifted the blame from himself to these so-called "psychopath" soldiers, when in fact, the use of rape by Serb forces was objectively deliberate. Once Bosnia declared its independence from the former Yugoslavia in 1992, Serb forces intentionally employed rape as a strategy of forcing non-Serb populations in Bosnia into flight, and here, rape clearly functioned as a method of warfare (Snyder et al. 2006: 189; Thomas & Ralph 1994: 85).

Contextualizing Bosnia's horrific genocide is essential to the conceptualization of rape as a weapon of war as it presents various examples of mass rape committed strategically, all for the broader purposes of ethnic cleansing. The Serbs' military advantage over the newly independent Bosnia, coupled with their desire to drive non-Serbs from the region in order to establish a Greater Serbia, largely targeted Bosnian Muslims, and women especially were left particularly vulnerable (Snyder et al. 2006: 185). Serb forces would drive out non-Serb populations "by first shelling towns, then segregating men from women and taking the men to detention centers," leaving women to either "fend for themselves in towns controlled by enemy forces" or be taken to holding centers where they were frequently raped and assaulted (Thomas & Ralph 1994: 85). This once again reinforces the gendered aspect of war and civilian targeting and reflects militarized conceptions of masculinity—while men are viewed as individuals with endowed agency who present threats and must be neutralized (whether through execution or forced labor), women are seen as useful kept alive only for the sake of their bodies and the purposes of torturing the enemy, sexual gratification, and punishment. As noted by Thomas and Ralph, "the fact that it is predominantly *men* raping *women* reveals that rape in war, like all rape, reflects a gender-based motivation, namely, the assertion by men of their power over women," and this is true of the atrocities committed by Serb forces against Muslim women (Thomas & Ralph 1994: 88).

Snyder et al. note that Serbs targeting Muslim women constituted the "vast majority" of perpetrators during the Bosnian conflict (Snyder et al. 2006: 189). Their purported goals of ethnic cleansing were motivated by nationalism and contempt bred for any and all who didn't ethnically identify as Serbs, so why use sexual violence, and not execution, for the purposes of genocide? If women constitute an estimated half of the population an organization is intent on wiping out, why keep them alive for the purposes of rape and torture? This is where it becomes important to

understand that rape as a strategy can be committed for much broader purposes; raping can directly contribute to an overarching goal of genocide by taking an avenue of psychological and physical torture rather than simply massacre. Not all rapes happen in the same manners or for the same intended purposes, and victims and perpetrators alike differ in their experiences with wartime rape. Rape as a weapon is more than just a single violent act; it functions in different strategic capacities for different reasons.

2.3 Purity and Shame: The various functions of strategic rape

Strategic mass rape functions in war as a means of achieving ethnic cleansing, and the Serb use of rape was a tactic clearly intended to drive non-Serbs into flight and subjugate and/or punish the "enemy." But the other manners in which strategic rape function also have the capacity to physically change the genetic makeup of a specific community or ethnic group, namely through the use of rape to forcibly impregnate women. Thomas and Ralph discuss the horrific accounts of Bosnian Muslim women coming forward to share their experiences being raped by Serb forces, with victims recounting how perpetrators' primary aim was often "making a baby" and intentionally humiliating women (Thomas & Ralph 1994: 87). Forcibly impregnating a woman through strategic rape creates a cascading effect of fallout in various political, social, and cultural capacities. While forcible impregnation through mass rape serves a clear purpose in furthering genocide and genetic imperialism (surviving rape victims then being forced to either carry an unwanted pregnancy that dilutes their own ethnic identity, or dying either from the physical trauma inflicted by rape/frequent raping or self-inflicted injury like suicide), it also upholds the conception of strategic rape as serving a distinctly gendered, sex-specific purpose that seeks to torture, intimidate, and punish women and the very structure of their families and communities (Thomas

& Ralph 1994: 87). This conception once again relies on how masculinity is constructed in military environments, and emphasizes how hypermasculinity is built upon a foundation of willingness to forcibly subjugate women through aggression and violence.

Goals of genetic imperialism, according to Claudia Card, can obviously be partially achieved through mass rape, and this constitutes just one of the many ways in which genocide and sexual violence intersect (Card 1996: 7). In Card's words,

> There is more than one way to commit genocide. One way is mass murder, killing individual members of a national, political, or cultural group. Another is to destroy a group's identity by decimating cultural and social bonds. Martial rape does both. Many women and girls are killed when rapists are finished with them. If survivors become pregnant or are known to be rape survivors, cultural, political, and national unity may be thrown into chaos. These have been among the apparently intended purposes of the mass rapes of women in Bosnia-Herzegovina, of Rwandan women by Hutu soldiers, [etc.]. (Card 1996: 8)

The combination of extermination through murder and forced impregnation was a primary tactic used in pursuit of the Serbs' aims of invasion and ultimate genocide in Bosnia. The nuances of gender relations, however, are significant in how strategic rape can further terrorize a population and forcibly subjugate them. Shame and humiliation are seemingly ubiquitous to instances of rape, and it is evident that inflicting this shame on rape survivors is another primary goal of genocidal forces.

Survivors of rape, even those who have not been forcibly impregnated, are still unfairly subject to modern narratives of purity and female victimhood. The Serb perpetrators' rapes accomplished more than just physically and psychologically traumatizing individuals; their rapes carried political, national and cultural consequences for the community at large. Rape is, according to Thomas and Ralph, "a profound offense against individual and community honor," and this is true of many surviving rape victims who have been ostracized and even shunned for the violence to which they have been subjected (Thomas & Ralph 1994: 89). Communities may view victims

as being tainted by enemy forces and are inextricably linked to the oppressor, whether or not these victims become pregnant. Women who have been devirginized, assaulted, or impregnated can be labeled "impure" according to various standards of contemporary attitudes towards sex and purity. Snyder et al. assert that rape "as a moral attack against women is especially devastating within southeastern European cultures, where female chastity is central to family and community honor" (Snyder et al. 2006: 190). By destroying the fabric of gender and sex relations within a population through mass rape, perpetrators can thus effect chaos and moral upheaval to terrorize and ultimately destroy the social bonds of a particular population. As noted by Snyder et al.,

> In this regard, the mass war rapes can be understood as an element of communication—the symbolic humiliation of the male opponent. By dishonoring a woman's body, which symbolizes her lineage, a man can symbolically dishonor the whole lineage. On a larger scale within the context of war, the concept of lineage extends to the entire ethnic group or culture. Thus, sexual violence against women became a tool of genocide for destroying the enemy's honor, lineage, and *nation*. (Snyder et al. 2006: 190)

In the case of Bosnia and other genocides involving mass rape, rape serves a strategic function not only to achieve genetic imperialism through forcible impregnation, but also to foist shame and humiliation onto communities as well as victims, disrupting the unity of a population whose stability is already at great risk.

Shame is not only a mechanism of instigating community upheaval, but also a factor that keeps many female victims quiet about their assaults, and consequently decreases the accountability perpetrators and commanders face. Women who are raped face social consequences for being raped, including the shame and dishonor that accompany being sexually assaulted. In fearing for their reputations, their health, and their community bonds, women who have been raped may not come forward to report their rapes for fear of risking social upheaval, familial dishonor, and ostracism. Thomas and Ralph observe that, "By virtue of being a rape victim, a woman becomes the perceived agent of her community's shame. In a bizarre twist, she changes from a

victim into a guilty party, responsible for bringing dishonor upon her family or community. As a result, women victims, whether for fear of being seen this way, or because they see themselves this way, are extremely reluctant to report rape" (Thomas & Ralph 1994: 90).

Additionally, rape is not only a tool used to effect genocidal goals, but also a mechanism of foisting cultural, social and familial dishonor upon a community on a major scale. The pregnancies that result from rape, whether the baby is kept or not (though many women under Serb domination who were forcibly impregnated were imprisoned until abortion methods would be too late to be effective), can evidently result in major negative impacts for the social and cultural makeup of an entire group, breeding contempt for victims. Pregnancies also fractionalize groups by creating an entirely distinct generation of individuals born from rape and thus associated with the opponent or oppressor, plunging a community further into chaos and ensuring that the impacts of mass rape are felt for generations to come. Strategic commands for mass rape and widespread sexual violence as a part of total war against the Bosnian Muslim population were willingly carried out by combatants in Bosnia-Herzegovina in order to systematically terrorize and eliminate. Although scholarship suggests that ordered rape is significantly less common in wartime than rape as practice or opportunistic rape, it nonetheless remains an ultimately real and pressing issue. At its core, ordered rape relies on key pillars of hypermasculinity as constructed by the military, including hierarchical dynamics, peer pressure, violence, and a focus on dominating and punishing women. Studying deliberate, ordered mass rape is essential to understanding how social and gender dynamics in military cultures mold combatants into participants who are willing to carry out horrific orders for various reasons, including misogynistic or ethnic motivations.

2.4 Genocidal Rape: Rwanda's genocide and the sexual violence targeting women

During the same time period that Serb forces deliberately used strategic rape to further their political goals, the African nation of Rwanda faced its own genocide: the deliberate extermination of the minority Tutsi population by the Hutu majority. During the Hutus' ethnically motivated massacre in 1994, between 800,000 and one million individuals were murdered, and it is estimated that between 250,000 and 500,000 women were raped (UN African Renewal; Mullins 2009: 3). The use of rape by Hutu forces against Tutsi women was orchestrated and overwhelmingly deliberate. In the words of Christopher Mullins, the violence experienced by rape victims in Rwanda "was not simply a 'pressure-cooker' release," but rather, "a core tool of the genocide itself. These events were neither spontaneous nor scattered, but systematic. They served to keep Tutsi populations in terror and served as a constant reminder of the totally debased state which Tutsis now occupied" (Mullins 2009: 21).

Ethnic tensions, like those in the Bosnian genocide during the same period, were significant motivators in the genocide against Tutsis in Rwanda, with an added dimension due to the fact that ethnic tensions were inherently *sexualized*. Because the Tutsi population was historically considered a somewhat aristocratic minority, the Hutus, albeit a much larger, dominant population, "were enraged over their lower status and resented the supposed Tutsi beauty and arrogance," and sought retribution. Tutsi women especially were targeted not only because of their ethnicity, but also their sex; the typical narrative cited by Hutu men surrounding Tutsi women entailed Tutsi women being arrogant "sexual deviants" who would attempt to seduce and steal Hutu men from their respective community (Mullins 2009: 6). According to Donatilla Mukamana and Petra Brysiewicz, the genocide relied in part on the mythical stories surrounding Tutsi women, that they were "sexually sweeter than Hutu women" (Mukamana & Brysiewicz 2008: 381). Rapes motivated by these myths and stereotypes were "a form of

revenge against those women they would not have had access to in the past and thus it was also an act of revenge toward the entire community" (Mukamana & Brysiewicz 2008: 381). This attitude was largely held by Hutu forces, who internalized their hatred of Tutsi women (whether for ethnic reasons or for specifically sexual reasons related to ethnicity) and exacted genocide through not only mass slaughter, but also mass rape.

As in the case of Bosnia, inspiring widespread fear and shame was a prevalent function of strategic rape in Rwanda as well. Mass rape spells out chaos for the social bonds of a community; denigration and identity spoilage are key motivations behind genocidal rape, as they build on the strong patriarchal structures already in place and ensure that raped women are no longer fit for society or marriage (Mullins 2009: 6). The same goes for forced impregnation as a part of the endured rape, as it functions as an even more permanent mark of ostracism and "contamination" by enemy forces. It is also worth noting once again that forced impregnation is an inherently gendered attack that likely reflects vital aspects of military hypermasculinity, including violence against women and the forcible subjugation of women. According to Mullins, rape and forced impregnation serve three major functions:

> First, [forced impregnation] provides a long-lasting reminder of the humiliation and derogation of the people as whole…Second, as the children and their mothers are often outcasts from their kin groups because of the assaults themselves, this enhances the social disorganization of villages and cities…Thirdly, in societies where lineage membership is determined via patrilineal parentage, the children in question are members of the father's and not the mother's ethnic group. In effect, this can change the symbolic ethnic group membership of a community and further work towards the elimination of a population.(Mullins 2009: 6)

The inherently gendered attacks on Tutsi women by Hutu forces achieved genocidal motivations by weaponizing shame against a minority community, as well as creating a distinct sect of "mixed" or multiethnic children that would emphasize disunity and ethnic/cultural disintegration

within the targeted community, ensuring that shame from rape follows victims and community members for generations after their attacks.

2.5 Motives and Commands: Deliberate orders to humiliate

Terrorizing the Tutsi population through shame did not stop at archetypical instances of rape and forced impregnation, however. Hutu forces were creative in their means of genocidal torture, and shame is a crucial tactic used to keep victims quiet and perpetrators unaccountable. The circumstances of some instances of rape in Rwanda were intended to attack the cultural morals of Tutsi women and inflict irreparable psychological damage onto them; there are countless sickening accounts of women being raped in front of family members, gang-rapes, adult women being raped by children, forced devirginization, and sexual organ mutilation. The deliberate spreading of HIV was also used as a tool to subjugate and inflict terror upon Tutsi women, and the contagious nature of the virus virtually guaranteed that victimized women would remain segregated and "othered" in their communities (Mukamana & Brysiewicz 2008: 382). Social isolation is a major consequence of genocidal rape that, should victims survive their attacks (which many did not due to the extreme violence exhibited by Hutu forces), has the ability to easily tear the social and familial fabric of a community.

Desires to humiliate, to exact revenge, and to inflict physical trauma, psychological damage, and even death onto Tutsi women could be considered the major functions of genocidal rape as utilized by Hutu forces in Rwanda. Combatants' willingness to commit mass rape was evidently tied to their notions of ethnic and gendered superiority, the perceived sexual status of Tutsi women, and a desire to not only punish the enemy but also to prove virility and dominance. What distinguishes rapes during the Rwandan genocide from opportunistic rapes or the tacitly

condoned practice of systematic rape is the fact that some combatants in Rwanda received explicit orders to rape from their commanders; certain local leaders and commanders were not turning a blind-eye to their combatants' sexual violence nor were they discouraging it, but instead were bluntly ordering crusades of rape and sexual torture, as is evidenced in the case of Jean-Paul Akayesu who explicitly instructed his combatants on multiple occasions to rape Tutsi women and girls (Mullins 2009: 14).

Notions and myths about Tutsi women's sexual appeal and promiscuity were among the many significant factors driving orders for rape. The prosecutions of individuals who sanctioned sexual violence following the genocide at international tribunals reveal not only the Hutus' motivations to rape, but also *how* these orders were given, received, and committed. The former mayor of Taba, Jean-Paul Akayesu, was the first individual convicted by an international court for genocide, as well as for rape as a crime against humanity (ICD *Akayesu*). Akayesu's trial presented multiple examples of his orders for rape and sexual violence. In one instance, he told his assembled men to make certain that they slept with certain women whom they humiliated, and in others, he "would demand men under his control commit rape, saying, '[y]ou can never tell me now you do not know what Tutsi women taste like'" (Mullins 2009: 13). Akayesu's case was the first in which rape was defined by an international court as an international crime, as well as the first recognition of mass rape as a means of enacting genocide (USHMM 2021).

Instances of commanders ordering rape were not rare in the Rwandan genocide. In addition to Akayesu, other notable leaders and military officials deliberately sanctioned weaponized rape. Scores of women have come forward in the years following the genocide to share their experiences and testify against their rapists, and though their stories have resulted in the prosecution of notable perpetrators, many survivors are still confined to quiet victimhood and

lost hope for justice as a result of the shame and humiliation that follows rape. Wartime rape has an undoubtedly massive impact on the lives and communities of survivors post-conflict, but strategic rape especially has major negative consequences that live on and continue to destroy individuals, sometimes even entire communities, including forced pregnancy, scores of assaulted women being deemed impure and thus unable to be married or live freely, and sociocultural fractionalization.

2.6 Command Responsibility: Legal justice for strategic and genocidal rape

Rape functions in several distinct strategic capacities, making it a powerful weapon of war and terror. Specifically, when it comes to achieving goals of genocide or ethnic cleansing, rape is a significant tool in effecting the extermination of an ethnic group. As illustrated in the genocides of Bosnia-Herzegovina and Rwanda in the 1990s, strategic rape that is ordered from top-tier authorities and carried out by combatants was utilized as a mode of warfare that inspired widespread terror, dehumanized and humiliated the perceived enemy, and ultimately forcibly changed the genetic makeup of ethnic minority groups. Forced impregnation, the intentional transfer of sexually transmitted diseases, and genital mutilation are all functions of rape that are inherently sexual in nature. Their use in a conflict setting distinguishes these rapes from rapes driven by lust or purportedly uncontrollable sexual urges because, though the crimes are innately sexual, they are largely motivated by attitudes of dominance and a desire to punish the enemy. These motivations, along with attitudes of competitiveness, violence, and female subordination, combine to create key pillars of military-constructed hypermasculinity.

Militaries themselves are not the issue when it comes to possible avenues of eradicating wartime rape. Rather, the way in which many male-dominated militaries indoctrinate and mold

their recruits in order to force their alignment with the organization's preferences and goals presents significant issues. Wartime rape is an issue of leadership. In training soldiers to harness traits of hypermasculinity like violence and male dominance, militaries instruct and consequently construct loyal combatants who are willing to carry out ordered atrocities, even if those orders are to rape and commit widespread sexual violence. The age and impressionability of combatants, as well as their indoctrinated passion for the organization's cause, combine to create combatants who are loyal to the hierarchical systems at play in military contexts. If strong leaders command soldiers to rape or tolerate the use of sexual violence, soldiers will rape.

There are vast variations across instances of wartime rape, including strategic rape. Individual and group motivations for raping, willingness to commit ordered rape, and perpetrators and victims alike vary widely. It is worth noting that not all wartime or strategic rape victims are women, nor are all perpetrators male, as sexual violence is inherently intended to punish and humiliate and is not gender-discriminatory. Military-constructed hypermasculinity, however, often positions itself as opposite and superior to femininity, and this becomes increasingly apparent when civilian women are attacked specifically because of their gender (Weitz 2015: 165).

Though strategic rapes are often intended to shame victims into silence, those victims who do step forward to share their stories can engender justice not only in the international legal sphere, but also in their personal lives. Until those who command and perpetrate rape are held unequivocally accountable for their crimes, wartime rape may continue to terrorize generations of women and communities whilst still being viewed as an unfixable symptom of war. Therefore, it is of the utmost importance that international legal mechanisms take action to undertake the prosecution of rape and sexual violence crimes in order to set a precedent internationally to hold

perpetrators accountable. In this sense, perpetrators of wartime rape must understand both the costs of committing sexual violence, and that they are not immune to retributive justice. The widespread deterrence of wartime rape cannot begin without a solid foundation of rape prosecutions, and cases tried in recent decades before the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court (ICC) contribute to such a foundation. The various ways in which these three international legal mechanisms have failed to deliver comprehensive justice for rape survivors, however, must be discussed in order to fully assess their respective efficacies in deterring and addressing wartime rape.

Chapter 3: The ICTY, the ICTR, and the ICC

3.1 Introduction to the ICTY, ICTR, and ICC, and debates over their effectiveness

Feminist and international criminal law scholars alike have widely noted the significance of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) in furthering the global fight against impunity for perpetrators of conflict-related sexual violence—especially widespread wartime rape (Cohen 2016; Broache & Kore 2023; Alam & Wood 2022). Since the creation of these tribunals, transnational advocacy campaigns have succeeded in increasing the attention surrounding conflict-related rape, and the prosecution of rape as a war crime or a crime against humanity—even a crime of genocide—on the international stage certainly presents an ideological shift in the conceptualization of sexual violence as martial strategy (Broache & Kore 2023).

The ICTY and ICTR were established by the United Nations Security Council as mechanisms for enacting justice in the aftermath of both nations' then-recent genocides. The ICTY was established in the Netherlands in May of 1993, and a little over a year later, the ICTR opened in Tanzania in November of 1994. The ICTY was especially instrumental in creating an international precedent to prosecute sexual violence in armed conflict. Heidi Nichols Haddad notes that prior to the ICTY, ICTR, and International Criminal Court (ICC), there existed virtually zero internationally accepted definitions of sex crimes, including rape, forced impregnation, and genocidal rape (Haddad 2011: 111); before these legal avenues for justice, rape was still widely viewed as a symptom of war and not as an instrument used systematically within war.

As previously discussed, systematic and ordered rape is not necessarily a common occurrence in wartime—the dominant and most common function of rape is that of rape "as practice," according to Elizabeth Wood's conception—but it is arguably more important to focus first on prosecuting cases of directly ordered rape, as it is free from the excuses of plausible deniability maintained in situations of "practiced" rape. This provides a clearer sense of culpability in terms of identifying and prosecuting the actors responsible for rape commands, as evidence of concrete commands given to military units to rape are more damning than that of commanders who never gave explicit orders to rape, but rather allowed rapes to occur and maintained a guise of plausible deniability.

The ICTY, ICTR, and ICC have made significant steps in prosecuting commanded and genocidal rape internationally; Beth Van Schaak notes, however, that the shift in legal recognition from inevitable wartime rape as practice to a "prosecutable crime against the physical and mental integrity of the victim" is not solely the achievement of the ICTY, ICTR,

and ICC, but also due in part to international advocates and diplomats who pushed to make the conceptual shift possible (Van Schaak 2009: 2, 6). But despite considerable progress in addressing conflict-related sexual violence crimes, all three legal forums have been criticized for their respective approaches to the prosecution of rape; the ICTY is considered to be comparatively more successful than the ICTR in effecting convictions for rape as the prosecutorial strategy of the ICTR largely failed to prioritize evidence and charges of rape, and the ICC's current record of sexual violence convictions is indeed mixed and fails to deliver a clear message of challenging impunity (Nelaeva 2010; Haddad 2011: 111; Schaak 2009: 8).

Scholars and policymakers, however, disagree whether the ratification of multilateral human rights agreements such as the Rome Statute leads to improvements in human rights protections, and whether the ICC and other international courts can succeed in deterring the commission of mass atrocities. Rothe and Collins (2013) describe the prospects of the ICC helping to end impunity for those most responsible for crimes against humanity, war crimes, genocide, and massive violations of human rights as "bleak" (2013: 1). In contrast, Benjamin Appel (2018) argues that the ICC can deter governments from committing human rights violations by imposing a variety of costs, including economic sanctions and domestic challenges to the regime. He finds that states that have ratified the Rome Statute commit lower levels of human rights abuses than non-ratifier leaders due to both screening and constraining effects of governments:

> Although governments with better human rights records are more likely to ratify the Rome Statute, their human rights practices still improve after ratification. The practices of nonratifiers, however, change very little across time. This suggests that the ICC appears to be associated with an independent effect on ratifiers that cannot entirely be explained by prior human rights practices, trends across time, or domestic conditions. (Appel 2018: 5)

Hyeran Jo and Beth Simmons (2016) analyze whether the ICC effectively deters international crimes by state and nonstate actors, and conclude that the ICC has in fact had a conditional impact on deterring governments and rebel groups that seek legitimacy and value citizen approval. They argue that the ICC "encourages member states to improve their capacity to reduce, detect and prosecute war crimes domestically, and indeed the evidence shows that ratifying states are much more likely than non-ratifiers to do so" (Jo and Simmons 2016: 469). They point to evidence that intentional killing of civilians by government actors declines when states implement ICC-consistent statutes in domestic criminal law, and highlight the potential that the ICC's deterrent effect may occur through increased social pressures and demands for justice from the international community as well as domestic civil society (Jo and Simmons 2016: 469). Evidently, the ICC's prosecution record alone is not enough to deter war crimes, but rather, a member-state's willingness to align domestic laws with the Rome Statute—for example, the DRC's instatement of multiple laws regarding military penal codes and domestic court procedures—can further challenge impunity, as such domestic steps "magnify the ICC's prosecutorial deterrent effect by bolstering it with the added possibility of punishment at home" (Jo & Simmons 2016: 469). Jo and Simmons caution, however, that deterrence remains difficult, especially in the case of self-reliant governments and rebel groups, and the Court has not had positive impacts in all cases (Jo and Simmons 2016: 469-470).

Dancy and Montal (2017) examine the effect of ICC investigations on domestic human rights prosecutions of perpetrators of human rights violations in African states, and find that countries under investigation by the ICC have more domestic prosecutions and convictions of crimes such as torture and sexual violence than other African states. They do not credit the ICC, however, as they attribute increased prosecutions of state agents charged with human rights

abuses to domestic reformers who put pressure on governments to uphold their commitments to legal justice; as they explain:

> ...prior to the opening of an [ICC] investigation, states face few reputational or political costs, and they do not make any maneuvers; likewise, reformers hold back and wait until investigation begins to devote more resources to litigation, because the attention of an investigation brings a higher chance of success. When the official prosecutorial investigation begins, so do government contrivances and activists' gap-filling litigation. The result is a significant increase in domestic human rights prosecutions—an unintended byproduct of ICC investigations that does not look like the positive complementarity that ICC strategists originally envisioned (Dancy and Montal 2017: 715).

Despite scholars recognizing that the ICC has effectively raised the costs of engaging in conflict-related sexual violence, Jo and Simmons also note that individuals "who intentionally terrorize civilians for their personal or political purposes are difficult to deter under any circumstances," and this difficulty is certainly illustrated by the ICC. While the Court may have great potential to deter the use of weaponized sexual violence, its record of prosecution tells a different, more disappointing story. The following sections will examine how shortcomings of international criminal tribunals for the former Yugoslavia and Rwanda gave rise to the need for a permanent international legal mechanism, which was remedied with the establishment of the International Criminal Court (ICC). Additionally, this chapter will analyze the many criticisms of the ICC and its failure to deter sexual violence, as well as examine its failure to communicate a clear message of challenged impunity and heightened consequences to perpetrators.

3.2 The International Criminal Tribunal for the former Yugoslavia (ICTY)

Beginning in the 1990s, international courts began laying the foundation for identifying commanded and genocidal rape in wartime as an international crime and challenging the impunity of leaders who commissioned the use of sexual violence. The International Criminal Tribunal for the former Yugoslavia is thus significant, as it tackled the subject of rape—

furthermore, that of *genocidal* rape—at a time when impunity for perpetrators of armed sexual violence had long been the norm. The ICTY, established in the spring of 1993, was in fact the first European-based international tribunal to "enter convictions for rape as a form of torture and for sexual enslavement as a crime against humanity" (UNICTY). Although the tribunal was established in 1993 and 34 total public indictments were issued, none of the accused were prosecuted until years later (Barria & Roper 2005). A common critique of the tribunal for the former Yugoslavia is in regard to its issues with arresting perpetrators; the first trials began in 1996, when the ICTY finally decided to end the somewhat fruitless endeavor of issuing public indictments and shift instead towards trying the accused (Barria & Roper 2005). The first trial proceeded in 1996, when Duško Tadić, the local board president of the Bosnian Serb Democratic Party, was tried for crimes committed during the conflict (UNICTY).

Tadić's trial was the first international war crimes trial involving charges of sexual crimes (in this case, it was the forcible sexual torture of male detainees); in other words, "The trial proved to the world that the nascent international criminal justice system could end impunity for sexual crimes and that punishing perpetrators was possible" (UNICTY). The ensuing trials of Zdravko Mucić, Hazim Delić, and Esad Landžo constituted an arguably larger landmark case, as their trial saw the legal recognition of rape as a form of torture, as well as a breach of the Geneva Conventions (UNICTY). This was the first judgment by an international criminal tribunal of rape qualifying as a form of torture under customary international law, which was a major first step in prosecuting sexual violence on the global stage (UNICTY).

The first case to be tried entirely on charges of sexual violence was that of Anto Furundžija in 1998, and it augmented the scope of rape prosecution under international law. The ICTY notes the following regarding the Furundžija trial:

> Presenting its legal considerations in the judgement, the Trial Chamber made important remarks on the qualification of rape in the context of international crimes. In the Tribunal's Statute, the only explicit reference to rape is as one of the crimes constituting crimes against humanity. The Trial Chamber widened that scope and stated that rape may also be prosecuted as a grave breach of the Geneva Conventions and as a violation of the laws and customs of war. Importantly, the Tribunal's judges also confirmed that rape may be used as a tool of genocide. (UNICTY)

Cases of sexual enslavement were also tried, and the major trial of Dragoljub Kunarac, Zoran Vuković, and Radomir Kovač in 2000 was a crucial step towards the increased prosecution of rape during conflict. The "rape camps" or "rape hotels," as they were colloquially known, included the deplorable and systematic rapes and sexual enslavement of Bosnian Muslim women and girls, and this case provided an opportunity for yet another landmark development: the inclusion of sexual acts under the umbrella of the criminal definition of enslavement. International law, according to the ICTY, had "previously associated enslavement with forced labor and servitude," but was expanded during this case to include sexual servitude. All three men were found guilty of rape as a crime against humanity, the first conviction of its kind in the history of the ICTY, which had been operating for nearly seven years at the time of the Kunarac et al. trial (UNICTY).

While the Kunarac et al. judgment recognized rape as a tool of war, there was still little to no recognition of rape being used as a tool to enact genocidal agendas. That changed in 2001 with the trial of Radislav Krstič, a General Major in the Bosnian Serb Army. While the rapes committed under his commandership were not a part of his conviction for aiding and abetting genocide, his case importantly established a connection between sexual violence and ethnic cleansing—a connection that was expanded upon further by the ICTR within its efforts and trials. But the ICTY did make additional headway in prosecuting commanders for their combatants' acts of sexual violence, though it took over two decades to do so. Nikola Šainović,

Sreten Lukić, and Nebojša Pavković were all held accountable by the ICTY's Appeals Chamber in 2014 for the sexual violence in Kosovo committed under their leadership and respective affiliations with the Third Army of the Yugoslav Army (Clark 2016: 3). This precedent would go on to inform later decisions of the ICC to convict defendants on the basis of command responsibility, a key component of achieving justice for victims of sexual crimes in conflict.

The legal traction gained in recognizing rape as a weapon of genocide has, however, also faced backlash for its unrealistic applicability and generalizability when it comes to prosecuting other instances of rape during conflict. Buss writes that disagreements over the ICTY's decisions among feminist scholars ensued, noting that:

> Some feminists argued the rapes in Bosnia were part of a genocide against non-Serbs, and the extreme nature of these rapes *as genocide* committed by Serbian military forces should be emphasized. Other feminists cautioned against overplaying the exceptionalism of this example of 'mass rape' as genocide, arguing that rape as genocide would set too high a marker that might erase less exceptional forms of violence against women. (Buss 2009: 149)

The latter argument speaks to the potential for militaries to continue to carry out rapes in later conflicts and have them determined to be non-genocidal and therefore not of great importance or relevance in prosecution—indeed, despite the tribunal's efficacy in recognizing rape as a weapon of genocide, rapes as part of martial strategy continue to be prevalent, which also suggests that perhaps the ICC has not carried on the ICTY and ICTR's legacies of challenging sexual violence impunity and deterring more general wartime rape.

Successful prosecutions of rape in the ICTY relied largely on the fact that the inclusion of sexual violence was a key element of the prosecution's strategy (Haddad 2011); a commitment to gender-sensitivity in "all stages of the development and implementation of a prosecutorial strategy," in the words of Van Schaak, is a crucial component to the heightened prosecution of gender-based violence and the fight against impunity (Van Schaak 2009). In stark contrast to the

ICTY's prosecutorial dedication to pursuing charges of sexual violence against its accused, however, the International Criminal Tribunal for Rwanda (ICTR) illustrated a significantly less gender-sensitive view of rape prosecution.

3.3 The International Criminal Tribunal for Rwanda (ICTR)

The ICTR in Rwanda, which at the time of the ICTY's ongoing trials was making considerable progress, beat the ICTY to the punch in concluding that rape constitutes not only a crime against humanity, but also genocide. In the words of Justice Richard J. Goldstone, former chief prosecutor of the ICTY and ICTR, "The statute for the Rwanda Tribunal went even further than its Yugoslavian counterpart, especially referring to 'rape, enforced prostitution and any form of indecent assault' as violations of Article 3 common to the 1949 Geneva Conventions" (2002: 279). The use of rape as an instrument of genocide was clearly illustrated in the trial of Jean-Paul Akayesu in 1998, years before Kristič's trial verified the linkage between rape and genocide. Goldstone summarizes the determination by the ICTR that:

> "Rape is a form of aggression. Rape is a violation of personal dignity," and "Rape and sexual violence constitute one of the worst ways of harming the victim as he or she suffers both bodily and mental harm"…For the first time in the history of humanitarian law, that Chamber of the Rwanda Tribunal handed down a conviction for rape as a crime against humanity, and they held further that the rapes, which had been condoned and encouraged by Akayesu, also constituted the crime of genocide. (Goldstone 2002: 277-278)

The ICTR was thus the first international tribunal to recognize and define rape as a means of perpetrating genocide (UNICTR). But the ICTR also faced the same criticisms of the ICTY in terms of its timeline. According to Doris Buss, "The Rwanda Tribunal, based in Arusha, Tanzania, has been beset by controversy over its location and slow start to prosecuting defendants" (2009: 147). Additionally, the delay in the prosecution's case against Akayseu is

concerning, and suggests that, despite knowing widespread and systematic rape had occurred in Rwanda, rape was not a priority in compiling the accused's initial indictments.

Comparing the two tribunals, the ICTY managed to produce "extensive jurisprudence on rape and sexual violence while the ICTR had a much more modest record in this regard despite the fact that, as some feminist scholars argue, atrocities in Rwanda were no less horrendous than in the former Yugoslavia and there was sufficient evidence to prosecute them" (Nelaeva 2010: 5). Nelaeva notes that the ICTR experienced a steady decline in its record of prosecuting crimes of sexual violence as the tribunal carried on; she cites that the proportion of indictments for sexual crimes fell from 100% in 1999 and 2000 to just 35% between 2001 and 2002, making the "immediate prospects of prosecution […] unfortunately fairly poor" (Nelaeva 2010: 5). Nelaeva does exclude the Akayesu trial of 1998 from these shortcomings, as it truly did constitute a landmark case for rape prosecution, but the decline in convictions for sexual violence as the tribunal continued is disappointing. Haddad (2011) also notes that the ICTR's prosecution strategy for sexual crimes was developed too late to be effective, as a sexual assault subunit within the investigative team was not formed until 3 years after the ICTR was established, was then disbanded just 4 years later in 2000, and finally reinstated in 2003 (110). Clearly, prosecuting sexual crimes was not a priority in the prosecutorial strategy of the ICTR, which resulted in "inconsistent levels of rape indictments" and an ultimately "sporadic approach to the adoption of gender-sensitive procedures" (Haddad 2011: 110).

While the ICTR's definition of genocidal rape suggested a willingness to combat impunity for Akayesu, Heidi Nichols Haddad maintains that the ICTR ultimately "failed to adequately incorporate rape into its prosecution strategy" in terms of the other cases it tried, specifically the acquittal of the charge of rape in the *Kajelijeli* case (Haddad 2011: 118).

Criticism regarding the ICTR's handling of rape, especially compared to the record of the ICTY, is merited; Haddad calculated in 2011 that while 92% of completed rape cases resulted in a successful conviction at the ICTY, the ICTR weighed in with just 25% of its completed rape cases having resulted in conviction (Haddad 2011: 117). Alarmingly, Haddad also notes the fact that rapes in Rwanda occurred on a scale 20 times larger than in Bosnia, a disparity not reflected whatsoever in the ICTR's decisions (Haddad 2011: 117). Ultimately, although the first prosecutor for the ICTR Richard Goldstone made various commitments to include sexual violence as a key component of charges, he "failed to put his words in action" according to Lombardi (2021), and the ICTR Prosecution largely failed to include charges of rape in its early indictments due to "the lack of a comprehensive prosecutorial strategy ensuring the consistent inclusion of sexual violence charges" (Lombardi 2021: 22).

The ICTR and ICTY experienced similar issues in getting defendants into custody; despite the massive number of suspects who were arrested in Rwanda for their crimes—nearly 800 suspects were arrested *daily* in August of 1994—the ICTR experienced significant issues with apprehending indicted individuals, and a lack of premises in Tanzania for the tribunal's setting created additional obstacles (Nelaeva 2010: 9). Nearly three years after the court opened, the first trial of the ICTR took place in 1997. While the ICTY had a methodology in place for investigating widespread sexual violence, the ICTR did not, and there was "no apparent commitment on the part of the tribunal to investigate rape and sexual violence even though the ICTR Statute was almost identical to that of the ICTY" (Nelaeva 2010: 9). The Chief Prosecutor was hesitant to include rape and sexual violence in investigative efforts, and instead concentrated "on genocide, murder, extermination, and torture," and there were no initial charges "of rape or sexual violence in any ICTR indictment," an ultimately disappointing pattern (Nelaeva 2010: 9).

Lombardi (2021) notes that this negative pattern was spurred by both prosecutorial and judgment chamber failures to consider the gravity and importance of rape charges, but was partially ameliorated with the creation of a sexual assaults investigative team (23); furthermore, the the prosecution of rape became a bigger priority when Goldstone's successor, Louis Arbour, began making increased efforts to include charges of rape and sexual violence in later indictments (Lombardi 2021: 23).

The fact that a tribunal that was aware of widespread sexual violence and designed to prosecute war crimes, however, fell victim to the same inconsistencies and deprioritized narrative of rape that have been maintained for centuries speaks to a much larger issue. While the traditional conception of wartime rape has long been one of inevitability and being labeled as symptomatic of war, the ICTY and ICTR gave survivors of sexual violence and rape hope that their perpetrators would be prosecuted. When the ICTR especially fell short of actualizing this hope as widely as possible, it revealed a larger, overarching problem within the methodologies of prosecuting rape.

The ICTR failed to recognize the gravity of the stigma that follows survivors of sexual violence; the shame surrounding rape, especially in cultures like that of Rwanda that emphasize purity standards for women, was used as an excuse for the lack of evidence and testimonies gathered by investigators, who claimed that in some instances, considering rape was too shameful to discuss with the affected communities, many cases were ignored and not accurately recorded (Nelaeva 2010). If it were not for international outcry and advocacy for the inclusion of rape charges, the ICTR's initial lack of "prosecutorial political will" to collect solid evidence and convict those charges with rape could have impeded or altogether destroyed the *Akayesu* decision on genocidal rape and diminished the ICTR's ability to set a precedent for the

prosecution of ordered rape (Haddad 2011). The utter lack of skills and preparation on the part of investigators in the ICTR when it came to crimes of sexual violence committed in Rwanda ultimately undermined the Tribunal's efficacy significantly. In failing to comprehensively investigate rape, the ICTR subsequently failed to comprehensively prosecute it, and returned a meager number of rape convictions compared to the ICTY due to various prosecutorial strategy shortcomings (Haddad 2011; Nelaeva 2010; Lombardi 2021).

3.4 The International Criminal Court

After the shortcomings and limited triumphs of the International Criminal Tribunals for both the former Yugoslavia and Rwanda, it became abundantly clear to other world leaders that more needed to be done to challenge the status quo of impunity for leaders in conflict. In the words of Michael P. Scharf:

> With the creation of the Yugoslavia and Rwanda Tribunals, there was hope that ad hoc tribunals would be set up for crimes against humanity elsewhere in the world. Genocidal leaders and their followers would have reason to think twice before committing atrocities. But then something known in government circles as "Tribunal Fatigue" set in. The process of reaching agreement on the tribunal's statute, electing judges, selecting a prosecutor and staff, negotiating headquarters agreements and judicial assistance pacts, and appropriating funds turned out to be too time consuming and exhausting for the members of the Security Council. It became apparent that Rwanda would be the last ad hoc tribunal. A permanent international criminal court was hailed as the solution to the problems that afflict the ad hoc approach. (Scharf 1998)

Establishing a permanent international criminal court was thought to be a more effective and quicker mechanism to prosecute instances of war crimes and genocide (Scharf 1998). Thus, the Rome Statute for an International Criminal Court was developed in 1998, and on July 17th of the same year, it was signed by 120 countries; the Rome Statute then "laid the foundation for the establishment of the International Criminal Court in 2002" in The Hague, Netherlands, with its

intended purpose being to investigate and ultimately prosecute those found guilty of war crimes (Scharf 1998).

Within the jurisdiction of the ICC are crimes of war, genocide, and crimes against humanity (ICRC 2015). Rape is included in all three of these categorizations, as it 1) constitutes a violation of human dignity under the broader umbrella of war crimes; 2) was previously recognized as an intentional instrument of genocide (in reference to Akayesu's trial in 1998); and 3) can be labeled a crime against humanity when "committed as part of a widespread or systematic attack directed against any civilian population" (ICRC 2015). The Rome Statute is significant for its efforts to consider sexual violence under its jurisdiction; it was the first international criminal law mechanism to recognize forms of sexual violence (including rape, sexual slavery, enforced prostitution, and enforced sterilization) as distinct war crimes (ICRC 2015).

Although the perceived need for a permanent international tribunal was born from dissatisfaction with the ICTY and ICTR's slow-moving timeline, the ICC fell victim to this issue as well. The first ICC case to end in a conviction for rape on the basis of command responsibility, for example, did not occur until March of 2016 in the trial of former DRC vice-president, Jean-Pierre Bemba Gombo, and the ICC dealt with significant difficulties in getting indicted individuals into custody in a timely fashion (Clark 2016). Despite its inefficiency in prosecuting the accused, the prosecution and conviction of Bemba remains a landmark case in the ICC's record of convicting rape. Janine Clark notes that Bemba's trial was significant for two key reasons: firstly, that Bemba was "the first ICC defendant to be convicted on the basis of command responsibility" (though the ICTY held defendants accountable for this in the case of

Sainović et al. in 2014), and secondly, that Bemba's was the first ICC case "to end in a conviction for rape" (2016: 3).

Additionally, Broache and Kore (2023) find that the ICC has had negligible, and even negative, effects on the occurrence of conflict-related sexual violence. The authors note that as of 1 July 2022, the ICC has charged 21 individuals for sexual violence crimes (of 41 persons charged for substantive crimes) across eight of nine 'situations' in which it has issued public arrest warrants or summonses (Broache & Kore 2023: 81); but five acquittals, five cases involving dismissed charges of sexual violence before or during trial, and six accused individuals at large detract significantly from the ICC's minimal record of successfully prosecuting sexual violence, and dilute the Court's message of challenged impunity (Broache & Kore 2023: 81).

Despite evidence that ICC investigations have contributed to improved human rights practices and have reduced general levels of violence against civilians, ICC trials have proven to be negligible in reducing conflict-related sexual violence as committed by both state and rebel forces (Broache & Kore 2023; Binningsbø and Nordås 2022). These findings are discouraging, as the ICC should ostensibly provide a clear message of zero-tolerance that contributes to deterrence, but they also call for a closer analysis of actions undertaken by ICC member states and non-member states to respond to wartime rape and sexual violence, as the Court and these states must cooperate to challenge conflict-related sexual violence impunity and effect justice. By committing to the International Criminal Court's nature of complementarity and promulgating the Rome Statute into domestic laws, state may have an improved chance of signaling costs and punishments to low- and mid-ranking combatants and subsequently deterring the use of sexual violence; the Democratic Republic of the Congo, for example, recently promulgated aspects of the Rome Statute into its domestic laws with varied success following

ICC intervention and prosecutions. The willingness of some ICC member states to contribute to and bolster the precedents set by the Court is therefore crucial to sexual violence deterrence.

Chapter 4: The ICC in the Democratic Republic of the Congo

4.1 Background on Sexual Violence in the DRC

Scores of feminist scholars, foreign policy professionals, and human rights organizations understand the Democratic Republic of the Congo to be the *rape capital of the world,* citing the DRC's military instability and near-constant state of conflict since 1994 as avenues of perpetuating the sexual and gender-based violence (SGBV) often wielded against civilian populations (Kelly 2010). While this characterization of the DRC may not necessarily be true and may instead be a sensationalized description of the violence witnessed in the state, the widely used moniker does manage to succeed in drawing international attention to the systematic rapes that occurred there (Bihamba 2017).

The DRC's two civil wars (initiated in 1996 and 1998, respectively) led to the genesis and mobilization of numerous rebel militia organizations, many of which enacted their agendas through various tactics of sexual violence. The First Congo War beginning in 1996 saw the invasion of then-Zaïre by Rwanda, which drew in other neighboring countries including Uganda, Angola, and Zambia and ended with the ousting of dictator Mobutu Sese Seko by rebel leader Laurent Kabila (Concern Worldwide 2020). After Zaïre was renamed the Democratic Republic of the Congo in 1997 by Kabila, the years 1998 to 2003 witnessed the second installment of the Congo War, which began with a Tutsi-minority rebellion in eastern DRC and was fueled by tensions between the DRC and Rwanda (Concern Worldwide 2020).

Indeed, the influx of Hutu rebel groups in Eastern DRC following President Kagame's 1994 takeover of Rwanda may have catalyzed the widespread sexual violence that persists in the state today, but these Hutu extremists cannot be the sole explanation for the climbing rates of SGBV in the DRC beginning in 1994. The political turmoil experienced in the DRC since then has engendered the creation of several rebel militias groups, as well as revealed significant cracks in the integrity of the DRC's Armed Forces (FARDC), both of which contributed to the frequency and normalization of conflict-related SGBV in the DRC over the past two decades.

Whether DRC-based conflicts during these wars were resource-related, driven by government mutiny efforts, or born from ethnic tensions, rape and weaponized sexual violence were among the most prevalent tactics used by rebel militia groups to enforce territorial dominance and social control; between the years 1993 and 2000, sexual violence that constituted major human rights abuses occurred daily and widely (UNHR 2009). Jocelyn Kelly describes the DRC as existing "in a theater of impunity," with more than twenty armed groups operating in a "shifting landscape of motivations and alliances" and using increasingly brutal forms of SGBV for strategic and opportunistic purposes (Kelly 2010). In the strategic sense, SGBV can be used as a means of punishing populations through intentional attacks with lasting effects, such as intentional HIV/AIDS transmission and forcible impregnation (Kelly 2010; Maedl 2011). Kelly also notes that in a 2007 survey in Eastern DRC, more than 80% of female interviewees reported their attacker as being uniformed, over two-thirds reported being gang-raped, and nearly half reported abduction, pointing to "the highly militarized forms of rape in DRC," and "suggesting that understandings of why SGBV occurs there are incomplete without fuller insight into the experiences and attitudes of the combatants themselves" (Kelly 2010).

4.2 The Mai Mai Sheka: Attitudes toward Women and Rape in the DRC

The attitudes toward women—and toward rape in general—instilled in combatants within a rebel group are crucial to understanding their willingness to rape. Some combatants raped as a result of the explicit support of their commanders to take women as "a spoil of war," some raped out of lust, opportunity, or the sense of entitlement endowed to them by their guns and uniforms, and others committed SGBV after explicit commands to do so. Speaking to the latter, The Mai Mai Sheka militia acted under Commander Sheka's leadership along with the Democratic Forces for the Liberation of Rwanda to systematically gang rape 387 civilians over three days in a Walikale territory (HRW 2020, Autesserre 2012). In the words of Séverine Autesserre:

> Sheka ordered his soldiers to systematically rape women, instead of just looting and beating people as they usually do, because he wanted to draw attention to his armed group and to be invited to the negotiating table. He knew that using sexual violence was the best way to reach this goal, because it would draw the attention of the international community, and various states and advocacy groups would put pressure on the Congolese government to negotiate with him—which is exactly what happened. Unfortunately, many other rebel leaders have used the same reasoning as Sheka and humanitarian organizations have observed an increase in the use of sexual violence by armed groups that have political claims. (Autesserre 2012: 217)

Autesserre notes that Sheka's use of rape as a means of gaining attention and leverage was unfortunately effective, but this example also places a political value on weaponized rape that is rarely discussed and quickly deepening (Autesserre 2012). It reflects an evolution of wartime rape from a tactic of inspiring chaos and terror into a means of manipulating international attention and forcing the state to bend to the will of rebel groups. This once again reinforces the idea that soldiers are encouraged to violate victims and use them as pawns in a greater political scheme, and whether these individuals' bodies are being used as currency or as an outlet for

performative sexual violence, the combatants enacting this SGBV are doing so in a bubble of impunity that may augment their willingness to violate individuals sexually.

The Mai Mai is infamous in the DRC for its combatants' practice of widespread rape and sexual violence, but as with all instances of conflict-related SGBV, there is great variation across and within rebel groups in their particular motivations for committing sexual violence. Kelly distinguishes two main motivations for Mai Mai combatants to engage in SGBV: 1) women are viewed as a "spoil of war" in the Mai Mai military ideology, and are often abducted and given as rewards at the request of high-ranking officers; and 2) individual motivations, like a combatant seeing and raping a woman simply because he found her desirable and felt that he was entitled to her sexually (Kelly 2010). The primary motivation to carry out these strategic kidnappings and sexual violations comes from Sheka's explicit orders—but this motivation to follow commands to commit sexual violence begets the secondary motivation for SGBV: opportunity. In ordering his combatants to weaponize sexual violence, Sheka also effectively gives them permission to do so opportunistically and on their own accord; rape is thus positioned as both explicitly and implicitly encouraged within the Mai Mai ranks.

In her analysis of the connection between SGBV and mental and physical health in the Eastern Democratic Republic of the Congo, Kirsten Johnson notes that out of nearly 1,000 interviewed households, 39.7% of women and 23.6% of men reported being exposed to sexual violence; of those who were exposed to SGBV, 74.3% and 64.5% of women and men respectively reported the sexual violence to be conflict-associated (Johnson 2010). Johnson found the following six groups to be among the most active perpetrators of abuse in Eastern DRC: the Mai-Mai; the FDLR (Democratic Forces for the Liberation of Rwanda); the FNI (Nationalist and Integrationist Front); the MLC (Movement for the Liberation of the Congo); the

Interahamwe (including Hutu extremists that fled from Rwanda); and the UPC (Patriotic Union of Congolese) (Johnson 2010). Out of the 998 households that experienced a human rights violation, including rape and SGBV, the Mai-Mai, UPC, FDLR, and FNI represented the highest numbers in terms of prevalence of perpetration (18.4%, 13.5%, 11.3%, and 10.3%, respectively). Of those households in which women specifically experienced a violation, 30.2% of female respondents reported experiencing a violation of a sexual nature involving their forcible participation in a sexual act; the predominant perpetrators of female-directed SGBV came from the Mai-Mai, FDLR, and FNI groups, which collectively comprised nearly a quarter of these violations (Johnson 2010).

But even state-sponsored organizations such as the FARDC participated in committing crimes sexual violence against civilian populations, and their willingness to do so was likely increased by the DRC's tradition of SGBV criminal impunity. The United Nations Joint Human Rights Office notes that of the 4,032 human rights violations committed by State agents between March 1993 and June 2003 in the DRC, only 231 cases have seen the conviction of these agents (UNHR Office 2009).

Margaret Ashiru explains that SGBV perpetrators in certain armed combatant groups in DRC are not represented in these documented figures as they have historically been granted statutory limitations, amnesty, or pardons; armed combatant groups who committed sexual crimes "were often beneficiaries of amnesty or integrated into the FARDC," and rarely faced punishments (Ashiru 2020). In her words:

> Knowing that they would not be prosecuted but would be granted amnesty or integrated by the DRC government into the DRC's national armed forces (that is, the FARDC), the perpetrators of crimes relating to SGBV were not deterred from committing these crimes. Also, at the international level, the DRC government was reluctant to assist the ICC with the arrest of members of armed combatant groups once it thought that it could enter into peace

> deals with these groups, although the government did self-refer certain cases to the ICC. (Ashiru 2020: 490)

Evidently, the DRC faced—and continues to face—an issue of longstanding impunity in regard to cases of sexual violence, which engenders an ultimate failure to significantly deter SGBV. Indeed, the findings of Binningsbø and Nordås suggest that an increased number of amnesties is associated with increased likelihood of sexual violence, essentially signaling impunity to both individuals who have been granted amnesties as well as to other individuals in their ranks who see this as tacit tolerance of wartime rape (2022: 1074). Evidently, the promulgation of the Rome Statute into domestic laws of member states, including laws to limit or altogether prohibit the granting of amnesties, is crucial to bolstering the deterrent effect of the ICC Statute.

4.3 DRC Laws and Domestic Military Courts

Despite nearly two decades of ICC membership, the Democratic Republic of the Congo did not take action immediately following its 2002 ratification of the Rome Statute, and only in 2006 did military judges in the DRC start slowly applying Rome Statue provisions to trials in order to fill gaps in existing domestic laws and more comprehensively define war crimes; steps taken to promulgate the Statute into domestic laws in the DRC did not begin until December 31st, 2015 (Ashiru 2020). Dancy and Montal note that President Kabila initiated this ICC investigation and promulgated aspects of the Rome Statute into domestic laws in 2003 as a "fig leaf" intended to respond to activists' pressures and "to demonstrate the government's willingness to abide by human rights laws," all while his government did not necessarily have the intention to abide by such laws (2017: 699). Instead, this ICC referral was a way for Kabila to neutralize political opponents under the guise of being committed to justice (Dancy & Montal 2017).

The lengthy promulgation of the Rome Statute ended with the publishing of the Statute in the DRC's Official Journal, which permitted "consistency in the application of the law relating to international crimes which are within the ICC's jurisdiction by the DRC's courts," signaling a marked, albeit late, shift in the DRC government's willingness to prosecute crimes, especially crimes of SGBV (Ashiru 2020). Laws 15/022, 15/023, and 15/024, published in February of 2016 and effective as of March 2016, contributed significantly to the reconceptualization of crimes against humanity, the reformation of military penal code, and the growing pushback against the long-endowed impunity of perpetrators of SGBV in the DRC; the laws' records of implementation, however, stand in stark contrast, and speak to the performative nature of Kabila's reforms.

4.3.1 Law 15/022

The DRC's Law 15/022 repeals the article of the military penal code that had previously given exclusive jurisdiction to military courts over the international crimes of genocide, crimes against humanity, and war crimes, including crimes of SGBV (Ashiru 2020). One of the ways in which Law 15/022 intends to combat the record of impunity for sexual crimes is its elimination of the possibility for perpetrators to obtain statutory limitations, amnesty, and pardon—the law prohibits the granting of such immunities to those who have committed war crimes, crimes of genocide, or crimes against humanity (Ashiru 2020, ICRC 2015). The findings of Binningsbø and Nordås (2022) are especially salient here, as the removal of amnesty possibilities for perpetrators could dramatically reverse domestic notions of wartime rape impunity and succeed in communicating the costs of engaging in sexual violence to a wider range of low- and mid-level combatants. In addition to cutting off avenues of immunity to perpetrators, Law 15/022 also

introduced Title IX (Crimes against Peace and Security of Humanity) to the Criminal Code, and amended its definitions of crimes against humanity, war crimes, and genocide—the United Nations' "three core international crimes"—to align with those of the Rome Statute (ICRC 2015; UNHR Office 2016).

The Law 15/022 aligns definitions of these three core crimes closer to those of the ICC in Articles 221 – 223; Article 222 lists rape, sexual slavery, enforced prostitution, and forced pregnancy as crimes against humanity, and Article 223 qualifies the same crimes as war crimes, as well as adding the offenses of forced sterilization and sexual attacks that constitute a breach of the Geneva Conventions (La Loi 15/022). It also directs domestic courts in the DRC to refer to the Elements of Crimes to interpret and apply the law, holding *individuals* criminally liable for the perpetration of genocide, crimes against humanity, and war crimes, and, significantly, also holding *commanders* to a standard of accountability; as stated in Law 15/022:

1. Regarding the relationship between non-military superiors and their subordinates, the superior shall be criminally responsible for crimes under articles 221 to 223 of this Penal Code for crimes committed by subordinates under his or her effective authority and control, when he did not exercise control properly over such subordinates, in situations where:
    1. the superior knew that the subordinates were committing or about to commit such crimes; or – has deliberately disregarded information which clearly indicated the plan to commit such crimes or the commission of the crime.
    2. These crimes were related to activities under the superior's responsibility and effective control.
    3. The superior failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the crime or to refer the matter to competent authorities for investigation and prosecution. (Article 22*bis* of Law No 15/022; ICRC 2015)

Article 27 of the Rome Statute states that it shall apply "equally to all persons without any distinction based on official capacity," including members of parliament, government officials and leaders, and elected representatives (ICRC 2015). Ashiru notes that the trial of Frederic Batumik, a Member of Parliament in South Kivu who was one of eleven perpetrators convicted

for the rape of 40 young girls, is especially significant considering the military court referred to Article 27 as prevailing over the defense's argument that Batumik's capacity as a member of parliament granted him immunity (Ashiru 2020). Instead of relying on the narrative of perpetrator impunity and politically endowed immunity, the decision of the court to side with the Rome Statute's interpretation of the law heralded a new era of nondiscriminatory accountability for perpetrators.

But Batumik's outcome within the *Kavumu* case seems to be the exception and not the rule; Ashiru observes that most officers of the FARDC and the PNC were never prosecuted by military courts due to their military status and its accompanying esteem (Ashiru 2020). Reluctance to prosecute warlords who have sanctioned sexual violence and combatants who have committed it impedes progress in rectifying the current culture of impunity; essentially, it sets the precedent that military service is a justification for sexual violence, detracting from deterrence efforts and obstructing the DRC's progress in prosecuting human rights violations.

4.3.2 Law 15/023

Law 15/022 was then further reinforced by Law 15/023, which modified the DRC's Military Penal Code, made the Title IX provisions of Law 15/022 applicable to military jurisdictions, and eliminated the conflation of crimes against humanity with war crimes that existed in the previous version of the Military Penal Code (CMN). Primarily, it abolished the previous Law 024/2002 of the Military Penal Code, and repealed Article 207 within in; Article 207 recognized military courts as holding exclusive jurisdiction to try the three major international crimes of genocide, crimes against humanity, and war crimes, but its repeal allowed ordinary, non-military courts to try these crimes (CMN, Ashiru 2020). In delineating between war crimes and crimes against

humanity, aligning the language of its laws according to the Rome Statute, and diminishing the jurisdiction of biased military courts, Law 15/023 seems as though it would encourage the swift and comprehensive prosecution of perpetrators of sexual crimes. In reality, however, the number of convictions for conflict-related SGBV committed by state agents, militia leaders, and combatants still remains quite low in the DRC, with the United Nations Joint Human Rights Office citing the country's "fragile" legal framework and the lack of judicial independence and resources as major challenges to holding perpetrators accountable (UNHR Office 2016).

4.3.3 Law 15/024

Finally, Law 15/024 provides for the primacy of the DRC's national courts over the ICC regarding crimes within the ICC's jurisdiction, the self-referral of situations to the ICC by the President of the DRC, and the rights and protection of the accused and victims alike (Ashiru 2020). Neither the concept nor the promulgation of the ICC's complementarity is novel, but the addition of protection measures for witnesses, victims, and intermediaries alike in the DRC initially appeared significant. The application of these provisions for witness/victim protection, however, tells a more pessimistic story: although Law 15/024 provides for enhanced protective measures for victims and witnesses, such as assessments of victims' perceived vulnerability and willingness to testify, it has failed to prevent warlords from engaging in witness intimidation in order to remain unaccountable (Ashiru 2020).

As chronicled by Human Rights Watch, the trial of Ntabo Ntaberi Sheka, commander of the Mai Mai militia known as the Nduma Defense of Congo (NDC), exposed major cracks in the DRC's military justice system. A warrant for Sheka's arrest was issued in 2011 when he was charged with responsibility for a massive, three-day-long rape spree in Walikale territory, but he

remained at large until his surrender in July of 2017 (HRW 2017). Furthermore, the case overseen by the Military Court in Goma, North Kivu was complicated by the task of locating survivors—more importantly, locating survivors who were able and willing to testify (HRW 2020); considering the investigation operated in a zone of active conflict, rape victims were reluctant to testify as they were often threatened with death for breaking their silence, and the fact that medical certificates confirming instances of rape either disappeared or were intentionally damaged illustrates that rebel militia groups of the DRC, such as the Mai Mai Sheka, were and still continue to be willing to go to extreme lengths to ensure their impunity and lack of accountability (HRW 2020, HRW 2017).

While the witness and victim protection measures introduced to the DRC's Official Journal in Law 15/024 may have symbolized a marked change in attitudes toward impunity, they continue to be just that: symbolic. Military justice officials' lacking framework for ensuring the safety of victims during investigations happening concurrently in conflict, and especially their unpreparedness to approach threats of death against victims and gauge the vulnerability of groups like female survivors of sexual violence, ultimately curtailed the process of achieving justice for victims and allowed Sheka to evade total accountability—it was not feasible for all 387 rape survivors from that three-day rebel spree of violence to testify against the combatants who violated them, but their experiences nonetheless demand justice (HRW 2015).

4.4 The Shortcomings of Laws 15/022-024

The promulgation of Laws 15/022, 15/023, and 15/024 represented a shift in DRC criminal justice ideology to align more closely with the language and protocol of the Rome Statute, but shortcomings in the application of the laws simultaneously undermined the integrity

of the DRC's judicial system and obstructed the path of legal justice. Although Laws 15/022 and 15/023 prescribed commander accountability for combatant-led crimes, many perpetrators of SGBV in the Democratic Republic of the Congo remain at large and unaccountable; additionally, the provisions of Law 15/022 and Law 15/023 beg the question whether the DRC's ordinary or civilian courts are prepared to handle cases of international crimes of genocide, crimes against humanity, and war crimes after an era of the military courts' exclusive jurisdiction over such crimes. The removal of statutory limitations and elimination of the possibility of amnesty or pardon for perpetrators are promising: however, these have yet to be applied consistently and indiscriminately.

The application of Law 15/024 regarding the investigation of Mai Mai Sheka crimes of sexual violence revealed gaps in the DRC's military justice framework, as well as an overall unpreparedness to address the threats, destruction of evidence, and strong organizational networks protecting warlords and combatants guilty of sexual crimes. Still, some scholars adamantly make the case to support prosecution of SGBV by military courts in the DRC as opposed to referring cases to the ICC. Ashiru posits that the willingness of victims testifying in their home areas is precarious enough, let alone after transportation to the ICC at The Hague, and that ultimately:

> Prosecuting cases in the locations where the crimes occurred and conducting trials in the villages where the victims reside has been more beneficial to the victims than taking the case to the seat of the ICC at The Hague. Victims are more comfortable with proceedings in their home areas as they are less formal and not as complex as ICC cases. The duration of cases in the DRC, once the prosecution is ready for trial, is short compared to the ICC… Cases tried by the ICC, on the other hand, are prolonged by complex logistical problems. (Ashiru 2020: 503)

She maintains, however, that the efficacy of military courts in the DRC after the promulgation of the Rome Statute relies on assistance from non-governmental organizations such as Trial International, and, importantly, ICC complementarity (Ashiru 2020). The quality of comfort and safety for testifying victims will inherently engender wider willingness to testify; considering the obstacles to justice faced in the trial of Sheka, the augmentation of witness/victim protection measures and the instatement of experienced investigators who understand evidence collection protocol for SGBV crimes seem to be necessary steps to achieving comprehensive justice for victims.

4.5 ICC Cases and Investigations in the DRC

The late promulgation of the Rome Statute in the DRC does not mean, however, that ICC intervention was underutilized in the DRC's first decade of ICC membership; the case of Bosco Ntaganda, which began with a 2004 referral by the DRC government to the ICC and ended with his confirmed sentence and conviction in 2021, illustrates the how the ICC's involvement can be ultimately effective, but is a lengthy process significantly hindered by the ICC's incapacity to swiftly get perpetrators into custody (ICC *Ntaganda*: 2021).

The first two warrants of arrest for Bosco Ntaganda were issued by the ICC in August 2006 and April 2008 respectively—the second warrant for his arrest was not issued until July of 2012—and finally, in March of 2013, he voluntarily surrendered to ICC custody (ICC *Ntaganda*: 2021). In terms of setting a precedent that challenges impunity, the ICC clearly displayed a lack of enforcement power in getting individuals into custody, thereby prolonging impunity. The former commander of the Forces Patriotiques pour la Libération du Congo (FPLC) was charged with13 counts of war crimes and five counts of crimes against humanity committed between

2002 and 2003, and he would later be convicted on 18 total counts; importantly, he was convicted of rape as both a war crime and a crime against humanity (ICC *Ntaganda*: 2021). The case of Bosco Ntaganda, however, remains one of the few examples of successfully secured convictions for sexual crimes including rape within the ICC.

The ICC's records of conviction and sentencing for perpetrators of sexual crimes including rape in the Democratic Republic of the Congo are a mixed bag of solid convictions that could deter sexual violence and acquittals that often endorse impunity. The first major issue reflected by the ICC's history with the DRC is that of getting perpetrators into custody; the DRC has seen six total cases by the ICC (five of which include charges of rape as either a war crime or a crime against humanity), with seven warrants for arrest issued for seven individuals. Despite the court's success in the sentencing of the Ntaganda case, Bosco Ntaganda evaded custody following his first warrant of arrest for more than six years before surrendering voluntarily to the ICC, and Sylvestre Mudacumura has managed to evade accountability for over a decade since his initial warrant of arrest in 2012 (ICC *Ntaganda* 2021; ICC *Mudacumura* 2021). This could signal that the ICC lacks the capacity to ensure that arrests made by the court will come to fruition and engender diminished impunity; as noted earlier, many of the perpetrators of sexual crimes in the DRC, whether they be commanders, warlords, or combatants, will remain at large and wholly unaccountable as long as they evade ICC custody. The potential for warlords to threaten witnesses and victims into submission also ensures their impunity, as these threats are incredibly effective at rendering victims silent and thereby preventing the act of testimony and, ultimately, conviction, as was seen in the case against Sheka.

Secondly, charges of rape as a crime against humanity or a war crime are often acquitted by the ICC. Germain Katanga, who played a significant role in commissioning the Forces de Résistance Patriotique d'Ituri (FRPI) to commit crimes of murder, civilian attacks, pillaging, property destruction, and rape in the village of Bogoro in February 2003, was tried for his role as the leader of the rebel group; while he was found guilty as an accessory of one count of crime against humanity (being murder) and four counts of war crimes (murder, attacking civilians, destruction of property, and pillaging), the Trial Chamber acquitted him of charges of rape and sexual slavery as a crime against humanity, stating the following:

> The Chamber found that there was evidence beyond reasonable doubt that the crimes of rape and sexual slavery were committed … However, the Chamber concluded that the evidence presented in support of the accused's guilt did not satisfy it beyond reasonable doubt of the accused's responsibility for these crimes. (ICC *Katanga* 2021)

Additionally, in the case of Mathieu Ngudjolo Chui (whose case was joined with that of Katanga's as they concerned the same Bogoro attack in February 2023), the defendant was charged with crimes against humanity and war crimes including rape and sexual slavery which he committed "through other persons" given his capacity as a senior commander during the spree of violence (ICC *Chui* 2015). It was alleged that he encouraged his soldiers to be reckless and violent, and yet, in one of the more disappointing ICC decisions to date, he was acquitted in 2012 on all charges due to insufficient evidence of his direct involvement, which speaks to the sometimes-unattainable evidentiary standard required to convict an individual on charges of rape that show command responsibility (HRW 2012).

Callixte Mbarushimana's case is the only one of the ICC cases in DRC to fail to make it to trial; Mbarushimana, the alleged executive secretary of the FDLR of Rwanda, was charged with five counts of crimes against humanity and eight counts of war crimes, both including rape

as a distinct crime, committed by combatants under his command (Coalition for ICC 2011). Although Pre-Trial Chamber I found sufficient grounds for the occurrence of war crimes committed by the FDLR troops, the prosecution failed to provide evidence sufficient to commit Mburashimana to trial, and the significance of his role as an organizer within the FDLR was debated (Coalition for ICC 2011). Because the majority did not understand the attacks to be a direct result of Mburashimana's "organizational policy," the prosecution effectively lost an opportunity to address impunity. It failed to prove whether or not Mburashimana commissioned the crimes of his combatants, thus allowing a military official connected to a conflict with approximately 7,000 cases of rape to walk freely. Mburashimana's acquittal and subsequent release in December 2011 speak to the ultimate unpreparedness of the Office of the Prosecutor in dealing with issues of commander liability, and as such, posits that perhaps military courts would be better equipped to try crimes against humanity and war crimes committed during conflict.

To summarize, out of the five perpetrators charged by the ICC for crimes of sexual violence in the DRC, only Ntaganda was convicted on charges of rape and sexual slavery as both crimes against humanity and war crimes (ICC *Ntaganda* 2021). Katanga's charges of rape in Bogoro village were acquitted due to insufficient evidence of his responsibility for such crimes, and he received just a 12-year sentence for murder, civilian attacks, destruction of property, and pillaging (ICC *Katanga* 2021); Chui was acquitted on all charges (ICC *Chui* 2015). Mburashimana's case was never committed to trial, and Mudacumura continues to remain at large, going on 11 years of ICC custody evasion (ICC *Mudacumura* 2021).

Evidently, ICC action in the DRC was complicated by the Court's lacking enforcement powers when it came to the celerity of procedures and getting the accused into custody—

perpetrators such as Mudacumura that remain at large significantly dilute efforts by the ICC to send a message of countered impunity. The Court's prosecutorial and investigative strategies also proved to be underprepared to deal with the threats of warlords who were keen to destroy evidence and keep survivors and witnesses silent, which significantly undermined the collection of evidence proving rape in the Katanga case and led to the acquittal of the defendant's rape charge, as well as produced insufficient evidence that precluded the case of Mburashimana from going to trial. Furthermore, Kabila's performative promulgation of the Rome Statute into the DRC's domestic laws has revealed significant gaps in the DRC's judiciary and prosecutorial strategies, and disappointing aspects of the laws' implementations did not signal a true commitment to the tenets of the Statute. ICC prosecutions in the Democratic Republic of the Congo have led to the increase of human rights cases tried domestically, according to Dancy and Montal (2017), but ICC action itself has produced a weak contribution to challenged impunity, and the case of Bosco Ntaganda remains the sole successful prosecution of rape by the Court in the DRC.

Chapter 5: The Special Court for Sierra Leone

5.1 Introduction to Sierra Leone

When the Revolutionary United Front, or RUF, crossed into Sierra Leone from Liberia and attacked the town of Bomaru in the Kailahun District on March 23, 1991, few imagined that this invasion would kickstart a decade-long civil war or lead to some of the most grotesque human rights abuses in recent history. The initial goal of the RUF under the leadership of Foday Sankoh was to overthrow the government of President Joseph Momah, but the allure of diamond-rich

territory control quickly became an additional primary goal of the RUF (Momodu 2017). With the support of Charles Taylor's Liberian rebel group, the National Patriotic Front of Liberia (NFPL), the RUF was able to take over the diamond-rich territories of eastern and southern Sierra Leone during its first year of conflict, but in these territories, chaos ran rampant. Murder, looting, pillaging, forced marriage, and of course, the widespread rape of women and girls characterized the RUF, and SLA soldiers who were underwhelmed by Momah's administration would eventually join the rebel group, committing crimes against humanity and war crimes for the sake of the RUF organization, but primarily for the promise of payment.

It is important to note here that many soldiers in the SLA, the national Army of Sierra Leone, were extremely dissatisfied with the state of Momah's administration, namely with soldiers' lacking salaries. Because the Sierra Leone economy is tied so closely to its resources, "blood diamonds" mined by slave labor were a primary means of garnering profit to pay soldiers, but the RUF control of these diamond-rich territories made it even more difficult for SLA troops to be compensated appropriately; due to the widespread discontent among the ranks of the SLA, many soldiers began vacating the SLA in order to join the more lucrative rebel operations occurring in the eastern and southern territories, bolstering groups like the RUF in order to share a part in the diamond control (Momodu 2017). SLA soldiers-turned-rebels began participating in RUF looting sprees, and they later began engaging in sprees of their own, all of which perpetuated violence within their ranks and within their territories; but SLA soldiers and RUF rebels were not the sole perpetrators of crimes against humanity and war crimes in Sierra Leone.

When the Armed Forces Revolutionary Council (AFRC), comprised of ex-junior SLA officers, joined forces with the RUF to overtake the Sierra Leone government in 1997, AFRC leader Johnny Paul Koroma and Foday Sankoh's respective militias worked concurrently to

commit grave human rights abuses upon civilian populations, including brutal rapes, sexual slavery, and forced marriages (RSCSL 2023). The Civil Defense Forces (CDF) were also party to the civil war in Sierra Leone; made up of government-supported civilian militias and the Kamajors, a traditional hunting society that was initially effective in using guerrilla warfare to push looting RUF and SLA rebels out of villages, CDF combatants also participated in the sexual violence committed during the conflict (Oosterveld 2009). Ultimately, reports of rape and sexual violence were reported as being "committed by all parties to the conflict," and between 215,000 and 275,000 women and girls are estimated to have been victims of sexual violence crimes during the civil war (Oosterveld 2009). Additionally, the Sierra Leone Truth and Reconciliation Commission confirmed that these crimes were an integral part of the strategies enacted by all sides party to the conflict, noting that combatants deliberately targeted women and girls believed to have associations with enemy forces in order to violate and punish them (Darcy 2010).

Sexual crimes in Sierra Leone, however, were not simply limited to the opportunistic, penetrative rapes that come to mind as typical and occurring on a broadened scale during rebel-led conflicts. Valerie Oosterveld notes that Sierra Leonian women and girls "were often targeted for gender-based violence, including vaginal and anal single and multiple rapes, rapes with weapons, sticks, burning wood, and hot oil, sexual mutilation, forced pregnancies, forced abortions or miscarriages, sexual slavery, and abduction followed by forced marriage," crimes which comprise a rebel agenda that relies on gender-based sexual attacks and the targeting of women (Oosterveld 2009). While these crimes committed during Sierra Leone's civil war were undoubtedly widespread and systematic in inflicting an agenda of gender-based terrorization and violation upon civilians, and thus constituted crimes against humanity as well as outrages upon human dignity in violation of the Geneva Conventions, the judgments of Sierra Leone's Special

Court left much to be desired in terms of directly addressing and holding perpetrators accountable for such crimes of sexual and gender-based violence.

5.2 Establishing the Special Court for Sierra Leone

The conflict in Sierra Leone formally came to an end in 2002, at which point the country's domestic justice system was becoming increasingly aware of its incapacity to try such a large and varied group of perpetrators—President Kabbah issued a request to the United Nations the same year, and an agreement between the two resulted in the establishment of the Special Court for Sierra Leone, or SCSL, on 16 January, 2002 (HRW 2012, Jalloh 2011). The bilateral agreement between Kabbah and the United Nations "set out the legal framework for a mixed court, featuring both local and international elements, while attempting to account for some of the experiences of the ad hoc International Criminal Tribunals of the former Yugoslavia and Rwanda" and remaining independent of both Sierra Leonean courts and the UN (Jalloh 2011). Additionally, in accordance with Ashiru's argument that posits the increased comfort and willingness of witnesses and victims associated with testifying locally as opposed to testifying at the Hague, Charles Jalloh notes that the Special Court for Sierra Leone was significant in that it was not "geographically divorced" from the location of the crimes committed unlike the ICTY and ICTR before it—operating from within the so-called "theater of conflict" did possibly allow for judgments to be more regionally and culturally specific to Sierra Leone and for the augmented participation of victims and witnesses (Jalloh 2011). The choice of location for the Court in Freetown presented setbacks, however, as Jalloh cites the lack of infrastructure, including electricity, phones, and running water, in the war-stricken capital as hindering legal processes as a whole in Sierra Leone.

The Special Court's nascent years were unfortunately characterized and complicated by financial rockiness—considering the Court was not given Article VII status under the Rome Statute, funding and compliance with its rulings mandatory as a UN Security Council instrument were not a possibility, and the Court had to rely exclusively on voluntary donations from UN member states (Gberie 2014; HRW 2005; Jalloh 2011). The Court itself cost 3.5 million US dollars to be constructed, and its lengthy duration augmented costs for Sierra Leone significantly (Gberie 2014); initially intended to last only 3 years on a budget of $75 million, the Court remained open for over eleven years until its formal closing in December of 2013, and cost in total approximately $300 million (Gberie 2014). Between 2004 and 2005, Human Rights Watch reported that funding shortages in the Special Court were responsible for a lack of protection measures for witnesses post-testimony and the postponement and prolongment of other "post completion" Court activities—additionally, the Court designated roughly 70 percent of its budget to the salaries and bonuses of the Court's permanent staff, resulting in a massively expensive operation of which the outcomes did not live up to the cost (HRW 2004; HRW 2005).

5.3 The Rome Statute's Role in the RSCSL

The RUF, the Armed Forces Revolutionary Council (AFRC), and the Civil Defense Forces (CDF) were the largest actors in the Sierra Leonian civil war, and cases tried by the Special Court were grouped according to these organizations (Oosterveld 2009; HRW 2012). The organizations themselves, however, were never formally indicted (Jalloh 2011). The Court announced its first indictments in 2003 against eight individuals: Foday Saybana Sankoh, Issa Hassan Sesay, Sam Bockarie, and Morris Kallon of the RUF, senior leaders Johnny Paul Koroma, Alex Tamba Brima, and Ibrahim (Brima) Bazzy Kamara of the AFRC, and Sam Hinga

Norman of the CDF—Charles Taylor was also indicted under seal, but because he was exiled in Nigeria, the Appeals Chamber had to rule that he was subject to criminal proceedings before the Special Court for Sierra Leone, and Taylor's challenged his indictment claiming lack of jurisdiction due to sovereign immunity and extra-territoriality, which prolonged his trial (Oosterveld 2012). Further indicted in the months following were Augustine Gbao of the RUF, Moinina Fodana and Allieu Kondewa of the CDF, and Santigie Borbor Kanu "Five-Five" of the AFRC (RSCSL 2023).

Despite having signed the Rome Statute in October 1998 and ratified it in September 2000, Sierra Leone did not rely on the International Criminal Court specifically for the prosecution of perpetrators—rather, the Special Court partially relied on the ICC's Elements of Crimes document to gauge defendants' accountability. The crimes of sexual slavery and forced marriage under the broader umbrella category of sexual violence and as crimes against humanity are arguably two of the most significant crimes covered by the Special Court, and the crimes' introduction to the Court initially sparked hope for the diminishment of impunity for rape in the context of sexual enslavement. The Special Court adopted legal conceptualizations of sexual slavery along the lines of those in the ICC's Elements of Crimes (Oosterveld 2009). Additionally, the SCSL's Statute "was drafted drawing both from ICTY and ICTR jurisprudence" regarding rape and sexual violence, as well as drawing from the ICC Statute (Frulli 2008). The resulting decisions of these Special Court cases, however, contributed as much hinderance to the process of challenging sexual crime impunity as it did progress, and elements of the ICC Statute were utilized rather inconsistently in the hallmark cases of the Special Court for Sierra Leone.

Criticisms aimed at the Court's lack of regard for crimes of sexual violence are directed mainly at the cases of the AFRC and the CDF, and the case of the RUF and conviction of Taylor are considered comparably more successful in addressing crimes of SGBV. Trial judges in the AFRC case charged sexual slavery as the war crime of outrages upon personal dignity which did not "fully match the evidence" according to Oosterveld (2009: 83). In the CDF case, the majority of Trial Chamber judges rejected the Prosecutor's late request to propose sexual violence charges and largely ignored the factors that complicate rape evidence collection, including the ongoing threats to survivors due to lingering CDF popular support (Oosterveld 2009). Witnesses who testified in the CDF trial were prohibited from mentioning accounts of sexual violence that would introduce new evidence, which suggests the Trial Chamber's concern for the celerity of proceedings and not the comprehensiveness of charges. While the CDF case can be considered the most disappointing in terms of obtaining convictions for rape and other crimes of sexual violence constituting crimes against humanity or other inhumane acts, such as sexual slavery and forced marriage, the comparative successes (albeit with some shortcomings) of the AFRC and CDF cases in challenging impunity must be noted.

5.4 The AFRC Trial

The AFRC trial opened on 7 March 2005 in the Freetown Special Court and intended to try the indicted Johnny Paul Koroma, Alex Tamba Brima, and Ibrahim (Brima) Bazzy Kamara, as well as Santigie Borbor Kanu (whose indictment was approved roughly 6 months after the three initial AFRC indictments) (RSCSL 2023). Koroma, however, "had fled Sierra Leone several weeks earlier, and was never taken into custody" (RSCSL 2023). In January 2004, the joint trial of the remaining AFRC members (Brima, Kamara, and Kanu) was ordered by the Trial

Chamber, and a year later in January 2005, a second Trial Chamber was sworn in in order to hear the AFRC case (RCSCL). It is crucial to note that a major controversy regarding the crime of forced marriage occurred in the months prior the second Trial Chamber's appointment: on 6 May 2004, the Prosecutor amended the initial indictment to "add a new Count 8, other inhuman act (forced marriage), a crime against humanity" under the heading of *sexual violence* (RSCSL, Oosterveld 2009). The Prosecution charged the defendants "with the practice of forced marriage under Article 2(i) of the SCSL Statute which provides for the sub-category of 'other inhumane acts' in the definition of crimes against humanity" (Frulli 2008).

5.4.1 Forced Marriage

Valerie Oosterveld states that the Trial Chamber, "in accepting the new charge as a 'kindred offence' to rape, sexual slavery, other forms of sexual violence, and outrages upon personal dignity, also appeared to view forced marriage primarily as a sexual crime," a view conferred by the report of Sierra Leone's Truth and Reconciliation Commission, which essentially conflated forced marriage with sexual slavery (Oosterveld 2009). In strictly recognizing the crime of forced marriage as a crime of sexual violence, Oosterveld maintains that the majority judges ultimately mischaracterized "a gender-based crime containing both sexual and non-sexual aspects singularly as a crime of sexual violence," therefore minimizing the crucial and often overlooked non-sexual aspects of forced marriage such as the mandated activities of "bush wives," who were typically forced by combatant husbands to cook, clean, do the washing, and transport weapons and cargo between raids and camps (Oosterveld 2009). Forced marriage is ultimately a multi-layered crime in practice, and while it may involve rape and aspects of sexual slavery, to conflate the two ignores fundamental non-sexual aspects of the crime (Frulli 2008).

Oosterveld's analysis suggests that this over-simplification of the complex crime of forced marriage by the Trial Chamber (barring the partial dissent of Justice Doherty to the trial judgment) was a source of significant concern marring the efficacy and scope of the AFRC trial in the context of sexual violence (Oosterveld 2009). Although as she further explains, the Appeals Chamber's criticism of the Trial Chamber's oversimplification of the crime of forced marriage as a crime against humanity of sexual slavery should be hailed as advancing the agenda of eradicating impunity:

> Indeed, the Appeals Chamber took pains to point out the various non-sexual aspects of forced marriage presented within the trial, such as forced movement from place to place, forced domestic labor, forced pregnancy, forced child-bearing, and forced child-rearing. In this regard, the judgment of the Appeals Chamber has undone much of the damage cause by the misrepresentation of forced marriage by the Trial Chamber…[The Appeals Chamber] distinguished sexual slavery and forced marriage on the basis that, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the "husband" and the "wife" and focuses on "forced conjugal association" instead of the exercise of ownership powers. The Appeals Chamber's clarity of explanation on forced marriage must be applauded as groundbreaking and validating the praise outlined above by academic commentators. (Oosterveld 2009: 86)

Oosterveld's explanation of the discrepancies between the Trial Chamber and Appeals Chamber's respective judgments on the topic of forced marriage speaks to the confusion inherent to the Special Court's approach to the vast variation across crimes of sexual violence. The Appeals Chamber's explanation on forced marriage may have been a milestone for challenging impunity, but the fact that the Appeals Chamber "declined to enter new convictions…since the evidence adduced for forced marriage was applied to Count 9, outrages upon personal dignity," is underwhelming (Oosterveld 2009).

In addition to the Trial Chamber's judgment to subsume forced marriage under sexual slavery, she argues that the Trial Chamber judges "fundamentally misunderstood the crime against humanity of other inhumane acts" to be strictly non-sexual in nature; in the words of

Oosterveld, “After examining the evidence, the majority of the Trial Chamber concluded that the evidence brought by the prosecution does not establish the elements of a non-sexual crime of forced marriage independent of the crime against humanity of sexual slavery” and dismissed the charge of forced marriage as redundant (Oosterveld 2009). And yet again, the Trial Chamber received pushback from the Appeals Chamber, which remedied the Trial Chamber’s failure to consider forced marriage as constituting other humane acts (Oosterveld 2009). The judgment of the Appeals Chamber to categorize forced marriage as a discrete crime against humanity falling within the category of ‘other inhumane acts’ was thus bolstered by ICTY case law as well as by “the ICC Statute that prescribes ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health” (Frulli 2008).

Micaela Frulli maintains that the “gravity of forced marriage” as it occurred in Sierra Leone “is analogous to that of other crimes against humanity committed in the same circumstances,” and that “the constitutive elements of forced marriage as perpetrated in Sierra Leone amount per se to crimes against humanity” and “may be assessed beyond any doubt” (Frulli 2008). In its entirety, the crime of forced marriage cannot be conflated with sexual slavery or reduced simply to its sexual aspects, and the Appeals Chamber’s willingness to criticize and ameliorate the misunderstandings of the Trial Chamber in regard to this concept reflects the increased discourse surrounding legal designations of rape and conflict-related sexual and gender-based violence that accompanied the Special Court; regardless of the efficacy of the Special Court’s trials in deterring wartime rape and holding perpetrators accountable, the fact that convictions for rape committed by senior- and junior-level rebel leaders in Sierra Leone—the groups most likely to enjoy impunity due to their status and support bases—are happening at all calls for hope.

5.4.2 Rape in the AFRC Case

The SCSL decision in the AFRC case to classify forced marriage as an "other inhumane act" and render convictions for the crime is laudable, but more can and should be done in order to allow the ICC to prosecute the crime of forced marriage as its own discrete crime, and to potentially recognize forced marriage as a crime against humanity in and of itself in the near future (Frulli 2008). Confusion and misunderstandings surrounding definitions of the crime of forced marriage during the AFRC trial did have the potential to endorse the legacy of conflict-related SBGV impunity, but the AFRC trial did manage also to convict the accused of rape as a crime against humanity, with the Trial Chamber adopting additional elements for the crime of rape:

1. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, and
2. The intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. (SCSL Statute)

The Trial Chamber relied on the ICTY's Kunarac case findings for this second element of rape in order to emphasize that consent of the victim must be given voluntarily, and the Statute of the Special Court recognizes the crime of rape as both a crime against humanity and a war crime (in line with the Rome Statute and the ICTR Statute) (Oosterveld 2009).

The Special Court of Sierra Leone did succeed in convicting Kanu and Kamara of rape in the AFRC trial (Brima died before the judgment was delivered), but the choice of the Appeals Chamber not to convict crimes of sexual slavery, forced marriage, and outrages upon personal dignity impeded the Court's progress in respect to challenging impunity (RSCSL). Counts 7, 8, and 11, which included these three crimes, were dropped completely due to a mix of lacking

evidence proving the non-sexual aspects of forced marriage and "a failure to recognize the harms done by the accused" (Oosterveld 2009). Marked by confusing language discrepancies, the mischaracterization of crimes, and the dropping of charges relating specifically to SGBV crimes, the AFRC trial seen by the Special Court for Sierra Leone eventually made "a modest but flawed contribution to gender-sensitive transitional justice," according to Oosterveld (2009: 76).

5.5 The CDF Trial

While the AFRC trial resulted in mixed messages regarding the criminal liability for rape, the CDF trial at the Special Court for Sierra Leone is considered to be significantly more harmful to the fight against impunity. Three alleged senior leaders of the CDF, Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, were indicted for various war crimes and crimes against humanity, but counts of rape are glaringly absent from the Court's decisions (Oosterveld 2009; RSCSL). Norman, however, died prior to the Trial Judgment's delivery, and thus the proceedings against him were terminated, resulting in a reduced two convictions from the initial indictment for the CDF case. Four months prior to the trial is the genesis of the controversy surrounding the CDF case: the prosecution submitted a motion to amend the indictment against CDF leaders in February of 2004 to include rape, sexual slavery, enforced prostitution, and forced marriage as separate counts, but the motion was subsequently denied in a majority decision in that May, in the final weeks before the trial commenced in June 2004 (Kelsall & Stepakoff 2007). As explained by Kelsall and Stepakoff (2007):

> In the majority decision, the prosecution is heavily penalized for submitting its motion to amend in February 2004, despite the availability of evidence of sexual violence as early as June 2003. The majority judges found the arguments of the prosecution regarding why this delay was necessary 'neither credible nor convincing.' Yet, according to the Office of the Prosecutor (OTP), initial investigations had not uncovered sufficient evidence to support counts of sexual violence against the CDF. While the OTP had indications of

> gender-based crimes as early as June and July 2003, it was not until October that solid evidence capable of securing a conviction was obtained. (Kelsall & Stepakoff 2007: 360)

Evidently, the majority judges during the CDF case did not prioritize the inclusion of these SGBV crimes, signaling a potential lack of priority for sex crimes in general.

Additionally, the CDF case saw the overt silencing of victims and witnesses of sexual violence. Victims and witnesses were prohibited from mentioning sexual violence during their testimonies, as it would cover the counts brought forth by the prosecutor that were previously dismissed for insufficient evidence—fearing that victims would testify about crimes such as rape and veer into what Kelsall refers to as *forbidden evidentiary territory*, silencing victims on a subject deemed to be "outside the scope of the indictment" promoted the speed and simplicity of the trial instead of its comprehensiveness (Kelsall & Stepakoff 2007). Here, Kelsall notes the reaction of Judge Thompson, who maintained that "allowing any evidence of sexual violence would 'undermined the integrity of the proceedings," and that the prosecution was warned "against leading evidence that could be construed as such" (Kelsall & Stepakoff 2007). Seven women testified in the CDF case, but none were allowed to speak on their experiences of sexual violence at the hands of CDF forces (Kelsall & Stepakoff 2007).

Once again, Kelsall speaks to the Court's success in terms of physical proximity to the atrocities that occurred and the impacted victims and communities, however, the negative implications of the CDF trial decisions significantly outweigh the progress achieved in the structure of the Special Court itself. Kelsall posits that by not working closely with the ICC's Rules to try war crimes, the judges' discretionary power was ultimately unchecked and widely ambiguous (Kelsall 2007). She explains the scope of the Special Court's jurisdiction, stating:

> Article 2(g) of the [SCSL] Statute clearly extended the Court's mandate in this area far beyond that of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, by explicitly acknowledging the prosecution of 'rape, sexual slavery, enforced

> prostitution, forced pregnancy and any other form of sexual violence,' hence increasing the recognition of all forms of crimes of sexual violence. (Kelsall & Stepakoff 2007: 359)

But the Court's strategy did not manifest successfully in terms of addressing, or even including, crimes of sexual violence in the CDF case. In failing to allow victims to testify about subjects of sexual violence, dismissing charges of sexual violence for fear of complicating or delaying the trial, and wasting an opportunity to address rampant and evidence-supported instances of rape, the CDF case tried by the Special Court for Sierra Leone falls short in considering the trauma of victims and comprehensively holding perpetrators accountable.

5.6 The RUF Trial

The trial of the Revolutionary United Front (RUF) before the Special Court of Sierra Leone is considered to be more of a landmark case regarding crimes of sexual violence than those of the AFRC and CDF. The RUF's 1999 attack on capital city Freetown was considered in depth in the rebel group's trial, and the sexual violence and human rights abuses that occurred within it pointed to the widespread and systematic use of SGBV as a means of terrorism in Sierra Leone, which the Court later confirmed. The RUF case stands out from its CDF and AFRC counterparts, as its understandings of rape, sexual slavery, and forced marriage set forth by both the Trial Chamber and the Appeals Chamber shifted—albeit slightly—traditional SGBV jurisprudence in the direction of heightened accountability with a more comprehensive scope. SGBV crimes of rape, gang rape, sexual slavery, rape in public, and rape with objects were all considered major and intentional facets of the RUF's tactics of inflicting terror, and Valerie Oosterveld characterizes rape for the RUF as "a specific tool of control and assertion of RUF power," as well as a way to deliberately target civilian women as part of an overarching plan to terrorize the larger population of Sierra Leone (Oosterveld 2011).

The initial indictments in the RUF case were served to senior RUF members Issa Hassan Sesay, Sam Bockarie, and Morris Kallon, and of course, Foday Sankoh, the group's founder, in March of 2003; the 17-count indictment was then also served to Augustine Gbao in April 2003 (RSCSL). Sankoh and Bockarie, however, had died prior to the trial's start in December of the same year, and the indictments against them were subsequently withdrawn—given the death of Sankoh, arguably the most important actor in the RUF who had collaborated with Charles Taylor, the Court lost an opportunity to truly hold the most responsible actors accountable, which raises questions about the Special Court's timespan and its late start due to funding deficits (RSCSL; Oosterveld 2009). But in February 2004, the Trial Chamber managed to continue on without their star accused, ordering a joint trial for Sesay, Kallon, and Gbao (RSCSL); in 2006, this was accompanied by a newly consolidated 18-count indictment, including the addition of the crime of forced marriage as *other inhumane act*, a crime against humanity (RSCSL; Jalloh 2011).

The addition of this count for forced marriage—specifically for forced marriage as a distinct crime against humanity—to the indictment is significant, as the previous AFRC case failed to distinguish forced marriage from sexual slavery. Sexual slavery, the other inhumane act of forced marriage, and rape are all considered distinct crimes each constituting a crime against humanity in the RUF indictment. On 25 February 2008, the Trial Chamber ultimately found Gbao guilty on 14 of 18 counts, and Sesay and Kallon guilty on 16 counts (RSCSL). Having convicted three accused of sexual war crimes, the RUF case can be considered a hallmark case in its potential precedent for international criminal law—unlike the AFRC and CDF trials, which were plagued with acquittals, evidence and amendment request refusals, and the forced silence of

SGBV victims on the topic of sexual violence, the RUF trial seemed to have comparatively more potential in terms of setting precedents that challenged impunity for perpetrators of SGBV.

5.6.1 Elements of Rape – Consent and *mens rea*

The Trial Chamber for the RUF Case defined four elements of the crime of rape as a crime against humanity, with the first two elements virtually identical to the ICC's elements of crime for rape, except for, as Oosterveld notes, the change of the word "perpetrator" to "accused" (Oosterveld 2011). The first two elements according to the Trial Chamber are the following:

> (i) The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
>
> (ii) The invasion was committed 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 another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent; (Oosterveld 2011; RSCSL Oct. 25, 2006)

Compared to the elements of crime for rape in the AFRC trial, the RUF Trial Chamber significantly expanded upon the definition of the constitutive acts of rape (Oosterveld 2011). Additionally, the Trial Chamber for the RUF Case added third and fourth elements of the crime, including:

> (iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and
>
> (iv) The Accused knew or had reason to know that the victim did not consent. (Oosterveld 2011; RSCSL 2006)

Evidently, the Chamber found that both partially relying on the ICC's elements of crime for rape and filling the gaps in jurisprudence with additional consent clarifications defined rape more broadly, making it simpler to prosecute than the previously vague definitions of the ICTY and ICTR. Oosterveld also posits that the Trial Chamber's constitutive elements of rape were adopted in order to bolster the possibility of more gender-inclusive justice, as women were not the sole targets of sexual violence in Sierra Leone at the hands of RUF combatants (Oosterveld 2011); narrow language that was limited to female sexual organs or denied oral modes of rape in previous definitions of rape did not account for male victims of sexual violence in Sierra Leone, who were frequently violated alongside women (Oosterveld 2011).

Additionally, the latter two elements of this broader conception of rape focused on the *mens rea*, the intent to commit a sexual violation with the knowledge of the victim's lack of (or inability to give) consent. As Oosterveld observes, the fourth element of non-consent contrasts slightly with the ICC's elements of the crime, as the ICC "focused on forms of coercion, as opposed to non-consent, because the Court believed that 'non-consent is not an element of the crime of rape when coercive circumstances are involved'" (Oosterveld 2011). Indeed, the atmosphere of Freetown during the attack in 1999 was coercive, and victims often felt as though they could not refuse the commands of RUF rebels lest they face execution, so the Trial Chamber's definition supposes that consent cannot be given in "the context of a hostile and coercive war environment" (Oosterveld 2011); the crimes of sexual slavery and forced marriage in the RUF case have no such written non-consent elements, but the Trial Chamber did use a similar framework to the fourth, mens rea element of the crime of rape to evaluate the crimes of sexual slavery and forced marriage, and ultimately found that genuine consent for these crimes

would have been impossible for victims to give in this midst of the chaos of the Freetown attack (Oosterveld 2011; RUF Open Session Transcript Oct. 25, 2006).

5.6.2 Sexual Slavery and Forced Marriage

Importantly, "the RUF trial judgment represents the first-ever international convictions for the crime against humanity of sexual slavery and of forced marriage (as an inhumane act)," but the judgment did more than simply consider these two crimes (Oosterveld 2011). Convicting all three accused RUF leaders on Counts 7 and 8 (sexual slavery as a crime against humanity and forced marriage as other inhumane acts (a crime against humanity), respectively) happened on account of the Appeals Chamber, who, much like in the AFRC case, "explicitly held that forced marriage is not subsumed by sexual slavery," confirming the two crimes as distinct (Sellers 2011). This is a major step in international legal conception of forced marriage, as the Appeals Chamber's vehement opposition to the subsummation of forced marriage under sexual slavery allowed for the additional conjugal duties of wives to be recognized, including physical labor and forced childrearing (Sellers 2011, Oosterveld 2011).

According to Amy Palmer, the RUF case does set forth a "persuasive precedent" for other tribunals or the ICC to follow in prosecuting forced marriage as a distinct crime against humanity under international law rather than its subsummation under sexual slavery (Palmer 2009); and while neither the crimes of forced marriage nor sexual slavery should be conflated with the crime of rape, the discussion of these crimes as central to major international criminal prosecutions is crucial to the widespread recognition of the systematic use of SGBV intended to terrorize civilian women. Rape is its own distinct crime against humanity under the Statute of the Special Court for Sierra Leone, and the progress of prosecuting it as such in the cases of the RUF

and the AFRC should not be hindered by the shortcomings of the CDF trials, lest the international legal community forget the relevance of challenging SGBV impunity.

5.6.3 Sexual Violence as Terrorism

The Sentencing Judgment of Sesay, Kallon, and Gbao noted that, having considered instances where SGBV crimes including rape were systematic and intended to destroy the social fabric of communities:

> The Chamber emphasizes that all rapes and forced marriages were found also to constitute acts of terrorism and outrages against personal dignity. Accordingly, the Chamber concludes that for purposes of sentencing the practice of using rapes and forced marriage to terrorize the civilian population increases the gravity of the underlying offense. (RSCSL 1.3.4. (131) Sentencing Judgment)

The recognition of rape as a constitutive element of terrorism as a war crime is a major step in understanding the tactical nature of rape and how it should be prosecuted. Compared to the ideology of rape inevitability that pervaded international criminal law prior to the ICTY and ICTR, rape understood as an element of terrorism is a considerable shift away from a legacy of impunity, so long as other tribunals—or the ICC itself—choose to act under the precedent in the future.

5.6.4 Outcomes and Concerns in the RUF Trial

The RUF case faced the same challenges as the CDF and AFRC trials initially in terms of lacking funding, and the deaths of Sankoh and Bockarie, both major actors in the RUF's reign of terror, seemed poised to render the RUF case underwhelming; the Court's convictions of Sesay, Kallon, and Gbao, however, should still be considered meaningful to the growing international understanding of weaponized rape. The explicit addition of a mens rea element for the crime of

rape is a significant inclusion, as well as the Court's ruling that sexual violence constituted elements of Count 1 for terrorism (a war crime) (RSCSL). Both of these elements demonstrate a willingness of the Trial and Appeals Chambers to more accurately define SGBV crimes, as well as to make sexual violence a central element of the case against the RUF actors as opposed to considering SGBV crimes against humanity as lesser than war crimes of murder and terrorism.

5.7 Charles Ghankay Taylor

The relationship between Charles Ghankay Taylor, former Liberian president between 1997 and 2003, and Foday Sankoh, leader of the Revolutionary United Front, is well-established. When, in 1997 after having ousted Kabbah's administration, the AFRC "invited RUF to join it in a junta" to enable allied AFRC and RUF forces to work jointly to gain control of Sierra Leone's diamond-mining regions (Mariniello 2013). Taylor, operating from Liberia at this point, was routinely involved with Sankoh and his RUF leaders, as well as being paid in diamonds for his suppliance of arms and ammunition to Sankoh's combatants (Mariniello 2013). During this period of conflict between 1996 and 2002, "members of the RUF, AFRC, AFRC/RUF Junta or alliance and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control or, and/or subordinate to the Accused, committed widespread acts of sexual violence against civilian women and girls, including rape," according to Taylor's indictment (Taylor Indictment RSCSL). Before his resignation as President of Liberia in 2003, Taylor was indicted under seal by the Special Court, however, he managed to evade justice while Nigeria housed him in exile, refusing to comply with Interpol's order to arrest him (Mariniello 2013). After enjoying nearly three years of exile, he was eventually arrested by Nigerian authorities at the request of the Liberian President and ultimately transferred to The Hague in

June 2006 (Mariniello 2013). Although he contested to secure immunity for himself, Taylor's request was subsequently rejected by both Chambers, and his trial was set to open before Trial Chamber II in The Hague in June 2007 (RSCSL). And in a dramatic and quite literal last-minute change before trial the opening, Taylor "sacked his legal team, demanded new counsel, and boycotted his trial" (RSCSL); the trial did resume, however, in January 2008.

5.7.1 Taylor's Crimes of Sexual Violence: Commissioned and Encouraged

Triestino Mariniello notes that, from the Chamber's perspective, Taylor's provision of arms and ammunition combined with his blatant support and encouragement of AFRC and RUF agendas contributed to "the commission of the crimes by the AFRC/RUF during the course of the military operations in Sierra Leone" (Mariniello 2013). In essence, the collective crimes of the Junta and its associates in the RUF and AFRC were now Taylor's crimes. As such, Taylor's judgment given in 2012 stated that the provided evidence proved beyond reasonable doubt Taylor's guilt in regard to rape, and he was convicted as such using the same framework as the AFRC Case's elements of crime for rape as a crime against humanity.

Taylor's charges of sexual violence are as follows: Count 4 of Taylor's indictment is for the crime of rape (a crime against humanity) committed by AFRC/RUF forces; Count 5 entails the systematic enactment of sexual slavery by said forces (a crime against humanity); and Count 6 (outrages upon personal dignity (a war crime)) alleges Taylor assisted and encouraged fighters to commit "widespread acts of sexual violence against women and girls, including rape and sexual slavery" (RSCSL 2003: SCSL-03-01-0001). Count 6 did not initially come off the ground easily, but ended positively as stated in Taylor's Judgment:

> 1194. The Trial Chamber has found in the Preliminary Issues Section that it would not consider evidence of sexual violence other than rape and sexual slavery under Count 6,

> Outrages Upon Personal Dignity, as the Accused was not provided with notice that any other forms of sexual violence were charged under this count.
>
> 1195. The Trial Chamber has therefore considered, for each district, the acts of rape and sexual slavery that it has found have been proved beyond reasonable doubt as the crimes against humanity of rape, Count 4, and sexual slavery, Count 5, to determine whether they also constitute war crimes under Outrages upon Personal Dignity, Count 6, and found that they do in each case. (RSCSL 2013: SCSL-03-01-1389)

Building on the perspective of Valerie Oosterveld, the Taylor judgment emphasized the intentional and systematic nature of rape, or its understanding as a war crime and a weapon of war, as it was "inextricably linked to how these groups achieved their military and political objectives" (Oosterveld 2012). The inclusions of rape and sexual slavery as constitutive elements of the war crime of outrages upon personal dignity signals the deepened recognition of the Court of the weaponized nature of rape in the Sierra Leone war as opposed to its traditionally accepted nature of opportunity.

In addition to the success of Count 6 including rape, the Taylor trial judgment "also served a confirmatory role on the law with respect to rape" according to Oosterveld, as the judgment aligned itself with the AFRC and RUF trial judgments in noting that "the actus reus element for rape may require reliance on circumstantial evidence" (Oosterveld 2012). These aspects of the Charles Ghankay Taylor trial exhibit, much like the RUF trial, a strong inclination by the Court to recognize the crimes of sexual violence—rape especially—committed by AFRC and RUF combatants under a leader's direct orders or encouragement, setting a solid precedent for commander accountability. And given Taylor's political prestige during the sanctioned violence, it is impressive that he became the first former head of state to be tried for serious crimes before an international or hybrid international-national court since the Nuremberg trials (HRW 2012). But the issue of commander liability—in Taylor's case, the literal "Big Man"

being held liable for orchestrating violence behind the scenes—raises important questions about the scope of the Special Court's judgments and overarching legacy.

5.8 "Greatest Responsibility" in the SCSL

The Special Court faces significant criticism across the AFRC, CDF, RUF, and Taylor cases in terms of judging "greatest responsibility." Charles Jalloh notes the erroneous reasoning of the RUF case's Prosecution in determining those most responsible in Sierra Leone that denies the existence of numerous suspects still at large and completely unaccountable, stating:

> Prosecutor Crane has suggested that the "greatest responsibility" formula narrowed his list of suspects from 30,000 individuals to about twenty. His reasoning is highly problematic. For one thing, he insinuates that all combatants in the Sierra Leone war could have been prosecuted. This is simply not the case because of the limited personal jurisdiction captured by the greatest responsibility idea. As seen earlier, that formulation was the result of a political compromise among the powers that be in the international community. Still, in the end, it was up to him to decide the specific numbers of persons to prosecute based on his prosecutorial strategy and his understanding of the jurisdictional parameters set out in the statute. (Jalloh 2011: 420)

Jalloh goes to assert that the SCSL Prosecutor "basically failed to meet Sierra Leonean expectations of internationally-supported justice as only thirteen indictments have been formally issued in a court that operated for about ten years," and states further that out of those thirteen successful indictments, when factoring in the deaths of multiple accused only nine were tried in total in the Special Court (Jalloh 2011). By failing altogether to consider any lower-level suspects, especially mid- and low- ranking commanders who were very likely connected to the widespread systematic violence committed by all main groups party to the conflict, the Prosecution takes the notion of greatest responsibility too literally. Jurisdictional parameters and financial and time constraints considered, the ordering of four indictments does seem reasonable, however, as with many cases of newly instated courts with high hopes from the international

community, the Special Court for Sierra Leone could have pushed the envelope in terms of extending its breadth.

Indeed, if rape in the Sierra Leone Civil War was widespread and committed by all rebel and government-backed organizations party to the conflict, it's certain that more than nine individuals were responsible for systematic rape. But the three cases the Special Court brought against the main organizations involved in the war, and the Prosecution's extreme narrowing of suspects, raise an important question of retributivism in the Court's proceedings. Does prosecuting only the few most prominent high- and mid-level leaders of these organizations accurately and comprehensively represent the gravity and the scope of the atrocities committed during the war? Can terrorism, extermination, rape, and murder committed on a broad scale by thousands of combatants from all sides be distilled into nine convictions? Or is the choice to prosecute only those with the "greatest responsibility" a symbolic choice, to send a message to criminal leaders that they are not immune to retributive justice? Is the justice served to these "most responsible" individuals truly retributive, and does it appropriately reflect the gravity of their crimes? Understanding the crime of rape is more than conceptualizing the crime itself—it is also conceptualizing the legal systems that allow for it to continue to go largely unpunished, or in this case, *performatively* punished to signal a mild message of deterrence. After all, what incentive exists for low- and mid-level combatants to refrain from enacting sexual violence and rejecting its costs, when only senior members and commanders face prosecution?

Shortcomings of the Special Court for Sierra Leone trials aside, the Special Court itself speaks to a larger notion of ICC importance: given that the ICC's Elements of Crimes were followed closely in cases tried before the Special Court, perhaps the ICC's understandings of rape and other sexual crimes are better suited to inform other domestic judicial proceedings and

war crimes tribunals in order to garner successful convictions and deterrence efforts. The ICC as a forum for these legal ideas has resulted in a mixed record of convictions and acquittals, but when applied to domestic trials and war crimes courts such as in Sierra Leone, ICC jurisprudence may be able to be used more effectively to garner convictions in smaller-scale or domestic trials.

Chapter 6:Liberia and the Rome Statute

6.1 The Liberian Civil Wars

The first installment of Liberia's civil conflict began when Charles Taylor, having assembled a rebel army called the National Patriotic Front of Liberia (NPFL) in Côte d'Ivoire, crossed into Liberia and attacked the village of Butuo in Nimba County in December of 1989 (Swiss 1998; Jalloh & Marong 2005). Charles Jalloh asserts that the two main "epochs" dividing the civil war include the first conflict, from 1989 to 1990 which saw conflict between President Doe's AFL (Armed Forces of Liberia) and rebel militias under the leadership of the NPFL and its various splinter groups, and the second conflict, which ran from 2000 to 2003 and saw newly-elected Taylor attempting to maintain control through the commissioning of violence against LURD (Liberians United for Reconciliation and Democracy) and MODEL (Movement for Democracy in Liberia) forces (Jalloh & Marong 2005).

By the end of the second conflict in Liberia, it was determined that all warring groups party to the conflicts, whether government-backed like the AFL or rebel militia organizations such as the NPFL under Taylor, had adopted and enacted deliberate policies "of targeting unarmed civilians who were killed, raped, tortured and sexually violated" routinely (Jalloh & Marong 2005). Importantly, during this conflict between 1996 and 2002, Charles Taylor was deeply involved in the Sierra Leonean war, supplying arms and ammunition to RUF rebels under

Foday Sankoh, and his prosecution in the Special Court for Sierra Leone reflected his involvement in Sierra Leone to an extent—in terms of Liberia's steps towards diminished impunity, however, the Taylor case before the SCSL remains one of the few instances of the prosecution of Liberian Civil War criminals, as it did not concern crimes committed in the Liberian Civil Wars (Jalloh & Marong 2005; Swiss 1998).

6.2 ICC Membership and the Rome Statute in Liberia

ICC intervention remains elusive in Liberia due to the Court's temporal jurisdiction—the state only ratified the Rome Statute in 2004, which occurred long after the majority of conflict-related crimes were committed (Jalloh & Marong 2005: 73). While the connection between the conflict in Sierra Leone and the Liberian civil wars is well-documented, and NPFL (National Patriotic Front of Liberia) rebel leader and former Liberian President Charles Taylor was prosecuted before the Special Court for Sierra Leone, Liberia's status as an ICC member state leaves much to be desired in terms of holding accountable the Liberian war criminals responsible for patterns of horrific violence during the country's two civil wars. Due to the political turmoil that characterized the First Liberian Civil War between 1989 and 1999, and later, the subsequent Second Civil War between 1999 and 2003, the Liberian government did not initially take any significant steps to address the country's recent history of grave human rights abuses targeting civilians at the hands of warring groups (rebel and government-backed alike), and did not sign the Rome Statute until 17 July, 1998, nearly a decade into the bloodshed.

After signing the Statute in 1998, it took the Liberian government over six years to ratify, and Liberia's ratification of the Statute in September of 2004 presented a significant temporal challenge to ICC jurisdiction over the atrocities committed during Liberia's First and Second

Civil Wars. According to Chernor Jalloh and Alhagi Marong, considering that the crimes witnessed in Liberia included crimes against humanity and war crimes, and possibly the crime of genocide (ultimately constituting two to three of the four crimes covered by ICC jurisdiction), the ICC would have been a "perfect venue" to investigate and potentially prosecute Liberian war criminals (Jalloh & Marong 2005); this, however, was complicated by Liberia's late ratification of the Rome Statute years after combatants had committed their crimes, and compounded by the ICC's temporal jurisdiction which is "limited to crimes committed after the entry into force of the Rome Statute" on 1 July, 2002 (Jalloh & Marong 2005).

Additionally, Jalloh and Marong maintained in their 2005 article that "the necessary political will does not exist at the international level for accountability to take place in Liberia"—they are partially correct, as well as partially incorrect, in 2023 (Jalloh & Marong 2005). In the sense that major actors in the international community, such as the UN, have remained rather ambivalent regarding legal mechanisms for accountability in Liberia, Jalloh and Marong correctly predict the ICC's lack of involvement in Liberia following the conclusion of the conflict in 2003 as well as the UN's de-prioritization of Liberian human rights abuses and breaches of international humanitarian law. Recent efforts in the last five years, however, have proven a piqued interest in Liberian accountability for primarily European courts operating under universal jurisdiction.

6.3 Liberia's Prosecutorial Silence

While ICC presence and support is virtually nonexistent in Liberia due to the Court's temporal jurisdiction limitations, and Liberia itself has not attempted to prosecuted a single crime committed during its civil wars, calls from the international community to hold perpetrators

accountable for their crimes decades later have resulted in a growing movement towards accountability (HRW 2022). Alieu Kosiah, a former commander of the United Liberation Movement of Liberia for Democracy (ULIMO), was convicted in Switzerland in 2021 for war crimes including rape, as Switzerland recognizes "universal jurisdiction over certain serious crimes of international law, allowing for the investigation and prosecution of these crimes no matter where they were committed, and regardless of the nationality of the suspects or victims" (and Kosiah later appealed this verdict.) (HRW 2021). Similarly in France, Kunti Kamara of ULIMO was also convicted of crimes against humanity including rape in November of 2022, shortly after Kosiah's trial in Switzerland—additionally, judiciaries in the U.S., Belgium, Finland, and the U.K. have listened to international outcry and pursued criminal cases pertaining to the Liberian Civil Wars (HRW 2021). But are these few and far-between landmark cases enough to ensure accountability for perpetrators decades after the conflict's conclusion?

Hopes were high for the Special Court for Sierra Leone to prosecute Charles Taylor to the fullest extent, and these expectations were largely met considering his conviction and sentencing as a prominent Head of State who had enjoyed impunity for so long. But the SCSL could only go so far, as it was limited to prosecuting Taylor's commission of crimes and direct connection to rebel groups like the RUF in Sierra Leone, and thus could not concern itself with instances of Liberian conflict-related crimes. In 2005, Jalloh and Marong posited the low potential for ICC intervention and for ad hoc tribunals like those of the ICTY and ICTR in Liberia to address the amassing evidence of war crimes committed during the consecutive conflicts, and indeed, it appears to be too late for the ICC to truly involve itself in the prosecution of Liberian war criminals given its temporal jurisdiction (Jalloh & Marong 2005). Today, in the wake of a few small (but nonetheless significant) trials abroad convicting prominent Liberian

actors for their crimes in the late 1990s and early 2000s, factions of the international community have ultimately turned to the promotion of a war crimes court for Liberia as the most viable option to pursue justice for those affected by the armed conflict (HRW 2022).

In a 2009 report, Liberia's Truth and Reconciliation Commission (TRC) recommended the establishment of "an internationalized domestic criminal court to ensure justice for the worst crimes committed," yet over a decade later, a war crimes court in Liberia has yet to become a reality (HRW 2009). Human Rights Watch (2022) has previously made explicit calls for the United States to send an explicit message to Liberian President George Weah to establish a war crimes court (which could potentially rely on the ICC's Elements of Crimes and past jurisprudence on sexual violence) to remedy the domestic legal stagnation surrounding the crimes committed during the Liberian Civil Wars; the organization further notes that major international powers like the U.S. have the tools "to foster justice for victims of atrocity crimes," and thus should be using them in Liberia (HRW 2022). Indeed, the international attention paid to Liberia raises a number of questions, with some regarding universal jurisdiction, others regarding the possibility of ICC intervention, debates between human rights law and humanitarian law duties, etc. More specifically to this paper's examination, however, is the question of why the Liberian government has done so little to address the crimes committed during its civil wars, including blocking ICC interventions and refusing to pursue a referral.

6.4 The Legacy of Conflict-Related SGBV Impunity in Liberia

The fact that levels of rape in Liberia have increased since the formal end to the second war in 2003 speaks to the notion that unchallenged SGBV criminal impunity both perpetuated a societal acceptance of rape as inevitable and revealed a lack of priority surrounding the

prosecution of the crime in general in Liberia (Boker Wilson 2021). As for why this concerning increase in rape has occurred post-conflict, Pela Boker Wilson suggests that the increase is attributed "to the lack of accountability for sexual violence in a crumbling post conflict judiciary," and that this prevalence additionally reflected notions of gender inequality that existed long before the wars began (Boker Wilson 2021). Similar to the struggles of the ICC in the DRC and the SCSL in Sierra Leone, acquiring evidence for the crime of rape in Liberia was complicated during the wars, and continues to impede justice today; Boker Wilson notes that Liberia is in desperate need of a system to collect and process forensic evidence, as many charges of rape currently fail in Liberian courts "due to the inadequacy of non-forensic evidence" (Boker Wilson 2021).

Seun Bamidele points to not only the lack of prosecutorial action surrounding the crime of wartime rape perpetuating a narrative of impunity, but also the inherently patriarchal values of Liberian society that position women as subordinate to men, objectify women, and normalize SGBV (Bamidele 2017). In Bamidele's words:

> In Liberia, the woman during the conflict and after is viewed primarily as a sexual object for the pleasure of the man. It is not an extreme view to state that some cultures in Liberia see women as akin to property for possession by men. In such cultures, women's bodies and their sexualities are not the preserve of the individual, but of the community and the man. In other communities within Liberia, for instance, these dehumanized conceptions of women result in rape, defilement, and various brutalities against girls and women. In other cultures, even the concept of rape may not exist within marriage, or outside of it, and sexual assaults and other forms of sexual and gender-based violence are blamed on the victim…Many Liberian national laws on the books either condone sexual stereotypes, men's control over women's bodies, or proscribe the ability of women to control their own sexuality. (Bamidele 2017: 75; Baaz & Stern 2009)

Bamidele goes on to explain how deeply engrained values of patriarchy and female objectification in Liberian society present significant roadblocks to the possibility of SGBV

justice for not only rape survivors within the civil wars, but also survivors who continue to be violated today due to perpetuated norms of impunity (Bamidele 2017).

6.5 Patriarchy and the Future of Liberian Civil War Prosecutions

Given Bamidele's strong opinions on the lack of gender focus within the Liberian state and judiciary, it is not unreasonable to assume that gender-based violence crimes (namely rape) could be deprioritized or minimized if trials are conducted domestically, potentially in a war court (Bamidele 2017). Suppose the Liberian war court became a reality—would charges of rape actually result in convictions, or would the specialized court fall victim to the SCSL's initial pattern of silencing victims and dropping charges? Given the stigma and blame associated with rape in Liberia, would victims even come forward to testify? And should the Liberian government decide to promulgate the Rome Statute into domestic judicial framework, would the offence of rape be considered as a crime against humanity? According to Bamidele, it is up to Liberia to fill this SGBV gap "at the jurisprudential level if sexual violence is to be addressed seriously" over two decades later (Bamidele 2017: 78).

Though amending a patriarchal system in order to establish more legal significance for sexual violence will be a lengthy process for policy-makers and judiciaries alike in Liberia, the state has made a few strides in implementing a revised legal framework for rape, a National Sexual Offense Court, several national policies to address rape, including the National Plan of Action for the Prevention and Management of Gender Based Violence in Liberia from 2011-2015 (Bamidele 2017; Boker Wilson, 2021). After such reforms were implemented, however, Boker Wilson notes the disappointing outcomes of the Sexual Offense Court—of 1,511 cases, only 259 were sent to court, and of those 259 cases, only 24 individuals were convicted in 2014

and 34 convicted in 2015 (Boker-Wilson, 2021). In terms of domestically addressing rape, Liberia is struggling to roll out convictions for the crime, yet in cases of ULIMO members tried abroad, rape committed widely and intentionally in Liberia was explicitly included in these decisions. If Liberia were to establish a domestic war court to try perpetrators of crimes during the country's two successive civil wars, and should it adopt a statute in line with the Rome Statute of the ICC, would the same domestic issues of lacking forensic evidence and low conviction rates persist?

Legal framework gaps, lacking communication between SGBV-specialized government agencies, and deeply-engrained patriarchal institutions are significant barriers achieving justice for victims of the Liberian Civil War (Boker Wilson 2021; Jalloh & Marong 2005; Bamidele 2017). In neglecting these factors, modern and past perpetrators are effectively allowed to operate unscathed in this "theater of impunity," further normalizing crimes of SGBV post conflict (Bamidele 2017). As such, the Liberian judiciaries must focus now on mitigating current rates of rape by implementing a more comprehensive legal framework for the crime, which could, in turn, bolster the future odds of a potential war court including and recognizing the gravity of SGBV crimes during the Liberian Civil Wars. In overcoming the various evidentiary and prosecutorial obstacles of SGBV crimes, and reversing the "national emergency" of rape in Liberia, Liberian judiciaries and the Sexual Offense Court have the capacity to influence the framework and attitudes toward rape of a future war court in Liberia.

While it is widely debated which format of a legal stage would best support the Liberian Civil Wars' trials, a war court or specialized court appears to be the most plausible option at this point to effect justice for Liberian victims who have been waiting for years. In terms of hope for ICC intervention, it appears that the Rome Statute and ICC arrived too late to Liberia to

effectively and comprehensively address the entire scope of the violence committed there in the late 1990s and early 2000s—a specialized court, therefore, would add on to the successes of convictions abroad in universal jurisdiction cases and the case of Charles Taylor before the SCSL. But a specialized war court cannot be feasibly established by a state on its own, however, and so the continuation of universal jurisdiction trials abroad and the possible endorsement of the United States for such a war court are crucial to ensuring that Liberian war criminals are brought to justice, regardless of Liberia's willingness to do so and the gaps in its national legislation.

Chapter 7: Syria and its Potential for ICC Referral

7.1 Rape in the Syrian conflict

Turning now to a state that is not party to the Rome Statute, Syria today remains as precarious as it did in 2011 at the genesis of its multi-sided civil war; in a shifting warzone of international alliances, active terrorist organizations, and rampant state-sanctioned violence, Syrian victims and refugees have been waiting for justice—or at least an end to the ongoing conflict—for well over a decade. In the earlier years of conflict, the Syrian regime under authoritarian President Bashar al-Assad experienced significant threats to its security, which was mitigated largely by State forces under the direction of Assad by means of terrorizing rebel opposition groups and the civilians suspectedly tied to them. Sexual violence in Syria was utilized by Assad's forces (and broadly recognized in international human rights scholarship) as a policy in the conflict, with its commission following distinct patterns and exhibiting a degree of organization and planning (Forestier 2017). Whether it can be prosecuted as such, however, is a different question.

Marie Forestier identifies the primary settings in which rape occurred largely at the hands of State actors as the following: 1) intelligence agency-run detention centers in which female prisoners were tortured or raped in order to elicit confessions about connections to or support of anti-Assad rebels, and sometimes impregnated or gravely injured from sexual violence; 2) during Shabbiha (Assad-backed) military operations and raids on neighborhoods thought to be housing rebels; 3) at Shabbiha checkpoints in various locations that targeted individuals thought to be bringing medical aid or resources to rebels beyond the checkpoint; and 4) during the abductions that were commonplace in the first year of the conflict, between 2011 and 2012 (Forestier 2017). In all of these situations, women were intentionally sexually violated and raped in order to punish them for their perceived allegiance to anti-Assad rebels, as well as to humiliate and incite terror among the Syrian civilian population (Kassab 2018; Forestier 2017).

Forestier notes that occurrences of rape were at a peak in 2012, at which point opposition forces had gained significant ground in Northern Syria and thus rendered Assad's forces and Shabbiha combatants insecure in their abilities to regain control; in 2013, sexual violence committed by State actors began to decrease as their political gains increased, and from 2014 onward, sexual violence gradually stalled as a component of Assad's sanctioned violence as the regime maintained the upper hand in the conflict (Forestier 2017). Forestier points to the connection between rape prevalence and pro-government forces' success when she observes the following:

> Sexual crimes have been committed more frequently when the regime was at its most fragile, as well in the areas that it was the most afraid to lose…More broadly, rapes have been committed in prisons in Damascus, Homs, Hama, Latakya, Tartous. These match areas where the regime felt undermined because of the support gathered by the opposition…Sexual violence taking place at these crossing points corresponds with anti-government areas. (Forestier 2017: 7)

Evidently, when pro-Assad State forces and intelligence agents felt the most insecure in their strongholds, they resorted to rape as a means of quashing resistance and punishing entire populations by targeting women; as is relevant in all cases of weaponized rape, the notion of rape as an attack that destroys the cultural fabric of a patriarchal society is especially salient here, as women who are raped in Syria are often forced to flee in order to evade more rape, societal stigma and shame, or ultimately, execution. Additionally, the fact that Syrian wartime rape survivors are silenced and prevented from coming forward about the crimes committed against them for fear of social rejection and life-threatening harm has allowed Assad to effectively neutralize them as threats, with Forestier asserting that rape was presented by State actors as an ever-looming threat intended to deter female activists from playing a role in opposition efforts, which unfortunately worked (Forestier 2017).

By raping civilian women perceived to be a threat to the State, Assad's regime not only terrorized a civilian population in targeting women and destroying Syrian Islamic purity ideals, but also attempted to spin the conflict, framing it "as a fight between Alawites and Sunnis instead of a struggle for democracy," succeeding in breeding additional religious tensions in the conflict that only further compounded the existing ones (Forestier 2017: 11). Sexual violence, however, mainly targeted Sunni women, and constituted a clear agenda of state-sanctioned violence against women because of their political and religious affiliations (Forestier 2017). Men and boys, albeit a smaller percentage, were not spared from sexual violence either as a result of their perceived affiliation with rebel groups (HRW 2020).

7.2 The Angle of Prosecution for Weaponized Rape in Syria

Seema Kassab states that the sexual violence and systematic use of rape in Syria constitute war crimes under Articles 7 and 8 of the Rome Statute, with agents of the Assad regime committing 62% of rapes and sexual violence crimes, Shabbiha (also backed by Assad's regime) being responsible for 23%, and only 2% of rapes and SGBV crimes committed by Free Syrian Army rebels (Kassab 2018; Levrant 2018). These crimes of SGBV are overtly systematic and part of an overarching policy of repression and punishment and must be prosecuted as such, the likelihood of which is bolstered by increased documentation of Assad's commissioning of grave violations of human rights law due to growing international media presence (Kassab 2018; HRW 2020).

While there is still no evidence that explicitly points to State officials ordering the use of rape from Damascus, instructions were apparently given to intelligence agents to do essentially whatever they wanted, a statement "repeated like a leitmotiv" according to Forestier (Forestier 2017; Kassab 2018). The explicit connections between Bashar al-Assad's name and the orders to do whatever is necessary to secure power for the regime suggest that while Assad may not have explicitly ordered his combatants to rape, he certainly never prohibited or discouraged it. In Forestier's words:

> While the President or high-level security officials probably didn't give explicit orders, the green light to rein in the uprising by all means necessary provided intelligence regional directors and army commanders with flexibility in repressing the population. Thus, it appears that sexual violence fits into local dynamics. (Forestier 2017)

This provides potential avenues for Assad to be considered individually liable for the commissioning of these war crimes and human rights abuses—Kassab maintains that Assad could be found individually liable for his role in ordering violence according to both Article 25(3) and Article 28 of the Rome Statute, which collectively comprise an effort to hold commanders and superiors specifically liable for the actions of their agents (Kassab 2018).

7.3 Can Syria Be Held Accountable via the ICC?

Kassab's assessment also compares the relative feasibility of three main avenues of prosecution for Syrian human rights violations, including domestic courts, the possibility of an ad hoc tribunal similar to that of the ICTY, and intervention by the ICC (2018). She suggests that the likelihood of domestic courts holding Assad's regime criminally liable is incredibly low, a fair assessment considering the regime would likely not cooperate and group loyalties are too deeply fractured in Syria to streamline a cooperative approach to human rights justice (Kassab 2018). Kassab further notes that the establishment of an ad hoc international criminal tribunal is low due to dependency upon the UN Security Council, which has been notably passive in its attempts to establish a mechanism of prosecuting human rights abuses in Syria (Forestier 2017; Kassab 2018). An ICC referral would be more efficient in terms of cost and time than an ad hoc tribunal, as well as more comprehensive considering the already well-established, albeit young, institutional capacity of the ICC compared to that of a freshly-created criminal tribunal (Kassab 2018). That is not to say, however, that ICC intervention would be an uncomplicated panacea for Syrians—the ICC also largely depends on the cooperation of State leaders to effect investigations and prosecutions, which appears uncharacteristic of the Assad regime. And while plenty of incriminating evidence exists and "is likely sufficient to attribute individual criminal liability to Assad and high-ranking officials within the regime under these provisions of the Rome Statute [Articles 25 and 28 regarding individual criminal responsibility]," potentially constituting a case stronger than those against Katanga or Bemba Gombo, the usefulness of this evidence is ultimately dependent upon the regime's willingness to cooperate with the ICC in a

potential future investigation, as well as dependent upon the actions United Nations Security Council (Kassab 2018).

7.4 Why the UNSC Is Failing Syrians

The UN Security Council has been assessed by certain international humanitarian rights law scholars as widely passive on the subject of human rights violations in Syria, and the Council's history of inaction is compounded by competing international influences intent on keeping Assad's regime unpunished (Forestier 2017; Krapiva 2019). Natalia Krapiva (2019) and Seema Kassab (2018) both note Russia and China's consistent efforts to block UN Security Council resolutions aimed at garnering justice in Syria, including a referral to the ICC after international outcries calling for prosecutions in 2013. The highly-politicized UNSC has revealed itself to be susceptible to the biased influence of States in blatant support of the conflict and Assad's regime, as well as ultimately fruitless in effecting prosecutions as evidenced by the facts that human rights abuses are ongoing in Syria and only a few past perpetrators have been brought to justice in universal jurisdiction cases abroad (Kassab 2018; Krapiva 2019; HRW 2022).

The UN Security Council's inaction frustrated the General Assembly as well as the international community, and on 16 December, 2016, the UNGA established the "International, Impartial and Independent Mechanism (IIIM) to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011," which was, according to Krapiva, "an unprecedented move […] to sidestep the Security Council" that "could pave the way for accountability in Syria" (Krapiva 2019). But the IIIM, without the authorization of the Security Council, is limited in its capacity to ensure the cooperation of Syria and other states party to the conflict, as it will have to

rely entirely on voluntary cooperation from involved states, NGO support, and individuals to collect and provide the evidence necessary for prosecution (Krapiva 2019).

Krapiva further notes that, given that the Security Council is unlikely to refer the Syrian situation to the ICC or establish an ad hoc criminal tribunal, the IIIM is forced to provide this evidence to European courts in universal jurisdiction cases abroad, meaning the primary avenues for Syrian accountability at the moment remain in Europe and domestic accountability remains unlikely (Krapiva 2019). In short, if the UN Security Council fails to refer Syria to the ICC, and the IIIM is unable to collect enough evidence to provide to European courts trying universal jurisdiction cases, there will continue to be virtually zero established mechanisms to garner accountability in Syria, allowing a culture of impunity to fester.

7.5 Unlikely ICC Intervention and Universal Jurisdiction Cases

Universal jurisdiction cases held before European courts appears to be the only glimmer of hope for accountability in Syria, but even then, Krapiva maintains that these positive developments "are not representative of the crimes committed in Syria" (Krapiva 2019). She indicates that most of these European cases, specifically those in Austria, France, and Germany, involve low-level perpetrators despite reports that Syrian and Russian forces are primarily responsible for the widespread violence used against civilians—additionally, in Austria, Germany, and Finland, cases only involved charges of domestic terrorism offenses, which did not include most of the human rights abuses committed in the conflict, including rape and sexual and gender-based violence (Krapiva 2019). Krapiva asserts that this "deficiency" in European cases is due to difficulties acquiring evidence of high-level perpetrators' crimes, and also notes

that while the IIIM can try its best to submit substantial evidence, there is always the possibility that European courts can refuse to admit the IIIM's evidence (Krapiva 2019).

Holding perpetrators, especially those who are high-ranking in the Assad regime, accountable for their violations of international human rights law in Syria will undoubtedly be a challenging road—with the possibility of cooperation devoid from Assad's regime, and the UN Security Council's continued inaction regarding conflict-related violence and human rights abuses, responsibility falls to the IIIM to provide evidence to European courts holding universal jurisdiction cases and hold perpetrators accountable. Is this too hefty of a task for the nascent IIIM, or can the Mechanism work in tandem with European courts to effect change where the Security Council could not? And in the unlikely event that the Security Council refers the Syrian situation to the ICC, will the evidence of sexual violence and patterns of systematic rape that characterized the early years of the conflict be forgotten or deprioritized? Due to the chances of ICC intervention in Syria being incredibly slim, the positive (albeit lackluster) progress of European courts will remain the sole source of hope for Syrians who have been waiting for justice for over a decade, at least until the UN Security Council can extract itself from the influence of Assad's supporting States and call for international human rights law action (HRW 2020; Kassab 2018).

Chapter 8: Myanmar's Complex Relationship with the ICC

8.1 Myanmar's Modern Genocide

Myanmar, or Burma, is still in the midst of an ongoing conflict that, beginning officially in 2016, is widely considered by the international community to be genocidal. The tensions

between the Rohingya Muslim minority in the northern Rakhine State (a largely Buddhist state) and the Burmese government go back decades—intercommunal violence and state repression were hallmarks of the Burmese treatment of the Rohingya, especially between 2012 and 2013, when rising ethnic tensions turned Rohingya Muslim and Arakan Buddhist communities against each other (Spadaro 2020). Rohingya insurgents, frustrated with the repression of Myanmar State forces, launched attacks in 2016 that were quickly countered by the State, but violence escalated dramatically in 2017 after the forced the expulsion "of more than half a million in the course of a month" (Alam & Wood 2022). Burmese troops and police officers are alleged to have conducted widespread raids and massacres against the Rohingya, and the use of sexual violence and rape against Rohingya individuals was and continues to be a major facet of the Myanmar military's agenda of ethnic cleansing (Alam & Wood 2022; Spadaro 2020). Multiple perpetrator rape was especially prevalent during these military "clearance operations," and the intent to terrorize Rohingya populations and traumatize them beyond recovery was a clear motivation for conflict-related rape in Myanmar (Alam & Wood 2022).

8.2 Systematic & Genocidal Rape in Myanmar

The subject of Rohingya genocide as discussed by the International Court of Justice (ICJ) and International Criminal Court (ICC)—the two courts that have managed to gain traction investigating genocide and human rights abuses in Myanmar—is characterized by two distinct phases of violence, the first occurring between October of 2016 and late January 2017 that saw escalating tensions and attacks between State forces and Rohingya populations, and the second beginning shortly after in August of 2017, with brutal violence lasting until November of 2019 (Gunawan et al. 2020). Though atrocities are still ongoing against the Rohingya minority in

Myanmar, these periods of genocidal persecution could be considered as more eminently prosecutable due to both the frequency and scale of violence that occurred within these periods, and the overwhelming evidence present pointing to Burmese State authorities' role in implementing a genocidal agenda against the Rohingya. Rape was a hallmark feature of both periods of violence, and the crime's systematic nature is made explicit in the case of Myanmar (Reuters 2017).

Mayesha Alam and Elisabeth Jean Wood argue in their assessment of the sexual violence committed in Myanmar that "sexual violence against the Rohingya occurred as an organizational policy, one authorized implicitly if not explicitly by commanders" (2022). Following ARSA (Arakan Rohingya Salvation Army) insurgency attacks on local security posts, the Myanmar military, also referred to as Burmese security forces or the Tatmadaw, launched a "massive campaign" of violence on 26 August, 2017 that included the widespread rape of Rohingya women. Most of the rapes of that occurred during this second phase of violence were allegedly committed by the Tatmadaw (the local name for the Myanmar military), although combatants of various armed groups as well as civilians "equally committed these acts" (Alam & Wood 2022; Spadaro 2020). Alam and Wood note the following:

> As the military raided villages, women and girls were sometimes rounded up from their homes and moved to schools, mosques, military barracks, and outposts or taken to the jungle where they were held against their will for hours or days during which time they were sexually assaulted and subject to threats and intimidation; such violence and abuse were reported in both 2016 and 2017. Some forcibly abducted victims were killed after being subjected to sexual violence and others were released or abandoned…State forces engaged in sexual violence in both private and public spaces. In some cases, soldiers put on gratuitous public spectacles that terrorized both victims and the broader population. (Alam & Wood 2022: 5)

In this sense, the Myanmar State forces exhibited a clear agenda to terrorize not only Rohingya women, but also the Rohingya population in general.

Additionally, while the sexual gender-based violence including rape committed by Myanmar military forces largely targeted women, men as well as 'Hijra' individuals that identify "as third-gender persons, transgender women, and intersex persons in South Asia […] assigned a masculine gender at birth" were also reportedly targeted and violated sexually (Spadaro 2020). Alam and Wood cite mutilation, castration, penis amputation, and anal rape against men and boys as occurring, as well as sometimes preceding executions, especially the executions of "the educated, community leaders, religious leaders, adolescent boys, and forcibly detained persons" (Alam & Wood 2022). The intent to humiliate and terrorize the Rohingya through sexual violence was overt early on in the Myanmar conflict, and as the violence escalated in early 2018, "sexual violence, gender harassment, and humiliation by officials increased," according to the United States' 2021 Human Rights Report for Burma, which points to the organized and systematic nature of the violence as State forces doubled down on their efforts to incite terror and ultimately enact genocide (US HRR Burma 2021).

Between the start of the second phase on 27 August 2017 and 25 March 2018, an estimated 6,097 sexual and gender-based incidents were reported, of which "the majority of alleged rapes occurred during village raids," but even these may be conservative estimates, considering the risks associated with reporting rape in Myanmar (Spadaro 2020; Alam & Wood 2022). Alam and Wood assert that "establishing the frequency of sexual violence is virtually impossible not least because many victims were killed or may have died from physical injuries they sustained," but also because social stigma leads to the underreporting of rape (Alam & Wood 2022). According to the US Human Rights Report for Burma, detained women were also subjected to sexual assault and gender-based violence, and in some cases, women were verbally abused by police for reporting rape—the report claims that women who reported rape or sexual

assault "faced further abuse by police and the possibility of being sued for impugning the dignity of the perpetrator" (US HRR Burma 2021). Undoubtedly, there exist clear barriers to those pursuing justice for sexual and gender-based violence in Myanmar, which should underline the need for international attention and legal involvement in addressing the widespread rape committed by Burmese military members in particular. In terms of viable legal avenues for justice in the Myanmar situation, the International Criminal Court and the International Court of Justice may be the only possible means of prosecuting the genocidal acts, war crimes, and crimes against humanity committed by Burmese State forces against the Rohingya.

8.3 The Viability of the ICC in Myanmar

Myanmar is not an ICC member state, as the Burmese government never signed the Rome Statute—its eastern neighbor did, however, sign and ratify the Statute, and thus Bangladesh's status allows for potential ICC action in Myanmar. Despite Myanmar's non-membership in the ICC eliminating the possibility of self-referral to the Court, an ICC investigation was authorized to be pursued in that "the ICC could assert jurisdiction pursuant to Article 12(2)(a) if at least one element of a crime within the material jurisdiction of the Court were committed on the territory of a state party," and considering the thousands of expelled Rohingya refugees that have fled to Bangladesh and the degree to which the violence has spilled over from Myanmar, Pre-Trial Chamber III's authorization to conduct this investigation through somewhat of a loophole is understandable. Regarding this decision to authorize an ICC investigation partially into Myanmar, Alessandra Spadaro notes:

> According to Pre-Trial Chamber III, there is a reasonable basis to believe that at least one element of the crimes against humanity of deportation and persecution, under Article 7(1)(d) and (h) of the Rome Statute respectively, were committed against the Rohingya on the territory of Bangladesh. […] The Chamber authorized the Prosecutor to investigate

> crimes committed at least in part on the territory of Bangladesh [since 9 October 2016 and continuing], as well as crimes committed at least in part on the territory of other states parties or of states making a declaration under Article 12(3) of the Rome Statute, and that were sufficiently linked to the situation as described in the decision. […] The Chamber also stressed that the Prosecutor was bound neither to investigate solely the events outlined in her Request, nor by their provisional legal characterization. (Spadaro 2020: 616)

The Prosecutor being granted permission to conduct this *proprio muto* investigation partially in an ICC non-member state is a significant achievement in the absence of a UN Security Council ICC referral, a referral which organizations such as Human Rights Watch deem to be critically needed in order to comprehensively investigate and prosecute those most responsible in the Myanmar situation (Spadaro 2020; HRW 2022).

Human Rights Watch further notes that the UN General Assembly is already discontent with the Myanmar situation's handling, calling for UN member states to enact arms embargos to stop bolstering Burmese state forces and passing a resolution in June 2021 calling on Myanmar to end its previously-declared state of emergency "to allow the sustained democratic transition of Myanmar" (HRW 2022). Perhaps the General Assembly's calls to action and increased international attention can spur the Security Council into drafting an ICC referral, but the likelihood of this cannot presently be determined. Until a formal referral by the UNSC is created, the Bangladesh/Myanmar investigation remains the sole avenue for ICC intervention in Myanmar at the moment.

8.4 How Will Rape Be Charged? The ICC vs. the ICJ

The issue of rape is specifically interesting in the Myanmar case, as rape could possibly be recognized as dual-functioning: while many instances of rape in Myanmar by the military junta could be construed legally as war crimes or crimes against humanity, the widespread

systematic nature of rapes committed against Rohingya women could also constitute genocide and thus a breach of the Geneva Conventions. In 1956, Myanmar ratified the UN's Genocide Convention of 1948, which cites any act constituting genocide as an international crime and "also commits Parties to the Convention to undertake actions to both prevent and punish" such crimes (Gunawan et al. 2020). Upon the submission of an Application by The Gambia to institute legal proceedings against Myanmar for alleged violations of the 1948 Genocide Convention, the International Court of Justice (ICJ) ordered provisional measures for Myanmar on 23 January, 2020 (Spadaro 2020). The Court relies largely on evidence collected by the Independent Investigative Mechanism for Myanmar, established by the UN Human Rights Council in September of 2018, and "has indicated that it is responding to requests from both Gambia and Myanmar in *The Gambia v. Myanmar* case" (HRW 2022).

As such, the ICJ and ICC are dealing with the Myanmar situation simultaneously. While the ICC is perhaps better equipped to charge rape in Myanmar as a crime against humanity, the ICJ is likely better suited to charge the crime of rape as genocide, as the ICJ is primarily concerned with Myanmar's breaches of the Genocide Convention of 1948 (Gunawan et al. 2020; Spadaro 2020). Both courts, however, are limited in their jurisdiction and subsequently limited in their ability to comprehensively prosecute perpetrators in Myanmar. Spadaro suggests that the ICJ's main constraints will "relate to the fact that its jurisdiction derives from Article IX of the Genocide Convention and is thus restricted to the subject matter of this Convention, whereas for the ICC the issue is that Myanmar is not a state party to the Rome Statute" (Spadaro 2020). She distinguishes, however, that both courts are legally qualified to address the Myanmar situation, and that "one qualification does not exclude others," which could optimistically garner twice the

impactful decisions of a lone court prosecuting Myanmar's most responsible perpetrators (Spadaro 2020).

While it remains unclear whether or not the ICC and ICJ will be able to effect comprehensive and just prosecutions in the Myanmar situations, both courts' recognition of general sexual violence and, more specifically, rape as constituting an organized agenda or policy of violence against the Rohingya in Myanmar is significant. Although the ICC is considerably less promising in terms of garnering convictions of Burmese officials given Myanmar's non-membership status in the ICC, the ICJ has the potential to find the Republic of the Union of Myanmar guilty of genocide including genocidal sexual violence, which would further advance the existing international jurisprudence on systematic and genocidal rape established the ICTY and ICTR, respectively. Alam and Wood suggest that during the coming proceedings, the focus for justice in Myanmar should look both backwards and forwards in order to avoid the "nonrepetition" of the crimes committed against the Rohingya (Alam & Wood 2022); while they agree that the prosecution of commanders and combatants who committed sexual violence crimes is "essential to accountability," they also posit that the prosecution of those most responsible does not necessarily guarantee the deterrence of sexual violence, nor violence in general (Alam & Wood 2022).

Bearing in mind the argument of Woods and Alam, it will be intriguing to see which perpetrators the ICJ (or ICC, potentially) chooses to prosecute in the future, and whether or not there will exist a variation of low-, mid-, and high-ranking officials as suspects; as evidenced by the previously discussed situation in Liberia, in which Charles Taylor assumed most of the accountability for the crimes of thousands of perpetrators, the symbolic prosecution of a "most responsible" leader can leave survivors and witnesses to feel as though the prosecution lacked in

scope, considering the lower- and mid-level perpetrators remaining at large and widely unpunished. Should the ICJ or ICC manage to continue its proceedings in the state of Myanmar, particular attention must be paid to the manner in which rape is charged, as either a crime against humanity or a crime of genocide (or both in either respective court), as well as to the profiles and military statuses of the future-accused, in order to effect comprehensive justice that accurately captures the scope and widespread, systematic nature of rape committed against the Rohingya in Myanmar.

Chapter 9: The ICC's Curious Role in Darfur, Sudan

9.1 Genocidal Rape in Darfur, Sudan

Ethnic tensions in the Darfur region of Sudan reached a breaking point in 2003, at which point the conflict began to be largely characterized by the brutal and systematic violence committed by Sudanese forces against ethnic minority groups, including rape and forced impregnation as part of an ethnic cleansing campaign. Sudan never signed the Rome Statute and thus is not a member state of the ICC, making the situation in Darfur especially unique; its contentious UNSC referral and progressive charge of genocide against a Head of State, former President of Sudan Omar al-Bashir, make the case of Sudan worth examining in the larger context of ICC efficacy.

The Sudanese Liberation Movement/Army (SLM/SLA) was largely comprised of individuals who identified as members of the Fur, Zaghawa, and Masalit ethnic groups, and in February of 2003, the insurgent organization, frustrated with their marginalization at the hands of the Sudanese government, attacked government targets (Amnesty International 2011). Closely following the inception of the SLA, the Justice and Equality Movement (JEM) established itself

with a similar platform, and both groups "demanded the end of the marginalization of Darfur and more protection for the settled population, which they claimed to represent" (Amnesty International 2011). While there have been rare reports of SLA and JEM soldiers engaging in sexual violence with the civilian population, it is rational to conclude due to victim accounts from various refugee camps that the Janjaweed (also Janjawid) Arab militia working with government forces committed the majority of large-scale rapes in Darfur in the earlier years of conflict (Amnesty International 2011). Rape was employed deliberately against women in Darfur by Sudanese forces in order to pursue a genocidal agenda—many scholars and human rights organizations alike agree that, due to the scale, frequency, and pattern of several unique tactics of the Sudanese forces, the rapes that occurred in Darfur were war crimes, crimes against humanity, and additionally amounted to genocide (Powell 2017; Reid-Cunningham 2008).

One unique tactic of the Janjaweed and the Sudanese military forces that reflected their joint genocidal agenda was forcible impregnation—similar to the rapes committed specifically to impregnate and thus mar the lineage of rape survivors in Bosnia-Herzegovina, Sudanese forces that raped civilians sometimes sought to impregnate women of ethnic minorities in order to make their bloodlines more "Arab" (Reid-Cunningham 2008; Powell 2017). Allison Ruby Reid-Cunningham asserts the following:

> Rape with intent to impregnate is a strategy used by the Janjaweed and military officers perpetrating mass rape in Darfur. Sudanese children's ethnicity is derived solely from their fathers; it is believed that an Arab father produces an Arab baby. This symbolic and cultural information becomes a weapon of genocide when applied in this manner. As one aid worker in Darfur has stated, ''Everyone knows how the father carries the lineage in the culture. They want more Arab babies to take the land.''44 One survivor reported that the Janjaweed said to her, ''Black girl, you are too dark. You are like a dog. We want to make a light baby ... You get out of this area and leave the child when it's made.'' (Reid-Cunningham 2008: 287)

Furthermore, the common enactment of public rapes in Darfur is another unique aspect of conflict-related rape that reflects a clear agenda of genocide; Reid-Cunningham maintains that the shame and humiliation inherent to the act of publicized sexual violence magnifies the psychosocial trauma of the community that witnesses it, further destroying bonds within ethnic groups (Reid-Cunningham 2008).

This agenda of intentional ethnic community destruction via rape in its various forms has resulted in intense stigmatization of rape survivors in Darfur, which, understandably, renders many survivors hesitant to testify, lest they be further traumatized or ostracized by their communities (Reid-Cunningham 2008; Powell 2017). In her analysis of genocidal rape in international criminal law, Cassie Powell examines the gravity of recognizing, charging, and ultimately prosecuting rape as genocide, as opposed to its longstanding and better-documented history of categorizations under war crimes and crimes against humanity; in this way, the recognition of the rapes that occurred in Darfur as genocidal is a major step in international criminal law, as it carries heavier implications. Powell asserts that genocidal rape "suggests that the motivation for sexual violence against this woman was more than her gender—rather, it was her role as part of a particular group," thus making genocidal rape a dual-faceted crime, against both a woman and her ethnic group (Powell 2017). As this chapter will examine later, however, there are significant barriers to the prosecution of genocidal rape on the international criminal legal stage.

9.2 The UNSC's Referral

Sudan is not party to the Rome Statute, and thus cannot refer its own situation to the ICC, but a referral by the UN Security Council in March 2005 made ICC proceedings in Sudan

possible. Compared to the Security Council's standstill in referring Syria to the ICC, this seems like major progress on the UNSC's end, but the reality of the UNSC's Darfur referral to the ICC presented several impediments to justice. While violence had erupted in 2003, the Security Council only took note of the ethnic violence officially in May 2004, a late start in attempting to mediate the massacres. Additionally, Dr. Amit Anand et al. note that Resolution 1593, which referred the situation in Darfur to the ICC, faced significant criticism due to its wording, which revealed that none of the expenses for said referral would be incurred by the UN, a move by the Security Council that sidestepped the General Assembly's sole authority to decide funding under Article 115 of the Rome Statute (Anand et al. 2023). In doing so, Anand et al. maintain that "the Security Council's concern for the rights of the affected people of Darfur was not reflected in the right spirit through the wordings of its resolution" (Anand et al. 2023). Nonetheless, the UNSC's decision to refer the situation in Darfur to the ICC was ultimately the correct one, albeit implemented poorly.

9.3 ICC Action in Darfur

The International Criminal Court has initiated six cases in Darfur against individuals alleged to have committed war crimes, crimes against humanity, and crimes of genocide, yet only two have proven to be remotely fruitful. The ICC investigation in Darfur opened in 2005, and in the years following, the Court began issuing warrants for arrest for a total of seven individuals (Powell 2017). Ali Muhammad Ali Abd-Al-Rahman's case is one of the two cases that have garnered or signaled progress in prosecuting rape in Darfur—although the 31 charges brought against Abd-Al-Rahman do not include genocidal rape, or any charges relating to genocide at all, they do include rape as both a crime against humanity and a war crime. The

defendant, who was a principal leader of the Janjaweed militia in West Darfur and is implicated in crimes from 2003-2004 as well as 2013, managed to evade arrest for over 13 years before his surrender to ICC custody in 2020, as his initial warrant of arrest was submitted in 2007 (ICC CIS for Abd-Al-Rahman). His trial is ongoing, but should he be convicted on his charges of rape, he would be one of the few in Darfur to face consequences for commissioning and participating in widespread rape, which would be a significant addition to international jurisprudence on wartime rape.

Four suspects still remain at large across the ICC's six cases in Darfur, one of them being infamous for his role in Sudan's ethnic cleansing: Omar al-Bashir, the former President of Sudan, is the first person to be accused of genocide in the International Criminal Court, with his commission of widespread rape helping to inform the charge of genocide. The initial indictment against al-Bashir did not include counts of genocide as Pre-Trial Chamber I required more evidence for the charge (ICC CIS for Al-Bashir); the prosecutor submitted additional evidence in November of 2008 "that demonstrated the extent of and ethnical motivations for the mass rapes, and successfully persuaded the Court to indict al-Bashir for genocide on the basis of this new evidence in 2010" (Powell 2017). The fact that the charge of genocide was brought about largely by the allegation "that al-Bashir had orchestrated the rapes of thousands of civilian women, primarily of the Fur, Masalit and Zaghawa ethnic groups" is incredibly significant—it not only accuses al-Bashir of genocide, but also inherently recognizes his commission of genocidal rape given his clear "ethnical motivation" to commit sexual violence against Rohingya women (Powell 2017).

9.4 Implications and Criticisms of the ICC in Darfur

As progressive as the case against al-Bashir may be, it has yet to be held, as al-Bashir remains at large. But the significance of al-Bashir's case should not be minimized, however, in light of his evasion of ICC custody; scholars including Powell note that charges of genocide are notoriously hard to establish in international criminal law, and thus the amendment of al-Bashir's warrant to include charges for genocide is consequential (Powell 2017; Amnesty International 2011). Powell cites the difficulties in accurately reporting rates of rape due to social stigmatization of survivors and hesitancy of victims to testify—additionally, she emphasizes that proving genocidal motivations for rape has long been hindered in the ICC's history, as well as in the rulings of the ICTY and ICTR (Powell 2017). Powell points to the notion that the obstacle of insufficient evidence for genocide charges has plagued international criminal law for decades, and, considering genocide is one of the gravest crimes a person can commit, she maintains that the ICC's handling of genocidal rape should not go unrecognized, and that a criminal conviction for genocide of a former Head of State could offer massive potential in establishing international criminal precedents for genocide and genocidal rape alike (Powell 2017).

The case of Abd-Al-Rahman is currently the sole case to make it to trial before the ICC in Darfur's situation, and the fact that so many of the accused are still at large is concerning—once again, the ICC's effectiveness is called into question in terms of its record of being unable to get accused perpetrators into custody. Because the Sudanese government has refused to cooperate with investigations, the ICC must rely on voluntary surrenders of the accused, and Anand et al. maintain that it is entirely the responsibility of the UN Security Council to get Sudan to comply with its obligation—this is also concerning, considering the Security Council's longstanding record of intervening too late or, as in the cases of Syria and Liberia, failing to intervene at all (Anand et al. 2023). Anand et al. also set forth the argument that ultimately, the

most glaring structural drawback of the ICC is its lack of its own enforcement mechanism—as evidenced in numerous cases, the UN Security Council is not necessarily the most reliable in terms of taking swift and comprehensive action (Anand et al. 2023). The Security Council must take action in addressing the Sudanese government and forcing it to comply, and must also take steps to keep itself independent of the influence of states opposed to the ICC, as Anand et al. note the United States' anti-ICC stance as having imbued the Security Council's decisions in the past (Anand et al. 2023).

In short, Darfur, Sudan saw one of the largest humanitarian crises in recent history, and though Sudan's non-member status with the ICC has presented challenges to the Court's investigation and attempted prosecutions, the UNSC's referral of the Darfur situation to the ICC created the very real potential for accountability in the genocidal conflict. Rape was committed both systematically and as an instrument of genocide in Darfur by Sudanese forces and Janjaweed militia members against the Fur, Zaghawa, and Masalit ethnic groups, and its prosecution as such in the al-Bashir case could make a significantly positive contribution to the understanding of both wartime and genocidal rape in international criminal law; additionally, the ongoing proceedings against Abd-Al-Rahman also have the positive potential to set a precedent regarding the individual criminal liability of commanders in committing crimes of sexual violence, in Darfur and beyond. These opportunities to challenge impunity, however, are complicated in Darfur by the lacking number of accused in custody—if the UN Security Council fails in getting the Sudanese government to comply, al-Bashir and the remaining individuals accused by the Court can effectively enjoy impunity so long as they evade custody, relaying a message of UNSC passivity and ICC ineffectiveness to the international community and further delay the longstanding struggle for accountability.

Chapter 10: Conclusions and Discussion

It is reasonable to assume that, as evidenced by the International Criminal Court's various ongoing investigations and current prosecutorial pursuits concerning sexual violence, conflict-related rape continues to be utilized globally by combatants and leaders alike to violate the rights of individuals. The international legal community cannot rely on the ICC to signal a message of deterrence through its prosecution of conflict-related sexual violence, as its inconsistent rulings and frequent inability to get defendants into custody have managed to dilute the Court's missions of prevention and accountability. Ultimately, as maintained by Broache and Kore (2023), when it comes to deterring sexual violence by state forces, the ICC has made negligible progress; furthermore, the findings of Binningsbø and Nordås (2022) suggest that ICC interventions may actually increase sexual violence committed by rebel forces, with "unclear" trials by the ICC failing to comprehensively prosecute rape and thus allowing wartime rape impunity to continue. The Court's minimal success in prosecuting state actors who have engaged in conflict-related sexual violence has sent a mixed message of both accountability and impunity to perpetrators, especially to state forces perpetrating conflict-related sexual violence. This is compounded by the fact that the ICC has produced so few high-profile convictions and many former and incumbent government officials have managed to evade arrest, leading to the continuation of state-sanctioned sexual violence and the continued normalization of sexual violence crimes (Broache & Kore 2023).

These case studies represent a wide variety of ICC outcomes in member and non-member states, and illustrate the ways in which the ICC has failed to bring about comprehensive accountability for perpetrators of conflict-related rape. Bosco Ntaganda's conviction for rape

remains the crowning achievement of the ICC in the Democratic Republic of the Congo, but the positive implications of this conviction for deterrence efforts are undermined by the Court's other DRC decisions, which include acquitted charges of rape, an indicted individual at large now for more than a decade, and a case involving rape never committed to trial. In Sierra Leone and Liberia, ICC involvement is virtually nonexistent, and despite progress made by the Special Court for Sierra Leone and universal jurisdiction cases abroad trying Liberian war criminals, both case studies illustrate the disadvantages of late ratification of the Rome Statute and the constraints of the temporal jurisdiction of the ICC.

In non-member state Syria, the likelihood of ICC intervention is incredibly low due to the unwillingness of the UN Security Council to refer the situation under Assad's regime to the ICC and the low possibility of the Syrian government cooperating with an investigation—similar to Liberia, universal jurisdiction cases remain the sole hope for Syrian accountability since the Security Council and ICC are not currently motivated to intervene. In Myanmar, the International Court of Justice appears better suited than the ICC to prosecute the occurrence of genocidal rape, and despite Bangladesh's loophole referral of the situation to the ICC, the Court still faces significant hurdles in getting the non-member state of Myanmar to cooperate and will likely only be able to prosecute rape as a crime against humanity or war crime (as crimes of genocide will be primarily handled by the ICJ). Although Sudan stands out as an example of a successful ICC investigation conducted in a non-member state, only one of the six accused surrendered and is standing trial, and the rest—including Omar al-Bashir, whose conviction could be an incredible achievement and statement against Head of State impunity—remain at large.

It is important to note that the ICC's shortcomings in deterring the use of conflict-related rape do not negate the extraordinary progress and legal developments made by the Court; rather, these achievements are undercut by a mixed record of acquittals, charges of sexual violence declined to be brought against accused, and a lack of convictions for sexual crimes. The understandings of wartime rape forwarded by the International Criminal Court and its two successful convictions of sexual violence charges should be understood as crucial to the international criminal and humanitarian law communities—furthermore, a successful message of deterrence could be sent to perpetrators in ICC member states that choose to promulgate the Rome Statute into domestic laws and judicial frameworks in order to hold low- and mid-ranking perpetrators accountable. Attempts made by member states such as the DRC to take advantage of ICC complementarity jurisdiction could signal to perpetrators the end of conflict-related rape impunity (Vinjamuri 2016; Igwe 2008; Altunjan 2021).

But if the ICC is to be effective in deterring sexual violence, it needs to set a firmer precedent of accountability for conflict-related rape through increased prosecution. Obstacles to creating this precedent include the ICC's temporal jurisdiction constraints, its often unprepared and/or uninformed prosecutorial strategies in investigating and finding substantial evidence for rape, and the Court's dragging timeline—furthermore, the ICC has displayed a consistent inability to ensure that those indicted are taken into custody, which delays accountability even more. Though scholarship that criticizes the ICC's structure and rulings is valuable to understanding why the Court continues to fail to prevent sexual violence, it is worth noting that the International Criminal Court has still made objective progress in deepening international criminal legal conceptions of the crime of rape and its various functions in war; ICC jurisprudence could importantly serve to inform other, smaller war courts in the future.

Ultimately, any and every conviction for conflict-related rape on the international legal stage contributes to the increased global recognition of rape's functions as a physical, emotional, social, and genocidal weapon. Should the Court seek to augment its international sway in deterring conflict-related rape, however, it must consider sexual violence and wartime rape as priorities in its future prosecutorial strategies and judgments, not as secondary to other traditionally accepted and punished crimes of conflict.

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