"Managing Violence"[1]

Can the International Criminal Court Prevent Sexual Violence in Conflict?

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In the Central African Republic (CAR), rebel leaders are doing something that could impress even the most cynical of international lawyers: they are meeting in makeshift outdoor classrooms to learn about the Rome Statute and international law. The year is 2007 and bursts of civil conflict[2] marked by sexual violence[3] persist in the CAR. Far beyond the reaches of newspapers and the Internet, rebel fighters are tuning their scratchy transistor radios to the BBC to follow the actions of the International Criminal Court (ICC) and its first prosecutor, Luis Moreno Ocampo.[4] In particular, these rebels are interested in the ICC prosecutor's recently launched investigation into previous incidences of sexual violence in the CAR.[5] At least one rebel force in the CAR seeks and receives instruction on the Rome Statute's prohibitions on sexual violence in an effort to rebrand itself as legitimate, law-abiding combatants impervious to ICC prosecution. Is this progress?

A series of legal developments have combined to create a situation in which international criminal law and the prosecutors who apply it have unprecedented power to influence how fighting forces[6] think about sexual violence in conflict. To advance this argument, this chapter details the important ways in which the Rome Statute's criminalization of sexual violence is exceptional and analyzes why these changes are a foundational step for advancing compliance with these new rules. Next, it explores how Moreno Ocampo's actions ushered in a new era of how international criminal law responds to sexual and gender violence,[7] asserting that the commitment evidenced in the first prosecutor's (admittedly late) focus on

sexual violence crimes has the potential to reshape expectations. Both the instruction of fighting forces on legal restrictions in conflict and the doctrine of command responsibility are indispensable steps for influencing fighting force behavior.

Sexual violence committed by armed forces is a common and gruesome feature of conflict. The Rome Statute of the ICC advanced international criminal law by responding to these crimes in an unprecedented fashion—for example, by including sexual violence in an enumerated list of war crimes and crimes against humanity,[8] codifying "gender" as a chargeable element of the crime of persecution,[9] and establishing prosecutorial obligations to take special note of gender when conducting investigations and prosecutions.[10] These articles of the Rome Statute are to date the most detailed and explicit international criminal provisions regarding sexual violence. This chapter examines the steps Moreno Ocampo and his team eventually took to fulfil the potential of the Rome Statute to respond to sexual violence. In the words of the then prosecutor-elect and now prosecutor Fatou Bensouda, who succeeded Moreno Ocampo as prosecutor, "We can and we will transform the public response to sexual crimes worldwide, in and outside recognized zones of conflict."[11] Reviewing the first prosecutor's strategy of charging gender crimes whenever applicable, the chapter argues that this strategy and the resultant centrality of gender crimes in almost all ICC prosecutions to date promote the legitimacy of the criminalization of sexual violence under international law. This legitimacy,[12] together with command responsibility, a mode of liability facilitating the prosecution of atrocities in conflict, increases the likelihood that combatants and those who lead them will comply with the Rome Statute's prohibitions on sexual violence. To examine Prosecutor Bensouda's assertion that "the law will help to change behaviour,"[13] this chapter employs a case study of a particular rebel group in the CAR as an example of a nonstate fighting force requesting instruction in international law. In doing so, it links the promises of the Rome Statute regarding international criminal law's response to sexual violence and the actions of Moreno Ocampo and his team to one example that might indicate that active prosecutions at the ICC can influence fighting force behavior.

Sexual Violence in Conflict: A Persistent and Widespread Problem

Sexual violence has defined the conflict in the CAR. However, the CAR is not an isolated example: armed forces the world over commit acts of rape

and sexual violence at alarming levels in conflicts of various natures.[14] State military, guerrillas, and paramilitaries have used rape as a weapon of civil war in Colombia for more than fifty years.[15] Tens of thousands of women, girls, men, and boys have been raped in the Democratic Republic of Congo (DRC), where conflict has raged for more than twenty years, engendering what United Nations experts call a culture of daily violence of "genocidal proportions."[16] Former Iraqi prisoners held at the now infamous Abu Ghraib prison accused American soldiers of forced sexual acts and threats of rape.[17] Unfortunately, these incidents represent just a few of many more instances.

While the character of sexual violence in conflict is as varied as the geography of conflict itself—including mass rape enacted either by policy or through license,[18] the sexual humiliation and assault of prisoners,[19] and "bad apple" soldiers organizing the gang rape and murder of civilians[20]—no form of sexual violence can ever be justified as a legal part of conflict. In sharp contrast to other violence in warfare—such as targeting, shooting, and killing the designated enemy in compliance with the rules for applying lethal force—there is no legal basis for committing sexual violence in conflict. The law of armed conflict strictly prohibits rapes as a tactic, weapon, or outcome of conflict.[21] And yet despite the widespread and persistent nature of these crimes, prosecuting sexual violence as a crime under international law is a late-twentieth-century development. In this sense, the Rome Statute, the actions of the ICC prosecutor, and the trial judgments emerging from the ICC represent an unprecedented international legal condemnation of sexual violence in conflict.

The Rome Statute's Potential to Punish and Prevent Sexual Violence

The Rome Statute's clear and detailed articulation of sexual violence as a crime under international law ushers in a new era of international legal response to these atrocities. The status of the Rome Statute, which was adopted on July 17, 1998, and entered into force on July 1, 2002,[22] as a duly negotiated treaty and its detailed definitions of sexual violence and gender crimes build on and go substantially beyond previous international law. In doing so, it offers the strongest international legal foundation for punishing and preventing these crimes that the world has yet seen.

The International Criminal Tribunal for the Former Yugoslavia (ICTY), established in 1993, and the International Criminal Tribunal for

Rwanda (ICTR), established in 1994, were the first international criminal tribunals to have subject matter jurisdiction over rape as an international crime.[23] Like the Rome Statute, their statutes began a new era in which crimes of sexual violence were tried as crimes against humanity, genocide, and war crimes. Yet distinct from the status of the crimes in the Rome Statute, it was not clear at the founding of these two tribunals whether and to what extent sexual violence existed as a crime under international law. Both the ICTY and the ICTR acknowledged in their judgments that "no definition of rape can be found in international law,"[24] and they pioneered groundbreaking international law jurisprudence on sexual violence.[25] At the same time, the report of the UN. secretary-general that established these tribunals[26] and later the judgments of these tribunals[27] asserted that rape definitively existed as a crime under customary international law prior to the founding of these courts.[28] Thus it seems that the birth of the modern prosecution of crimes of sexual violence under international law presented a tension between grounding crimes in previously existing international law and developing international crimes through judicial decisions.

The novelty of the crime of sexual violence articulated in the judgments of the ICTY and the ICTR presents problems of legality and legitimacy. Because the tribunals had to invent the definition of rape under international law through their written judgments, legal scholars have argued that such a "highly remarkable" number of definitions of sexual violence emerged[29] that these judgments violated the principle of *nullum crimen sine lege*.[30] But for the Rome Statute, the status of sexual violence under international criminal law might have remained disputed. The entry into force of the Rome Statute solidified the status of crimes of sexual violence under international law. Because the Rome Statute is a treaty with 122 states parties, it provides further evidence that the changes to the international law of sexual violence rendered at the ICTY and the ICTR have assumed the status of customary international law.[31] In contrast, the ICTY and the ICTR were created not by treaty but rather by the United Nations Security Council.[32] Legal theorists express a preference for treaty as a source of international law and in particular prefer a treaty-based international criminal law system as the most legitimate foundation for depriving persons of liberty. As one writes,

> Constitutionally, the preferable way of handling *any* lawmaking text may be the standard method of a diplomatic conference followed by a treaty that is subject to ratification (or not) by govern-

> ments. This approach is evidently preferable where the text in question is, for example, the statute for an international criminal court, which imposes itself on individuals and requires due process of law; or, more generally, where the text must be embodied in domestic law to have its effect.[33]

Thus, the multilateral treaty process by which the Rome Statute came to be international law imbues it with a legitimacy that surpasses that of the U.N. Security Council–created statutes of the ICTY and ICTR. This added strength in turn bolsters the impact of the Rome Statute's criminalization of sexual violence by removing doubt regarding the existence of these crimes in advance of ICC trials, something the ICTY and ICTR statutes were not able to do.

This multilateral negotiation process afforded the Rome Statute another hallmark of legitimacy: textual determinacy. The level of specificity with which the Rome Statute defines crimes of sexual violence is unprecedented in international law. The texts of the Nuremberg and Tokyo Charters did not mention rape or other forms of sexual or gender-based violence. The statutes of the ICTY and the ICTR included rape as a crime against humanity and in the case of the ICTR as a violation of article 3 common to the Geneva Conventions and of Additional Protocol II, but these statutes did not provide a substantive definition of rape or enumerate related crimes of sexual violence such as sexual slavery. In contrast, the Rome Statute articulates specific acts such as "forced pregnancy"[34] and sets out broader categories such as "any other form of sexual violence of comparable gravity,"[35] thereby allowing for charges within the category of sexual violence for acts not expressly enumerated. Further, the Elements of Crimes[36] substantially define the listed acts of sexual violence. By detailing these crimes in advance of prosecution charges and trials, the Rome Statute and Elements of Crimes eliminate the risk of violating *nullum crimen sine lege*. Accordingly, this achieves what jurist Thomas Franck sets out as a hallmark of legitimate, compliance-inducing international law:

> Perhaps the most self-evident of all characteristics making for legitimacy is textual determinacy. What is meant by this is the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning. Obviously, rules with a readily ascertainable meaning have a better chance than those that do not to regulate the conduct of those to whom the rule is addressed or exert a compliance pull on their policymaking pro-

> cess. Those addressed will know precisely what is expected of them, which is a necessary first step towards compliance.[37]

The specificity with which the Rome Statute defines sexual and gender crimes is meaningful. Drawing on the social meaning of the law to express values and norms, Margaret M. deGuzman argues that "the strongest justification for a special focus on sex crimes at international courts lies in the need to express the undervalued norms prohibiting such crimes."[38] The precision with which the Rome Statute codifies crimes of sexual violence expresses the status of these crimes as normatively and legally condemned, and the clarity of this legal expression has the potential to create a shift in how those who would commit these crimes approach these acts.

The Link between Law and Preventing exual Violence in Conflict

This chapter's central thesis asserts links between the threat of international criminal prosecution and deterrence of sexual violence. To make that link, the causes of mass violence, sexual violence, and violence against women more broadly must be addressed. International criminal law is a system that can influence behavior and act as a counterweight to the forces that drive violence, including sexual violence. The legitimacy described previously and the prosecutor's role in investigating and prosecuting (discussed in the next section) detail the contours of international criminal law and the ICC within it as a power system. Particularly when taken up by commanders in position of hierarchical power over combatants, international law's prohibitions on sexual violence in conflict can come to form part of the organizational culture and power system of the combat unit, acting as a powerful influence on combatant behavior. Because the forces that drive violence involve features such as authority and deindividuation, dehumanization, and moral disengagement rather than formal military structures, these theories apply even in situations where civilian leaders exercise control over civilians turned combatants, such as when civilian political leaders organized and ordered civilians to commit mass sexual violence in Rwanda in 1994.[39]

Social science offers insight into how mass groups of people can come to inflict gruesome sexual violence on others, including their former neighbors and friends. While criminal law is often focused on locating individual responsibility and punishing single persons or small groups of

persons, the large-scale violence that takes place during conflict and/or crimes against humanity or genocide, including sexual violence, cannot be attributed to the "unusual" and "criminal" disposition of one individual. Rather, social science focuses on the systems and conducts situational inquiry. "People and situations are usually in a sense of dynamic interaction."[40] Consequently, it is important that law recognize that "systems, not just dispositions and situations must be taken into account in order to understand complex behavior patterns."[41]

Social psychologist Philip Zimbardo argues that various situational factors and instructions via power systems can cause ordinarily good people to do horrific things, including perpetrating appalling sexual violence.[42] His work assesses mass rapes, killing squads, torture, and other horrific abuses as well as more generally how people can be made to lie, cheat, steal, or otherwise conform to immoral behavior in any number of situations. His theory has many layers and is based not only on his own empirical experiments, decades of his expertise in psychology, and his service as an expert witness in Abu Ghraib torture trials but also on a thorough review of empirical psychology literature on such phenomena as conformity, moral flexibility, anonymity, and violence. His work also "puts the system on trial," investigating "command complicity" and how elites in power construct systems and situations that produce horrific violence by driving masses of other humans to commit such acts. This chapter engages these theories to ask how international criminal law—more specifically, the threat of prosecution and instructing combatants in international criminal law—can counterbalance the forces that drive violence.

To summarize Zimbardo's work, almost all human beings are capable of complying with explicit or implicit instructions—for example, via words, symbols, images, and inaction as well as action—to perpetrate brutal violence on others. This compliance is based on human nature and even the structure of the human brain: human beings have a very strong inclination to conform, a burning desire to be in the "in" rather than "out" group, and a forceful proclivity to follow the orders of those in power, even if those orders mean brutalizing other human beings and even in situations where obeying orders threatens one's own life.[43] At the same time, humans have a tendency to overestimate their individuality and their ability to resist such orders and to underestimate the power of others, situations, and systems on human behavior and standards of morality.[44] This "in group/out group" trigger to violence comports with Ruth Seinfert's analysis of sexual violence in conflict, in which she describes combatants as using rape to send a message, man to man, that the men in one group

are vulnerable or conquered because they are not able to protect "their" women from rape.[45] When told that the other group is bad and must be conquered, sexual violence can become a tool for doing so and is chosen because it aligns with peacetime concepts of dominance, hierarchy, and control.

The flip side of needing to feel included and having an inclination to conform is how the dehumanization of people or groups allows previously peaceful people to commit horrible violence: "humanity" is as much a status as a way of being.[46] Public health studies on preventing sexual violence frequently site inequality between men and women and cultural, societal, and religious beliefs that women are inferior—less human than men—as causal factors for such violence.[47] "Combatants recognize that they can easily dehumanize women in wartime, thus encouraging mass rape and sexual slavery, because the necessary animosity against women previously existed."[48] As discussed in the next section, the prosecutor's office has deliberately and carefully used its power—whether in giving interviews, making speeches, issuing press releases, opening investigations, or prosecuting—to send a message that violence against women and girls will not be tolerated. These messages and their accompanying activities serve as counterweights to prevailing societal, cultural, and organizational attitudes that dehumanize females and in doing so facilitate sexual violence against them.

Human nature can be manipulated and mobilized to spur brutal atrocities. Certain features common to militaries, nonstate armed groups, and even civilians mobilized into violence squads during extreme situations help facilitate this violence. Key factors include anonymity and deindividuation, which exponentially increase the likelihood that a person will follow orders and inflict brutal violence on others.[49] Camaraderie among fighting forces, uniforms, a shared identity as one group against others—all of these things are common features in regular and irregular fighting forces, and all of them make these forces much easier to control and turn violent. Something as simple as having fighters change their external appearance—a ritual of warfare since the beginning of time—provides the anonymity needed to transform ordinarily compassionate and respectful people into violent monsters.[50] However, a changed appearance is not necessary as long as a person feels anonymous; if the person is one among many, feels ignored or overlooked, or operates without threat of punishment, it is enough to flip the switch and unleash violent behavior.[51] Combat and hierarchical combat structures provide such situational anonymity. In contrast, visible prosecutions at the ICC shine a light on this

behavior, shattering the myth that it will remain hidden and unpunished. Prosecutions at the ICC also offer accountability when those in power over combatants fail to restrain them or to investigate or punish reports of illegal violence. Failure of the power structure to intervene enhances the likelihood that those perpetrating the violence will continue to do so.[52] Prosecutions at the ICC connect directly to this cause of violence. This link depends on those committing the acts viewing themselves as accountable to the ICC. The case study presented in this chapter is an example of a nonstate fighting force that felt just this connection and was influenced by it.

International criminal law interacts with combatants when it is translated through the organizational hierarchy of combat units. The importance of the command structure of a combat unit must be addressed head-on; the hierarchy of control that is central to waging conflict is a powerful tool. "Systems create hierarchies of dominance with influence and communications going down—rarely up—the line."[53] The relationship between command structure and violence is mirrored by the ICC's reliance on command responsibility as a mode of liability, linking power over combatants, mass violence, and leaders' individual responsibility. The principle of command, or superior, responsibility, articulated in article 28 of the Rome Statute,[54] provides an important link between the limited number of prosecutions that can happen at the ICC and the instruction of fighting forces. The case brought by Moreno Ocampo against Jean-Pierre Bemba for crimes committed in the CAR exemplifies the connection between prosecution of sexual violence in conflict and the role of commanders in instructing soldiers in prohibitions against these acts. During proceedings, the court linked the duty of a commander to prevent crimes to the practice of instructing troops in legal prohibitions.[55] Putting a commander on trial for failing to prevent mass rapes conforms exactly to Zimbardo's research detailing how inaction in command structures creates the necessary environment and thus promotes violence perpetrated by lower ranks.[56]

Moreover, evidence suggesting the strong likelihood that soldiers obey the orders of their superiors supports both the need to instruct soldiers in prohibitions on sexual violence and the utility of defining sexual violence as a war crime and crime against humanity under the Rome Statute. After evaluating a range of disciplines, including history, law, psychology, and organizational theory, Martha Minow concluded,

> On the basis of varied sources of social science research, we can predict that soldiers will follow orders whether legal or illegal, that

> soldiers will conform to expectations of superiors and peers, and that soldiers will be unlikely to resist a commander or peer group authorizing or engaging in atrocities.[57]

Minow goes on to hypothesize that instructing military personnel in the law holds "real prospects for preventing atrocities by soldiers [by] changing organizational design and resources surrounding the soldier, including specifying new obligations for those in command."[58] In the same vein, a Red Cross study mirrored social psychology in emphasizing that an individual in a combat unit is not morally autonomous. This conclusion led the authors of the study to stress the importance of pressing commands to refrain from illegal violence as law: "Efforts to disseminate IHL [international humanitarian law] must be made in a legal and political matter rather than a moral one, and focus more on norms than on their underlying values, because the idea that the combatant is morally autonomous is mistaken." The study also stressed that instruction in the law was a prerequisite to compliance with the law: "Greater respect of IHL is possible only if bearers of weapons are properly trained, if they are under strict orders as to the conduct to adopt and if effective sanctions are applied in the event they fail to obey such orders."[59]

Similarly, prosecutions at the ICC under the Rome Statute have the power to influence the internal organizational culture of fighting forces and governments. Organizational theory suggests that the moral and normative space within fighting forces will be changed by instruction in legal prohibitions:

> The significance of this body of scholarship lies in the suggestion that organizational culture can actually be affected by external forces, including laws, norms, values, and aspirational targets. Consequently, articulating (and defining) international law norms, for example, may have a real impact on institutions even absent mechanisms of enforcement. This literature also suggests that training regimens can have lasting effects on institutional culture by changing the normative space within the institution.[60]

An institution's acceptance of itself as bound by a norm of international law is an example of "real impact on institutions." For example, as the case study later in this chapter reveals, the rebel leader in the CAR made instruction in international law a prerequisite for promotion. Such a policy could be interpreted as a step toward internalizing this norm and letting it

shape the culture of the rebel force. The nature of combat forces as separate from and morally distinct from the general population underscores the necessity of training combatants to comply with legal standards: "Because military units are traditionally isolated from other citizens, transforming the military to reflect human rights standards requires education and training from within the system."[61]

Further adding to this concept, public health approaches to primary prevention of sexual violence also focus on social and community relationships and attitudes and influences.[62] The World Health Organization's "ecological model of violence," which draws on yet goes beyond many other assessments of causality and risk for violence, locates relational, community, and societal drivers of violence in addition to the traditional focus on the individual committing violence.[63] This model prompts those interested in prevention to address "the norms, beliefs and social and economic systems that create the conditions for intimate partner and sexual violence to occur."[64] Applying this model to the goal of preventing sexual violence perpetrated by nonstate armed groups, UNICEF and United Nations Office for the Coordination of Humanitarian Affairs (OCHA) propose that

> the individual level will be organized to describe the personal history risk factors of individual members of the non-state armed group. At the relationship level, it is the group dynamics and interactions between the members of the group that are examined. The community level describes the physical environment in which the group lives and operates (particularly in reference to the scarcity of resources) as well as their interactions with local communities. Finally, the societal level includes the larger dynamics that perpetuate the perceived need for armed resistance, such as the absence of law and order.[65]

This framework is useful in evaluating the case study of the rebel group in the CAR. More generally, the public health approach to preventing sexual violence aligns with the previously examined social science research that argues that messages from authority and even peers to commit violence is a causal driver of this violence and that the human tendency to conform means that the opposite message to refrain from violence is equally likely to be obeyed.

In addition, prosecutions at the ICC and instructing combatants regarding the Rome Statute's prohibitions on sexual violence relate to both

"direct prevention" and "structural prevention" models found in the conflict management approach to preventing sexual violence. As one advocacy organization has explained,

> Direct prevention refers to short-term actions taken to prevent the imminent escalation of a conflict or the use of violence. This involves direct engagement with warring parties through dialogue, confidence-building measures, sanctions, coercive diplomacy, special envoys, and preventive deployment of, for example, peacekeeping troops to prevent potential perpetrators from gaining access to affected populations.
>
> Structural prevention entails long-term interventions that aim to transform key socioeconomic, political and institutional factors that, if left unaddressed, could lead to violence. This encompasses a broad range of factors, including but not limited to: addressing inequality, exclusion and marginalization; developing social capital and social cohesion; promoting livelihoods, local development and economic opportunities; and promoting legitimate and equitable political, justice and security institutions.[66]

The Role of the ICC Prosecutor in Punishing and Preventing Sexual Violence

The actions of the ICC prosecutor support the expressive function of the Rome Statute and the idea that "those addressed will know precisely what is expected of them." Punishment, an essential ingredient to ending impunity, is linked to prevention; the preamble of the Rome Statute declares that it is "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." A focus on sexual violence and gender crimes, prompted by the text of the Rome Statute, became a hallmark of Moreno Ocampo's approach, as set forth in a 2006 report on prosecutorial strategy:

> The Office will endeavour to do a selection of cases that represent the entire criminality and modes of victimization. The Office will pay particular attention to methods of investigations of crimes committed against children, sexual and gender-based crimes.[67]

His office, often through Bensouda, who was serving as deputy prosecutor at the time, specified its focus on sexual violence in public forums. In one such public speech, Prosecutor Bensouda declared, "Regarding our investigations, we have an obligation and a duty to focus our attention on sexual and gender violence."[68]

These declarations reflected the centrality of sexual violence crimes in prosecutions at the ICC. A substantial portion of the cases brought at the ICC by Moreno Ocampo addressed sexual violence and gender crimes: eleven of the sixteen cases, or almost 70 percent, charged sexual violence. The number of cases before the ICC presents a small data set, but sixteen cases is a significant enough number to conclude that Moreno Ocampo's strategy did indeed prioritize responding to crimes of sexual violence.

While his office's first case, brought against Thomas Lubanga Dyilo of the DRC, did not explicitly charge sexual violence crimes, the "evidence in this case showed how Mr. Lubanga instrumentalised sexual violations to subject child soldiers of both sexes to his will."[69] When, during an interview, a journalist pointed out that "some argue your case against Thomas Lubanga should have gone way beyond the recruitment of child soldiers," Moreno Ocampo responded,

> I think [recruiting] child soldiers is a very serious crime. Many of them can never recover. It's an awful experience, a terrible experience. Girls were systematically raped and beaten, forced to kill, forced to be raped, it's a horrific experience.[70]

After this first case, Moreno Ocampo's office began to bring explicit charges of sexual violence. In 2005, he charged Joseph Kony of the Lord's Resistance Army of Uganda with sexual enslavement as a crime against humanity, rape as a crime against humanity, and rape as a war crime.[71] In his second case, regarding the DRC and brought in 2007, he charged Germain Katanga and Mathieu Ngudjolo Chui with sexual slavery and rape as crimes against humanity and war crimes.[72] In 2010 and also regarding the DRC, he charged rape as a war crime and a crime against humanity against Callixte Mbarushimana,[73] although those charges were dismissed at the pretrial stage. On May 14, 2012, the prosecutor applied for a second warrant of arrest for Bosco Ntganda, the amended version of which included charges of rape and sexual slavery as war crimes and crimes against humanity.[74] This warrant was issued on July 13, 2012,[75] and Bosco surrendered on March 22, 2013.[76] With a warrant of arrest issued for Sylvestre

Mudacumura, alleged supreme commander of the Forces Démocratiques pour la Libération du Rwanda, on July 13, 2012, charging rape, four out of five of the DRC cases have explicitly charged crimes of sexual violence, and the one that did not charge sexual violence presented sexual and gender crimes as a component of its case.

Three of the five cases in the situation in Darfur presented counts of sexual violence. In 2007, the prosecutor opened two cases regarding the conflict in Darfur, charging Ahmad Muhammad Harun, the former minister of state for the interior of the government of Sudan,[77] and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), the alleged leader of the Janjaweed militia, with rape as a war crime.[78] In 2008, he charged Sudanese president Omar Hassan Ahmad al-Bashir with rape as a crime against humanity,[79] presenting evidence that showed "that the crimes of rape and sexual violence committed in Darfur are an 'integral part' of his attempt to destroy the Fur, Massalit and Zaghawa groups, and should be charged as genocide under the Rome Statute."[80] On March 1, 2012, an arrest warrant was issued for Abdel Raheem Muhammad Hussein, the current minister of national defense for the Sudan, former minister of the interior, and former special representative of the Sudanese president in Darfur, alleging rape as a war crime and as a crime against humanity.[81] In 2011, Moreno Ocampo charged Laurent Gbagbo, the former president of Côte d'Ivoire, with rape and sexual violence as crimes against humanity alleged to have been committed "during the post-election violence [in Côte d'Ivoire] from 28 November 2010 onwards."[82] That same year, he charged rape as a crime against humanity in one of the two cases brought regarding the situation in Kenya. These charges were confirmed for Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, but Pre-Trial Chamber II declined to confirm charges against Mohammed Hussein Ali.[83] Thus far, every situation excluding Libya has included a charge of sexual violence, and there is still the possibility that if evidence warrants it, the new prosecutor will charge crimes of sexual violence regarding this situation.

Perhaps the most significant sexual violence case before the ICC to date is the case against Jean-Pierre Bemba Gombo of the CAR, which has not yet concluded. The case against Bemba stands out among sexual violence jurisprudence because of the scale of the sexual violence crimes alleged and because this case prioritizes charges of sexual violence over other crimes charged. The prosecutor's case against Congolese political leader Bemba focused on the extensive number of rapes committed in the CAR during 2002–3.[84] Moreno Ocampo spoke of the significance of prosecuting crimes of sexual violence in response to a journalist's question

about why he chose to charge Bemba for crimes committed in the CAR when Bemba's main operation was in Congo:

> In the Bemba case, the number of rapes outnumbered the number of killings by far. They were looking for the boss of the neighborhood and when they found him, he was raped publicly to humiliate him. Of course there are allegations of Bemba committing other crimes. My business is to investigate massive crimes, I cannot present all the crimes committed in the courtroom because then the case would never finish.[85]

The next section uses a case study to explore the links between Moreno Ocampo's prosecution of Bemba and an enhanced atmosphere of compliance in one rebel group in the CAR regarding international law's criminalization of sexual violence in conflict.

Case Study: Training a Rebel Group in the Central African Republic

> "I think we knew there were going to be cases of sexual violence. I don't think we knew that there were going to be this many."[86]
>
> —Phone interview with NGO worker (February 8, 2012)

A large international NGO that did not normally engage in providing IHL training ventured deep into the bush behind rebel lines to conduct two years of international law training for rebel forces engaged in ongoing civil conflict in the CAR. This case study covers those years, 2007 and 2008, and focuses on trainings conducted in "small towns" on the "front lines/just behind the lines of the fighting,"[87] located in the center and center-northwest of the country. To protect the anonymity of the NGO, this chapter cannot disclose its name or the name of the rebel group. At the time of writing, this particular rebel force has not been charged with any crimes at the ICC.

The CAR has been plagued by political instability and ongoing "low-level" conflicts[88] between government forces and rebels[89] since gaining independence from France in 1960. As a "least developed country (LDC), [the CAR] is ranked 178 out of 179 countries in the 2008 UNDP Human Development Index."[90] As of 2008, the United Nations stated that more than one million people had been negatively affected by ongoing instabil-

ity and that almost two hundred thousand people had been internally displaced.[91] Unlike its problem-plagued neighbors—the Sudan, the DRC, and Uganda—the CAR has failed to garner much global interest.[92] This conflict and the substantial internal displacement it has created led to an agreement between the NGO and a United Nations agency to conduct work to improve the living conditions of those caught in the fighting.[93]

The NGO focused on providing health services with an emphasis on care to victims of sexual violence. To do so, they opened an office in a hospital "two hundred meters" from rebel-controlled territory.[94] The fighting had destroyed clinics in the rebel-held territory, and the rebels had set up roadblocks to keep women from accessing the hospital in African Union–patrolled territory where the NGO opened its program. When the NGO arrived, women and girls in the area were completely without health services and psychosocial sexual violence survivor services.[95] Without waiting for reporting to come out regarding this area—which would have been unrealistic given that the area was rebel-controlled and that the women and girls who had been attacked had little or no access to reporting structures—the NGO entered the CAR on the assumption that where there is conflict, there is also sexual violence. According to one NGO worker,

> A lot of people said we were wasting our time, but within two and a half weeks of setting up the office we were completely overwhelmed. We hadn't even had time to hire staff. We were running out of medicine. Within a year of opening we had seen over a thousand survivors of sexual violence. Most of the attacks had taken place within the previous year.[96]

The NGO operated from the perspective that providing rape kits and an office were not enough: real health services meant outreach, information, and access. This meant that beyond strategies such as locating their office in the maternity ward to allow women to access it without question, they had to work with the rebels to ensure women's access to the hospital. They built a relationship with the rebels and negotiated an end to the roadblocks. In the course of relationship building to facilitate services to survivors of sexual violence, the NGO workers saw an opportunity to train the rebels directly. While the NGO worker who ran the sexual health services had to remain distant from the rebels, given her role in the lives of sexual violence survivors, two other NGO workers worked closely with the rebels and provided international law training.

Complying with the Rome Statute Gave Combatants Legal and Political Legitimacy

A key factor in the NGO's ability to train the rebels was the fact that the rebels themselves wanted to be trained. The rebel leader wanted to be viewed as a "good rebel"[97] with legal and political legitimacy.[98] In the CAR, rebels are vying for political power, and it is not unusual for leaders of uprisings to assume the legitimate mantle of the state: current president François Bozizé Yangouvonda originally came to power after leading a 2003 coup.[99] Bozizé keeps a wary eye on threats to his rule and arrests rebel leaders.[100] When Bozizé seized control, he was condemned for doing so and criticized for lootings and rapes.[101] The Bozizé situation is not terribly unusual. For example, Gbagbo came to power in the Côte d'Ivoire by force in 2000.[102] Pre-Trial Chamber I confirmed the charges against Gbagbo on June 12, 2014.[103] In this context, it is not surprising that rebel forces would seek legal and political legitimacy and attempt to comply with the Rome Statute. The rebels in this case study were aware that other African rebel leaders had been arrested and wanted to avoid the same fate.[104] The ICC and international law figured prominently in the commander's idea of legitimacy. In the words of an interviewee, "He wanted to be a 'good rebel,' and the ICC was the most visible measure of whether he was doing so."[105] The principle of command, or superior, responsibility, delineated in article 28 of the Rome Statute,[106] has great potential for preventative effect, as exemplified by the Bemba case. During proceedings, ICC pretrial judges linked the duty of a commander to prevent crimes to the practice of instructing troops in legal prohibitions during armed conflicts. The Pre-Trial Chamber stated that the duty of a commander to take "all necessary measures" to prevent his or her troops from committing crimes might include instructing these troops in the prohibitions of the Rome Statute: the judges noted that while "Article 28 of the Statute does not define the specific measures required by the duty to prevent crimes," they nevertheless found "it appropriate to be guided by relevant factors such as measures: (i) to ensure that superior's forces are adequately trained in international humanitarian law."[107] Thus, the Rome Statute's principle of command responsibility has the potential to prompt leaders of fighting forces to instruct their troops in the law. Even if this instruction is done to discharge a duty or prepare a defense, it communicates the law and enhances the likelihood of compliance by subordinate fighters.

The rebel leader also viewed the legal trainings as a useful way to control his troops. As one NGO worker commented, "He actually told the

officers, 'Rape is illegal in our movement and anyone who rapes will be punished.' I think for him it was an opportunity for putting some order in his movement." The added control the trainings afforded the rebel leader were further motivated by local politics. His movement was spread out over two geographical areas, and tension seemed to exist between him and the head of the other geographical division.[108] Consequently, it was even more important for this leader to have tight control over his own combatants.

What the Rebels Learned

> "This was a very basic knowledge transfer."[109]
>
> —Phone interview with Central African Republic NGO worker (May 1, 2010)

The NGO chose to adapt a formal international law manual that it had used to train state-based combatants in workshop settings.[110] Workers adapted more than eighty pages of comprehensive international law manuals written in French and organized by subject matter—the rights of children, the rights of women, and explanations of concepts such as access to justice, basic due process protections and rights, and the law of armed conflict and criminal liability.[111] The manual's section on criminal liability explicitly referenced the ICC. The NGO personnel interviewed found the formality of the course to be ill-suited to training rebel forces. "It's fine if you're training a multinational force,"—the NGO also trained regional peacekeeping forces operating in the CAR—but it proved too sophisticated for rebel combatants.[112] The NGO adapted the training material and hired two male lawyers from the CAR to convey the material in the local language. These instructors, the NGO personnel, and the CAR lawyers met with various groups of rebels on at least a weekly basis. The groups changed frequently, which presented a practical challenge for the NGO. The NGO thus developed stand-alone sessions that addressed a single legal right at a time.[113]

The Setting: A Makeshift Classroom in the Forest

Working with the rebel forces, the NGO created various outdoor classrooms in rebel-controlled territory. Together, they chopped down trees and scraped the thick vegetation down to dirt to create small clearings.[114]

Clothed in mismatched garments rather than uniforms, the men dropped their guns by a specific tree as they entered the clearing and took their places on cramped log benches. The NGO had declared the classroom a weapons-free zone.[115] When rebels smoked marijuana in class, the staff made a rule prohibiting that as well.[116] A male lawyer from the CAR used a small chalkboard propped up on a wooden easel to draw pictures in colored chalk as he explained tenets of international law to the rebels. The rough-hewn classroom was a place of order, and the rebels generally followed the ground rules set by the NGO.

Teaching Prohibitions on Sexual Violence

The NGO workers initially addressed the topic of sexual violence with the rebels as an abuse that was not accepted.[117] They also aimed to impart a definition of rape by discussing what it means to rape.[118] This information generated curiosity and surprise among the rebel combatants. "This discussion regarding the meaning of rape was super interesting to them; with them it was an entirely new concept. The idea that forcing someone to have sex was not okay was kind of revolutionary."[119] The lack of understanding that sex by force was not sex but rather a violent crime was apparent in the responses in the classroom discussions:

> We spent a lot of time in our classes on the topic of what is rape? [We told them,] "Rape is when you have sex with someone and you use force to do that." This one guy—a real badass, a tough guy, completely covered in weapons type of guy—said in a really earnest way, confused way, "But, I've only *ever* had sex by force; that's what sex *is;* I don't get it." The soldiers really were listening. They were trying to follow the rules, and maybe they just didn't understand.[120]

This case study thus presents an example of rebel forces whose norms regarding sexual violence appeared to run counter to the tenets of the Rome Statute, inviting instruction in legal prohibitions that could change their actions. It illustrates the necessity both of criminalizing sexual violence under international law and of communicating the specificities of these crimes to those who might commit such acts in conflict. Like the data demonstrating the prevalence of sexual violence in conflict, which prompts a corollary of a prosecutorial focus on these crimes, this anecdote underscores the way in which law interacts with norms, beliefs, and behaviors.

Evaluating the Impact of the Trainings: New Norms, New Language, New Concepts

In this case study, instructing combatants on the Rome Statute's prohibitions of sexual violence had several noticeable effects. First, the instruction in international law reshaped the internal norms and structure of the fighting force. Second, instruction in the Rome Statute provided the combatants with new rhetoric and concepts to discuss and understand as well as to explicitly prohibit sexual violence in conflict. Third, the trainings changed the way that the rebels interacted with the civilian population in at least three ways: they facilitated civilian access to health services—in particular, services for survivors of sexual violence; they allowed the NGO to correct misinformation about the NGO's activities and the ICC, a crucial effort in a tense conflict situation; and they facilitated a platform for the NGO to discuss better treatment and rights of civilians more generally. All of these outcomes, while modest, represent advances in ameliorating the substantial sexual violence that has occurred in the CAR.

A New Vocabulary for Discussing and Prohibiting Sexual Violence

The NGO workers interviewed described an evolution in the dialogue they observed between the commander and the combatants. One interviewee said that the combatants employed their knowledge of international law in discussions with their commander:

> They would say, "I know international law. I know this is a right. I know how things are supposed to be. I know this is how we're supposed to deal with civilians." They'd talk about [international law.] They'd refer back to it. There is, of course, no way to know if this transferred into [changed] behavior.[121]

Another interviewee noted that the international law trainings "changed the rhetoric they used; the commander would declare absolute prohibitions on gender violence."[122] The rebels even held discussions on the topic when the NGO workers were not present. After the NGO workers returned from a Christmas holiday, some rebels were eager to report that they had held group discussions on the topic of sexual violence in the workers' absence.[123]

This chapter does not claim an absolute causal link between rhetoric

and behavior. Nevertheless, social psychology research emphasizes the idea that language can help create a "hostile imagination," allowing for the dehumanization of others and facilitating violence against them.[124] Therefore, providing people with a vocabulary to conceptualize change—for example, a change in relationships between combatants and females in the area, a change in the social status of women and girls, or a change in what it means to be a good soldier—can be one tool for transforming attitudes and behaviors. The impact of this new vocabulary, derived from legal trainings, is enhanced by the status of the Rome Statute as legitimate law. A commander of a fighting force declaring an absolute prohibition on gender violence can be powerful. This declaration could influence the behavior of combatants who, while not necessarily fearful or cognizant of the prosecutor of the ICC, do fear reproach by their commander. The doctrine of command responsibility thus links the prosecutor to even the lowest-ranked combatant through a chain of liability. If the commander has control over these forces, the forces could theoretically be deterred from committing transgressions such as sexual violence.

Gained Access to Health Services for Survivors of Sexual Violence

The NGO originally began working in the CAR to provide health services to survivors of sexual violence and came into contact with the rebels because they were blocking civilian access to these services. This contact then engendered training the rebels in international law practices and facilitated relationship building between the NGO workers and the rebels, particularly the group's leader. Developing this trust allowed the NGO workers to conduct outreach about sexual violence health services even in rebel-controlled territory. The NGO operated on the philosophy that simply providing rape kits was not enough; women and girls needed explanations about the services available before they would feel comfortable accessing these services. After establishing a rapport, the rebels allowed the NGO workers to conduct outreach and health trainings among the general population. Extensive outreach was necessary because "many women were attacked far from the main roads."[125]

When the ICC opened its investigation into the CAR, there was a moment when the rebels almost shut down this access for fear that they would become targets of the ICC investigation. The rebels had previously tested the NGO, claiming they had sent someone to verify that the NGO was providing only health services to victims rather than legal

services or assistance to the ICC.[126] When the ICC opened an investigation into sexual violence in the CAR, the rebels realized that the patterns of violence documented by the hospital records could implicate them in crimes under the Court's jurisdiction. They preferred to shut the services down to avoid the risk. In response to this threat, the NGO called a meeting with the rebel leader and his fighters.[127] While many of the combatants opposed continued access to sexual violence services on the grounds that permitting access to such services would draw attention to the group, the rebel leader turned the conversation around, declaring that the men had to allow survivors access to health services and would do so.[128] In his view, his fighters had assumed such risks as prosecution when they decided to join an armed movement.[129] And, they would not shut down civilian health access to avoid such risks.[130] As a result of this strong relationship with the rebel leader and his efforts to remain legally and politically legitimate, access to the hospital remained open.

The Trainings Allowed the NGO to Correct Misinformation, Thereby Defusing Tension

Another way that instruction in the Rome Statute can change the content of conflict is by correcting misinformation. According to one interviewee, the media were the rebels' main source of information on the ICC, occasionally leading to problems. For example, the commander believed that women were reporting rape by the rebels to obtain money.

> Even in the case of the CAR, where [the NGO] was providing basic training on IHL and human rights, the reaction of the rebels to the ICC investigation stemmed more from what they heard through the media and less through our discussions. But we were, to a certain extent, able to provide accurate information in response to some of their misperceptions of the process.[131]

While media reports catalyzed fear of ICC prosecution in the rebels and this fear prompted legal training, these same reports led to confusion. The presence of the NGO, the regular weekly training sessions, and the trust and confidence between the commander and the NGO allowed the NGO to interject clarifications. Providing accurate information about the threat that the ICC did or did not present to the rebels was valuable in a tense combat area.

The Trainings Promoted Better Treatment of the Civilian Population

The trainings in the Rome Statute and international law served as an entry point for the NGO to suggest better rebel behavior toward the civilian population. The high level of interest expressed by the rebels prompted the NGO to expand its trainings:

> We approached the rebels and proposed this dialogue/training, but I will say that once we got a routine down, the rebels were very committed to the regular sessions and expressed disappointment [the] few times because of security I did have to call the commander and cancel. It was their interest, and the fact that they were coming in large numbers, that sparked us to increase the number of sessions/groups that we held each week. . . . [E]ventually, in cooperation with our [gender-based violence] team, [we] established a session just for the women among the rebels—their wives, girlfriends and some female soldiers. We used these sessions—both with the women and the men—to introduce other important information about HIV/AIDS, health service availability for the children living with them in the bush, and hygiene.[132]

The actions of the ICC prosecutor can thus create windows of opportunity for other actors, such as NGOs, to ameliorate negative conduct that falls below the level of crimes within the jurisdiction of the Rome Statute and thus improve the lives of those living in conflict situations.

Among the factors that facilitated these outcomes is the rebel leader's strong interest in political and legal legitimacy, which allowed the training and kept the sexual violence health services up and running even when the combatants wished to shut the clinic down. The role of the commander was thus a crucial one. One NGO worker contrasted this situation with her previous experience in Darfur, where the leadership was fluid and difficult to work with.[133] Another NGO worker commented that the pattern of sexual violence in the CAR resembled opportunistic violence as opposed to rape as a weapon of war.[134] This interviewee distinguished this from her experience in Darfur, where the evidence suggested to her that rape was a deliberate tactic.[135] She hypothesized that because rape was not the rebel commander's policy, it was easier to get access and acceptance for the trainings and the support of the commander. Thus, if the commander had instructed his subordinates to rape, the negotiations to prohibit sex-

ual violence would likely have taken a different course.[136] In this instance, legal prohibitions on sexual violence seemed to serve the rebel commander's need to maintain discipline, thereby facilitating the instruction and prohibition. If the commander had thought that sexual violence served his objectives, the ICC investigations and prosecutions might have had very different effects. This chapter does not purport to measure the total of these outcomes, but it does argue that they are, individually and together, markers of change and progress.

Conclusion: Taking the Necessary Steps toward Prevention

International criminal law's relationship to the prevention of sexual violence in conflict begins with the idea of compliance, which in turn centers on the notion of legitimacy. These concepts specific to law are parallel to concepts of obedience to authority and conformity in social science. A decade before the creation of the ICC, Thomas Franck wrote that

> in a community organized around rules, compliance [with international law] is secured—to whatever degree it is—at least in part by perception of a rule as legitimate by those to whom it is addressed. Their perception of legitimacy will vary in degree from rule to rule and time to time. It becomes a crucial factor, however, in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms. . . . Since the world is not about to create a global supersovereign with overriding enforcement powers, it might be encouraging to know that these are not the prerequisites of a developed, functioning international community. It would be even more helpful to know that the global system of rules could be further refined and developed, even in the absence of the Austinian factors, by augmenting the legitimacy of rules and institutions.[137]

Today, prosecution of international crimes provides an added compliance-inducing mechanism. However, the legitimacy of the rules and of the institutions that enforce the rules forms the bedrock of the legitimacy of the ICC's prosecutions. As Fatou Bensouda has stated, "We have no army, no police. We have one strength: our legitimacy."[138] It may strain the imagination to conceptualize efficacy without an international corollary to domestic criminal justice. And yet legitimacy, not enforcement mechanisms, is

the hallmark of the ability of international law to exert compliance. As the case study of the rebel leader in the CAR illustrates, the compliance pull of an international law must attach to the desire of a political actor to be seen as legitimate under the law.

Luis Moreno Ocampo has worked to link the legitimacy of the ICC to the activities of fighting forces, arguing that he seeks to influence the behavior of military commanders through threat of prosecution.[139] When asked whether the court is a deterrent to those committing war crimes, Moreno Ocampo replied,

> The legal advisor of NATO (North Atlantic Treaty Organisation), the most important military organisation, told me that they told their staff to imagine: in 15 years you are retired as a two-star general, on the beach with your family. Suddenly you're surrounded by policemen who handcuff you and you go to the ICC and the evidence is documentation from NATO. You have to be aware that if you commit crimes, you could be prosecuted. So that's it. Armies all over the world are adjusting to this.[140]

In a 2009 interview with Moreno Ocampo, a journalist writing in the *Wall Street Journal* posited that this threat to commanders is evidence that "the ICC's very existence is already changing the way Western nations fight wars."[141] In this interview, the prosecutor said that states are busying themselves with the task of compliance. "Six years ago, the challenge was—can a court without a state operate? Now the issue is how the states and other organizations will react to the global court."[142] This argument depends on the idea that law affects behavior. But can a court restructure the internal norms of fighting forces?

Social science research postulates that whether or not one can claim results from instructing fighting forces in international law, doing so is a known and necessary step for controlling violence in conflict and preventing atrocities. Direct instruction regarding a legal prohibition is a clear and requisite way to communicate expectations to combatants and thus shape their behavior. As the case study of the CAR explores in detail, a rebel leader used an NGO's legal trainings to convey his expectations to senior staff and rebel combatants under his command. Instructing combatants in prohibitions on sexual violence is necessary for two reasons: (1) sexual violence is pervasive in conflicts, and (2) conflict-related violence can spiral out of control with situations of authorized violence degenerating into those of prohibited violence. Punishment alone cannot prevent

the problem of sexual violence in conflict; carefully planned instruction in these prohibitions prior to conflict is necessary.[143] Further, failure by leaders of armed forces to teach clear prohibitions on sexual violence may enhance the likelihood that those forces will commit sexual violence. A Red Cross study found that while

> violations of IHL may sometimes stem from orders giving by such an authority, they seem more frequently to be connected with a lack of any specific orders not to violate the law or an implicit authorization to behave in a reprehensible manner.[144]

These findings underscore the importance of leaders to specifically educate their combatants about the prohibition on sexual violence before combatants are deployed into combat.

Thus, through a sequence of events, all of them forming a necessary part of the chain, the Rome Statute and the ICC prosecutors have the power to influence the behavior of fighting forces and prevent sexual violence in conflict. The Rome Statute criminalizes acts of sexual violence and gender violence under international law in an unprecedented manner. The clarity and precision with which the Rome Statute details these crimes, the way in which the treaty was negotiated, and the large number of states parties to the Rome Statute, builds legitimacy for it and for the crimes it articulates. In addition, the centrality of sexual violence crimes in the strategies pursued by the ICC prosecutors—proven not only through policy statements but through prosecutions—activates the Rome Statute, communicating it as law in force, applicable to a large number of the world's combatants. Command responsibility links the actions of fighters to the prosecutor's ability to charge leaders with crimes before the ICC. This in turn creates incentives for these leaders to communicate the law criminalizing sexual violence to their troops. This formulation, which is profoundly innovative, heralds a new day for international law's response to sexual violence and perhaps, if we remain hopeful and vigilant, a new world in which women, girls, men, and boys are less threatened by these awful crimes.

NOTES

1. The first prosecutor of the International Criminal Court, Luis Moreno Ocampo, stated in a 2009 interview that the "idea" of the ICC is "changing the way the world is managing violence." *See* Patrick Smith, *Interview: Luis Moreno-Ocampo, ICC Prosecutor,*

AFRICA REPORT (Sept. 21, 2009), http://www.theafricareport.com/News-Analysis/interview-luis-moreno-ocampo-icc-prosecutor.html.

2. The CAR has been plagued by ongoing, "low-level" conflicts between government forces and rebel troops for the majority of the new millennium. *See, e.g.,* United Nations, *Central African Republic: A Silent Crisis Crying Out for Help,* http://www.un.org/events/tenstories/06/story.asp?storyID=300; *Central African Republic: Humanitarian Crisis in Central African Republic,* WFP.ORG, http://www.wfp.org/countries/central-african-republic.

3. *See, e.g.*, *Thousands Fall Victim to Sexual Violence in Central African Republic—UN,* UN NEWS CENTRE (Feb. 22, 2008), http://www.un.org/apps/news/story.asp?NewsID=25725.

4. E-mail from NGO worker, with relationship to rebels, to author (Jan. 16, 2012) (on file with author).

5. Moreno Ocampo decided to open an investigation into the situation in the CAR on May 22, 2007. While the ICC's investigation covered 2002 and 2003, the Court also declared that it would monitor the current situation while collecting evidence regarding these crimes. Further, collecting evidence that can help determine which groups committed which crimes during the 2002–3 period might also include assessing current violence to look for patterns, signatures, and other indicators of responsibility. *See* International Criminal Court, *Prosecutor Opens Investigation in Central African Republic,* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB.

6. This chapter uses the phrase *fighting forces* broadly to mean both state and nonstate combatants.

7. This chapter uses both *sexual violence* and *gender violence* because the Rome Statute and the prosecutors of the ICC use both terms. However, these terms are not strictly interchangeable. According to the definition in the Element of Crimes accompanying the Rome Statute, the "crime against humanity of sexual violence" occurs when "the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent." Article 7(3) of the Rome Statute states that "for the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." While speeches of members of the ICC Office of the Prosecutor often use these terms interchangeably, in at least one public statement, Moreno Ocampo sought to distinguish them, explaining, "In relation to the Statute, I would like to emphasise the relation between sexual crimes and this new concept of gender crimes in the Statute. Sexual crimes are crimes of violence or coercion. The concept of gender crimes added a different dimension to the analysis. The new concept emphasises that sexual crimes such as rape are crimes of gender inequality, enacted violently." This chapter adopts this definition. When it uses only the term *sexual violence,* it assumes that the acts of sexual violence referenced contained an element of "gender inequality," regardless of the sexes of the people perpetrating the act or being victimized by the act.

8. The Rome Statute enumerates sexual violence as a crime against humanity and as a war crime in articles 7 and 8. For example, as art. 7(1)(g) states, "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . . (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." Similarly, with regard to "War crimes," art. 8(2)(b)(xxii) states, "For the purpose of this Statute, 'war crimes' means . . . [c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions." Moreover, article 7 sets forth additional definitions of these offenses, and the Elements of Crimes further explain the crime enumerated in articles 7 and 8. *See generally* Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (July 7, 1998) (hereinafter Rome Statute); International Criminal Court, *Elements of Crimes,* ICC-ASP/1/3(part II-B) (Sept. 9, 2002), http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.

9. Article 7(1)(h) of the Rome Statute lists persecution on the grounds of gender as a crime against humanity.

10. Article 42(9) of the Rome Statute states, "The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children," thereby establishing a structure within the Office of the Prosecutor for cultivating and receiving expert advice on sexual and gender based violence. Separately, article 54(1)(b) of the Rome Statute articulates that the "prosecutor shall . . . [t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children." This article instructs the prosecutor to focus on sexual violence and gender violence as essential elements of crimes, thereby bringing these elements and crimes to the forefront of prosecutions in which such events have occurred.

11. *See* Fatou Bensouda, Prosecutor-Elect, ICC, *Gender Justice & the ICC: Progress & Reflections,* Speech at The ICC—Ten Year Review Conference: Justice for All? (Feb. 14, 2012), http://www.iccwomen.org/videos/webcasts/Justice-for-All.php.

12. The concept of legitimacy for law and legal institutions is discussed in more detail later in this chapter.

13. *See* Bensouda, *supra* note 11.

14. In addition to the conflicts mentioned in this chapter, for documentation of crimes of sexual violence throughout modern conflicts, see Human Rights Watch/Africa, *Shattered Lives: Sexual Violence during the Rwandan Genocide & Its Aftermath,* HRW.ORG n. 39 (Sept. 1996), http://www.hrw.org/reports/1996/Rwanda.htm#p341-72129, which enumerates a long list of rape in conflict by naming "a few" examples in a footnote: "During the Second World War, some 200,000 Korean women were forcibly held in sexual slavery to the Japanese army. During the armed conflict in Bangladesh in 1971, it is estimated that 200,000 civilian women and girls were victims of rape committed by Pakistani soldiers. Mass rape of women has been used since the beginning of the conflict in the Former Yugoslavia. Throughout the Somali conflict be-

ginning in 1991, rival ethnic factions have used rape against rival ethnic factions. During 1992 alone, 882 women were reportedly gang-raped by Indian security forces in Jammu and Kashmir. In Peru in 1982, rape of women by security forces was a common practice in the ongoing armed conflict between the Communist Party of Peru, the Shining Path, and government counterinsurgency forces. In Myanmar, in 1992, government troops raped women in a Rohingya Muslim village after the men had been inducted into forced labor. Under the former Haitian military regime of Lt. Gen. Raoul Cedras, rape was used as a tool of political repression against female activists or female relatives of opposition members."

15. *See, e.g.,* Oxfam Int'l, *Sexual Violence in Columbia: Instrument of War,* OXFAM.ORG (Sept. 9, 2009), http://www.oxfam.org/sites/www.oxfam.org/files/bp-sexual-violence-colombia.pdf.

16. "The phenomenon of sexual violence against women and children has reached truly genocidal proportions." Mr. Titinga Frédéric Pacéré, Advisory Services and Technical Cooperation in the Field of Human Rights Report Submitted by the Independent Expert on the Situation of Human Rights in the Democratic Republic of the Congo, E/CN.4/2005/120 (Feb. 7, 2005).

17. *See, e.g.,* Ian Fisher, *Iraqi Tells of U.S. Abuse, from Ridicule to Rape,* N.Y. TIMES (May 14, 2004), http://www.nytimes.com/2004/05/14/international/middleeast/14PRIS.html?pagewanted=all.

18. *See, e.g.,* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05/01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ¶¶71, 210 (June 15, 2009), http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf (charging rape as a crime against humanity and as a war crime).

19. See, e.g., *Inquiry into "Rape & Torture" by UK Troops as Iraqis' Lawyer Claims 32 Cases Are Tip of the Iceberg,* DAILY MAIL ONLINE (Nov. 15, 2009), http://www.dailymail.co.uk/news/article-1228141/Rape-torture-inquiry-Iraqis-lawyer-claims-32-cases-tip-iceberg.html (noting accusations by people detained in Iraq by British troops); Duncan Gardham & Paul Cruickshank, *Abu Ghraib Abuse Photos "Show Rape,"* TELEGRAPH (May 27, 2009), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5395830/Abu-Ghraib-abuse-photos-show-rape.html (chronicling reports of rape at Abu Ghraib).

20. For example, the U.S. Army tried and convicted three soldiers of gang-raping and then murdering a fourteen-year-old Iraqi girl while serving in combat in Iraq in 2006. The soldiers were not tried or convicted for war crimes or crimes against humanity but rather for rape, conspiracy to commit rape, housebreaking with intent to commit rape, and felony murder. *See* Jim Frederick, *Civilian Trial Begins for Ex-Iraq Soldier,* TIME (Apr. 29, 2009), http://www.time.com/time/nation/article/0,8599,1894375,00.html#ixzz0niIYfedm. The longest sentence given was 110 years imprisonment. *See U.S. Soldier Sentenced to 100 Years,* BBC NEWS (Aug. 5, 2007), http://news.bbc.co.uk/2/hi/6930845.stm.

21. The International Committee of the Red Cross (ICRC), for example, notes that Rule 93 of Customary International Humanitarian Law is titled "Rape and Other Forms of Sexual Violence." *See* Int'l Committee of the Red Cross, *Customary IHL: Rule 93* (2005), http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule93. The ICRC cites state practice, the Leiber Code art. 44, common art. 3 of the Geneva Conventions, and other sources to establish this prohibition. *See id.* at n. 1.

22. *See* ICC, *About the Court,* ICC-CPI.INT (last visited Sept. 16, 2013), http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.

23. Article 5(g) of the statute of the ICTY and article 3(g) of the statute of the ICTR give these tribunals subject matter jurisdiction over rape as a crime against humanity. The ICTR statute article 4(e) also lists rape as a violation of article 3 common to the Geneva Conventions and Additional Protocol II.

24. Prosecutor v. Anto Furndžija, Case No. IT-95-17/1-T, Judgment ¶176 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf; Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment ¶¶596, 687 (Sept. 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

25. For example, the ICTY's website declares that the "ICTY took groundbreaking steps to respond to the imperative of prosecuting wartime sexual violence. Together with its sister tribunal for Rwanda, the Tribunal was among the first courts of its kind to bring explicit charges of wartime sexual violence, and to define gender crimes such as rape and sexual enslavement under customary law." *See Crimes of Sexual Violence,* ICTY.ORG (last visited Sept. 16, 2013), http://www.icty.org/sid/10312.

26. *See, e.g.,* U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* ¶43, S/25704, (May 3, 1993), http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf.

27. At the ICTY and the ICTR, rape was charged as an act constituting *other* crimes established under customary international law rather than as itself a crime. As Catharine MacKinnon put it, "Rape under these statutes is thus not a free-standing crime but must be charged as an act of war, genocide, or crime against humanity. To reference only a few examples of how these two tribunals declared rape to constitute previously existing international crimes, the Akayesu trial chamber at the ICTR found rape and sexual violence to amount to crimes against humanity and to genocide, and the Čelebići case at the ICTY found rape to constitute torture as a crime under customary international law. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶692–97, 707, 731–33 (Sept. 2, 1998), available at http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf; and Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment, (Čelebići Case) ¶¶486–88, 495 (Feb. 20, 2001), http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf.

28. Additional preparatory documents leading up to the establishment of the ICTY, such as the EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to EC Foreign Ministers, Released Feb. 1993 by Udenrigsministeriat Ministry of Foreign Affairs Copenhagen, argued that rape committed systematically in the former Yugoslavia amounted to a war crime. ¶42: "The Mission is aware of work currently under way in the UN and elsewhere in this area. It notes existing provisions under the Geneva Conventions and Protocols for the protection of women against rape, enforced prostitution or any form of indecent assault. Practiced on the scale and for the purposes witnessed against Muslim Women in Bosnia-Hercegovina. The Mission believes there is now a strong case for clearly identifying these abuses as war crimes, irrespective of whether they occur in national or international conflicts." https://www.google.co.uk/?gws_rd=cr&ei=q1lUUqKcC8GM0AXJy4Eo#q=EC+INVESTIGATIVE+MISSION+INTO+THE+TREATMENT+OF+MUSLIM+WOMEN+IN+THE+FORMER+YUGOSLAVIA.

29. "It is, of course, highly remarkable that so many definitions of rape have emerged from ICTY/R case law." ANNE-MARIE L. M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC & THE PRACTICE OF THE ICTY & THE ICTR 127 (2005).

30. *See, e.g.,* Roelof Haveman, *Rape & Fair Trial in Supranational Criminal Law,* 9 MAASTRICHT J. OF EUR. & COMP. L. 263–78 (2002).

31. Customary international law, which consists of state practice and *opinio juris*—that states are following the law because they believe it to be the law—is one of the three sources of international law described in article 38 of the Statute of the International Court of Justice. For further support, see ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 234 (2007), stating that a "treaty does not 'make' customary law, but like soft law it may both codify existing law and contribute to the process by which new customary law is created and develops." This chapter argues that following the work of the ICTY and the ICTR, the widespread ratification of the Rome Statute is a strong indication that states consider its contents—and in particular, its new contents, such as sexual violence crimes—to have entered the corpus of customary international law. It may not yet have become customary international law, yet the belief of many states that it has is significant, including in the process of creating new norms.

32. The ICTY was officially established and its statute set forth in Security Council Resolution 827 of May 25, 1993. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement. The ICTR was officially established and its statute set forth by Security Council Resolution 955. *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement.

33. James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospective,* 96 AM. J. INT'L L. 890 (2002), http://www.asil.org/ajil/ilcsymp7.pdf.

34. Rome Statute, *supra* note 8, art. 7(1)(g).

35. *Id.*

36. *Id.* art. 9.

37. *See* Thomas M. Franck, *Legitimacy in the International System,* 82 AM. J. INT'L L. 705, 713 (1998).

38. *See* Margaret M. deGuzman, *An Expressive Rationale for the Thematic Prosecution of Sex Crimes,* in THEMATIC PROSECUTION OF INTERNATIONAL SEX CRIMES 11, 51 (Morten Bergsmo ed., 2012), http://www.fichl.org/fileadmin/fichl/documents/FICHL_13_Web.pdf.

39. *See, e.g.,* GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE (1995) (detailing how ordinary civilians were instructed by civilian political leaders to rape and kill their civilian neighbors).

40. *See* PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 8 (2007).

41. *See id.* at 10.

42. *See id.* at 8.

43. *See id.* at 258–96.

44. Zimbardo describes how self-serving biases inherent to all human beings obscure the reality of our moral flexibility and how much we are influenced by our surroundings.

As he notes, because "most people believe that they are less vulnerable to these self-serving biases than other people, even after being taught about them . . . [y]ou are convinced that you would be the good guard, the defiant prisoner, the resistor, the dissident, the nonconformist, and most of all, the Hero. Would that it were so, but heroes are a rare breed." *See id.* at 261.

45. *See* Ruth Seifert, *War & Rape: A Preliminary Analysis,* in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 58–65 (Alexandra Stiglmayer ed., 1994).

46. *See* Zimbardo, *supra* note 38, at 307–13.

47. *See, e.g.*, WORLD HEALTH ORGANIZATION, PREVENTING INTIMATE PARTNER & SEXUAL VIOLENCE AGAINST WOMEN: TAKING ACTION & GENERATING EVIDENCE 25–26 (2010), http://whqlibdoc.who.int/publications/2010/9789241564007_eng.pdf (hereinafter WHO Report).

48. *See* Sarnata Reynolds, *Deterring & Preventing Rape & Sexual Slavery during Periods of Armed Conflict,* 16 LAW & INEQ. 601, 607 (1998).

49. *See* Zimbardo, *supra* note 38, at 297–306.

50. *See id.* at 303–4.

51. *See id.* at 304–5.

52. *See id.* at 381–429.

53. *See id.* at 10–11.

54. Article 28, Responsibility of Commanders and Other Superiors, States: "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

55. *See* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* note 18, at ¶438.

56. *See* Zimbardo, *supra* note 38, at 381–429.

57. Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct & the Dilemma of the Superior Orders Defence,* 52 MCGILL L.J. 30, 35 (2007).

58. *See id.* at 36–37.

59. ICRC, *supra* note 21, at 206. *See* Daniel Munoz-Fresard, *The Roots of Behavior in War: Understanding & Preventing IHL Violations,* 853 INT'L REV. OF THE RED CROSS 206, 2006 (2004), http://www.icrc.org/eng/assets/files/other/irrc_853_fd_fresard_eng.pdf.

60. Laura T. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance,* 104 AM. J. INT'L L. 1, 7 (2010), http://www.asil.org/ajil/Jan2010selectedpiece.pdf.

61. *See* Reynolds, *supra* note 46, at 604.

62. *See* WHO Report, *supra* note 45, at 6.

63. *See id.* at 18.

64. *See id.*

65. *See* YLVA I. BLONDEL, UNICEF, & OCHA, STRENGTHENING PREVENTION OF CONFLICT-RELATED SEXUAL VIOLENCE WITH NON-STATE ARMED GROUPS: A PRELIMINARY FRAMEWORK FOR KEY PREVENTION STRATEGIES 7 (2011), http://www.stoprapenow.org/uploads/advocacyresources/1352897743.pdf.

66. *See id.* at 5.

67. *See* Office of the Prosecutor, ICC, *Report on Prosecutorial Strategy* (Sept. 14, 2006), http://www.fidh.org/IMG/pdf/OTPProsecutorialStrategy_2006-2009.pdf.

68. *See* Bensouda, *supra* note 11.

69. *See* Fatou Bensouda, Deputy Prosecutor, ICC, *International Gender Justice Dialogue,* Keynote Address at the Women's Initiatives for Gender Justice and Nobel Women's Initiative (Apr. 19, 2010).

70. *See* Smith, *supra* note 1.

71. *See* Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony, Issued on July 8, 2005, as Amended on September 27, 2005 (Sept. 27, 2005), http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-02-04-01-05-53_English%20Warrant.pdf.

72. *See* Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Warrant of Arrest for Germain Katanga (July 2, 2007), http://www.icc-cpi.int/iccdocs/doc/doc349648.PDF; Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui (July 6, 2007), http://www.icc-cpi.int/iccdocs/doc/doc453054.PDF.

73. *See* Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Warrant of Arrest for Callixte Mbarushimana (Sept. 28, 2010), http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf.

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

75. Available at http://www.icc-cpi.int/iccdocs/doc/doc1441449.pdf.

76. See http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx.

77. *See* Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Muhammad Al Abd-Al-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007), http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF.

78. *See* Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Muhammad Al Abd-Al-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007), http://www.icc-cpi.int/iccdocs/doc/doc279858.PDF.

79. *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf.

80. *See* Bensouda, *supra* note 68.

81. More information is available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/situation%20icc-0205?lan=en-GB.

82. *See* Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11, Warrant of Arrest for Laurent Koudou Gbagbo (Nov. 23, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1276751.pdf.

83. *See* Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Moham-

med Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf.

84. The rebel force discussed in this paper is not the same force over which Bemba had control. The rebel force cannot be named because it would jeopardize the need of the NGO that trained the force to remain anonymous. The name of the leader and the rebel group are on file with the author.

85. *See Interview: Luis Moreno-Ocampo, ICC Prosecutor*, STARAFRICA.COM (Sept. 21, 2009), http://www.starafrica.com/en/news/detail-news/view/interview-luis-moreno-ocampo-icc-prose-16651.html.

86. Telephone Interview with Former NGO Worker Who Helped Set Up Gender-Based Violence Health Program near Rebel-Held Area in the CAR (Feb. 8, 2012).

87. Interview with Former NGO Worker Who Conducted Trainings in the CAR (Apr. 24, 2010).

88. *See, e.g.,* United Nations, *supra* note 2.

89. *See Humanitarian Crisis in Central Africa Republic*, *supra* note 2.

90. *See id.*

91. *See Conflict in Central African Republic Uproots 300,000, UN Reports,* UN NEWS CENTRE, Jan. 17, 2008, http://www.un.org/apps/news/story.asp?NewsID=25320&Cr=car&Cr1=unicef.

92. The United Nations has called the situation in the CAR a "a silent crisis crying out for increased international donor support and media attention" and has noted that the world's attention is focused more on neighboring African conflicts (e.g., in the DRC) and on conflicts such as Iraq. *See, e.g.,* United Nations, *supra* note 2.

93. Telephone Interview with CAR NGO Personnel (May 1, 2010).

94. Telephone Interview from Feb. 8, 2012, *supra* note 83.

95. *See id.*

96. *See id.*

97. *See* Interview from Apr. 24, 2010, *supra* note 84.

98. *See id.;* Telephone Interview from May 1, 2010, *supra* note 90. Both interviewees spoke of how the rebel leader was seeking legitimacy via these trainings; how he was very savvy; and how he was in many ways using the trainings and his relationship with the NGO for his own advancement and the advancement of his cause.

99. *See Central African Republic: Rebel Leader Seizes Power, Suspends Constitution,* IRIN NEWS (Mar. 17, 2003), http://www.irinnews.org/report/42102/central-african-republic-rebel-leader-seizes-power-suspends-constitution.

100. *See, e.g., Central African Republic Rebels Demand Payment,* YAHOO NEWS (Jan. 6, 2012), http://news.yahoo.com/central-african-republic-rebels-demand-payment-165700252.html.

101. *See, e.g., CAR Coup Strongly Condemned,* BBC NEWS (Mar. 17, 2003), http://news.bbc.co.uk/2/hi/africa/2853429.stm (noting condemnation by the African Union and France).

102. *See, e.g., From Potentate to Prisoner,* ECONOMIST (Apr. 14, 2011), http://www.economist.com/node/18561015 (noting that Gbagbo "seized power from another unelected leader in 2000").

103. *See* http://www.icc-cpi.int/iccdocs/doc/doc1783399.pdf.

104. *See* Interview from Apr. 24, 2010, *supra* note 84.
105. E-mail from Former CAR NGO Worker (Apr. 16, 2010) (on file with author).
106. Article 28, Responsibility of Commanders and Other Superiors, *see supra* n. 54.
107. *See* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* note 18, at ¶438.
108. *See* Telephone Interview from Feb. 8, 2012, *supra* note 83.
109. *See* Telephone Interview from May 1, 2010, *supra* note 90.
110. *See id.*
111. The gender-based violence specialist shared with the author the two training manuals that they adapted, one for 2007 and 2008. Because they are internal documents, they must remain confidential. The author read through the manuals, and all statements regarding the content of the manual are based on the author's reading.
112. *Id.*
113. *See* Telephone Interview from May 1, 2010, *supra* note 90.
114. The author viewed two confidential photographs of the classroom setting.
115. "The first day we set out a ground rule that guns got left at a certain tree. [The rebels] thought it was hilarious, and they'd try and sneak a gun in. I'd see someone with a small gun, like a pistol, and I'd remind them of the rule. It was a pretty bizarre place: they'd laugh and put it with the rest of the guns." Telephone Interview, *supra* note 90, May 1, 2010.
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.*
120. Interview, Apr. 24, 2010, *supra* note 84.
121. *See id.*
122. *See id.*
123. *See* Telephone Interview from Feb. 8, 2012, *supra* note 83.
124. *See* Zimbardo, *supra* note 38, at 11, 14, 402, 432.
125. *See* Telephone Interview from Feb. 8, 2012, *supra* note 83.
126. *See id.*
127. *See id.*
128. *See id.*
129. *See id.*
130. *See id.*
131. *See* E-mail, *supra* note 102.
132. *See id.*
133. *See* Telephone Interview from Feb. 9, 2012, *supra* note 83.
134. *See id.*
135. *See id.*
136. *See id.*
137. *See* Franck, *supra* note 35, at 706, 711.
138. Fatou Bensouda, Deputy Prosecutor, ICC, *The Rome Statute of the International Criminal Court & Its Incorporation of a Gender Perspective* (on file with the author).
139. *See* Smith, *supra* note 1.
140. *See id.*

141. *See* Daniel Schwammenthal, *Prosecuting American "War Crimes,"* WALL ST. J. (Nov. 26, 2009), http://online.wsj.com/article/SB10001424052748704013004574519253095440312.html.

142. *See* Smith, *supra* note 1.

143. *See* Minow, *supra* note 55, at 36 ("Reliance on post hoc punishment based on a formal rule will always be at best a partial solution. . . . [T]he deterrent and pedagogical signals from punishments are insufficient to prevent future abuses. Advance planning and training are crucial to preventing atrocities.").

144. *See* Daniel Munoz-Fresard, *The Roots of Behavior in War: Understanding & Preventing IHL Violations,* 853 INT'L REV. OF THE RED CROSS 189, 194, 2006 (2004), http://www.icrc.org/eng/assets/files/other/irrc_853_fd_fresard_eng.pdf.