Sexual Violence in Warfare: Using Theory to Inform Practice, From the Sabines to the ICTY and the ICC

By: Katie McClenahan[1]

Nicolas Poussin, *The Abduction of the Sabine Women*, 1633-34, oil on canvas, THE METROPOLITAN MUSEUM

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I. Introduction

In Nicolas Poussin's 1633–34 painting *L'Enlèvement des Sabines*, or *The Abduction of the Sabine Women*, the Sabine women writhe and reach towards their husbands, faces stricken with pain as Roman soldiers abduct the women and strike down the Sabine men. *L'Enlèvement des Sabines* is a neo-classical representation of a foundational event in Western history and viscerally represents the pain and horror of women as objects of sexual violence. The painting reflects an ancient conception of warfare as a practice conducted by men and between men, with the sexual subjugation of women as an "ancillary byproduct of war."[2]

The conflicting positioning of sexual violence in the Western canon—as foundational to the establishment of the early Roman empire yet ancillary to warfare itself—presents a continuing challenge to international human rights and humanitarian activists who seek to effectively prevent future atrocities of sexual violence in wartime. Conceptions of wartime sexual violence reflected in the Rape of the Sabine women have remained salient into the modern era. Kathy Gaca, whose research explores the salience of antiquity in modern issues of social injustice, conceptualizes modern attempts to address wartime sexual violence as "an attempt to outlaw one of the most persistent and fundamental purposes of warfare as historically practiced."[3] This poses a challenge for human rights activists to eradicate sexual violence as "second phase warfare," as sexual violence is perceived as a tangential phase of primarily man-to-man combat.[4] Without prosecution and eradication, such violence against (typically) women remains "either too specific to women to be seen as human or too generic to human beings to be seen as specific to women."[5]

Feminist legal scholars have pushed back on the continued influence of this myth and the burden it places on legal recognition of women's suffering in wartime. Catharine MacKinnon argues that much of the conception of womanhood is tied to a perceived inevitability of sexual violence: "women have created the idea that women have human rights out of a refusal to believe that the reality of violation we live with is what it means for us to be human—as our governments seem largely to believe."[6] The feminist legal movement surrounding sexual violence in wartime arises out of this pushback against ancient narratives, that "genocide is not business as usual—not even for men."[7]

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[2] Kathy L. Gaca, *Girls, Women, and the Significance of Sexual Violence in Ancient Warfare* in SEXUAL VIOLENCE IN CONFLICT ZONES. FROM THE ANCIENT WORLD TO THE ERA OF HUMAN RIGHTS (Elizabeth D. Heineman, ed., 2011) 77. Gaca does not directly discuss the rape of the Sabine women in her article, but does note that rape was "commonplace" in Roman warfare, *id.* at 75, and in their attacks on the Celts, among others, "they andrapodized the women and children, and uniformly killed the males adolescent and older," *id.* at 79.

[3] *Id.*, 88.

[4] *Id.*

[5] Catharine MacKinnon, Rape, Genocide and Women's Human Rights, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (1994), at 6.

[6] *Id.*

[7] *Id.* at 11.

This Note examines efforts to ensure accountability for sexual violence in warfare, which require advancing towards a better understanding of sexual violence *within* conflict and as an "important problem of international security,"[8] rather than an ancillary byproduct of war. Ensuring accountability for perpetrators and justice for survivors requires application of that understanding in modern criminal prosecutions of perpetrators of wartime sexual violence. Modern understandings of the perpetration of wartime sexual violence have informed efforts to fight impunity and effectively prevent sexual violence. But these understandings are hindered by incongruity between theoretical understandings and legal frameworks for addressing sexual violence. This hysteresis stems from the difficulty in grappling with the nature of the violations (as either ancillary to warfare or organizationally oriented) and the role of the legal community in prosecution (in balancing the criminalization of sexual violence and the agency of victims, particularly in novel legal frameworks attributing responsibility to commanders in a statist structure).

This Note discusses this incongruity by engaging first with the emergence of modern theoretical understandings of sexual violence in Part II. It will then explore how these theoretical understandings were first applied in the International Criminal Tribunal for the former Yugoslavia (ICTY) in Part III and later limited before the International Criminal Court (ICC) in Part IV. Efforts to prosecute and eradicate sexual violence in wartime are limited by a) the need to better understand why and how sexual violence is perpetrated in modern warfare and b) the need to build more effective legal frameworks to prosecute and effectively prevent sexual violence in future conflicts, as addressed in Part V.

II. Theoretical Frameworks on the Nature of Sexual Violence in Warfare

Understanding theoretical frameworks underpinning patterns of sexual violence in ancient warfare informs comprehensive legal frameworks applicable to modern conflict situations. This Part relies on feminist legal scholarship to construct a consistent theoretical framework for understanding sexual violence in warfare. Building off of the work of Gaca, MacKinnon, and others, I explore four primary determinants of sexual violence in warfare: strategic use, levels of violence, degree of ethnic targeting, and degree of symmetry, before moving to organizational analyses of incentive/sanction structures within armed groups. Together, this delivers a robust account of wartime rape conducive to application in international criminal proceedings.

To start with the ancient, Gaca delineates four modes of ancient warfare in which sexual violence was conducted against women and girls, describing them as either "predatory, parasitic, expansionist, or retaliatory."[9] While the (almost exclusively) men who waged war would perceive sexual violence as an ancillary and inevitable byproduct of their inter-masculine conflict, the modes in which warfare was conducted greatly influenced the manner in which sexual violence was perpetuated as organized retributive warfare.[10] Extensive descriptions of warfare in ancient sources

[8] Dara Kay Cohen, *Explaining Rape During Civil War: Cross-National Evidence (1908-2009)*, 107 AM. POL. SCI. REV., NO. 3, Aug. 2013, at 461.
[9] Gaca, at 80-81.
[10] *Id.*

reflect how sexual violence functioned as more than just an expression of masculine sexual aggression, instead driven by an objective "to commandeer through sexual violence the female bodies among the enemy or outsiders."[11] Sexual violence made manifest a strategic effort to commandeer the sexual property of enemy combatants within a greater strategy of subordination. Gaca attributes this to the androcentric conception of war inherent in Clausewitzian warfare, in which "war as a whole" is limited to "armed combat among males of fighting age" as they conduct politics by other means.[12] But such structural analysis, which explains sexual violence solely by its subordination function within an organizational strategy, fails to capture the wide variation of conflict scenarios under which sexual violence takes place in the modern era.

Reducing explanations of sexual violence to its subordination function itself does not capture the wide variation in perpetration of sexual violence across conflict situations, limiting understanding of wartime sexual violence to situations where there is the opportunity and incentive to engage in such violence and failing to accurately capture wide variations in the nature, scale, and scope of sexual violence in conflict situations.[13] The historical record lays bare degrees in the *levels of violence*, with circumstances in which there are high levels of violence against civilians and widespread sexual violence, such as in Nanking in World War II,[14] alongside the Red Army's withdrawal from Germany and Eastern Europe in World War II,[15] or in the Bosnian War,[16] and conflicts where the overall level of violence against civilians is high but sexual violence is low, as with the insurgent conflicts perpetrated by the Tamil Tigers in Sri Lanka and the Sendero Luminoso in Peru.[17]

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[11] *Id.* at 88.
[12] *Id.* at 76.
[13] Cohen, *supra* note 5, at 461.
[14] The Rape of Nanking was the result of a massive attack undertaken by the Japanese soldiers against the newly established capital of the Republic of China, Nanking. In Nanking, between 8-32% of female civilians in the city at the time of Japanese seizure were subject to sexual violence. Japanese soldiers would execute many of them following their assault. *See*: IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II, (1997). Experts have estimated that more than 260,000 noncombatants were killed by Japanese soldiers in late 1937 and early 1938, although estimates range as high as over 350,000. *Id.* at 14.
[15] *See* Anne Applebaum, *The agony of liberation*, NATIONAL POST (Nov. 18, 2013) https://nationalpost.com/opinion/anne-applebaum-the-agony-of-liberation. ("In Poland, Hungary, Germany, Czechoslovakia, Romania and Bulgaria, the Red Army's arrival is rarely remembered as a pure liberation. Instead, it is remembered as the brutal beginning of a new occupation.")
[16] *See* MacKinnon, *supra* note 4; *Karen Engle, Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina,* 99 AM J. INT'L. L. 778, at 784-85 (2005) ("In 1992 Bosnian Muslim women arriving in refugee camps in Croatia began reporting that they had been raped by Serbian men. An investigation ensued; although estimates have varied widely, it is generally thought that close to twenty thousand women were raped during the war. Eighty percent of the rape are said to have occurred in detention camps.").
[17] Elisabeth Jean Wood, *Variation in Sexual Violence During War*, 34 POL. & SOC'Y no. 3 (Sept. 2006) at 307-308. ("Sexual violence is relatively limited even in some cases of ethnic conflict that include the forced movement of ethnic populations; the conflicts in Israel/Palestine and Sri Lanka are examples. Some armed groups engage in relatively little sexual violence; Sendero Luminoso was deemed responsible for more than half the deaths and disappearances reported to the Peruvian Truth and Reconciliation Commission but for only a tenth of the (few) reported cases of rape.")

There is also variation in the *degree of ethnic targeting*, which can be intentionally perpetrated in situations where female victims are viewed as the sexual property of the group subject to ethnic targeting. In Bosnia, Catharine MacKinnon found that sexual violence against Bosnian women was carried out as "ethnic rape as an official policy of war in a genocidal campaign for political control."[18] In contrast, sexual violence in the Sierra Leonean Civil War was widespread but was not marked by explicit ethnic targeting.[19] Instead, it was perpetrated "indiscriminately on women of all ages, of every ethnic group and from all social classes."[20] Similarly, the Red Army's retreat from Germany and German-occupied territories following the end of World War II was associated with widespread violence against civilians by Soviet troops "enraged by the deaths of friends, spouses and children, enraged by the burned villages and mass graves the Germans had left behind in Russia."[21] Women would "bear the brunt of this rage," yet acts of rapes, gang rapes, and sexually motivated murders were often apolitical and directed towards *victims* of the Nazi regime, including newly liberated Polish forced laborers.[22]

Furthermore, there is variation in the *degree of symmetry* between armed groups within the same armed conflict, demonstrating how sexual violence cannot be solely described by the structure of the conflict itself or by the levels of overall violence. In Sri Lanka, government forces perpetrated sexual violence against women associated with the Tamil insurgency, but there was little evidence of sexual violence by insurgents against civilian women despite widespread violence otherwise against civilians.[23] Similarly, during the civil war in El Salvador, though government soldiers and security forces occasionally engaged in sexual violence against civilians, no incidents of sexual violence reported in the United Nations-sponsored Truth Commission report were attributed to the insurgent force.[24]

Given the multiple planes of variation, rationales must go beyond the nature of conflict and instead examine causal accounts that mirror and explain these variations. Elisabeth Jean Wood finds that the effectiveness of an armed group's command and control structure is important in examining both the instrumentality of sexual violence within armed groups and the effective prohibition of sexual violence by the group's leaders.[25] Her research surpasses opportunity and incentive as the sole driving factors for sexual violence, moving beyond "macrostructural factors," which include arguments of increased opportunity, biological incentives, socio-cultural incentives, and militarized masculinity.[26] Arguments which focus solely on biological incentives through biosocial theories similarly over-emphasize the sexual nature of wartime sexual violence in expecting men "to be unable to handle their sexual aggression during the pressures of conflict," which allows for assumptions that rape

[18] MacKinnon, *supra* note 4, at 11.
[19] Wood, *supra* note 13, at 314.
[20] *Id.*
[21] *See* Applebaum, *supra* note 14.
[22] *Id.*
[23] Wood, *supra* note 13, at 313-314.
[24] *Id.* at 316-317.
[25] *Id.*, 327-330.
[26] *Id.* at 331.

during armed conflict is natural and inevitable.[27] The weakness of these macrostructural theories is in their inability to describe variation, as most of them over-predict sexual violence in warfare by failing to differentiate it from larger patterns of violence.[28]

Instead, organizational analyses, which consider the capacity of armed groups to provide incentives that either promote or sanction sexual violence, provide a starting point for addressing patterns of variation in sexual violence.[29] These incentives can operate in a microcosm, unpacking granularity beyond macrostructural factors, for even in the absence of incentives across an organization as a whole, incentives can be present among smaller units and individuals themselves.[30] But even in the absence of incentives *promoting* sexual violence, opportunistic sexual violence can fester in circumstances where there is an absence of sanctions and norms that effectively *prohibit* it or when individuals and units are in proximity to potential victims.[31] By focusing on both the absence of sanctions and norms and the opportunity to engage in sexual violence, this organizational approach attributes responsibility to commanders who fail to implement such prohibition, implement recruitment efforts in such absence, and engage in strategies that provide for the opportunity to engage in sexual violence.

Whether engaged as a weapon of sexual terrorism or institutionalized as a method of organizational unity, the perpetration of sexual violence reflects the organizational capacity of armed groups to incentivize either engagement or prohibition of wartime rape. Wartime rape is "a coherent, coordinated, logical, and brutally effective means" of waging war, and a theoretical understanding of such violence requires focus on its militarized utilization rather than regressing towards antiquated assumptions of its necessity and inevitability.[32]

III. Prosecution of Wartime Sexual Violence: ICTY and Command Responsibility

In Part III, I assess the ICTY as a foundational criminal tribunal, and its engagement with command responsibility across three separate judgements: the *Čelebići*, *Furundžija*, and *Kunarac* prosecutions. This Part connects theory to practice, illustrating the components of sexual violence in warfare *in situ*. I introduce relevant details about the historical context of the tribunal and summarize the intent of feminist scholars and the ICTY Prosecutor before presenting an account of command responsibility and unpacking the ways in which it interacts with different elements of each prosecution. This section helps to plot the metes and bounds of command responsibility across different actors, demonstrating its eventual precedential value.

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[27] Hee-Won Son, *Militarising Rape: A Strategic Analysis of Bosnian Rape Camps and the Japanese "Comfort Women" System,* 22 J. OF MIL. & STRATEGIC STUD. no. 4 (2023) AT 191.
[28] Wood, *supra* note 13, at 331.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] Sun, *supra* note 27, at 194.

A. Establishment of the ICTY

Attributing sexual violence to organizational structure supports command responsibility prosecution models, as sexual violence can be attributed to either a negligent breakdown in strategy and structure or an intentional effort by the organization to engage in sexual violence. Command responsibility operates as a form of liability attaching to a military commander to render them criminally responsible for crimes committed under his or her effective command and control.[33] In the evolution of wartime sexual violence as a violation against *women qua women*, the ad hoc ICTY and International Criminal Tribunal for Rwanda (ICTR) presented a pivotal opportunity for a "systematic consideration" of how rape and sexual violence were treated under international law.[34] Such considerations, based in theoretical reappraisals of the nature of sexual violence and rape as a war crime, reconceptualized existing humanitarian law to include sexual violence as part of a project of "reenvisioning human rights so that violations of humanity include what happens to women."[35]

Amid the violent dissolution of the former Yugoslavia in the early 1990s, the United Nations created the ICTY as an ad hoc international criminal tribunal, an unprecedented step that reflected a renewed international commitment to enforcing humanitarian law and addressing atrocities through legal accountability.[36] Following the dissolution of the Socialist Federal Republic of Yugoslavia, wars in Croatia and Bosnia and Herzegovina were characterized by campaigns of "ethnic cleansing," the deliberate targeting of civilians, and widespread acts of torture and sexual violence.[37] The international response to these atrocities catalyzed renewed momentum for international criminal accountability, marked by the UN Security Council's establishment of the ICTY in 1993 through Resolution 827, citing threats to international peace and security under Chapter VII of the UN Charter.[38] Feminist activists and NGOs recognized the tribunal as a historic opening to challenge the historical marginalization of gendered violence in international law, as widespread stories of sexual abuse against women shocked the international community into a reconsideration of wartime rape as a war crime.[39] The ICTY's statutory development

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[33] Rome Statute art 28(a); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7(3), May 25, 1993, S.C. Res. 827 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 6(3), Nov. 8, 1994, S.C. Res. 955.

[34] Engle, *supra* note 12, at 779. Both the ICTY and the ICTR developed seminal jurisprudence on command responsibility for sexual violence in warfare. This memo will limit discussion to just the ICTY, but for further on the ICTR, *see* DEP'T OF PEACEKEEPING OPERATIONS, REVIEW OF THE SEXUAL VIOLENCE ELEMENTS OF THE JUDGEMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, AND THE SPECIAL COURT FOR SIERRA LEONE IN THE LIGHT OF SECURITY COUNCIL RESOLUTION 1820, (March 9, 2009), [hereinafter SEXUAL VIOLENCE ELEMENTS].

[35] MacKinnon, *supra* note 4, at 7.

[36] Engle, supra note 15 at 778.

[37] S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (noting the "continuing reports of widespread and flagrant violations of international humanitarian law" in the territory of the former Yugoslavia).

[38] *Id.*

[39] Engle, *supra* note 15, at 778 (quoting Theodor Meron, former ICTY president, "Indescribable abuse of thousands of women in the territory of former Yugoslavia... shock[ed] the international community into rethinking the prohibition of rape as a crime under the laws of war.").

and subsequent jurisprudence served as a testing ground for incorporating feminist theory into international criminal procedure, translating legal theory into criminal adjudication.[40]

The theoretical reappraisals shaping ICTY indictments were shaped by advocacy led by feminist NGOs and legal scholars. Feminist lobbyists pushed for the explicit inclusion of rape as a crime against humanity in the statute of the ICTY, a success for the statutory inclusion of gender crimes in the framework of international criminal law.[41] Feminist scholars also pushed for effective prosecution, ensuring that statutory inclusion did more than just pay lip service to the crimes of sexual violence committed in the former Yugoslavia. As Richard J. Goldstone, former Prosecutor for the ICTY recounted regarding the causal influence of feminist activism,

> From my very first week in office… I began to be besieged with petitions and letters, mainly from women's groups, but also from human rights groups generally… expressing concern and begging for attention, adequate attention, to be given to gender related crime, especially systematic rape as a war crime. Certainly if any campaign worked, this one worked in my case, because it definitely made me much more sensitive, concerned and determined that something should be done about the proper investigation of allegations of mass rape in the former Yugoslavia…[42]

B. Command Responsibility before the ICTY

Ensuring prosecution of gender-based violence in the process of reenvisioning the treatment of sexual violence under international law involved interaction with command responsibility liability, which has informed prosecutions under international humanitarian law in various seminal criminal tribunals, including the International Military Tribunal at Nuremberg. The ICTY and ICTR defined command responsibility in the presence of:

(i) a superior–subordinate relationship;
(ii) the superior knew or had reason to know that a subordinate was about to commit crimes or had done so; and
(iii) the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[43]

The ICTY prosecutions of sexual violence in particular began by engaging with theory. Feminist legal theorists' debates influenced the formation and jurisprudence of the ICTY, driving the conduct and pattern of the eventual prosecution of sexual

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[40] MacKinnon, *supra* note 4, at 16 (noting the potential that the creation of the ICTY "becomes the time and place, and these the women, when the world recognizes that violence against women violates human rights. That when a woman is raped, the humanity of a human being is recognized to be violated"); Engle, *supra* note 15, at 781.
[41] EITHNE DOWDS, FEMINIST ENGAGEMENT WITH INTERNATIONAL CRIMINAL LAW: NORM TRANSFER, COMPLEMENTARITY, RAPE AND CONSENT 48-50 (2020).
[42] *Id.* at 49 (quoting Richard Goldstone, The United Nations' War Crime Tribunals: An Assessment, 12 CONN. J. INT'L L. 227, 231).
[43] ICTY Statute art. 7(3).

violence by the ICTY's Office of the Prosecutor (OTP).[44] The OTP brought successful prosecutions against rapes alleged to have been committed by perpetrators on all sides of the ethnic conflict, concentrating prosecutorial efforts on situations that viewed rapes as "systematically aimed" at Bosnian Muslims.[45] Ultimately, the ICTY would hand down three judgements comprising its jurisprudence on rape: the *Čelebići*, *Furundžija*, and *Kunarac* prosecutions, each of which involved defendants from different ethnic groups involved in the conflict.[46] Notably, the *Čelebići* prosecution was brought against Bosnian Muslim defendants for raping Serbian women in captivity, signaling that "all rapes committed on all sides violated international law," and the *Furundžija* prosecution was brought against Croat defendants.[47]

The *Kunarac* prosecution involved mass rape and sexual enslavement by Serbian perpetrators against Bosnian Muslims in Foča and resulted in a Tribunal decision that held that the sexual violence formed part of a "systematic attack" against Bosnian Muslims.[48] The Tribunal concluded that the attacks were crimes against humanity, whether they were rape or rape as torture or enslavement, functioning within a systematic or widespread attack on Bosnian Muslims.[49] Notably, the *Kunarac* decision both requires and presumes lack of consent, finding that requiring proof of force or threat of force to prove lack of consent would permit perpetrators to evade liability by "taking advantage of coercive circumstances without relying on physical force."[50]

Furthermore, the *Kunarac* decision establishes command responsibility under ICTY Article 7(3) even in the absence of formal designation of commanders, finding that "such responsibility may be recognized by virtue of a person's *de facto*, as well as *de jure*, position as a commander."[51] Some commentators have argued this flexibility in recognizing command responsibility risks due process concerns, particularly when applied to civilian leaders or leaders in a hybrid conflict scenario.[52] Furthermore, the "reason to know" standard, element (ii) in the ICTY's definition of command responsibility, permitted the court, and later courts, to permit "constructive knowledge" based on *de facto* command position, raising further due process risks.[53] "Reason to know" is not a unitary concept, instead raising a spectrum of scienter, [54] but the ICTY (and the ICTR, in its concurrent jurisprudence), limit the requirements for "reason to know" to a sufficient showing that the accused "had 'some general

[44] Engle, *supra* note 12, at 789.
[45] *Id.* at 798.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 799.
[49] *Id.* at 800.
[50] *Id.* at 804 (quoting Prosecutor v. Kunarac, No. IT-96-23 & IT-96-23/1, ¶130 (June 12, 2002)).
[51] Prosecutor v. Kunarac, No. IT-96-23 & IT-96-23/1, ¶396 (June 12, 2002).
[52] Daniel Watt, *Stepping Forward or Stumbling Back? Command Responsibility for Failure to Act, Civilian Superiors and the International Criminal Court*, 17 DALHOUSIE J. OF LEGAL STUD. 141, 149 (2008).
[53] Aaron Fellmeth and Emily Crawford, *"Reason to know" in the international law of command responsibility*, 104 IN'L REV. RED CROSS 1223, at 1226 (2022).
[54] Id. at 1236.

information in his possession, which would put him on notice of possible unlawful acts by his subordinates.'"[55]

In cases such as the *Čelebići* decision, the ICTY found that a showing of knowledge of "specific information about unlawful acts committed or about to be committed" was not necessary; instead, the decision demonstrated that a commander who had received information that soldiers under his command had a "violent or unstable character, or have been drinking prior to being sent on a mission" may be sufficient to fulfill the "reason to know" element.[56] The ease with which the court was able to establish the "reason to know" element demonstrates the influence of the feminist legal scholars in the development of its jurisdictional approach, allowing for a flexibility that helps capture responsibility in situations where sexual violence is systemic, diffuse, or part of patterns rather than directly ordered. A low bar for the "reason to know" element allowed the court's jurisprudence power hierarchies and structural failures (i.e., failures to train, supervise, and punish) within the command structure, which feminist critiques attribute as drivers of sexual violence in wartime. As a result of the low scienter requirement, an individual's "effective control" becomes a key element of demonstrating command responsibility.

The *Kunarac* court looked to "effective control," defined as the "material ability to exercise his powers to prevent and punish the commission of the subordinates' offenses," in recognizing an individual's *de facto* position as a commander.[57] This framing reflects Wood's organizational strategy theory by considering the capacity of armed groups to provide incentives that either promote or sanction sexual violence. Operating on a micro scale, even temporally (such as on an *ad hoc* basis within a unit), jurists can attribute responsibility to hold individual commanders liable for those who are under their effective control, even for short periods of time or as a "rankless individual commanding a small group of men."[58] Looking to the Commentary to the two Additional Protocols of 1977 to the Geneva Conventions of 1949, the court finds that, "as there is no part of the army which is not subordinated to a military commander at whatever level, this command responsibility applies from the highest to the lowest level of the hierarchy."[59] This liability approach allows for flexibility in determining responsibility even in the absence of *de jure* command and is mindful of the inherently coercive nature of both military commanders who wield effective control over their subordinates and the inherently coercive circumstances of the systemic sexual violence such that combatants are waging against a civilian population. The ICTY Trial Chamber would justify its reliance on the command responsibility liability approach as a "well-established norm of customary and conventional international law."[60]

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[55] Prosecutor v. Delalic, (IT-96-21-T) ¶28 (Nov. 16, 1998).
[56] Prosecutor v. Delalic ("*Čelebići* Case"), IT-96-21-A, ¶238 (Feb. 20, 2001).
[57] Prosecutor v. Kunarac, ¶397.
[58] *Id.*, ¶398-399.
[59] *Id.*, ¶398, (quoting COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski, Bruno Zimmerman eds., 1987).
[60] Prosecutor v. Delalic, ¶333 (Nov. 16, 1998).

Positioning such violations within a larger pattern of crimes against humanity and war crimes in order to establish such circumstances as "universally coercive" fits within a command responsibility liability model.[61] Crimes against humanity, in particular, require systematic and intentional perpetration of violence against civilians, attributing liability to commanders who either promote or fail to sanction such violence. While the ICTY did not explicitly link *rape* and genocide in its jurisprudence, it did establish a connection between sexual violence and genocide by including sexual violence as an element of genocidal warfare.[62] The indictment of former Serbian President Slobodan Milošević, charged with the intent to destroy the Bosnian Muslim population, as "effected by" widespread and systemic violence, included sexual violence in its rationale.[63] The indictment demonstrates that despite the prosecution of the perpetration of sexual violence by actors of varied ethnic backgrounds, the highly organized and strategic nature of sexual violence by Serbians against Bosnians indicated an intentional policy of genocide and more directly supported findings of command responsibility.[64]

The ICTY also established command responsibility for systemic perpetration of sexual violence by elevating such violence as an element of a grave crime: either as a war crime or crime against humanity, if not as genocide. The jurisprudence of the ICTY established that "a superior's failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed."[65] Elevation of failure to prevent sexual violence as a breach of a duty under customary international law reflects the progression of the ICTY in reenvisioning human rights to include sexual crimes against women as violations of humanity and acts as a bridge between organizational strategy theory and effective legal jurisprudence.

IV. Command Responsibility Before the ICC: Bemba Conviction and Acquittal

The development of the ICTY and ICTR sexual violence jurisprudence provided a useful starting point to apply modern theoretical understandings of sexual violence to prosecutorial efforts criminalizing sexual violence within a command responsibility framework. Further prosecution of sexual violence, as in the Special Court for Sierra Leone, reflected a growing consensus in "the importance and legal duty of superiors to prevent or punish crimes, including sexual crimes, by their subordinates."[66] The jurisprudence developed in these ad hoc international criminal tribunals have informed further criminal prosecutions in additional criminal tribunals and in the International Criminal Court, as evidenced by the ICC's initial prosecution

[61] Prosecutor v. Kunarac, ¶130. ("[T]he circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.")
[62] Engle, *supra* note 12, at 801.
[63] *Id.* (quoting Prosecutor v. Milosevic, Amended Indictment, No. IT-02-54-T, para. 32 (Apr. 21, 2004).
[64] *See* Engle, *supra* note 12, at 801; Son, *supra* note 22, at 197.
[65] Prosecutor v. Enver Hadžihasanović, No. IT-01-4, ¶30 (April 22, 2008).
[66] SEXUAL VIOLENCE ELEMENTS, supra note 28, at 5.

of Jean-Pierre Bemba Gombo, or Bemba, former Vice President of the Democratic Republic of the Congo and leader of the Movement for the Liberation of the Congo (MLC).[67] While the Bemba prosecution demonstrated an opportunity to extend command responsibility liability to criminal prosecutions for war crimes involving sexual violence, the ICC Appeal Chamber's latter acquittal of Bemba lays bare the potential shortcomings of the liability model by failing to attribute criminal responsibility without high showings of direct involvement.

Part IV ties together the conceptual framework from Part II with the case study explored and commentary on command responsibility in Part III to comment on the ICC's development of sexual war crime jurisprudence. Through the lens of the *Bemba* proceedings, I argue that the ICC's inconsistent application of theory and prior jurisprudence jeopardizes the court's legitimacy and lays bare the persistent limitations of international human rights law in ensuring effective justice and accountability through international criminal prosecution.

Codified in article 28 of the Rome Statute, command responsibility informs the ICC's attempts to prosecute sexual violence.[68] Attempts to prosecute sexual violence in the ICC have been informed by this interpretation of command responsibility.[69] In comparison to the determination of command responsibility under the ICTY and ICTR statutes, the Rome Statute defines command responsibility as follows:

> (1) 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:
>
> > (a) 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
> >
> > (b) 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.[70]

The Rome Statute determination of command responsibility under article 28 differs from the ICTY and ICTR definitions in a few primary ways. In particular, the Rome Statute requires a finding of causation, with the requirement that the crimes be the

[67] Oumar Ba, *What Jean-Pierre Bemba's acquittal by the ICC means*, AL JAZEERA (June 13, 2018), https://www.aljazeera.com/opinions/2018/6/13/what-jean-pierre-bembas-acquittal-by-the-icc-means.
[68] Rome Statute art 28.
[69] *Id.*
[70] *Id.* (emphasis added).

"result of" the commander's acts or omissions.[71] The *mens rea* standard is lowered to "should have known," rather than "having reason to know" under the ICTY and ICTR definitions.[72] As a result, commanders are held to take "all" necessary and reasonable matters under the Statute, although the distinction from "the" necessary and reasonable matters is unclear.[73]

The ICC Trial Chamber's initial conviction in March 2016 of Bemba appeared to be a watershed moment for international human rights law as the first prosecution of an individual in the court for rape as a weapon of war under the command responsibility doctrine.[74] The conviction was both the first ICC conviction under the theory of command responsibility liability and the first ICC conviction for sexual and gender based crimes, with the conviction recognizing rape as a war crime and a crime against humanity.[75] However, the conviction was overturned on June 8, 2018, when the ICC Appeals Chamber acquitted Bemba of war crimes and crimes against humanity by a narrow 3-2 decision.[76] In the acquittal decision, the majority reasoned that the scope of command responsibility is "intrinsically connected to the extent of a commander's material ability to prevent or repress the commission of crimes or submit the matter to the competent authorities for investigation and prosecution" and thus a "commander cannot be blamed for not having done something he or she had no power to do."[77] While article 28 lowered the prosecutorial burden for demonstrating command responsibility compared to the standard established by the ICTY, command responsibility was much more narrowly interpreted by the three majority judges of the Appeals court than by the Trial Chamber judges in 2016.[78] While the Trial Chamber had placed the burden on Bemba to demonstrate that the measures he took were sufficient to prevent or prohibit sexual violence, the Appeals Chamber effectively shifted the burden back to the prosecutor to demonstrate Bemba's "material ability" to prevent or suppress such crimes.

Bemba's acquittal demonstrates the limitations of the ICC as a *criminal* court, not a human rights court, as it seeks to provide accountability for atrocity *crimes* that also constitute human rights violations.[79] As a criminal court, the Appeals Chamber considered Bemba's individual responsibility for atrocities committed by the armed group that he directly commanded. However, the Appeals Chamber accorded him further deference than the Trial Chamber to the "attendant difficulties on Mr. Bemba's ability, as a removed commander, to take measures" of control over MLC forces.[80] In finding that the Trial Chamber failed to conduct a proper assessment as to whether

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[71] Rachel Finn, Note, *Fracture for Good? Using the Acquittal in the Prosecutor v. Jean-Pierre Bemba Gombo as an Impetus to Clarify and Strengthen the Development of International Criminal Law*, 51 GEO. J. INT'L L. 691, 702 (2020).
[72] *Id.*
[73] *Id.*
[74] Ba, *supra* note 48.
[75] Finn, *supra* note 51, at 695.
[76] Prosecutor v. Gombo, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF.
[77] Prosecutor v. Gombo, ¶ 5.
[78] Finn, *supra* note 51, at 695-96, 702.
[79] Ba, *supra* note 48.
[80] Prosecutor v. Gombo, ¶ 171.

the measures taken by Bemba to investigate and thus prohibit sexual violence were the extent of "necessary and reasonable measures," the Appeals Chamber concluded that the Trial Chamber's attribution of liability exceeded the scope of the duty to take "all necessary and reasonable measures" under Article 28.[81]

The Appeals Chamber decision undermines future accountability for sexual violence crimes by creating uncertainty around the application of Article 28. As a decision addressing both command responsibility and standards for prosecution of sexual violence, the *Bemba* acquittal is, at least, a missed opportunity to provide precedential jurisprudence or, at worst, an abdication of responsibility in providing for meaningful legal accountability.[82] While the ICC is a criminal court, it is also a court intended to "put an end to impunity" for "the most serious crimes."[83] The court fails to meet its responsibility when it hands down verdicts that are "confusing" rather than precedential and meaningful to victims.[84] In particular, the burden of proof established by the Appeals Chamber sets forth a fragmented framework overly deferential to the commander-defendant that presents issues for both prosecutors and defense teams to determine the liability of remote commanders.[85] Allegations of "confusing" verdicts also further undermine the court's legitimacy, which already faces allegations of politicization, inefficacy, and bureaucratic bloat and threatens statist sovereignty by its imposition of "automatic jurisdiction."[86]

Beyond undermining the legitimacy of the court, failure to establish command responsibility relegates sexual violence back to "second phase warfare," in which criminal commanders can evade responsibility in international courts for crimes by cleaving them off from primary war crimes. The requirement to establish command responsibility is rooted in the statist structure identified by MacKinnon in Bosnia, where "each state's lack of protection of women's human rights is internationally protected, and that is called protecting state sovereignty."[87] The Appeals Chamber's decision placed a heightened burden on victims to provide evidence to the trial chamber to demonstrate that the commander themselves did not take reasonable, specific, and concrete measures available to them, shifting the burden from the commander defendant to the Trial Chamber, the ICC Office of the Prosecutor, and thus to victims.[88]

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[81] *Id.* ¶¶ 171, 167.
[82] Finn, *supra* note 51, at 709.
[83] Rome Statute, Preamble.
[84] James A. Goldston, Don't Give Up on the ICC, FOREIGN POLICY (Aug. 8, 2019), https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/ ("…the conviction of former Congolese Vice President Jean-Pierre Bemba for crimes his troops had committed in the Central African Republic was overturned by five appellate judges whose fragmented reasoning—in four separate opinions, including three by a splintered three-member majority—confused many.")
[85] Finn, *supra* note 51, at 703, 707.
[86] "Protecting American Constitutionalism and Sovereignty from International Threats," National Security Advisor John Bolton Remarks to Federalist Society, Sept. 10, 2018, https://www.lawfaremedia.org/article/national-security-adviser-john-bolton-remarks-federalist-society; *but see* Hyeran Jo and Beth Simmons, *Can the International Criminal Court Deter Atrocity?,* 70 INT'L ORG. 443 (2016).
[87] MacKinnon, *supra* note 4, at 15.
[88] Finn, *supra* note 51, at 702.

V. Implications

While the evolution of sexual violence jurisprudence reveals great potential for progress, the persistent limitations of international law in imagining the ability to address wartime sexual violence atrocities suppress impact and prevents meaningful justice and accountability. While the ICTY and ICTR provided for a transformative integration of feminist legal theory in their project to affirm sexual violence as a grave breach of humanitarian law, their legacy was undercut by later legal developments, particularly in the ICC. The *Bemba* acquittal highlights the fragility of prosecutorial success under the doctrine of command responsibility when constrained by rigid legal formalism and continued deference to statism. The Appeals Chamber decision underscored a systemic reluctance to interpret international criminal law in ways that fully encompass the organizational and strategic use of sexual violence, thereby reinforcing the relegation of such acts to a secondary status under humanitarian law.

For the international community to meaningfully respond to the realities of sexual violence in modern conflict, it must reconcile the theoretical understanding of rape as both a strategic weapon and a human rights violation with prosecutorial models capable of addressing systemic and organizational failure. This involves shifting away from archaic assumptions that sexual violence is inevitable or incidental and instead recognizing it as a deliberate and punishable element of warfare. Establishing legal frameworks that permit findings of direct responsibility as informed by organizational strategy allows for more effective persecution strategies; strategies driven by evidence-based responsibility for serious violations of international criminal law avoid the pitfalls of seeking positive perceived legitimacy of international criminal prosecutions at the cost of effective reconciliation efforts.[89] Failure by criminal tribunal to push back against victimization narratives may instead serve as a catalyst for further episodes of violence, as opposition groups coalesce around those they perceive as victims of illegitimate persecution.[90] International criminal courts must remain mindful of their purpose as transitional justice mechanisms. A robust legal framework rooted in direct responsibility, informed by interdisciplinary theory, and responsive to the lived realities of victims, is essential for challenging impunity and redefining the scope of meaningful justice and accountability.

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[89] *See generally* Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT'L L. 405, at 466 (2014) (suggesting that the role of courts in both "fairly and impartially prosecuting crimes committed by all groups and by collecting and making available evidence that persuades groups that perceive themselves as victims to see their role in the conflict more realistically" may ultimately contribute more to reconciliation efforts by breaking down inaccurate in-group narratives, even if it results in short-term negative perceptions of legitimacy.)

[90] *Id.* at 466 (finding that the catalyzing force of self-victimization "strongly suggests that simply pursuing positive perceived legitimacy by catering to self-serving and inaccurate internal narratives about the conflict is not the solution," instead finding "a role for international criminal courts in reconciliation by trying to break down inaccurate internal narratives about the underlying conflict.") and at 470-1 ("There is evidence that growing numbers of Serbs have accepted that some of the worst crimes committed in the Balkans… occurred and were perpetrated by Serbs… this nascent reevaluation appears to be, at least in part, a result of the evidence accumulated by the ICTY during its prosecution of crimes committed during the conflict in the Balkans.")

VI. Conclusion

In *L'Enlèvement des Sabines*, the Roman leader Romulus is seen at the upper left of the frame, standing on a dais, lifting his vibrant red cloak as a signal for his warriors to seize the Sabine women.[91] Romulus himself does not engage in the sexual violence depicted, instead commanding from above those below him to engage in systematic, intentional sexual violence. Myths of foundational violence continue to shape both culture and jurisprudence, and feminist legal interventions must engage in targeted, effective advocacy to disrupt these narratives. The Sabine women, in all their misery, are served less by a denigration of their rapists than by an overhaul of the ways in which sexual violence continues to be harnessed as an organizational bonding mechanism and a weapon of suffering through sexual terrorism. To accomplish this, international human rights jurisprudence must start by prosecuting those that stand above the fray. Though, like Romulus, their hands may appear clean, they remain ultimately responsible for the violation of humanity perpetrated below.

[91] Nicolas Poussin, *The Abduction of the Sabine Women*, 1633-34, oil on canvas, THE METROPOLITAN MUSEUM OF ART, New York, https://www.metmuseum.org/art/collection/search/437329.