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Part I

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Introduction

Makeshift Justice

In 2006, in a small town in the Equateur Province of the Democratic Republic of the Congo (DR Congo) – nearly 1,000 miles northeast of Kinshasa and 3,000 miles north of Johannesburg – a military judge handed down life sentences to 7 Congolese soldiers for the mass rape of civilian women in the town of Songo Mboyo.¹ The soldiers, former rebels who had been integrated into the Congolese national army, had mutinied after not receiving pay promised to them by their commanders. They caused havoc through the town, looting houses and assaulting men, women, and children. In war-torn DR Congo, such incidents were not uncommon within the armed forces. However, the trial that followed broke new ground in both Congolese history and international criminal law. Despite the fact that DR Congo's laws lacked strong protections against rape at the time, the decision combined elements of the Congolese Penal Code with international human rights protections to arrive at one of the most innovative human rights rulings concerning rape as a crime against humanity that the world had ever seen. The judgment also made DR Congo one of the first countries in the world to utilize the Rome Statute of the International Criminal Court to prosecute international crimes through its domestic courts. The judge ordered the accused to pay \$5,000–10,000 USD in compensation to each of the victims and their families.²

This landmark human rights decision was produced despite seemingly insurmountable challenges facing the Congolese justice system. At the time, DR Congo's annual budget was insufficient to cover judicial salaries for even one month of the year, meaning that many Congolese state employees and law enforcement officials rarely received the compensation

¹ Tribunal Militaire de Garnison de Mbandaka. RMP 154/PEN/SHOF/05 / RP 084 / 2005 (April 12, 2006).

² Ibid.

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they were owed. Moreover, magistrates and military judges received little human rights training as part of their formal legal education, especially not in the complex areas of international criminal law invoked in the 2006 judgment. While most towns lack a functioning courtroom, court buildings that do exist typically lack electricity, computers, the Internet, office equipment, or filing space (International Bar Association 2009). Since most courts, police stations, and prosecutors lack any budget whatsoever to carry out their duties, activities like investigating cases or keeping judicial records typically occur either on an informal basis (paid for by victims or other stakeholders) or not at all. Yet, in spite of these challenges, courts in DR Congo's eastern provinces have been incredibly active on specific human rights issues. Most notably, since the landmark 2006 judgment, local courts have produced an extraordinary number of judicial decisions convicting perpetrators of sexual and gender-based violence for their roles in mass atrocities and ordinary sexual offenses.³ Judges and prosecutors have relied heavily on international human rights instruments to do so.

Attention to sexual and gender-based violence has not been restricted to DR Congo's military courts. In recent years, sexual and gender-based violence has also garnered attention in the civilian justice system. Poor record keeping makes precise figures very difficult to obtain; however, a United Nations Development Programme (UNDP) monitoring project reports that for 5,042 gender violence cases reported to the police in three Congolese provinces from 2010 to 2011, 76.6 percent (3,866 in total) were transferred to the prosecutor's office for investigation. These figures stand in stark contrast to statistics from many other countries. In a study of six European and commonwealth countries, for example, only thirty-five percent of all rape cases reported to police made it as far as the prosecutor's office (Daly and Bouhours 2010).⁴

³ The term "gender-based violence" refers to any form of violence (physical or psychological) that is rooted in structural gender inequalities or results from power imbalances based on traditional gender roles. While this project focused predominantly on judicial responses to systematic and widespread sexual violence, human rights practitioners often employ the term "gender violence" rather than "rape" or "sexual violence" in order to encompass myriad forms of violence. For this reason, I use the term "gender-based violence" to include sexual and nonsexual gender-based crimes. Where I use the term "sexual violence," I refer explicitly to violence of a sexual nature. The term "ordinary" sexual offense is used to refer to any sexual offense committed or criminalized under the ordinary civilian or military penal codes, rather than those offenses that constitute international crimes. My use of these terms is discussed more fully later in this chapter.

⁴ See Kelly, Lovett, and Regan (2006); Koss et al. (2004); and Lonsway and Archambault (2012) for comparable statistics in the United States and the United Kingdom. While legal processes in both civilian and military courts were riddled with many of the usual challenges faced in severely under-resourced legal systems, elements of legal practice, particularly in cases dealt with by specialized police units, exemplified fairly remarkable gender sensitivity.

For lack of a functioning courtroom in close proximity to the site of the mutiny, the landmark Songo Mboyo ruling was handed down in a makeshift courtroom in the shade of a line of trees. Many such rulings have since been delivered in similar locations: in equatorial towns, dense forests, and remote hillside villages almost entirely inaccessible by road. Yet, time and time again, these decisions have invoked cutting-edge human rights provisions, drawing from a large body of international human rights law and the most innovative international jurisprudence. Of even greater surprise in a country renowned for its egregious human rights violations, collapsed state apparatus, and dilapidated judicial infrastructure, victims of gender violence have turned to Congolese courts in increasing numbers to resolve their grievances.

This book compares the surprisingly progressive response to gender-based violence from courts in DR Congo's eastern provinces to the legal response in another country, South Africa, where human rights advocates have called attention to similarly shocking incidence of gender-based violence, but this time against the backdrop of a legal system that emerged from its political transition as a human rights leader. Like DR Congo, South Africa has attracted considerable international attention for its extraordinarily high rates of sexual crimes. Yet South Africa's institutional response has differed notably from eastern DR Congo's. Analyzing the treatment of sexual and gender-based crimes by courts in a fragile and under-resourced state against their treatment in a very different – and more robust – institutional setting brings this book's central questions into greater relief.

A Point of Comparison

South Africa, like DR Congo, has frequently been referred to as “the worst place in the world to be a woman” (Abrahams 2013; Faul 2013; Snodgrass 2015). Despite avid global attention to the country's so-called rape crisis, South Africa's courts have been notably silent – even hostile – toward widespread gender violence, which remains notoriously difficult to prosecute. Some reports suggest that fewer than five percent of reported sexual offenses ever make it to South Africa's courts, and those few cases that do go to trial rarely result in conviction (Human Rights Watch 2011). In addition, in stark contravention of South African law, the victim's prior sexual conduct and other characteristics have too often been permitted as mitigating circumstances in investigation and sentencing to suggest that the victim provoked the attack.

These facts are particularly startling given that South Africa's courts are endowed with considerably greater resources and far more

institutionalized human rights protections than those of DR Congo. Following the end of apartheid, South Africa was hailed as a regional human rights leader by virtue of its progressive record on a variety of human rights concerns. In 2007, South Africa passed exemplary legislation criminalizing sexual and gender-based offenses, and its domestic legal protections against rape are among the strongest in the world. Moreover, the country is home to one of the world's most influential women's rights movements. Yet survivors of sexual violence in South Africa have faced immense difficulties in securing justice for crimes committed against them. Given that domestic and transnational human rights advocates in both countries have campaigned tirelessly for gender justice, why have their efforts in eastern DR Congo resulted in an emerging culture of legal accountability and increasing numbers of gender-sensitive rulings (despite an institutional environment that would seemingly obstruct the effective pursuit of criminal justice), while the efforts of activists in South Africa have met endless barriers? Strong domestic human rights coalitions in South Africa, who have robust links to global donors, have failed to exert real influence over formal institutional processes, police responsiveness to gender violence cases, courtroom practices, or judicial decisions.

In both countries, rape and sexual violence are notoriously widespread. Both South Africa and DR Congo have been described as the "rape capitals" of the world by media and humanitarian outlets (Wilkinson 2014). Reports suggest that one in every three women will be subject to nonconsensual sex in her lifetime (Thomson Reuters Foundation 2011; United Nations Office of Drugs and Crime 2014). In a South African study from 2007, one in four men admitted to an act of rape (Jewkes et al. 2011), and a similar study involving men in eastern DR Congo arrived at a comparable figure (Sonke Gender Justice Network 2012). In South Africa and DR Congo, reports of sexual attacks on men, as well as public assaults on men and women, the sexual mutilation of young children and newborn babies (both male and female), and brutal gang rapes of civilians have attracted domestic and international media attention and condemnation. While government representatives have acknowledged so-called rape epidemics in the respective countries, and have introduced policies and legislative reforms designed to mitigate violence and facilitate prospects for criminal accountability, influential political elites in *both* countries have appeared reluctant to sincerely engage with this threat to social order and gender security. Given these fairly comparable responses from political elites, why have local courts in eastern DR Congo diverged so dramatically from those in South Africa in their legal responses?

The Argument: Human Rights Advocacy and Openings Created by State Fragility

The argument I advance in this book is that state fragility in eastern DR Congo has created opportunities for non-state actors to shape the human rights practices of local courts in ways that have proved impossible in environments with stronger institutional capacity and better-respected state sovereignty. Opportunity structures created by state fragility in DR Congo have enabled both domestic and international NGOs and human rights practitioners to exert considerable influence over judicial processes at multiple levels of governance, most notably at the level of local courts. Put differently, state weakness has allowed human rights practitioners to bypass the central state in order to assume selective responsibility over legal practice in ways that prove impossible in stronger state environments. A coalition of NGOs and other non-state actors have thus been able to ensure that courts and prosecutors give high priority to certain human rights issues – in this case, the prosecution of sexual and gender-based violence – to a greater extent than have similarly situated activists in South Africa.

Activities undertaken by external actors in eastern DR Congo have led to striking advancements in the legal system's capacity to hold perpetrators of gender-based crimes criminally accountable for their actions. These include steady increases in rates of convictions for sexual and gender-based offenses in courts across the east, as well as a growing willingness among some victims to turn to the legal system for support. Many judges and prosecutors have also adopted increasingly progressive and gender-sensitive legal reasoning in their decisions and arguments, and legal practitioners have engaged in considerable efforts to afford the protections required by law to victims and witnesses throughout the legal process. Gender violence activists and human rights NGOs in eastern DR Congo have thus met greater successes on a range of indicators than have their counterparts in South Africa.

However, the successes of NGOs and other non-state actors in promoting justice for gender-based crimes through local courts in eastern DR Congo have not come without a price. Indeed, capitalizing on state fragility to advance gender justice has introduced a host of new challenges. For example, a singular focus on securing convictions for gender-based crimes has meant that the rights of defendants, and the enforcement and implementation of legal decisions, have sometimes been overlooked in favor of bolstering prosecutorial capacity. Emphasizing gender violence over other pressing human rights concerns has created perverse incentives for legal practitioners and human rights organizations, such that other violent crimes persist with impunity.

Finally, victim-centered processes are most evident in cases targeted by NGO interventions or supported by NGO legal teams, while others vary considerably in their treatment. The extent to which victim-sensitive practices are likely to generate future spillover effects elsewhere in the legal system remains an open question.

In order to elucidate the intended and unintended consequences of using opportunities created by weak state capacity to advance specific human rights agendas, this book is divided into two parts. Part I outlines the ways in which state weakness in eastern DR Congo has created opportunities for human rights advocates to shape judicial approaches toward sexual and gender-based violence in accordance with international human rights norms. Part I also shows how a very different institutional environment in South Africa has stymied possibilities for similar legal developments, given the state's demonstrable resistance to gender justice. Part II explores the contradictions and complexities that arise from a singular international focus on bolstering legal capacity for sexual and gender-based violence, exploring the repercussions of targeted human rights interventions that circumvent the juridical authority of weak states.

This book draws its definition of opportunity structures from the literature on social movements and legal mobilization. Kitschelt (1986: 58) defines opportunity structures as specific configurations of resources, institutional arrangements, and historical precedents for social mobilization that facilitate or constrain certain actions and behaviors. The term has typically been used to describe tactics employed by social movements, whereby coalitions of actors take advantage of certain political structures, regime types, or environments, in order to promote particular political agendas. While some have defined a political structure's "openness" according to its regime's responsiveness to its electorate (Eisinger 1973), others have examined opportunities for advancing human rights claims that arise from changes in procedural rules (Alter and Vargas 2000), institutional context (Bloodgood, Tremblay-Boire, and Prakash 2013; Noonan 1995; Wilson and Cordero 2006), political climate (Hilson 2002; Ramirez 2012), and new possibilities for resource mobilization (Byrne 2013; McCarthy and Zald 1977).

For Eisinger (1973), an open opportunity structure involves a government that provides opportunities for formal representation of diverse segments of its population, and that allows those constituencies to influence government policy. While Eisinger was writing about opportunities in Western democratic systems, the broad concept of open and closed political structures has traveled to other political and institutional contexts. Scholars working on political transition, for example, have

employed the term “political opportunity structures” to refer to how changes in political structure or regime type might create new opportunities for political reform or minority inclusion (Berry 2015, 2018; Noonan 1995; Ramirez 2012; Tripp 2010). A similarly well-developed literature on legal opportunity structures emphasizes the extent to which changes in laws, processes, and structures can alter human rights strategies, create possibilities for new forms of legal mobilization, or lay the foundations for more progressive social justice outcomes, decisions, or judicial reasoning in courts (Cichowski 2007; Vanhala 2012; Wilson and Cordero 2006).

I interpret the openness of the political opportunity structure in eastern DR Congo (and, at times, in transitional South Africa) fairly broadly. In eastern DR Congo, the political opportunity structure has remained “open” in the sense that the institutional configurations created by state fragility have generated opportunities for non-state actors to advance their agendas through multiple institutional channels. Not only has state fragility permitted unprecedented access to local and national political structures by human rights organizations but, as discussed in Chapter 3, the heavy reliance on aid distributed by international agencies, combined with other empirical realities of weak statehood, has meant that courts are heavily incentivized to respond to the agendas of external stakeholders. This openness across a variety of dimensions has enabled organizations, including NGOs, foreign governments, international agencies, and others, to exert influence over national policy and its implementation in the eastern provinces. These dynamics illuminate the institutional context from which gender-progressive legal practices and reasoning have emerged. Sometimes organizations have worked in collaboration with one another to promote these goals, and sometimes they have acted independently.⁵

Openings created by state fragility, which allow organizations working on sexual and gender-based violence to exert influence over legal processes, arise from both “empirical” and “juridical” dimensions of state

⁵ In this sense, the phenomenon I describe differs significantly from the social movements described in sociology literature. The literature presents social movements as collective, rational decision-makers that mobilize their followers and promote their causes with the best available strategies given their limited cognitive and material resources (McCarthy and Zald 1977; Oberschall 1995). While a social movement is typically understood as a bottom-up movement that gains salience at a specific moment in history, the phenomenon I outline involves a broad coalition of actors often employing top-down strategies guided by global human rights scripts. This loose coalition of actors sometimes works toward similar goals and objectives but is not necessarily unified by a single agenda or approach. Global efforts to overcome sexual and gender-based violence, and their particular manifestations in South Africa and DR Congo, are discussed at greater length in Chapter 3.

fragility (Jackson and Rosberg 1982; M. Lake 2014). First, a general lack of oversight and capacity on the part of the central state has meant that well-resourced human rights NGOs have, in effect, been able to assume direct responsibility for one of the most fundamental functions of governance: the administration of justice. They have also been able to shape law and policy at national and local levels and through formal and informal channels. Second, the international designation of DR Congo as a “weak” or “fragile” state has channeled attention and resource flows toward state capacity building, as well as provided a justification for non-state actors to intervene in matters usually under the jurisdiction of a sovereign government, which would not be possible in a stronger state environment.⁶

To elaborate, when states are described as weak or fragile, that description often reflects an empirical reality in which NGOs, religious groups, and/or civil society organizations have assumed some of the basic functions of governance (Lund 2006; Mampilly 2011; Menkhaus 2007). Since the central state in DR Congo has remained absent from the organization and regulation of local communities for a number of decades, as in other weak state settings a variety of non-state actors have stepped in to perform governance activities. The empirical realities of weak statehood in eastern DR Congo have thus meant that domestic civil society organizations, sometimes in partnership with international and humanitarian agencies, often function as the *de facto* legitimate authorities: they make decisions about policy, employ personnel, and manage institutions in ways that could not occur in stronger state settings (Büscher and Vlassenroot 2010; Seay 2009; Trefon 2011). The *de facto* assumption of power by these diverse sets of actors has created opportunities for non-state actors to enter and influence judicial processes, engaging in tasks normally reserved for sovereign governments.

“Juridical” dimensions of state fragility have also created opportunities for human rights advocacy. Jackson and Rosberg (1982) suggest that the formal recognition of sovereign states (known as juridical statehood) facilitates actions and resource flows from other states and members of the international community. Similarly, state fragility can be recognized both formally (for instance, by UN Security Council Resolutions), and informally (through failed states indices and the discursive frames employed by development practitioners and other key actors).⁷ When

⁶ See Caplan (2006), Chesterman (2005), Donais (2009), and Zaum (2006) for discussions of international actors promoting norms of human rights, good governance, and state-building in weak or post-conflict states.

⁷ See Autesserre (2009, 2010, 2012) for further discussion of the discursive frames applied to DR Congo’s (post)-conflict identity.