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By

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**Prosecuting Wartime Gender Crimes in
International Law: Advances and
Challenges**

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Dedication

This work is dedicated with love to my parents for their trust,
encouragement and inspiration to me throughout life.

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Summary

Crimes of sexual violence committed against women during wartime have been increasingly prohibited internationally, yet the use of sexual violence as a weapon of war remains high in many armed conflicts around the world. This study addresses the response to wartime gender crimes in international law and international criminal tribunals.

It examines the international legal protection against gender violence in international humanitarian law, international human rights law and the international criminal tribunals. In particular this study examines the historical treatment of gender crimes in World War II tribunals as well as the recent treatment of gender crimes in the current international criminal tribunals, particularly the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, the International Criminal Court and the hybrid courts; the Serious Crimes Panels in East Timor and the Special Court for Sierra Leone , in the light of the advances and limitations each has demonstrated in the recognition of and punishment of wartime gender crimes.

More generally this study explores the prosecution of these crimes in the national criminal justice system, highlighting the absence and inadequacy of the recognition of these crimes in specific jurisdictions. Finally this study concludes by exploring the potential implication of implementing these developments at the national level.

Preface

Gender Crimes such as rape, sexual slavery and forced pregnancy have always been prevalent during armed conflict since time immemorial; yet, the laws have been slow in recognizing these crimes and bringing their perpetrators to justice until recently.

In the 1990th, significant developments in the legal treatment of gender crimes committed against women in situations of conflict have taken place in response to the massive scale of gender crimes and their systematic use as weapons of war in the former Yugoslavia, Rwanda, Sierra Leone, and the recent revealing of the mass rape and sexual slavery of women throughout Asia, known as the “comfort women”, by Japanese army during World War II.

These atrocities attracted the attention of the international community and led it to act .Since then, gender crimes have become more visible as a violation of the international law and begun to get the attention and recognition they deserve in international justice mechanisms such as the international criminal tribunals for Yugoslavia and Rwanda, the International Criminal Court as well as the hybrid tribunal set up in Sierra Leone and East Timor.

The Jurisprudence of the Ad hoc tribunals have provided further definition of rape and recognized various forms of gender crimes as crimes against humanity, genocide, means of torture, grave breaches of the Geneva Conventions and war crimes, regardless of the nature of the conflict being international or internal.

Further, since 2000, the UN Security Council has been paying particular attention to the situation of women in armed conflict. In October 2000 the Security Council passed Resolution 1325¹, which recognizes the extent and gravity of sexual violence against women and specifically emphasizes States' responsibility to end impunity and punish perpetrators for gender based abuses committed during and after armed conflict.

Nonetheless, despite the increased international attention and legal prohibitions, the use of sexual violence as a weapon of war remains high in many conflict situations as evidenced in Darfur, Congo and Uganda.

Perpetrators of sexual violence continue to enjoy near complete impunity.

The numbers of crimes that are reported and prosecuted are extremely small in proportion to the scale of the incidence that is being committed. Major obstacles continue to prevent most victims from seeking redress, with the result that, rape and other forms of gender crimes perpetuated during armed conflicts go largely unrecognized and unpunished.

In this context there is a need to examine the recent developments in the prosecution of crimes of sexual violence under international law to determine how far it has helped advance the struggle to prevent and end impunity for these atrocities.

This study explores these developments and outlines challenges to further progress. It also considers the broader implications of implementing these developments nationally.

¹ Resolution 1325 was adopted by the Security Council at the 4,213th session 31, October 2000.

Abbreviations

ACHR	American Convention on Human Rights
CAT	Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CEDAW	Committee on the Elimination of Discrimination against women
CRC	Convention on the Rights of the Child
ECHR	European Convention on Fundamental Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EHHR	European Human Rights Reports
IACHR	Inter-American Commission on Human Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMFTE	International Military Tribunal for the Far East

ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
IMT	International Military Tribunal (Nuremberg)
Inter-Am Ct. H.R.	Inter-American Court of Human Rights
O P T	Office of the Prosecutor
S C	Security Council
SCSL	Special Court for Sierra Leone
U N	United Nations

1 Introduction

1.1 Purpose

This study examines the recent developments in the prosecution of crimes of sexual violence under international law, in particular whether these developments are adequate response to the incidences of gender crimes which have occurred or will occur in armed conflicts. It also considers the potential effect of implementing these developments at the national level. More generally it examines the national prosecution of these atrocities at the national level. Further, it examines the motivations behind the use of sexual violence as a weapon of war and the social structures that make this weapon effective.

1.2 Methodology

This study approaches the subject from a critical perspective, with the aim of answering the questions posed through an examination of the relevant legal sources under international human rights law, humanitarian law, international criminal law and the relevant jurisprudence. In addition this study is also based on information, obtained from various resources; articles, books, reports and Publications of the United Nations and the International Non Governmental Organizations.

1.3 Statement of the Problem

Can the developments in the international prosecution of gender crimes have an effect on the pervasiveness of gender crimes taking place in armed conflicts? Are the existing legal measures protecting victims of gender

crimes adequate? Why are gender crimes so pervasive feature of armed conflicts? Why are women so consistently targeted for this specific type of assault? Ultimately, what can be done to achieve more justice?

1.4 Limitations to the Study

The scope of this study does not permit these issues to be subject to the detailed examination they deserve. Rather, this study highlights key achievements and obstacles to further progress.

This study only deals with justice for victims of sexual violence in armed conflict as a matter of international or national prosecution and does not deal with other aspects of gender justice.

1.5 Overview of the Study

This study is divided in five Parts:

Part One set out the content of the study identifies the problem and outlines the methodology. Part Two provides an overview of the nature and pervasiveness of wartime gender crimes and examines the motivations for the use of sexual violence as a weapon of war and the social structures that make this weapon effective.

Part Three examines the development of the legal treatment of wartime gender crimes in international law. It begins by reviewing the historical development of international humanitarian law and the historical treatment of gender crimes in the post war crimes tribunals of World War II. Next it

provides an overview of International humanitarian Law (IHL) standards, which governs wartime gender crimes. Then it examines the protection against gender violence under international human rights law. Finally, it examines the recent treatment of gender crimes in the current international criminal tribunals. In particular the International Criminal Tribunal for the Former Yugoslavia , the International Tribunal for Rwanda, the hybrid courts; the Serious Crimes Panels in East Timor and the Special Court for Sierra Leone; and the International Criminal Court, in the light of the advances each has demonstrated in the recognition of gender crimes as a weapon of war.

Part Four deals with the prosecutions of gender crimes at the national level; it addresses some of the challenges and highlights the absence and inadequacy of the recognition of these crimes in specific jurisdictions.

Part Five deals with assessing the progress, limitations, and implications for creating greater recognition of gender crimes. It begins by highlighting some of the limitations that undercut the capacity of the international criminal tribunals to prosecute wartime gender crimes. Then it discusses the potential effects of implementing the international standards protecting against gender violence nationally.

Finally, this study concludes by emphasizing the progress achieved on the international level and highlighting the need for more intervention particularly at the national level.

1.6 Terminology

Gender refers to the socially constructed differences between men and women and the unequal power relationships that result.

“**Gender violence** is violence that is targeted at women or men because of their sex and/or their socially constructed gender roles”.² Gender violence is usually manifested in a form of sexual violence, but can also include non-sexual physical or psychological attacks e.g. the killing of pregnant women by the slashing of their wombs and removal of their fetuses.

Sexual violence is a form of gender violence that can be committed against both men and women. Sexual violence" is defined as "any violence, physical or psychological, carried out through sexual means or by targeting sexuality”.³

Gender Crimes are crimes which are targeted at men or women because of their sex or gender roles which may or may not have a sexual element.

Gender crimes are some times broader than sexual violence as some crimes of sexual nature can only be committed because of the gender of the victim

² *What is Gender*, Background Papers, publication by the Women initiative for Gender Justice.

³ United Nations, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur (New York: United Nations, 1998), E/CN.4/Sub.2/1998/13, pp. 7-8.

such as the reproductive crimes against women e.g. forced pregnancy and forced abortion.

For the purpose of this study, the term “gender crimes” is used as a broader term to cover all forms of crimes perpetuated during armed conflicts because of gender or sex , including rape, sexual slavery, enforced prostitution, forced pregnancy, forced abortion, enforced sterilization, sexual assault, sexual mutilation, forced nudity, sexual humiliation, forced sexual intercourse or other sexual acts with family members, being compelled to exchange sexual favor for the return of children, trafficking and forced cohabitation /marriages.

In this study, the term “gender crimes” is used interchangeably with the terms “sexual crimes, “sexual violence” and “gender violence”

Gender violence disproportionately affects the members of one sex more than another. Women have been recognized as particularly vulnerable and will therefore be the principal focus of this study.

2 GENDER CRIMES IN ARMED CONFLICT

2.1 The Pervasiveness Of Wartime Gender Crimes

“Where there is war, there is always sexual assault.”⁴

Throughout history, gender crimes such as rape, sexual slavery and other forms of gender violence atrocities committed against women have always been prevalent during armed conflict.

Recently, however, with the changing nature of war, the world is experiencing a new type of warfare that is deliberately targeting civilian as a way of waging war. During these acts of violence which are inflicted on the whole population, women are subjected not only to the forms of violence and atrocities that accompany any war such as killing, starvation and torture but also to forms of gender violence directed specifically at women because of their gender.

Further rape and other forms of sexual violence are increasingly used as weapons of war. Horrendous acts like rape, gang-rape, sexual slavery, enforced pregnancy, sexual mutilation, sexual torture, forced abortion, murder by having their unborn babies ripped from their wombs, gang raped in front of family members, intimate family members are asked to rape them in public, compelled to exchange sexual favor for the return of children, trafficking, the spread of sexually transmitted infections including

⁴ Askin, Kelly D, *War crimes against women: Prosecution in International War Crimes Tribunals* (1997).

HIV/AIDS and denial access to medical assistance and abortion are commonplace.

Gender crimes are common in international and internal conflict “Numerous examples can be cited to illustrate that women are attacked in conflicts across the globe by men of all colors, religions, nationalities and ideologies”.⁵

In 1937, the Japanese soldiers raped the women of Nanking, the Chinese wartime capital. During World War II, the Japanese army sexually enslaved and raped thousands of Korean, Indonesian, Chinese, and Filipino women, known as the “comfort women”; German soldiers raped Jewish and Russian women; German women were raped at the end of World War II. In the sixtieth and seventieth American soldiers raped Vietnamese women; Pakistani soldiers, raped women of Bangladesh during the 1971 Bangladesh war of Secession and Turkish soldiers, raped women in Cyprus during the occupation.⁶

There are reports of sexual violence from virtually all armed conflicts in the world including Ache, Afghanistan ,Algeria, Angola, Azerbaijan, Bosnia, ,Chad , Chechnya , Croatia , Cyprus , East Timor, Guatemala, Haiti, Kashmir, Kosovo , Liberia , Mozambique ,Myanmar ,Namibia, Palestine, Peru, ,Rwanda, Sierra Leone, the Congo, Tibet ,Uganda ,⁷ Kuwait⁸ Burundi, Colombia, India, Indonesia and Sri Lanka.⁹

⁵ Chinkin , Christine , *Rape and Sexual Abuse of Women in International Law* , *European Journal of International Law* ,vol.5.no.3(1994).

⁶ Brownmiller, Susan, *Against Our Will: Men, Women and Rape* (1975). See also Seifert , Ruth , *War and Rape Analytical Approaches* (1992) .

⁷ Gardam and Jarvis , *Women, Armed Conflict and International Law* (2001) .

Most recently rape and other forms of gender crimes also continue to be used in on-going conflicts today, Darfur-Western Sudan, the Democratic Republic of Congo and Northern Uganda¹⁰ are examples where rape has and still is used in connection to armed conflict.

2.1.1 Women as the Most Vulnerable to Sexual Violence

Sexual violence during armed conflict affects men as well as women.

However, it is widely recognized that women are by far the more common targets and women are uniquely susceptible to the reproductive violations of forced pregnancy and forced abortion¹¹. Women are also targeted for different reasons than men and they are affected by the experience in very different ways to men.¹²

2.1.2 Men as victims of sexual violence

Men may also be victims of rape, sexual mutilation, forced sterilization, forced nudity, stripping prisoners naked and binding them together, chaining prisoners naked to the bars of their cells, forced sexual acts between male prisoners and other forms of sexual violence.

⁸ Chinkin, supra note 5.

⁹ Coomaraswamy, Radhika, *2001 Report on Violence Against Women Perpetrated and/or Condoned by the State During Times of Armed Conflict*, United Nations Special Rapporteur on Violence against Women, (E/CN.4/2001/73) (23 January 2001) pp 21-30.

¹⁰ Human Rights Watch World Report 2006

¹¹ Lindsey, Charlotte, *Women Facing War*, (2001).

¹² *Sexual Violence and Armed Conflict: United Nations Response*: Division for the Advancement of Women and the Department of Economic and Social Affairs,

In the former Yugoslavia, men were forced by their captors to sexually abuse other men, as evidenced by the sexual violence and sexual mutilation of a male prisoner in the Tadic case.¹³ United States occupation forces have sexually abused Iraqi detainees following the occupation of Iraq in 2003 as recently highlighted by the atrocities committed at the U.S-run Abu Ghraib prison in Iraq.¹⁴ In the Democratic Republic of Congo, young boys and men are raped as a means of reprisal against individuals, families or communities, and to undermine the fundamental values and social fabric of the community.¹⁵

Like women, men may experience shame and humiliation; however it may be more difficult for men to disclose sexual violence compared with women. “It may be socially acceptable for women to be described as victims of violence, but not so in relation to men – this represents a denial of one of the gendered realities of conflict. (Dolan argues that ‘the level of stigma attached [to male rape] is even higher than that associated with female rape’, and ‘undermining men’s sense of masculinity becomes a key channel for men to exercise power over other men’ (2002: 75). In this sense, rape or violent sexual abuses as demonstrations of ‘masculinity’ or power are

¹³ Prosecutor v. Tadic, IT-94-1, Second Amended Indictment, counts 2-4,8-9(1995).

¹⁴ Ian Fisher ‘*Iraqi Tells of U.S. Abuse, from Ridicule to Rape*’, N.Y. TIMES, May 14, 2004 . Douglas Jehl & Eric Schmitt, ‘*The Struggle for Iraq: Investigations; Army Discloses Criminal Inquiry on Prison Abuse*’, N.Y. Times, May 5, 2004. R Jeffery Smith and Josh White, ‘*General Granted Latitude At Prison: Ab Gharaib Used Aggressive Tactics*’, Washington Post ,12 June 2004.

¹⁵ *Sexual Violence During Armed Conflict: Lives Blown A part Crimes Against Women in Times of Conflict*: Amnesty International, December 2004.

potentially weapons that can victimize both women and men in conflict zones.”¹⁶

2.1.3 Perpetrators of Sexual Violence

Women are raped by men from all sides - both enemy and 'friendly' forces.¹⁷ Those who carry out the abuses are many and varied: soldiers of the state's armed forces; pro-government paramilitary groups or militias; armed groups fighting the government or at war with other armed groups; neighbors and relatives ; the police, prison guards or private security and military personnel; military forces stationed abroad, including UN and other peacekeeping forces; staff of humanitarian agencies. In recent years, UN and other peacekeeping forces, as well as humanitarian aid workers, have been implicated in sexual violence. There are many reports of rape and sexual harassment by these forces as well as complicity in sexual abuse perpetrated by parties to the conflict.¹⁸

2.1.4 Women as Perpetrators

Although men are most often the perpetrators of rape and sexual violence in armed conflict and women the victims, women themselves may also be perpetrator of sexual violence as recently evidenced by the involvement of two females U.S. Army officers in the sexual atrocities committed against Iraqi male prisoners at the U.S –run Abu Ghraib prison in Iraq.¹⁹

¹⁶ El Jack Amani , *Gender and Armed Conflict* , 2003.

¹⁷ Chinkin ,supra note 5

¹⁸ Gardam and Jarvis, supra note 7.

¹⁹ Supra note 14.

In 1999, the ICTR charged Pauline Nyiramasuhuko, the former Minister of Women's Development and Family Welfare, with genocide and rape.²⁰

Human Rights Watch documented two cases in which female rebels forced men to have sexual intercourse at gunpoint. Further it has documented a case of a female rebel manually raping female abductees. The virginity checks performed by female rebels on abductees prior to their "virgination" by male rebels constitute rape given that penetration occurred without the consent of the victim.²¹

²⁰ ICTR .97-21-1(26 May 1997), Amended Indictment (10 August 1999).

²¹ *We'll Kill You If You Cry: Sexual Violence in the Sierra Leone Conflict*, Human Rights Watch January 2003.

2.2 Functions of Sexual Violence as a Weapon of War

2.2.1 Overview

Traditionally the occurrence of rape and other forms of sexual violence have been viewed as the natural consequence, the inevitable by-product of armed conflict; as booty or a reward for soldiers or civilians; as a boost to soldiers morale or because of the lawless climate created by the war and the breakdown of social, moral, traditional and/or institutional systems that accompanies war.²² Deeply entrenched in the notion that access to women bodies and sexuality is often seen as the spoils of war to which soldiers are entitled, is the idea that women are property –chattel available to victorious warrior.²³

However the mass-scale violations of women's rights that occurred during the conflicts in the former Republic of Yugoslavia and Rwanda have led to a broader understanding of the many functions that rape and sexual violence can serve, beside its traditional usage .

²² Lindsey, Charlotte. *Women Facing War*, (2001) See also, Pilch , Frances T . *Sexual Violence During Armed Conflict: Institutional and Judicial Response*.

²³ Supra note 12.

2.2.2 The Use of Sexual Violence as a Weapon of War

Sexual violence as a weapon of war serves many functions including:

2.2.2.1 Sexual Violence as an instrument of terror

The use of sexual violence is seen as an effective way to terrorize and demoralize populations thereby forcing them to flee. Sexual terror and the violent appropriation of women's bodies thus aid the enemy to occupy and control the territory from which its population has fled. Rape of Bosnian women was used to terrorize the Bosnian Muslim population, with the specific purpose of making them flee and never return to their homes²⁴.

2.2.2.2 Sexual Violence as an instrument of Dominance

Sexual violence can be used "to assert dominance over the opposition enemy. Thus, since women's sexuality is seen as being under the protection of the men of the community, its defilement is an act of domination asserting power over the males of the community or group that is under attack. . . . Women are particular targets as they are often regarded both as representing the symbolic honor of the culture and being the genetic gatekeepers to the community." ²⁵

²⁴ Gayatri , Patel : *Sexual Violence and War: Extending the Battlefield to Women's Bodies* (2001).

²⁵ *Review of Reports ,Studies and other Documentation for the Preparatory Committee and the World Conference* ,Note by the Secretary-General transmission of Contribution by Special Rapporteur Radhika Coomaraswamy to the World Conference Against Racism ,Racial Discrimination, Xenophobia and Related Intolerance on the subject of race ,gender and violence against women ,120,121. A/CONF.189/PC.3/5 27 July 2001.

2.2.2.3 Sexual Violence as an instrument of Humiliation

Sexual violence is sometimes viewed as a way to destroy male and community pride or humiliate men who cannot "protect" their women.

According to Radhika Coomaraswamy, violence against women may be directed towards the social group of which she is a member because to rape a woman is to humiliate her community.²⁶

2.2.2.4 Sexual Violence as an instrument of Ethnic Cleansing and Genocide

The use of rape and other forms of gender violence as a form of “ethnic cleansing” through forced impregnation, the prevention or termination of births, the infliction of severe physical or mental suffering, mutilation of genitals and intentional HIV transmission (i.e. as part of an attempt to destroy an ethnic group either physically or by demoralizing individuals and communities, undermining the sense of identity of individual women and destroying the social bonds within the group).²⁷ Rape with the intention to impregnate has been documented in Bosnia²⁸ and Rwanda²⁹.

2.2.2.5 Sexual Violence as an instrument of Dehumanization

²⁶ Chinkin, supra note 5.

²⁷ *Contemporary Forms of Slavery :Systematic rape, sexual slavery and slavery –like practices during armed conflict, Update to the final report* submitted by Ms. Gay J. McDougall, Special Rapporteur, 20 (E/CN.4/Sub.2/2000/21) (6 June 2000).

²⁸ *Dying of Sadness : Gender ,Sexual Violence and The HIV Epidemic*, Gordon, Peter and Crehan Kate

²⁹ *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, Human Rights Watch, 1 September 1996.

Military or combat indoctrination often desensitizes combatants and dehumanizes the opposition, thereby facilitating the commission of atrocities during armed conflict, including sexual violence.³⁰

2.2.2.6 Sexual Violence as an instrument of Punishment

Sexual violence can also be used as a form of punishment, particularly where women are politically active, or are associated with others who are politically active. In Peru's emergency zones, security forces have punished female civilians with rape for their perceived sympathy with armed insurgents of the Shining Path.³¹

2.2.2.7 Sexual Violence as an instrument of Deconstruction of a culture

Rapes in wartime are aimed at destroying the opponent's culture. The deconstruction of a culture can be considered one of the primary goals of armed conflicts, because only through its destruction – which involves destruction of people – can a decision be forced. Because of the cultural position of women and their important role within the family structure they are a principal target if one intends to destroy a culture.³²

³⁰ McDougall , *supra* notes 27.

³¹ *Rape as a Weapon of War and a Tool of Political Repression*: Human Rights watch (1995).

³² Ruth Seifert , *War and Rape, Analytical Approaches*, 1992.

2.2.3 The potent use of gender violence in armed conflict

The effectiveness of Sexual violence as a potent weapon relies on the gender roles that exist within society and the pervasive cultural norms that value women's sexual virtue.

Many societies have the idea that women are the bearers of cultural identity and symbols of ethnic, national or religious identity. Women of those groups were prime targets because of their cultural position and significance in the family and ethnic structure. "Women are particular targets as they are often regarded both as representing the symbolic honor of the culture and being the genetic gatekeepers to the community".³³

In many countries, the cultural and religious attitudes associate the honor of a community or family with female virginity, chastity and sexual purity.

Consequently, an attack on women can be seen not only as an attack on the women assaulted but also to the entire community or ethnic group or nationality to which the female victims belong. Rape, wherever it occurs, is considered a profound offense against individual and community honor.

"Soldiers can succeed in translating the attack upon individual women into an assault upon their communities because of the emphasis placed in every culture in the world on women's sexual purity. It is the premium placed upon protection and control of women's purity that renders them perfect targets for abuse".³⁴

³³ Review of Reports, supra note 25.

³⁴ *Rape as a Weapon of War and a Tool of Political Repression*: Human Rights watch (1995).

Another aspect of the effective use of sexual violence comes from rejection by the community. Because of the persistent stigma attached to sexual violence victims in most of the world, women victims of rape often face ostracism and rejection by their families, and communities; if they are married, they risk being divorced or otherwise abandoned by their husbands; and if they are not married, they risk never becoming so and therefore living as outcasts from their communities.

Thus, it is a very effective weapon and continues to be a very effective weapon because of “The potential devastation of whole communities, not just through armed conflict but also through sexual violence. Rape crime survivors and those who do not survive are not the only victims of sexual violence. The impact and the harms often extend to families, local communities, and society at large. Ultimately, it may serve to destroy families, communities, and entire cultures”.³⁵

³⁵Pilch , Frances T , *Sexual Violence During Armed Conflict: Institutional and Judicial Response*.

3 THE INTERNATIONAL LEGAL PROTECTION AGAINST WARTIME GENDER CRIMES

3.1 The Development of the International Legal Protection against Wartime Gender

The crime of rape has long been prohibited under the law of armed conflict, however, until recently, gender based violence committed against women in times of conflict were generally considered crimes against a woman's honor rather than crimes of violence.

3.1.1 The legal recognition of Wartime Gender Crimes prior to World War II

3.1.1.1 The Lieber Code

One of the first mentions of rape as a punishable offence is included in the Lieber Code of 1863, the military code of the Union Army during the American Civil War, which expressly included rape as a crime punishable by death sentence, Article (44).³⁶

3.1.1.2 The Hague Convention IV concerning the Laws and Customs of War on Land (1907)

The Hague Convention IV (1907), Article 46, mandated respect for "family honor and rights," which was commonly considered to include a prohibition against rape. "Rape was thus categorized not as part of the violence of war

³⁶ Askin , supra note 4.

but as an offence against honor and dignity. This characterization is based, however, on the notion of women as property and sexual violence as a moral affront described in largely moralistic terms. The word honor thus alludes to chastity, sexual virtue and good name and refers equally to the honor of the male-husband or father-with whom the woman is related.”³⁷

3.1.1.3 World War I and Sexual violence: The Commission 3.1.1.4 on the Responsibility of the Authors of the War and on Enforcement of Penalties

The commission on the responsibility of the authors of the war and on Enforcement of Penalties, set up in 1919 to examine the atrocities committed by Germany and other Axis powers during World War 1, had found substantial evidence on sexual violence and subsequently rape and other forced prostitution had been included among the violations of the laws and customs of war. However efforts to prosecute failed.³⁸

³⁷ Submission by the Coalition for Women’s Human Rights in Conflict Situations to the Truth and Reconciliation Commission .

³⁸ Askin : *Prosecuting Wartime Rape And Other Gender Related Crimes Under International Law : Extraordinary Advances ,Endure Obstacles* .

3.1.2 The Legal recognition of Wartime Gender Crimes Post World War II

3.1.2.1 The International Military Tribunals of Nuremberg and the International Military Tribunals of the Far East

In the aftermath of World War II, two multinational war-crimes tribunals were set up by the Allies to prosecute suspected war criminals of the Nazis and the Japanese militaries, the International Military Tribunal in Nuremberg (IMT) and the International Military Tribunal for the Far East in Tokyo (IMTFE).

Both tribunals relied on the provisions of the Hague Convention, which they determined were part of customary international law. No reference was made to rape or other crimes of sexual violence in the Charters of either the Nuremberg or the Tokyo tribunals.³⁹

Despite widespread sexual violence in Europe and an abundance of evidence of sex-based crimes e.g. rape, enforced prostitution, sexual mutilation, forced sterilization and others and the fact that some of these evidence were received by the Nuremberg Tribunal, sexual crimes committed against women were ignored at the Nuremberg Tribunal.⁴⁰ Similarly, in the subsequent Nuremberg trials held, pursuant to Control Council Law No. 10, which was adopted by the Allies in 1945 to provide a basis for the trial of suspected Nazi war criminals who were not dealt with at Nuremberg, and although this law represented an advance over the Charters of the Nuremberg and Tokyo Tribunals in that rape was explicitly listed as

³⁹ Askin , supra note 4.

⁴⁰ Ibid.

one of the crimes over which the Control Council had jurisdiction, however, no charges of rape were actually brought pursuant to Control Council Law No.10.⁴¹

The Indictments before the International Military Tribunal for the Far East in Tokyo (IMTFE), on the other hand, did expressly charge rape. The Tribunal did prosecute sexual crimes though to a limited extent, in conjunction with other crimes. The Tribunal prosecuted the rape of Nanking where evidence of rape during the Japanese occupation of Nanking was presented during the trial of General Matsui who had the command of Japanese forces there. Matsui was convicted of war-crimes and crimes against humanity based in part on evidence of rape committed by his troops. This judgment, established that "approximately 20,000 cases of rape occurred within the city during the first month of occupation."⁴² But that Tribunal also completely ignored the extensive system of military sexual slavery known as the «comfort women» system whereby over 200,000 women from Taiwan, Korea and the conquered countries of the Far East were forced to sexually serve the Japanese Army.⁴³

⁴¹ Askin , supra note 38.

⁴² Ibid.

⁴³ Ibid.

3.1.2.2 The Geneva Conventions (1949) and their Additional Protocols (1977)

The main international humanitarian instruments that regulate contemporary armed conflict are the four Geneva Conventions 1949 and their two 1977 Additional Protocols. They specify the minimum rules which shall be observed in armed conflict and set out protections for civilian, prisoners of war and other non combatant during international and internal armed conflict .In 1977 two additional protocols were adopted to expand and strengthen the protection provided in the Geneva Conventions, Additional Protocol 1, which regulate international armed conflict and Additional Protocol 11, which regulate non international armed conflict.

The four Geneva Conventions and their two additional protocols implicitly and explicitly condemn rape and other forms of sexual violence as serious violations of humanitarian law in both international and internal conflicts.

In the cases where the Geneva Conventions have provided explicit protection against rape and other sexual abuses, it has been provided for as a crime against honor and decency rather than as a crime of violence. Such provisions can be found in the Fourth Geneva Conventions relative to the Protection of Civilians Persons in Times of War 1949 Article 27 (2) which states that “ women shall be especially protected against any attack on their honor ,in particular against rape ,enforced prostitution, or any form of indecent assault.”

Similarly, Article 76(1) of Protocol I states: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault." Article 4(2)(e) of Protocol II prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."

Failure of these instruments to categorize sexual violence as a violent crime that violates bodily integrity, presents a serious obstacle to addressing crimes of sexual violence against women. It directly reflects and reinforces the trivialization of such offences and further contributed to the widespread misperception of rape as an "incidental" or "lesser" crime by comparison to killing, torture or enslavement. In addition, the provisions are protective rather than prohibitive.⁴⁴

"By using the honor paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law. Thus, criminal sexual assault, in both national and international law, is linked to the morality of the victim. When rape is perceived as a crime against honor or morality, shame commonly ensues for the victim, who is often viewed by the community as "dirty" or "spoiled". Consequently, many women will neither report nor discuss the violence that has been perpetrated against them. The nature of rape and the

⁴⁴ Supra note 12.

silence that tends to surround it makes it a particularly difficult human rights violation to investigate”.⁴⁵

Under the Geneva Convention of 1949 crimes of sexual violence are not explicitly listed among the grave breaches listed in Article 147 of the Geneva Conventions 1949 which considered crimes of the most serious nature and is subject to the universal jurisdiction exercisable in national courts.

Although the view that sexual violence fits within other categories of grave breaches such as willfully causing great suffering or serious injury to body or health, and torture or inhumane treatment has gained acceptance.

Nonetheless, the absence of express reference to sexual violence as a grave breach is a reflection of the international community's historical failure to appreciate the seriousness of sexual violence during armed conflict.⁴⁶

Crimes of sexual violence are not explicitly listed under common article 3 to the four Geneva Conventions 1949 applies to international and internal armed conflict , however through its prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment , Common Article 3 implicitly condemn sexual violence.

Serious violations of international humanitarian law impose individual criminal responsibility. All parties involved in armed conflict are obliged to respect international humanitarian law and are answerable for any act violates these laws. The provision of Common Article 3 to the four Geneva

⁴⁵ Radhika Coomaraswamy, 'Report of the Special Rapporteur on Violence against women, its causes and consequences' UN. Doc E/CN.4/1998/54 .

⁴⁶ Supra note 12.

Conventions apply in international and internal armed conflict and to all parties to the conflict, this includes armed opposition forces .As such, non state actors may be held accountable for their violations of international humanitarian law .

3.2 International Human Rights Law and Gender based Violence

3.2.1 Overview

International Human Rights law provides safeguards for individual at all times, including during armed conflict and although some human rights treaties permit states to derogate from certain rights in situations of public emergency, there are certain rights that can not be derogated from under any circumstances e.g. torture and slavery.

International human rights law provides protection from rape as torture and other mistreatment; slavery and forced prostitution; and discrimination based on sex. These acts of gender violence are explicitly or implicitly prohibited in many international human rights instruments.

3.2.1.1 Torture

The International Convention on Civil and Political Rights (ICCPR)⁴⁷ and the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or punishment (CAT)⁴⁸ prohibit torture and other cruel, inhumane or degrading treatment committed by officials or persons acting in an official capacity. The convention on the Rights of the Child (CRC)⁴⁹

⁴⁷ International Covenant on Civil and Political Rights adopted on the 16 December 1966 entered into force 1976.

⁴⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 1984, entered into force 1987.

⁴⁹ Convention on the Rights of the Child Adopted and opened for signature, ratification and accession on 20 November 1989.

provides for the right to freedom from torture, sexual exploitation and abuse as well as liberty and security of person.

The United Nations Special Rapporteur on torture has recognized that rape can constitute torture: “Rape is a traumatic form of torture for the victim”.⁵⁰

Sexual violence including rape is also recognized as a form of torture in cases of the European Commission on Human Rights, European Court of Human Rights and the Inter American Court of Human rights.

3.2.1.2 Discrimination

Sexual violence generally violated women’s rights to be free from discrimination as provided for under the ICCPR .The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)⁵¹ , prohibit discrimination on the basis of sex. Under article (1) the definition of discrimination is considered to include “gender based violence as interpreted by the Committee on the Elimination of Discrimination against Women (CEDAW) in General Recommendation 19⁵² . Further The CEDAW Committee in General Recommendation 19 specified a number of obligations for states related to ending sexual violence including insuring appropriate treatment of victims in the justice system. The Optional

⁵⁰ United Nations, Reports of the U.N. Special Rapporteur on torture, Mr. Nigel S. Rodley, submitted pursuant to the Commission on Human Rights Resolution 1992/32,E/CN.4/1995/34,Paragraph 19,January 12,1995.

⁵¹ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted 18 December 1979, entered into force 3 September 1981.

⁵² CEDAW General Recommendation No 19 , “*Violence against Women*”, (Eleventh session, 1992) A/47/38.

Protocol⁵³ to CEDAW allows the submission of complaints of human rights violations and provides enforcement measures to monitor and ensure compliance with CEDAW.

The Declaration on Elimination of Violence against Women⁵⁴ also provides protection against all forms of violence against women including sexual violence. The Beijing Platform⁵⁵ for Action includes provisions prohibiting violence against women and identifies rape as a war crime and an act of genocide.

3.2.1.3 Slavery and Forced Prostitution

Under the ICCPR and CEDAW, Slavery and forced prostitution in times of armed conflict constitute a basic violation of the right to liberty and security of person.

Furthermore Slavery, which is a jus cogens norm from which no derogation is permitted, is prohibited under article 8 of the ICCPR and by the Slavery Convention 1926 which defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

⁵³ CEDAW Optional Protocol, adopted 6 October 1999, entered into force 22 December 2000

⁵⁴ Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104 of 20 December 1993.

⁵⁵ The *Beijing Declaration and Platform for Action*, Adopted by the Fourth World Conference on Women, held in Beijing, China, September 1-15 1995

3.2.1.4 Other relevant treaties

Further other treaties such as the Convention on the prevention and punishment of the Crime of Genocide⁵⁶ also protects against sexual violence during armed conflict.

3.2.2 States Responsibility under International Human Rights Law

Under international human rights law, States are under an obligation to protect all persons against human rights violations including rape and other forms of sexual violence. This obligation applies whether or not those responsible for the commission of these violations are acting on the state's behalf; the State is responsible for the acts of its officials and agents, including armed groups who work with or whose actions are tolerated by the state such as paramilitary and militias forces ; the State may also be held internationally responsible regardless of whether or not the alleged perpetrator of sexual violence has connections with the state (i.e. a private non state actor or a member of an armed opposition group) if it can be proved that these violations have resulted of either a deliberate practice promoted by the State or the State failure to act in accordance with due diligence to prevent, investigate and punish violence against women committed by a State or non state actors.

⁵⁶ Approved for signature, ratification and accession on 9 December 1948 ,entered into force 12 January 1951

To prove State responsibility, however, there is a need to show the relationship between the State, and the act of the non state actors, such as complicity, acquiescence, or lack of due diligence on the part of the state.

Thus a State may be held internationally responsible for providing an environment that encourages violence including rape and other forms of gender violence e.g. where a State officials incite citizens of a certain ethnic group to commit violence including rape and other forms of sexual violence against citizens from another ethnic group or where they incite them to commit these acts against women who don't conform to dress code.

The failure of the State to act in accordance with due diligence can lead to international responsibility of the State. Thus States can be held accountable if they fail to enact necessary law to criminalize rape and other forms of gender violence; if the officials or actors responsible for investigating , prosecuting or punishing such crimes do not comply with the obligation to exercise due diligence; by refraining from taking reports or failing to investigate; if acts of sexual violence are never or rarely prosecuted as criminal offences under domestic law; if they fail to punish or inadequately sentencing acts of sexual violence or if they fail in providing redress.

Therefore the inaction by the state concerning rape or other forms of sexual violence and consequently the failure to protect women against acts of sexual violence may give rise to international responsibility.

The decision in the Velasquez case⁵⁷ at the Inter –American Court for Human Rights, established that the responsibility of the state for any breaches of human rights on its territory, including the ones committed by paramilitary actors.

In the Case of Cyprus v Turkey (1976)⁵⁸ the European Commission on Human Rights found that rape constituted inhumane treatment under Article (3) of the European Convention on the Human Rights⁵⁹ and held that Turkey is responsible for the mass rape of Cypriot women in 1974.

In the Case of Raquel Marti De Majia v Peru (1996)⁶⁰, the commission recognized rape as torture according to the definition of the convention and found violation of Article 5 the right to humane treatment of the American convention⁶¹. The commission declared that rape constitutes torture if the rape was: "1) an intentional act through which physical and mental pain and suffering is inflicted on a person; 2) committed with a purpose; and 3) committed by a public official or by a private person acting at the instigation of the former." The IACHR found that the rape in *Mejía* fulfilled these requirements and amounted to torture. Since an official of the Peruvian state perpetrated the rape, the commission attributed responsibility for the rape to Peru. Further the commission found a violation to Article 25 the right to an effective remedy despite the fact that the petitioner did not file a complaint

⁵⁷ *Velasquez Rodriguez v Honduras* Inter-American Court of Human Rights , Judgement of July 29, 1988 Series C, No. 4, 28 I.L.M 294(1989)

⁵⁸ *Cyprus v Turkey* (1976), EHHR 1976 .

⁵⁹ Adopted 1950, entered into force 1953.

⁶⁰ *Raquel Marti de Mejia v Peru* , Case 10.970, (1996) Report No. 5/96, Inter-Am. C.H.R, OEA/Ser.L/V/II.91 Doc 7 at 157.

⁶¹ Signed 22 November 1969, entered into force 18 July 1978.

with the police or domestic courts since the practice in Peru is that these types of acts involving State's agent is not investigated while moreover those who report them run the risk of reprisals. The court recognized the impunity with which sexual violence were carried out in the emergency areas and presumed the non existence of effective recourse that would have remedied the human rights violations suffered by the petitioners. Thus the inadequacy of the national justice system to respond to human rights violations may give rise to international responsibility without requiring the victim to file complaints with the domestic justice system.

In *Aydin v Turkey* (1997)⁶² the European Court of Human Rights held that *Aydin*, a young Kurdish woman, had been subjected to torture through being raped and otherwise ill-treated while being detained by the Turkish security forces, contrary to article 3, of the Convention. In this case the Court found that the rape of a detainee by an official of the State was an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim, of such a serious nature as to amount to torture. The Court furthermore held that the Turkish authorities had failed to carry out a thorough and effective investigation into the petitioner complaint that she had been raped and that there were no effective remedies available to address her complaint.

⁶² *Aydin V Turkey* (1997) ECHR 1997 .

3.2.3 Limitations on International Human Rights Law

The effectiveness of international human rights law can be limited by several factors to mention some ;many states have not yet ratified these treaties ,many states have signed with reservations limiting their commitment; some states have failed to pass the necessary laws to make these international conventions applicable at the national level; the inconsistency between the international conventions and the laws incorporating them on the national level ; and the lack of remedies and enforcement mechanisms of these conventions .

The ability of international human rights law to provide redress for the victims of human rights violations depends on the availability of the right of individual petition to regional or international human rights body and the willingness of the state to abide by the decision of such body .However even without any action by the state the shame resulting from the public declaration of being held responsible for such abuses and the international pressure may led to significant positive consequences for victims seeking redress for such violations .Thus subjecting a country to international scrutiny and pressure is an effective way of pressing a country to modify laws and practices that permit human rights abuse including rape and other forms of gender violence .

3.3 RECENT DEVELOPMENTS UNDER INTERNATIONAL CRIMINAL LAW

3.3.1 The International Criminal Tribunals for the Former Yugoslavia (ICTY) and the International Criminal Tribunal For Rwanda

During the 1990s, and largely in response to the massive scale of gender crimes and their systematic use as weapons of war which took place in the former Yugoslavia and Rwanda, the United Nations established the International Criminal Tribunals for the Former Yugoslavia (ICTY) and the International Criminal Tribunal For Rwanda (ICTR) to prosecute persons responsible for the serious violations of international law including grave breaches of the Geneva Conventions, other war crimes, crimes against humanity and genocide in the former Yugoslavia and Rwanda.

The statutes of both tribunals specify rape in the definition of acts which may constitute crimes against humanity. The statute of the ICTY included rape as a crime against humanity though not explicitly among the grave breaches or violations of the laws and customs of war (Article 5)⁶³. This was the first time that rape had been explicitly codified as a crime within the jurisdiction of an international court. The Statute of the ICTR⁶⁴ includes

⁶³ Statute of the International Criminal Tribunal For the Former Yugoslavia UN Doc .S/RES/827 (1993).

⁶⁴ Statute of the International Criminal Tribunal For Rwanda .U.N Doc S/Res/955(1994).

rape as a crime against humanity (Article 3). In addition, rape is specifically included in Article 4 among the violations of “common article 3” of the Geneva Conventions and Additional Protocol II.

Both statutes include rape without any mention of honor or dignity.

Though both statutes include the crime of rape as a crime against humanity, they failed to include sexual violence as a war crime, a grave breach of the Geneva Conventions or an act of genocide and crimes of sexual violence other than rape were not enumerated in the statutes of the tribunals. The result was a continuation of the historical legal classifications regarding sexual violence.

Therefore, when prosecuting acts of sexual violence the courts were limited by numerous constraints, however, the prosecutors in both tribunals have through jurisprudence recognised that crimes of sexual violence include elements of other crimes that are grave breaches under the Geneva Conventions.

The ad hoc tribunals have convicted individuals for various acts of sexual violence as grave breaches of the Geneva Conventions, crimes against humanity, war crimes, and genocide. Moreover a number of alleged war criminals were charged with command responsibility for crimes of sexual violence.

The rules of procedure and evidence of the tribunals also made significant advances in addressing sexual violence against women. They recognize the need for particular evidentiary exclusions in cases of rape and sexual

violence and provide for a range of protective measures for victims and witnesses testifying in court.

Rule 96 of the rules of procedure and evidence of the ICTY and ICTR⁶⁵ which sets forth evidentiary procedure for cases of sexual assault states that in cases of sexual assault, (1) no corroboration of the victim's testimony is required, (2) prior sexual conduct of the victim is inadmissible evidence, and (3) consent is not a defense in situations in which the victim was subjected to or reasonably believed she was subjected to the threat of violence to herself or another.

This rule is significant as it helps protecting the integrity of the victim and protecting those willing to testify from the shame and stigma so often associated with rape and from being targeted for retaliation .

Further both tribunals have Victims and Witnesses Units with a mandate to ensure the safety and security of witnesses and provide counseling and support.

There are cases from the two tribunals that constitute particular landmarks as they have contributed to a new recognition of sexual violence in armed conflicts.

The Akayesu-case⁶⁶

Jean-Paul Akayesu, then Mayor of Taba commune, was charged with genocide, crimes against humanity, and war crimes. Akayesu was also charged with having known that acts of sexual violence were being

⁶⁵ International Criminal Tribunal for the Former Yugoslavia, Rules of evidence and Procedures, U.N.Doc.IT/32/Rev.7 (1996). And the International Criminal Tribunal for Rwanda, Rules of evidence and Procedures, U.N.Doc.ITR/3/Rev.1 (1995) amended 2000.

⁶⁶ *Prosecutor V Akayesu* Case No ICTR – 96 -4- T Judgment (1998) .

committed and having facilitated the commission of such acts by permitting them to be carried out on commune premises.

The case of Akayesu establishes a remarkable number of historic precedents related to the definition of rape as well as to its conviction.

The Akayesu case was historic, as it has been the first time that an international court has punished sexual violence in an internal conflict and has found rape to constitute an act of genocide, as well as an act of torture. It was the first time that rape was punished as an act of genocide aimed at destroying a group, as it was found to be a constituent element of genocide “causing serious bodily or mental harm”. The Akayesu judgment affirms that such measures, which target woman specifically, both as members of an ethnic group and as women, may constitute genocide. The Akayesu judges note that, *“in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.”*

In this case, the Court also broke new ground by issuing the first definition of rape under international law, as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” Coercive circumstances, according to this definition, can include physical force, threats and intimidation.

The judges also affirmed that rape constitutes torture, when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The judges also affirm that sexual violence, including rape, when committed as part of a widespread or systematic attack on a civilian population on a discriminatory basis, constitutes a crime against humanity.

Celebici case⁶⁷

Rape has been recognised as constituting torture by the judges of the International Criminal Tribunal of former Yugoslavia (ICTY) in the Celebici case.

The court found Hazim Delic, a Bosnian Muslim and deputy camp commander at the Celebici prison camp, guilty of raping and sexually assaulting two Bosnian Serb women held prisoner in the camp in 1992, and convicted him of, among other things of grave breach (torture) and war crimes (torture) for the rapes.

The court also found Zdravko Mucic, a Bosnian Croat camp commander, to have command responsibility for the abuses committed against detainees in the Celebici camp, including killings, torture, sexual assaults, beatings, and other forms of cruel and inhuman treatment. This landmark decision confirms that rape and sexual violence can be acts of torture; affirm that rape inflicts the severe physical and psychological pain and suffering that constitutes torture. The Trial Chamber underscored that a prohibited

⁶⁷ *Prosecutor V Delalic, et al.*, Case No .IT -96-21, Judgment (1998) .

purpose of torture is “for discrimination of any kind”, including gender discrimination and the court emphasized that rape and sexual violence result not only in physical but also psychological harm. The court also emphasised that sexual violence “strikes at the very core of human dignity and physical integrity”.

Furundzija Case⁶⁸

Anto Furundzija, a local Bosnian Croat military commander, was convicted on 10 December 1998 of torture as well as of aiding and abetting in the rape of a Bosnian Muslim woman during interrogation, although he was not the physical perpetrator himself he was found responsible as his colleague who did rape her.

Furundzija was found to have provided "*assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime*" when his subordinate orally, anally and vaginally raped a Bosnian Muslim woman who was interrogated by Furundzija.

In this case the ICTY recognized that rape is a form of torture as established in the Celibici case and developed a more explicit definition that expressly prohibits forced oral sex; "unequivocally encompassed forced oral or anal sexual acts."

This case was the first ever prosecuted exclusively on crimes of sexual violence before an international tribunal.

⁶⁸ *Prosecutor v. Furundzija*, Case No .IT-95-17/1, Judgment (1998).

Foca case⁶⁹

On 22 February 2001, the Tribunal convicted the three former Bosnian Serb commanders Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic for, *inter alia*, rape as a crime against humanity, rape as a violation of the laws or customs of war, enslavement as a crime against humanity, outrages upon personal dignity as a violation of the laws or customs of war.

The decision marked the first time that in history that an international tribunal brought charges exclusively for crimes of sexual violence against women and it is also the first time ICTY found rape and enslavement as crimes against humanity. The accused are charged with crimes against humanity for a widespread or systematic campaign of sexual violence against women. Thus, rape and sexual assault in and of themselves were systematic, constituting “the perpetration of a criminal act on a very large scale against a group of civilians” required for a charge under crimes against humanity. With this verdict, the tribunal elevated systematic rape from being a mere violation of the customs of war to one of the most heinous war crimes of all - a crime against humanity.

Equally, the “Foca” case constitutes a pioneering conviction of perpetrators of rape, for it redefined rape as a violation of sexual autonomy. The Trial Chamber in Foca saw rape as a violation of sexual autonomy and noted that such autonomy was “violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant”.

⁶⁹ *Prosecutor v. Kunarac, Kovac, Vukovic*, Case No. IT-96-23/1 Judgment (2001).

Pauline Nyiramasuhuko Case ⁷⁰

In one indictment, Arsène Shalom Ntahobali is charged jointly with his mother, Pauline Nyiramasuhuko, the former Minister of Women's Development and Family Welfare, with genocide, crimes against humanity and serious violations of common article 3 and Additional Protocol II to the Geneva Conventions.

The two indictees allegedly controlled a roadblock near their home where members of the Tutsi ethnic group were kidnapped, abused and killed.

While Ntahobali was charged for his direct participation in the raping of Tutsi women, rape charges were brought against Nyiramasuhuko for using her influence to incite those under her authority to commit acts of rape and abuse against women during the Rwandan conflict. The indictment also charges both defendants with violations of Common Article 3 of the four Geneva Conventions for "outrages to the personal dignity in particular humiliating and degrading treatment, rape, enforced prostitution and indecent assault.

This decision established an incredible precedent. Nyiramasuhuko is the first woman charged with genocide, and also the first woman to be charged with rape for her command responsibility. This confirms that women like men can act as the perpetrator of sexual violence.

⁷⁰ *Nyiramasuhuko & Ntahobali*, Case supra note 20.

Further, the international tribunals for the former Yugoslavia and Rwanda have prosecuted leading members of armed groups. In The Foca Case the ICTY confirmed that under international humanitarian law, the “presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offense to be regarded as torture.” In the Tadic case, the ICTY confirmed that , anyone "including non-state actors and low-level participants may be convicted of aiding and abetting crimes of physical, mental and sexual violence through continued and knowing participation in, or tacit encouragement of, these crimes."

3.4 The Special Criminal Tribunals

3.4.1 Overview

In 2000 and 2002, special war crimes tribunals were established to redress crimes against humanity and war crimes. These courts are hybrid in nature. Hybrid courts are established in the country where the crimes committed; they employ varying degrees of international involvement. They draw on both international and domestic financial resources, having a combination of both national and international personnel appointed by the Secretary-General and the national Government and apply a combination of domestic and international law.

Special courts and tribunals are more ‘nationalized,’ compared to the Chapter VII-based ad hoc international criminal tribunals. In particular, those special courts and tribunals cannot assert primacy over national courts of other states nor can it order accused individuals located in another state to surrender like ad hoc tribunals do. At the same time, such ‘nationalization’ leaves space for involvement of the country’s own citizens, provides a sense of ownership, and helps rebuilding the country’s legal system and building local capacity.⁷¹

Such courts are currently functioning in Timor-Leste, Sierra Leone and Kosovo, and one has been proposed for Cambodia.

⁷¹ Dicker, Richard and Kepler, Elise :*Beyond The Hague: The Challenges of International Justice* . Human Rights Watch World Report 2004, Women and Armed Conflict .

3.4.2 The Special Court for Sierra Leone

3.4.2.1 Overview

In 2002, the Special Court for Sierra Leone was created by an international treaty between the United Nations and the Government for Sierra Leone.⁷²

Its Statute⁷³ mandates the Court to prosecute crimes against humanity, war crimes, and other serious violations of international humanitarian law, and to bring to justice those who bear the greatest responsibility for atrocities committed in Sierra Leone during the war.⁷⁴

The Special Court will try cases of events occurring after 30 November, 1996. Although the conflict started in 1991, it was believed that extending the temporal jurisdiction to that time would impose too much of a burden on the court.

The Special Court is a hybrid court draw on both international and Sierra Leonean resources. The Court is based on a treaty agreement between the U.N. and the Sierra Leonean government and as such it cannot assert primacy over national courts of other states nor can it order accused individuals located in another state to surrender. The Court's jurisdiction includes acts in violation of international humanitarian law as well as certain crimes under Sierra Leonean law. The Court has its own statute and rules of

⁷² See S.C. Res. 1315, U.N. SCOR, 55th Sess., U.N. Doc S/RES/1315 (2000) .

⁷³ Statute of the Special Court for Sierra Leone, U.N Doc,S/2002/246. (hereinafter the statute).

⁷⁴ The Statute, supra note 73, article. 1.

procedure. Staff at the Special Court, including the judges and investigators is composed of both Sierra Leonean and international personnel. Two Sierra Leonean judges sit alongside five U.N.-appointed foreign judges⁷⁵.

The Special Court is funded on a voluntary basis by donor countries⁷⁶. The hybrid nature of the court and its location within Sierra Leone is hoped to help rebuild the domestic judicial system and make it more accessible for women.

3.4.2.2 Gender-Based Crimes in the Special Court

The Statute of the Special Court for Sierra Leone explicitly includes gender-based violence in its definition of several categories of crimes that the Court has the power to prosecute.

The Statute, in its listing of Crimes against Humanity, includes “rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence” Art 2 (g) as prosecutable crimes when “committed...as part of a widespread or systematic attack against any civilian population⁷⁷.”

The Court also expressly includes “rape, enforced prostitution and any form of indecent assault” as violations of humanitarian law as enshrined in Common Article 3 and Additional Protocol II⁷⁸.

⁷⁵ The Statute, supra note 73, article 12(1).

⁷⁶ Supra note 72.

⁷⁷ The Statute, supra note 73, article 2.

⁷⁸ Ibid. article 3.

The Court also has the power to try certain offenses under Sierra Leonean law. Some of these may be used to prosecute gender-based violence against girls under the age of fourteen⁷⁹.

The statute also explicitly stipulates that “due consideration should be given in the appointment of staff, to the employment of staff, to the employment of prosecutors and investigators experienced in gender related crimes and juvenile justice⁸⁰.”

The court has on staff two full-time gender crimes investigators and has conducted gender sensitivity training for all members of the investigations team⁸¹.

As of November 2004, the Prosecutor had indicted thirteen persons associated with every faction on various charges of war crimes, crimes against humanity, and other serious violations of international humanitarian law. The charges against these indictees include command responsibility for murder, rape, extermination, acts of terror, enslavement, looting and burning, sexual slavery, conscription of children into an armed force, and attacks on U.N. peacekeepers and humanitarian workers, among others. Ten of these cases include sexual violence charges⁸².

On 7 May 2004 the Special Court of Sierra Leone announced that a new count of “forced marriage” will be added to the indictments against six defendants accused of heading the former rebel AFRC and RUF. It is the

⁷⁹ Ibid. article 5 (a) .

⁸⁰ Ibid . article 15(4).

⁸¹ See Special Court for Sierra Leone website at www.sc-sl.org .

⁸² Ibid.

first time that forced marriage is prosecuted as a crime against humanity under international law⁸³.

“The experience of the Special Court illustrates that sexual crimes can be effectively addressed if the appropriate political will exists. Despite having significantly fewer resources and staff at his disposal than the ad hoc tribunals possess, Prosecutor David Crane has made a concerted effort to deliver justice to Sierra Leonean victims of sexual violence. The work of the Special Court has repeatedly demonstrated that, even with extreme constraints, the political will of the Prosecutor and his senior staff can shift the balance toward justice for victims of sexual crimes”⁸⁴.

3.4.3 The Special Serious Crimes Panel in Timor Leste

The UN Transitional Administration in East Timor (UNTAET) established a Special Serious Crimes Panel with the Dili District Court, known as the Special Panels for Serious Crimes, which comprised of two foreign judges and East Timorese judge and has exclusive and universal jurisdiction to adjudicate cases of genocide ,war crimes ,crimes against humanity, murder ,sexual offences ,and torture that occurred between January and October 1999 .

⁸³ Special Court for Sierra Leone Press Release dated 7 May 2004/ website www.sc-sl.org.

⁸⁴ Binaifer, Nowrojee , *Making the Invisible War Crime Visible : Post Conflict Justice for Sierra Leone’s Rape Victims* , Harvard Human Rights Journal 85-105 (2005).

On 12 September 2002 ,the Special Panel for Serious Crimes sentenced Francisco Soares ,an East Timorese who served in the Indonesian military and as pro- Indonesian militia leader ,to 4 years imprisonment for raping a woman in Dili in September 1999 ,which was the only rape conviction by the Panel .In addition to insufficient funding and staffing the lack of cooperation of Indonesia to extradite suspects to Timor -Leste has limited the performance of the panel ,in the light that most war criminals are Indonesian. ⁸⁵

⁸⁵ Women, War , Peace and Justice, UNIFEM www.womenwarpeace.org

3 . 4 The International Criminal Court and Gender Crimes

3.4.4 Overview

In July 1998, the international community adopted the Rome Statute of the International Criminal Court (hereinafter "ICC"), creating the world's first permanent court which came into force on July 1, 2002. The ICC has jurisdiction over persons who commit genocide, crimes against humanity, war crimes and aggression⁸⁶. The Rome Statute provides that the ICC can investigate and prosecute individuals only when national courts are unable or unwilling to do so. The ICC can only try crimes that occurred after the Statute came into force on July 1, 2002.

For the court to exercise its jurisdiction, the crime must have been committed in the territory of a member state or by a national of a member state Article 12 (1) (2). Additionally, the ICC can exercise its jurisdiction if a state that is not a party agrees and the crime has been committed in the territory of that state or by a national of that state Article 12 (2) (3).

There are three ways to refer "situations" to the Court in which one or more of the crimes under the jurisdiction of the Court appear to have been committed : first, a State Party to the ICC Statute may refer the case to the Prosecutor 13 (a) ; second, the Prosecutor may begin an investigation on

⁸⁶ The crime of aggression has not yet been activated.

his or her own initiative 13 (C); third, The Security Council of the United Nations may refer a situation to the Prosecutor irrespective of where the crimes allegedly committed , if it determines that the situation fulfils the requirements of Chapter VII of the UN Charter, namely that the situation constitutes a threat to or breach of international peace and security¹³ (b) .

Within the history and development of gender crimes in international criminal law instruments, the Rome Statute⁸⁷ is a major accomplishment in ending impunity of and giving recognition to gender crimes. The codification of crimes in the statute reflects all the substantive and procedural advances made by both the ICTY and the ICTR as well as furthering the acknowledgement of sexual violence as an independent crime.

The Rome Statute explicitly recognizes rape and other gender violence as among the most serious crimes by specifically defining them as constituent acts of crimes against humanity and war crimes.

The Rome statutes remove the connection to honor and outrages on personal dignity from the crimes specified in the statute. Gender is defined in the statute as “the two sexes”, male and female, within the context of society Article 7 (3).

⁸⁷ The International Criminal Court Statute is commonly referred to as the Rome Statute. Additionally after the adoption of the Rome Statute, the Assembly of States Parties adopted two supplementary instruments - the Rules of Procedure and Evidence, and the Elements of Crimes, a non-binding instrument which is designed to assist the Court in its interpretation and application of the Rome Statute.

3.4.5 Gender Crimes under the ICC Statute

The Rome Statute explicitly recognizes as falling within the Court's jurisdiction a broad spectrum of sexual and gender violence crimes as both crimes against humanity and war crimes.

3.4.5.1 Crimes against Humanity

Article 7 of the Rome Statute defines crimes against humanity as part of a pervasive or systematic attack directed against any civilian population, requiring the perpetrator to have had knowledge that such conduct was part of a widespread or systematic attack. It does not require that the perpetrator know the precise details of the plan or policy of the state.

The crimes enumerated in article 7 (1) (g) are “rape, sexual slavery, enforced prostitution, forced pregnancy 7 (2) (f), enforced sterilization or any other form of sexual violence of comparable gravity.”

Additionally two other gender crimes have been enumerated. The first is the crime of persecution against any identifiable group or collectively on various grounds including gender as a separate crime against humanity [Article 7(1) (h)].

Secondly, the crime of enslavement is defined as the exercise of any power attaching to the right of ownership over a person, including in the course of trafficking in persons, in particular women and children.

3.4.5.2 War Crimes

Article 8 of the ICC Statute, which enumerates the war crimes over which the ICC has jurisdiction, establishes as international crimes both war crimes

committed in international armed conflict and war crimes committed in non international armed conflict.

Article 8 (2) (b) (xxii) provides that war crimes in international armed conflict include committing rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilizations, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.”

Article 8(2)(e)(vi) provides that war crimes in non-international armed conflict include committing rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilizations, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

3.4.5.3 Genocide

The definition of Genocide in article 6 of the statute does not explicitly refer to crimes of sexual violence. This exclusion doesn't however exclude prosecution for genocide by the ICC as the Statute provides that constituent acts of genocide include “causing serious bodily or mental harm to members of group” and “imposing measures intended to prevent birth within the group” “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” 6 b/d. These acts may include rape and other forms of sexual violence if they are committed with the intent to destroy a national, ethnic, racial or religious group. This would be consistent with the finding of Akayesu case.

3.4.5.4 Non -Sex Specific Crimes

In addition to the explicit mention of these crimes, Crimes of sexual violence can also be prosecuted as constituent acts of other crimes of violence that constitute non-sex specific crimes, such as (i) torture as a crime against humanity 7 (1) (f) and a grave breach of the Geneva Conventions; 8 (2) (a) (ii) , inhumane acts which cause serious injury as a crime against humanity 7 (1) (k) and a grave breach of the Geneva Conventions 8 (2) (a) (iii), “outrages upon personal dignity, in particular humiliating and degrading treatment” as a serious violation of the laws and customs of war and a serious violation of common article 3 /8 (2) (c) (ii), and violence to life and person, mutilation, cruel treatment and torture as serious violations of common article 3.

3.4.6 Structural Mechanisms to Ensure Gender Balance and Expertise

On the procedural side the ICC Statute requires that a “fair representation of female and male judges ” be taken in the selection process article 36 (8) (a) (iii) as well as fair representation of female and males in the selection of staff in the office of the Prosecutor and in all other organs of the court. The Statute also requires a consideration of the need for legal expertise on gender violence in the Court 42 (9). Part 4 provides for the creation of Victims and Witnesses Unit to provide protective measures, security arrangements, counseling and other appropriate assistance for witnesses, victims and other at risk on account of witness testimony Article 43 (6).

3.4.7 Court's Functioning: Procedures and Evidence

The Statute specifically states under article 21 which deals with the sources of law that can be applied by the Court in Article 21(3) that the application and interpretation of the law must be consistent with internationally recognized human rights, and be without adverse distinction founded on gender, among other grounds.

The Statute of the ICC also provides for the protection and rehabilitation of victims and witnesses, including “where the crime involves sexual or gender violence or violence against children 68 (1). This protection requires consideration of such matters as safety, physical and psychological well-being, dignity and privacy of both the witnesses and victims of such crimes. The Statute requires, therefore, that appropriate mechanisms be put in place to protect victims and witnesses, such as the use of cameras in the proceedings in the place of live testimony. During trials, the ICC shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court. In particular, there is a complete prohibition against presenting evidence of prior and subsequent sexual conduct of the victim, thus removing the burden on the victim from proving that she either solicited the act or that it was as a result of her conduct. Moreover, the Court will be notified when there is an intention to introduce or elicit evidence that the victim consented to an alleged crime of sexual violence through words, conduct, silence or lack of resistance, thus preventing the unnecessary ridiculing and humiliation of victims of sexual violence that often occurs during trials. The Statute also provides for in

camera proceedings and non-public hearings, particularly in cases involving sexual violence 68 (2).

The Statute of the ICC provides for the reparation of victims. Article 75 states: “The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Article 79 requires the establishment of a Trust Fund for the benefits of victims of crimes within the jurisdiction of the Court.

Further, the Statute of the ICC provides for the non-applicability of statutes of limitations Article 29 of the Statute of the ICC states: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations. Article 25 provides for individual criminal responsibility for those persons who commit, attempt to commit, order, solicit, induce aid, abet, assist or intentionally contribute to the commission of a crime within the Court’s jurisdiction, and for persons who incite others to commit genocide. The ICC applies individual criminal liability without distinction whether the person in question is a Head of State or Government, a representative of parliament Article 27 or a military commander Article 28.

3.4.8 The Principle of Complementarity

According to the principle of complementarity, the ICC will only exercise jurisdiction where States are unable or unwilling to take action. Thus the investigation or prosecution of a case within a national system will therefore usually stop the ICC from commencing proceedings, in accordance with article 17 (1) which provides that a case which has been or is being

investigated or prosecuted by a State with jurisdiction is inadmissible, unless the State is unwilling or unable genuinely to conduct the proceedings. However, the ICC may still exercise jurisdiction if it finds that the State concerned is unable or unwilling genuinely to take action, with respect either to investigating or to prosecuting a case.

In accordance with Article 17 (2) to determine the unwillingness, the Court will consider whether proceedings were undertaken for the purpose of shielding an individual from criminal responsibility^{17 (2) (a)}; whether there have been unjustified delays that are inconsistent with an intent to bring the accused to justice^{17 (2) (b)}; and whether proceedings were conducted impartially or independently ^{17 (2) (c)}.

To determine the inability, the Court will consider whether the national justice system has suffered total or substantial collapse or unavailability of its national judicial system to the extent that it is unable properly to carry out its functions ^{17 (3)}.

“It is the understanding of the Special Rapporteur that a crucial concern in evaluating the competence of national judicial systems to adjudicate international crimes is the extent to which the national system in question adequately protects the rights of women. In particular, the existence of gender biases in municipal laws or procedures must be taken into account when assessing the general competence of domestic courts to adjudicate the types of violations of human rights and humanitarian law that are directed against women⁸⁸.”

⁸⁸ McDougall, *supra* note 27.

Thus where existing national laws are inconsistent or absent, those laws should be amended or enacted to make them relevant with the provisions of the Rome Statute. Failure to do so could result in the state being deemed unwilling or unable genuinely to investigate or prosecute a case, which may result in the ICC exercising Jurisdiction over a particular situation.

3.4.9 Situations Pending Before the Court

The Prosecutor of the court has started investigations into three situations, all in Africa, the Democratic Republic of Congo, The Republic of Uganda and Sudan.

The first two countries had referred the situation to the Prosecutor by themselves Uganda⁸⁹ and the Democratic Republic of Congo⁹⁰.

The situation in Darfur- Sudan had been referred to the Prosecutor by the Security Council resolution⁹¹, which decided to “refer the situation in Darfur since July 1, 2002, to the Prosecutor of the ICC.” The Prosecutor announced that he was opening an investigation on Darfur on June 6, 2005⁹². The Prosecutor has also received referrals from the Central African Republic⁹³ and the Prosecutor is currently carrying out an analysis in order to determine whether to initiate an investigation.

In all four conflicts, mass rape and other forms of sexual violence have taken place, and it is therefore to be expected that sexual violence would be included among the charges in the ICC indictments.

⁸⁹ ICC Press Release, The Hague, 29, January, 2004.

⁹⁰ ICC Press Release, The Hague, 19, April 2004.

⁹¹ Security Council Resolution S/RES/1593 (2005), 31, March 2005.

⁹² ICC Press Release, The Hague, 6, June, 2005.

⁹³ ICC Press Release, The Hague, January 7, 2005.

4 PROSECUTIONS AT THE NATIONAL LEVEL

4.1 Significance of National Prosecutions

States bear the primary responsibility to prosecute perpetrators of human rights violations within national justice system. On principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself.⁹⁴

Prosecution of serious violations of international law in national courts has several advantages. For example, during national prosecutions; trials take place in the country where the crimes were committed; there is better access to evidence and witnesses; witnesses don't have to travel outside of the country; the "remoteness" of international tribunals is absent; enable the people of the region to claim ownership; and can help rebuild the judiciary and the criminal justice system in accordance with rule of law and human rights principles.

Yet getting indictments for crimes against women have proven to be most difficult at the national level⁹⁵.

⁹⁴ Final report on "*Question of the impunity of perpetrators of human rights violations (civil and political)*," prepared by Louis Joinet for the Commission on Human Rights, E/CN.4/Sub.2/1997/20, June 26, 1997, para. 28.)

⁹⁵ Elisabeth Rehn & Ellen Johnson Sirleaf , *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* (2002).

4.2 Barriers to Justice

Most acts of sexual violence committed in war against women are never investigated, prosecuted or punished. The reasons for this pervasive impunity are many and vary.

Lack of political will to ensure that those responsible for acts of violence against women are held accountable before the law.

In some countries the administration of justice, including investigations, prosecution and judicial process is completely destroyed or disabled by the armed conflict, so that seeking justice is difficult.

Even in many post conflict situations, effective mechanisms for the investigation and prosecution of crimes of sexual violence against women are lacking. Where new or transitional governments have created legislation addressing violence against women, these bills are in some cases at a stand still in the legislative process and in others are passed, only to be rendered ineffective by a lack of implementation. Although sexual slavery and rape against war-affected individuals have been incorporated into Colombia's new Penal Code, no cases had been brought by the start of 2004, despite the submission of copious testimonies⁹⁶.

Fear of reprisal, intimidation and stigma associated with sexual violence and lack of trust in the administration of justice system prevent many victims of sexual violence from lodging a complaint, testify and seeking justice.

⁹⁶ *Colombia Scarred Bodies, Hidden Crimes: Sexual Violence and the armed Conflict*, Amnesty International, 2004.

When these crimes are reported, national authorities often fail to investigate and prosecute crimes of sexual violence against women. When they do act, the applicable laws are often inadequate in the areas of sexual violence against women and rules of evidence and procedure fail to respect the dignity of the victims and work to prevent women seeing justice achieved.

4.2.1 Shortcomings in National Laws and Procedures

Many acts of sexual violence are not criminalized under national law. Many legal systems continue to treat rape and crimes of sexual violence as “honor” crimes and not as a crime against the physical integrity of the victim. Rape and other forms of sexual assaults are also defined as crimes against the community and not against the individual victim. In Sudan Criminal Code of 1991, rape falls under offences of honor and public morality. Turkey’s criminal code classifies rape as a "felony against public decency and family order" and not—as are other types of assault and battery—as a "felony against an individual"⁹⁷.

The inadequacy of the domestic definition of rape is one of the main problems with prosecuting this crime. Rape is often characterized as sexual union of specific physical parts.

The Congolese Criminal Code prohibits rape and defines it as forcible sexual penetration of a female, and indecent assault, is defined as sexual assault without penetration.

⁹⁷ Dorothy Q and Regan. A. Ralph : *Rape in War Challenging the Tradition of Impunity* Human Rights Watch (1994) .

According to Article 167 of the Congolese criminal code, “sexual union” needs to occur in order to qualify an act as rape. The criminal code does not specifically deal with acts of sexual violence such as inserting objects into the vagina and oral sex rape. It also does not criminalize male rape⁹⁸.

In Sierra Leone, rape is defined as "the unlawful carnal knowledge of a woman without her consent by force, fear or fraud. Penetration (however slight) is required to constitute the crime of rape⁹⁹.

Rape involving Adultery or homosexuality is defined in the Sudanese Penal Code 1991 in Article 149 as sexual intercourse, without consent committed upon penetration with the penis (or part thereof) into the vagina (without legal right to penetrate one's vagina) (145) or the anus of a person (148)¹⁰⁰.

According to Section 6(1) of the Zina Ordinance, "Penetration is sufficient to constitute the sexual intercourse necessary to the offence of zina-bil-jabr," and the case law is clear that penetration must be by a penis and not other foreign objects¹⁰¹.

The many different types of sexual attack, such as forced oral sex and insertion of objects into women’s bodies, cannot be covered by such a restrictive definition. In the Akayesu case¹⁰², the concept of "invasion" was developed, defining rape as "a physical invasion of a sexual nature".

In the case of Furundzija¹⁰³ the Yugoslav Tribunal found that ‘forced penetration of the mouth by the male sexual organ constitutes a most

⁹⁸ *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, Human Rights Watch, / March 2005.

⁹⁹ Offences Against the Person Act, 1861 (24 & 25 Vict. c 100), s. 63), *We Will Kill You If You Cry Sexual Violence in the Sierra Leone Conflict*, Human Rights Watch, 2003.

¹⁰⁰ Sudan Criminal Code 1991 .

¹⁰¹ Crime or Custom: Violence against Women in Pakistan, Human Rights Watch, 1999.

¹⁰² Akayesu case, supra note 66

¹⁰³ Furundzija case ,supra note 68

humiliating and degrading attack upon human dignity - such an extremely serious sexual outrage as forced oral penetration should be classified as rape.

Using the narrow definition contained in criminal law would mean that most of the horrific sexual crimes that don't conform to penetration as provided for in these laws would probably be qualified merely as indecent assault.

If a woman is raped, she runs a high risk of facing capital charges. Some legal systems provide that, a victim's failure to prove the allegation of rape can be converted into an admission of illicit sex, and the authority can prosecute her for adultery. Courts consider a woman's charge of rape as an admission of illegal sex unless she can prove, that the intercourse was non-consensual and therefore not adultery.

If a woman is raped, she runs a high risk of being charged with adultery, particularly if she becomes pregnant. In some Jurisdiction, evidentiary requirements provide that pregnancy constitute irrefutable "evidence" of adultery for unmarried women or married women (if she bear child out of wedlock). According to the Sudanese Penal Code 1991, a woman may be convicted of 'Zina', if she is unmarried and pregnant.

"There are specific legal hurdles to reporting sexual crimes, including the possibility that the rape victim herself may face capital charges. Female victims of sexual crimes are adversely affected by the characterization of the offence of adultery due to discriminatory evidentiary requirements. If an

unmarried woman is pregnant and cannot prove that she was raped, she can be charged with the capital crime of adultery (*zina*)¹⁰⁴.”

Beyond the risk of having a rape charge turned against them, rape victims who want to bring the perpetrators to court are facing highly discriminatory evidentiary requirements.

In some jurisdictions evidentiary laws give less weight to the testimony of women in a court of law especially rape crimes. Some jurisdiction expressly provide that corroboration of the victim’s testimony is required for crimes of sexual violence. Further some jurisdiction evidentiary laws in rape and sexual assault cases require women to provide corroborating testimony from men. In Pakistan, evidentiary laws discriminate against women by granting no legal weight to their testimony in certain rape trials.

Some jurisdictions require for the prosecution of individuals who have committed crimes of sexual violence that four eyewitnesses must testify in order to prosecute a rape charge. Thus the only way to obtain a rape conviction is if the accused confesses or there are four adult male witnesses to the act of penetration. In Sudan in order to convict a man of the offence (*zina*), a confession or the testimony of four witnesses is required (art. 146).

Those requirements make it nearly impossible to achieve a fair trial for rape, in particular because rape is often committed in the absence of eyewitnesses.

¹⁰⁴ Access to Justice for Victims of Sexual Violence: Report of the United Nations High Commissioner for Human Rights, 29 July 2005.

In many national justice systems, victims of rape and other forms of sexual violence are required to prove the non-consensual nature of the intercourse. In rape cases courts generally require physical evidence. Supporting physical evidence from the victim's body has been required, to corroborate the victim's testimony as to the non consensual nature of the intercourse and to convict even in rape cases where consent has been obtained through the threat of violence. The fact that the victim did not struggle or fight with the perpetrator is often used as evidence of consent, regardless of the circumstances.

In the international tribunals (rule 96 (ii) of the Rules of Procedure and Evidence of ICTY and ICTR / ICC), consent was not allowed as a defense if the victim had been subjected to, threatened with, or had reason to fear duress, detention or psychological oppression, or believed that if she did not submit, another person might be assaulted, threatened or put in fear.

International law recognizes that in situations of armed conflict, normal ideas of consent to sexual relationships cannot be seen as applying, given the circumstances of coercion and fear of violence. This would be consistent with the rule made by the Akayesu case which defined rape as taking place in "circumstances which are coercive".

High evidentiary requirements are not the only deterrent for rape victims who want to press charges. Rape victims can be charged with providing False Information or with false accusation of zina, known as *qazf*, if they cannot make their case. The offense of *qazf* is punishable with up to 80 lashes.

4.2.2 Medical Evidence

Medical evidence can be expensive or too difficult to obtain; because of remote location of the facilities, the time limitation for collecting such evidence and lack of technical capacities.

In some jurisdiction in practice, only medical evidence obtained by specialized state medical offices in jurisdictions where they exist is admissible in court.

Under Sudanese law, rape victims were until recently required to report rape to the police in the first instance so as to obtain a form allowing them to receive medical care. Through procedural misapplication, this standard form was used on many occasions as an obstacle to investigations and prosecutions. Failure to comply with the procedure for collecting medical evidence from victims of crimes has resulted in confidential medical assistance being denied to many women. An extreme example was the case of a victim who was forcibly taken from a medical clinic to be repeatedly examined against her will by Government doctors¹⁰⁵. A decree issued by the Minister of Justice changed that in October 2004. The decree stated that victims of violence and other serious injuries, including rape victims, could obtain medical treatment without the requirement of this Form. The Decree also stated that health care providers shall face no negative repercussions or harassment for providing treatment to victims.

¹⁰⁵ Access to Justice, supra note 104.

However the practice shows that despite the official changes made to the criminal procedure to guarantee a victim's right to confidential medical treatment, certain elements continue to disregard the procedure and threaten and intimidate health care providers and victims¹⁰⁶.

4.2.3 Impunity

In some cases, procedures or practices may create barriers to the proper investigation and prosecution of sexual crimes against women and allow enforcement forces personnel to commit crimes with impunity.

In many jurisdictions, where the alleged perpetrators are agents of the State, complaints filed against them may fall within military, security or police jurisdiction which represents a source of impunity and strong legal protections that safeguarded them from being brought to justice for human rights abuses.

The procedures for the investigations and prosecutions of military ,security or police forces may not allow civilians the legal standing to bring complaints as the the procedures make the investigation and subsequent prosecution of security forces subject to the permission of the executive bodies responsible for their conduct. Requests by the prosecutor to withdraw the immunity of the officials concerned often meet with no response or are rejected.

¹⁰⁶ Access to Justice, supra note 104.

In addition, Government officials often shelter security officials from investigation or prosecution, simply by failing to seriously investigate or prosecute.

In Mexico, where a number of indigenous women have been raped by government soldiers in the state of Guerrero over the past decade, all the cases have been transferred to military jurisdiction, which has consistently failed to conduct proper investigations, guaranteeing that the alleged rapists go unpunished¹⁰⁷.

In Sudan, members of the armed forces, security forces or police officers are immune from prosecution for abuses committed during the course of their official duties¹⁰⁸. In many cases of sexual violence, the alleged perpetrators were agents of the State, who were not tried because of their immunity.

4.2.4 Amnesty Laws

National amnesty laws intended to shield perpetrators from justice. In some cases, broad amnesties may be granted to specific individuals or groups of individuals, which invariably result in impunity for crimes of sexual violence committed against women, such amnesty laws have been introduced in countries including Argentina, Chile, Peru, Sierra Leone and Uruguay.

In Burundi, women remain concerned about the persistence of prevailing impunity and also by the impunity institutionalized by various political

¹⁰⁷ Supra note 15.

¹⁰⁸ See Article 46 of the Sudan Police Force Act 1999. See also Criminal Circular No. 3/1995, on the prosecution of members of the armed forces with reference to the Sudan Peoples' Armed Forces Act of 1986.

agreements. It is feared that relevant provisions of these agreements could be transformed into amnesty measures covering heinous crimes perpetrated against women, such as rape¹⁰⁹.

4.2.5 Absence of Adequate Protection for Victims and Witnesses

In prosecutions of crimes at the national levels, including those involving sexual violence, victims and witnesses must be protected from intimidation, retaliation and reprisals at all stages of the proceedings and thereafter.

In many jurisdictions neither the law nor police procedure makes any provision for protecting witnesses and ensuring confidentiality of proceedings. Victim and witness protection, particularly relating to the prosecution of gender-based crimes, remains critical to the success of prosecutions of perpetrators, and yet very few resources and very little expertise are allocated for these key requirements. This has been true, for example, in the Democratic Republic of the Congo, Sierra Leone, and Haiti¹¹⁰.

¹⁰⁹ Report of the Conference on Gender Justice in Post-Conflict Situations: “*Peace Needs Women and Women Need Justice*” United Nations S/2004/862, September 2004.

¹¹⁰ Ibid.

4.2.6 Prosecution of Sexual Violence under Customary Law

Many jurisdictions allow customary laws and practices that enforce gender bias and discrimination and mask the violent nature of sexual violence acts.

Under customary law, the victim's family can seek justice through demanding payment of compensation or marriage from the perpetrators.

Sometimes the family of a girl who was raped decides that she should marry her rapist¹¹¹.

In Sierra Leone, the practice of treating rape and crimes of sexual violence as matters to be settled between families, often by the payment of money, has contributed to such crimes not being taken seriously¹¹².

4.2.7 Gender Bias and Discrimination in the Administration of Justice

Bias against female victims of rape is not confined to national discriminatory laws; victims often face difficulties in the national criminal justice systems because of the general gender bias within the national criminal justice systems which pervades all facets of the criminal justice system. From the initial lodging of complaints until the final resolution of cases, women seeking justice confront discrimination and gender bias within the justice administration system that prevent them from receiving fair treatment as witnesses, as complainants and in investigations.

¹¹¹ The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo, June 2002.

¹¹² Supra note 109.

In Sudan, police and other Government officials also proactively obstructed justice by refusing to investigate human rights abuses or conducting inadequate investigations of human rights abuses committed by militia in Darfur¹¹³.

In the end, women face a legal system that is biased against them, making it nearly impossible for them to turn to the law for protection against sexual violence.

4.3 The Competence of National Prosecutions To Adjudicate Wartime Gender Crimes

The absence, inadequacy and the existence of gender biases in national laws or procedures must be taken into account when assessing the general competence of domestic courts to adjudicate wartime gender crimes that are directed against women.

4.3.1 The Democratic Republic of Congo

The International Criminal Court may prosecute a small number of cases of sexual violence. At the same time, the vast majority of such crimes will have to be tried in Congolese courts. However, the Congolese judicial system is in disarray. Judges and prosecutors generally fail to treat sexual violence as a serious offense. Superior military officers are not held accountable for crimes committed by combatants under their command.

Current national laws on rape and war crimes are inadequate and

¹¹³ Access to Justice, *supra* note 104.

inconsistent with the requirements of international humanitarian and human rights law¹¹⁴.

4.3.2 Sudan

“In Darfur, the Government stood in constant opposition to the Security Council’s referral of the situation in Darfur to the ICC, claiming that Sudan was able and willing to bring to justice perpetrators of human rights abuses and international humanitarian law.

But the plethora of mechanisms in place to help bring about accountability for crimes committed during the conflict have largely failed and demonstrates the continued necessity of the ICC. This is especially true with respect to the failure on the part of domestic courts to bring to justice high ranking officials responsible for the most serious crimes related to the conflict.

The most prominent accountability mechanism in Darfur was the Special Criminal Court on the Events in Darfur (the SCCED), which the Chief Justice of Sudan established by decree on 7 June 2005. Its wide jurisdiction covered crimes in the Sudanese penal code, violations cited in the report of the National Commission of Inquiry, and charges pursuant to any other law, as determined by the chief justice. It was originally a roaming court that was scheduled to pass through all three states in Darfur. A number of public statements by the Sudanese Government indicated that the SCCED was established to deal with major criminal offences which had occurred in

¹¹⁴ Seeking Justice: The Prosecution of Sexual Violence in the Congo War, Human Rights Watch, March 2005.

those states and which could be characterized as war crimes or crimes against humanity. On 10 November, the Chief Justice issued a decree amending the subject matter jurisdiction of the Court to explicitly include crimes under international humanitarian law. The court was also permanently located in El Fasher, while two separate decrees established sister courts with the same subject matter jurisdiction in Nyala and El Geneina.

As of 30 November 2005, the cases prosecuted before the SCCED did not, however, reflect the major crimes committed during the height of the Darfur conflict in 2003-2004. All except one out of the six cases involved incidents from 2005. Furthermore, only one of the cases included charges brought against a high ranking official—who was acquitted. Thus, the court failed to address command responsibility issues or to convict high ranking officials directly involved in human rights abuses and violations of international humanitarian law. The court was also inadequately staffed and resourced”¹¹⁵.

¹¹⁵ Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan , January 2006 .

5 THE INTERNATIONAL PROSECUTION OF WARTIME GENDER CRIMES: AN ASSESSMENT

5.1 Challenges To The International Prosecution of Wartime Gender Crimes

While the international tribunals have made significant contributions to the development of the law and procedures of wartime gender violence, these tribunals suffer from a number of limitations on their ability to hold perpetrators accountable and to provide victims justice.

Although the ICTY and ICTR have made great strides, they have been criticized for being extremely slow, costly, obtaining relatively few convictions, lack of counseling, security, sensitivity of judges and prosecutors or essential confidentiality and anonymity as well as lack of competent personnel¹¹⁶.

The ICTY and the ICTR—have failed to meet expectations for establishing accountability for sexual violence in the former Yugoslavia and Rwanda. Both tribunals have been plagued by weak investigations and neither has had an effective long-term prosecution strategy that acknowledges the degree of wartime sexual violence suffered by women. Barring dramatic advances before the expiration of their respective mandates in 2010, in terms of sexual violence prosecutions each criminal tribunal risks being remembered for what it missed doing, rather than for what it achieved¹¹⁷.

More generally, the ICTR's effectiveness in investigating and prosecuting sexual violence has been hampered by a number of factors, including lack of

¹¹⁶ Supra note 71.

¹¹⁷ Jefferson, La Shawn R. , In War as in Peace: Sexual Violence and Women's Status : Human Rights World Report 2004

financial resources, poor staff training, lack of political will, poor witness protection, weak investigations, and a general perception by investigators that rape cases are too hard to prove in court¹¹⁸.

Even more problematic than these structural and procedural limitations, is the limited capacity of these mechanisms to address the vast majority of sexual violations in armed conflict.

The Ad hoc and hybrid tribunals have limited jurisdiction both temporally and geographically. Incidences of sexual violence in armed conflict outside the former Yugoslavia, Rwanda, or Sierra Leone that occurred before July 1, 2002 are not within the jurisdiction of any of the international mechanism of accountability.

Because of financial and human resource constraints faced by international tribunals in addressing situations of widespread violations, the vast majority of perpetrators are not brought before international tribunals. Rwanda is the starkest example of a resource-poor judicial system straining to address genocide and other wartime crimes far too numerous for international prosecutions¹¹⁹.

The International Criminal Court can only try a small number of cases and only in circumstances where national courts are unable or unwilling to prosecute. The ICC will not be able to address all situations in which national courts are unwilling or unable to prosecute perpetrators. Resource constraints will also limit the capacity of the ICC to address crimes of sexual violence in future armed conflicts, forcing it to limit its efforts to the

¹¹⁸ Ibid.

¹¹⁹ See supra note 109.

“worst” perpetrators. The Prosecutor has laid out the prosecution strategy in a policy paper issued by his office wherein he indicates that his Office will prosecute only those most responsible for the crimes¹²⁰.

Due to overwhelming potential caseloads, international criminal tribunals relegate most of their investigative and prosecutorial work to those suspects who bear the greatest responsibility for planning and executing the crimes. That often leaves free thousands, indeed tens of thousands, of perpetrators that national prosecutors and courts are supposed to bring to justice in keeping with an ideal vision of accountability¹²¹.

Accordingly the Special Rapporteur McDougall has determined that international mechanisms will only be able to address a small fraction of sexual violence committed in armed conflict and that national prosecution for all sexual violence is imperative¹²².

National court, however, as discussed before often fail to investigate crimes of sexual violence against women.

¹²⁰ Paper on some policy issues before the Office of the Prosecutor, September 2003 ICC-OTP 2003.

¹²¹Supra note 109.

¹²² Supra note 27.

5.2 The Way Forward

In light of the constraints on the ICC and other international justice mechanisms to address the vast majority of sexual violations in armed conflict, efforts to reform national systems are imperative.

For all the achievements at the international level, fighting impunity should be pursued at the national level. National justice system must reform to become more gender sensitive in law and procedures so as better able to address the abuses that women suffer in armed conflict.

States must adopt special legislation incorporating International standards, as developed in human rights, humanitarian and international criminal law, into their own legal systems.

Gender-sensitive developments in the International Criminal Court must be incorporated into national legal systems.

Key reforms should be implemented to remove substantive and procedural obstacles that hinder effective redress for crimes of sexual violence.

States must enact legislations contain a comprehensive definition of crimes of sexual violence as a war crimes and crimes against humanity

States must enact legislations permitting the exercise of universal jurisdiction for crimes under international law so that who commit these crimes can be brought to justice in any court, even outside the country where the crime took place.

States must enact legislations that include and define in consistency with international laws crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, forced abortion, enforced sterilization and all other forms of sexual violence.

Further legal changes are needed to protect victims and witnesses against reprisals.

Legislative reform must be accompanied by training and reform of the criminal justice system as it is generally insensitive to the needs of the women victim.

Gender sensitive training should be given to all professionals involved in the criminal justice process, including the judiciary, investigators, prosecutors, police and other staff to enable them to work in a gender sensitive manner with victims of sexual violence.

Key reforms should be implemented to ensure the independence of the judicial system and building their capacity in the field of international crimes.

Changes should be made to the administration of justice through the creation of specialized police stations

Efforts should include increasing the recruitment of female personnel among judges, prosecutors, investigation officers and police.

The capacity of the police force and judicial system should be strengthened adequately to address cases of sexual violence including rape.

Finally, the national justice system needs to be strengthened with sufficient resources to properly carry out their functions. The international community, including the United Nations, must give maximum support to rebuilding effective, accessible and non-discriminatory municipal legal systems following the cessation of hostilities and ensure adequate prosecutions of international crimes committed during the conflict, including those involving sexual violence.

6 CONCLUSION

Accountability for wartime gender crimes against women is critical not only for deterrence, but also to create an environment that advance the elimination of sexual violence, through addressing the social structure and practices that perpetuate and condone violence against women. Increased accountability can help raise awareness and reverse the stigma attached to being a victim of sexual violence; place the shame on the perpetrators of sex crimes instead of on the victims, thereby diminishing its potency and consequently its use as a weapon of war¹²³.

A key factor allowing wartime sexual violence against women to continue is the failure to investigate, prosecute and punish the perpetrators of these crimes. Impunity for sexual violence against women contributes to a climate where such acts are seen as normal and acceptable and where perpetrators are safe from any kind of accountability for their actions.

Historically sexual violence crimes in armed conflict situations have been regarded as “side-effects” of war; thus, as a result, these crimes have not been sufficiently prosecuted or investigated.

In recent years with the establishment of the two ad hoc tribunals for the Former Yugoslavia and Rwanda, the International Criminal Courts and the Hybrid Courts this trend has begun to change and important developments occurred.

¹²³ Askin , supra note 38 .

Rape and sexual abuse, by now are recognized as a crime among the most serious crimes in international law. In connection to armed conflicts, rape and other forms of gender crimes can be prosecuted as genocide, crime against humanity and war crime.

Gender crimes are prosecuted as war crimes whether they are committed in international or internal conflicts. In the ad hoc tribunals of Yugoslavia and Rwanda, rape and other forms of sexual violence have been successfully prosecuted as rape, torture, enslavement, persecution, cruel treatment, inhumane treatment, inhumane acts, willfully causing great suffering and outrage upon personal dignity.

The cases have confirmed that males and females can be raped and sexually abused; that a person convicted of rape does not have to be the physical perpetrator; that forcible vaginal, anal or oral sex constitute rape; and that rape can be committed by foreign objects .The rape of one victim is prosecutable as a war crime and that persons can be held criminally responsible for sex crimes as individuals and superiors.

Further the recent progress in recognizing acts of gender violence by regional and international bodies and the increased attention given to gender violence in international treaties and UN documents and resolutions indicate a universal awareness of the importance of redressing and ending impunity for gender crimes.

The significant developments in recognizing , criminalizing and punishing gender crimes in international law reflects the international community's denouncement of these crimes and the commitment to redress them as among the most serious crimes .

Thereby, it can be established that significant progress has been made in recognizing, criminalizing and punishing rape and other forms of gender crimes in international law and the international criminal tribunals.

However, whether these developments might have effect on the prevalence of wartime sexual violence or are adequate response to the incidences of gender crimes which have occurred or will occur in armed conflicts is questionable.

Sexual violence continues to occur in many conflicts around the world.

These developments have had little effects on the vast majority of cases.

Impunity is still the norm. Most acts of wartime gender crimes are never investigated and perpetrators commit their crimes safe in the knowledge that they will never face arrest, prosecution or punishment.

Considering the magnitude of this violence, efforts to bring perpetrators of gender violence against women to account have been inadequate so far.

The international criminal tribunals are not tangible or accessible for most victims of gender violence. The international criminal system can only deal with a small number of cases. These limitations markedly illustrate the limited effects and the inadequacy of these mechanisms to deal with the magnitude of the problems.

All the aforementioned suggest that these developments are not adequate and that more must be done to protect women against the abuses they suffer during armed conflicts.

To better protect against these atrocities, there is a need to fight impunity by supporting the International Criminal Court and enhance the effectiveness of tribunals and justice mechanisms.

Furthermore this thesis has suggested that the effects of these developments can be expanded and maximized through the incorporation of these developments at the national level; International standards, as developed in international human rights law and in the statutes and judgments of international tribunals and the International Criminal Court, should be fully reflected in all national jurisdictions. The norms that have been developed so far for addressing sexual violence against women should be put into practice in investigations and prosecutions.

These developments are opportunity to push ahead and make the reforms that are needed to comprehensively address sexual violence and allow women to access justice in accordance with the State's commitments under international law. Thus making many more national courts assume their front-line role in combating impunity.

It is to be hoped that such reforms will be pursued, failure to do so mean that both the crimes themselves and impunity for these crimes will continue.

“It is the hope and expectation of those seeking legal reform that in hearing cases related to war crimes and crimes against humanity these institutions will apply the latest international legal norms and jurisprudence (Warbrick and MccGoldrick 2001,428). If and when this occurs, it will not only enable a better acknowledgment at the national level of the experiences of women during armed conflict, but may also help to expand an understanding of

women's lives in peacetime. For instance, one step forward would be the application at the national level of the expanded definition of rape that is being developed through international jurisprudence which emphasizes the violation from a victim rather than the perpetrator point - experiences of violence"¹²⁴.

Only through the full inclusion and recognition of these developments nationally, and the vigorous investigation, prosecution and effective redress of all acts of gender crimes at the international and national level, can the world hope for a future in which sexual violence is not used as a weapon of war.

¹²⁴ Chappel, Louise. Finding Space for Women Interests: Developments at the UN Ad Hoc Tribunals and the International Criminal Court.

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