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ABOUT WOMEN, WAR AND DARFUR: THE CONTINUING QUEST FOR GENDER VIOLENCE JUSTICE

MARY DEUTSCH SCHNEIDER*

I. INTRODUCTION

Since World War II, some 250 conflicts of an international and non-international character have occurred which, along with tyrannical regime victimizations, produced an estimated one hundred seventy million casualties and other extensive harmful consequences.¹ Approximately ninety percent of current war victims are civilians, mostly women and children, compared to a century ago when ninety percent of those who died were military personnel.² Among the continuing horrors of war are many atrocities which happen to both men and women. Both are taken hostage, executed, shot, burned, bayoneted, hung, beaten, bombed, tortured, and forced into various forms of slavery. There is an overlay of additional brutality, however, that occurs with greater violence and frequency to women. Male civilians are killed; female civilians are typically raped, then killed. In

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Ms. Deutsch Schneider wishes to thank her husband, Mark, children McLain and Liberty, her co-workers at LSNM and Irish Centre Director William Schabas for their help and support.

1. M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 2 (1998).

2. Women 2000: Gender Equality, Development and Peace for the Twenty-First Century, Fact Sheet No. 5, Women and Armed Conflict, <http://www.un.org/womenwatch/daw/followup/session/presskit/fs5.htm> (last visited Feb. 11, 2008); see also Malinda M. Schmiechen, *Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps*, 22 ST. LOUIS U. PUB. L. REV. 473, 473 (2003) (stating that eighty percent of displaced persons, at extreme risk as refugees, are women and children).

interrogations, males are savagely beaten; females are savagely beaten and raped.³

Sexual violence during armed conflict takes many forms, such as:⁴ rape,⁵ forced sexual intercourse or other sexual acts with family members,⁶ forced impregnation,⁷ forced pregnancy,⁸ sexual mutilation,⁹ sexual humiliation,¹⁰ medical experimentation on women's sexual and reproductive organs,¹¹ forced abortion,¹² forced sterilization,¹³ forced prostitution,¹⁴ being compelled to exchange sexual favors for essential items or services,¹⁵ being compelled to exchange sexual favors for the return of children,¹⁶ being

3. KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNAL 12-13 (1997) [hereinafter ASKIN, WAR CRIMES]; see also SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 31 (1975).

4. Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 COLUM. HUMAN RIGHTS L. REV. 1, 12-18 (2000).

5. BROWNMILLER, *supra* note 3, at 31-113.

6. See *Report of the Special Rapporteur on Violence Against Women: Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict*, U.N. Doc. E/CN.4/1998/54/Add.1 8-10 (1997) [hereinafter *Rwanda Report*].

7. Asma Abdel Halim, *Attack with a Friendly Weapon*, in WHAT WOMEN DO IN WARTIME: GENDER AND CONFLICT IN AFRICA 94 (Meredeth Turshen & Clotilde Twagiramariya eds., 1998) (discussing the occurrence of this crime during conflict in Sudan).

8. Laura Pitter & Alexandra Stiglemeyer, *Will the World Remember? Can the Women Forget?*, MS., Mar./Apr. 1993, at 19 (detailing the practice in the Bosnian conflict of detaining women made pregnant as a result of rape until abortion was not possible).

9. See, e.g., Myrna Goldenberg, *Memoirs of Auschwitz Survivors: The Burden of Gender*, in WOMEN IN THE HOLOCAUST 285, 330-31 (Ofer & Weitzman eds., 1998) (describing women being forced to strip naked and lie on tables while SS officers stared and poked the women's genitals with a stick).

10. See Gardam & Jarvis, *supra* note 4, at 25-26.

11. See, e.g., *Rwanda Report*, *supra* note 6, at 10; see also AMNESTY INT'L, WOMEN ON THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN 18-24 (1991).

12. See, e.g., The Secretary-General, *Report of the Secretary-General on the In-depth Study on All Forms of Violence Against Women*, ¶¶ 143-46, delivered to the General Assembly, U.N. Doc. A/61/122/Add.1 (July 6, 2006) [hereinafter *In-Depth Study*].

13. See, e.g., ASIAN & PAC. DEV. CTR., WOMEN AND ARMED CONFLICT: A STATEMENT ON THE SITUATIONS AND FORWARDING OF RECOMMENDATIONS TO THE 42ND SESSION OF THE U.N. COMMISSION ON THE STATUS OF WOMEN 12-13 (1998) (describing forced sterilization of Tibetan women); MERANDA SSISSONS, EAST TIMOR HUMAN RIGHTS CTR., FROM ONE DAY TO ANOTHER: VIOLATIONS OF WOMEN'S REPRODUCTIVE AND SEXUAL RIGHTS IN EAST TIMOR 19-24 (1997) (discussing, *inter alia*, the use of Depo-Provera on East Timorese women and non-consensual tubal ligations).

14. See, generally USTINIA DOLGOPOL & SNEHAL PARANJAPPE, COMFORT WOMEN: AN UNFINISHED ORDEAL *passim* (1994) (describing forced prostitution of the "comfort women" by the Japanese army prior to and during World War II).

15. See, e.g., Nelia Sancho-Liao, *Clutching a Knife Blade: Human Rights and Development from Asian Women's Perspective*, in WOMEN AND CONFLICT 31, 34 (Helen O'Connell ed., 1993) (reporting this practice in the Philippines); Clotilde Twagiramariya & Meredith Turshen, *Small "Favors" to Give and "Consenting" Victims: The Sexual Politics of Survival in Rwanda*, in WHAT WOMEN DO IN WARTIME, *supra* note 7, at 101, 108-109 (describing practices in Rwanda).

16. See, e.g., *Rwanda Report*, *supra* note 6, (describing soldiers kidnapping refugee children and demanding sex from their mothers as ransom).

involved in trafficking in women,¹⁷ forced sexual slavery¹⁸ being the subject of pornography,¹⁹ and forced cohabitation/marriages.²⁰ In recent years, women and girls have been raped with burning wood, knives and other objects.²¹ They have been sexually assaulted and raped by government forces and non-state actors, friendly forces, police responsible for their protection, checkpoint guards, prison guards, administrators and staff of refugee camps, fellow refugees, looters, lawless gangs, local politicians, neighbors,²² and family members under threat of death.²³ They have been maimed or sexually mutilated, and often later killed or left to die.²⁴

Sexual torture of women is also used to cause terror sufficient to drive whole populations out of an area, or to deter male activists from revolutionary activity. "In this respect, the gendered division of violence acts to keep repressive regimes in power."²⁵

While there is a hoped-for major impact on impunity with the Yugoslavia and Rwanda Tribunals, and the new International Criminal Court, there has been sexual violence against women in armed conflict almost anywhere and everywhere in the world: Aceh,²⁶ Afghanistan,²⁷ Algeria,²⁸ Angola,²⁹ Azerbaijan,³⁰ Bosnia,³¹ Bougainville,³² Chad,³³

17. See, e.g., AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR, AND DEFIANCE 769 (rev. ed. 1995) [hereinafter AFRICAN RIGHTS] (reporting the buying and selling of woman among the Interahamwe during the 1994 conflict in Rwanda).

18. See *Report of the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/2000/21 17 (June 22, 1998).

19. Catharine A. MacKinnon, *Turning Rape into Pornography: Post Modern Genocide*, MS., July/Aug. 1993, at 24 (discussing conflict in Bosnia).

20. See, e.g., BINAIFER NOWROJEE, HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996), available at <http://www.hrw.org/reports/1996/Rwanda.htm> (reporting stories of women who were "rescued" only to become sexual slaves or "wives" of their captives during the 1994 conflict in Rwanda).

21. *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Violence Against Women*, U.N. Doc. E/CN.4/2001/73 14 (Jan. 23, 2001) [hereinafter *Violence Against Women Report*].

22. Gardam & Jarvis, *supra* note 4, at 13-14.

23. *Violence Against Women Report*, *supra* note 21, ¶ 44.

24. *Id.*

25. V. SPIKE PETERSON & ANNE SISSON RUNYAN, GLOBAL GENDER ISSUES 87 (1993).

26. *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Addendum: Mission to Indonesia and East Timor on the Issue of Violence Against Women*, U.N. Doc. E/CN.4/1999/68/add.3 93-98 (Jan. 11, 1999) [hereinafter *Report on Indonesia*].

27. See, e.g., *In-depth Study*, *supra* note 12, ¶ 145.

28. See, e.g., Zazi Sadou, *Algeria: The Martyrdom of Girls Raped by Islamic Armed Groups*, in WITHOUT RESERVATION: THE BEIJING TRIBUNAL ON ACCOUNTABILITY FOR WOMAN'S HUMAN RIGHTS 28 (Niamh Reilly ed., 1996) [hereinafter WITHOUT RESERVATION].

29. INT'L FED'N TERRE DES HOMMES, THE FALSE START: A PRELIMINARY STUDY ON SEXUAL VIOLENCE, ABUSE AND EXPLOITATION OF CHILDREN IN TIMES OF ARMED CONFLICT 22 (1996).

Chechnya,³⁴ Croatia,³⁵ Cyprus,³⁶ Democratic Republic of Congo³⁷ East Timor,³⁸ Georgia,³⁹ Guatemala,⁴⁰ the Gulf War,⁴¹ Haiti,⁴² India,⁴³ Indonesia,⁴⁴ Iraq,⁴⁵ Kashmir,⁴⁶ Kosovo,⁴⁷ Liberia,⁴⁸ Mozambique,⁴⁹ Myanmar,⁵⁰ Namibia,⁵¹ the Occupied Palestinian Territories,⁵² Peru,⁵³ The

30. LEYLA YUNUS ET AL., IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS BY AZERBAIJAN 23 (2004).

31. See, e.g., AMNESTY INT'L, BOSNIA-HERZEGOVINA: RAPE AND SEXUAL ASSAULT BY ARMED FORCES 1 (1993).

32. See, e.g., Tosca Looby, *Women in Bougainville*, 42 REFRACTORY GIRL 66, 66-67 (1992).

33. Women's Comm'n of the Human Rights League of Chad & Editors, *Women Denounce Their Treatment in Chad*, in WHAT WOMEN DO IN WARTIME, *supra* note 7, at 118.

34. Human Rights Watch, *Rape Allegations Surface in Chechnya*, Jan. 20, 2000, www.hrw.org/hrw/press/2000/01/chech0120.htm (reporting allegations of rapes by human rights watch investigators in Ingushetia).

35. See, e.g., Pitter & Stiglemeyer, *supra* note 8, at 19-21.

36. See, e.g., Maria Roussou, *War in Cyprus: Patriarchy and the Penelope Myth*, in CAUGHT UP IN CONFLICT, WOMEN'S RESPONSES TO POLITICAL STRIFE 32-34 (Rosemary Ridd & Helen Callaway eds., 1986).

37. Warren Hoge, *U.N. Relief Official Condemns Use of Rape in African Wars*, NEW YORK TIMES, June 22, 2005, at A4, available at <http://www.nytimes.com/2005/06/22/international/africa>. In April 2005 alone, a local rights organization reported more than 2000 cases of gender-based violence with half of the victims minors. *Id.* The total number of rape victims in the first half of 2005 was 25,000. *Id.*

38. See, e.g., AMNESTY INT'L, EAST TIMOR: SEIZE THE MOMENT 28-29 (1999) [hereinafter AMNESTY INT'L, EAST TIMOR]; AMNESTY INT'L, WOMEN IN INDONESIA AND EAST TIMOR: STANDING AGAINST REPRESSION 13 (1995) [hereinafter AMNESTY INT'L, WOMEN IN INDONESIA].

39. See, e.g., INT'L FED'N TERRE DES HOMMES, *supra* note 29, at 22.

40. See, e.g., *id.*; *Violence Against Women Report*, *supra* note 21, at 28-29.

41. AMNESTY INT'L, WOMEN IN INDONESIA, *supra* note 38, at 44.

42. HUMAN RIGHTS WATCH, RAPE IN HAITI: A WEAPON OF TERROR 2(1994).

43. See, e.g., *Violence Against Women Report*, *supra* note 21, ¶¶ 85-88.

44. *Report on Indonesia*, *supra* note 26, at ¶¶ 62-74.

45. Paul von Zielbauer, *G.I. Gets 110 Years for Rape and Killing in Iraq*, N.Y. TIMES, Aug. 5, 2007, available at <http://www.nytimes.com/2007/08/05/us/05abuse.html>.

46. See, e.g., ASIA WATCH & PHYSICIANS FOR HUMAN RIGHTS, RAPE IN KASHMIR: A CRIME OF WAR I (1993).

47. HUMAN RIGHTS WATCH, FEDERAL REPUBLIC OF YUGOSLAVIA—KOSOVO: RAPE AS A WEAPON OF "ETHNIC CLEANSING" (2000), available at <http://www.hrw.org/reports/2000/fry/>.

48. See, e.g., Ass'n of Female Lawyers of Liberia (AFELL) & Editors, *Hundreds of Victims Silently Grieving*, in WHAT WOMEN DO IN WARTIME, *supra* note 7, at 129.

49. See, e.g., Alcinda Antonio de Abreu, *Mozambican Women Experiencing Violence*, in WHAT WOMEN DO IN WARTIME: GENDER AND CONFLICT IN AFRICA, *supra* note 7, at 73.

50. See, e.g., AMNESTY INT'L, WOMEN IN INDONESIA, *supra* note 38, at 45.

51. See, e.g., Teckla Shikola, *We Left Our Shoes Behind*, in WHAT WOMEN DO IN WARTIME: GENDER AND CONFLICT IN AFRICA, *supra* note 7, at 138.

52. See, e.g., Simona Sharoni, *Every Woman is an Occupied Territory: The Politics of Militarism and Sexism and the Israeli-Palestine Conflict*, 1 J. GENDER STUD. 447, 458 (1992).

53. See, e.g., AMERICA'S WATCH & WOMEN'S RIGHTS PROJECT, UNTOLD TERROR: VIOLENCE AGAINST WOMEN IN PERU'S ARMED CONFLICT 1 (1992).

Philippines,⁵⁴ Rwanda,⁵⁵ Sierra Leone,⁵⁶ Somalia⁵⁷ refugees, South Africa,⁵⁸ Sudan,⁵⁹ Tibet,⁶⁰ Uganda,⁶¹ and West Papua.⁶²

In cases of sexual violence:

Virtually always the victim is a female; occasionally the victim is a male. *Virtually always* the perpetrator is a male. *Virtually always* rape is about power and contempt. *Virtually always* the effect of rape is humiliation, degradation, subordination, and severe physical or psychological injury; and *virtually always* the perpetrator goes unpunished. In whatever form, whether committed during the course of armed conflict and whether committed by or against a combatant or civilian, each and every instance of sexual assault needs to be recognized as a serious crime, prosecuted, and punished.⁶³

While the plight of women subjected to gender violence in armed conflict remained nearly invisible until the 1990s, much was written about it at that time and in the following decade. Grimly, however, sexual violence in war continues today, and may be escalating in its viciousness.

The United Nations' top relief official has said that although sexual violence is repeatedly condemned, it persists virtually unchallenged: "Far from making progress, we have regressed. More and more women are being attacked, younger and yet younger children are victims of these atrocities."⁶⁴ In Africa, he said, organized, premeditated sexual attack has become a preferred weapon of war, with rapists going unpunished and victims of rape shunned by their communities. Local governments, he added,

54. INT'L FED'N TERRE DES HOMMES, *supra* note 29, at 22.

55. *See, e.g.*, AFRICAN RIGHTS, *supra* note 17, at 748.

56. *Long Sentences Sought for Heads of Rebel Forces in Sierra Leone*, N.Y. TIMES, July 17, 2007, at A13, available at <http://www.nytimes.com/2007/07/17/world/africa/17leone.html>.

57. *See, e.g.*, AFRICA WATCH WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, SEEKING REFUGE, FINDING TERROR: THE WIDESPREAD RAPE OF SOMALI WOMEN REFUGEES IN NORTH EASTERN KENYA 3 (1993).

58. *See, e.g.*, Goldblatt & Meintjes, *South African Women Demand the Truth*, in WHAT WOMEN DO IN WARTIME, *supra* note 7, at 27.

59. *See, e.g.*, Halim, *supra* note 7, at 85.

60. *See, e.g.*, TIBET JUSTICE CTR., WOMEN'S COMM'N FOR REFUGEE, WOMEN AND CHILDREN TIBETAN CTR. FOR HUMAN RIGHTS & DEMOCRACY, VIOLENCE AND DISCRIMINATION AGAINST TIBETAN WOMEN 7 (1998).

61. Hoge, *supra* note 37, at A4. In Gulu in northern Uganda, at least sixty percent of women in a displaced persons camp were found to be victims of sexual violence. *Id.* *See, e.g.*, Nora Matovu, *Wartime Abduction and Sexual Abuse in Uganda: The Story of Agnes*, in WITHOUT RESERVATION, *supra* note 28, at 35-36.

62. *See, e.g.*, ASIAN & PAC. DEV. CTR., *supra* note 13, at 14.

63. ASKIN, WAR CRIMES, *supra* note 3, at 16-17.

64. Hoge, *supra* note 37, at A4.

were resisting international efforts to intervene, suppressing evidence of the violence and sometimes charging the victims with crimes related to becoming pregnant outside of marriage.⁶⁵

In Darfur, Sudan, between October 2004 and mid-February 2005, Doctors Without Borders/Medecins Sans Frontieres treated almost 500 rape victims in just two of the three regions, South and West Darfur, but indicated that because of pressures not to report sexual violence this number was likely only a fraction of the total cases.⁶⁶ Almost a third of the victims were raped multiple times and eighty-one percent reported their rapists were military or militia who used their weapons to force the assault.⁶⁷ Local authorities will not acknowledge the magnitude of the problem, and for documenting the magnitude of rape in Darfur, humanitarian workers have been castigated and jailed.⁶⁸

This article contends that sexual assault of civilian women in conflict is an unabated and ongoing legal issue, and there is still insufficient legal redress for women victimized by gender violence in war. It is important to understand the past and acknowledge the recent progress in legally addressing gender violence, but there is a pressing need to continue to move toward further potential solutions. This article will explore the war on civilian women in armed conflict and the responses of the international community and international law. The article includes past, present and future perspectives on this pervasive and persistent problem that continues to plague individuals, families, communities and society.

The main tenets of this article are that (1) despite the great strides at the Yugoslavia and Rwanda Tribunals and in the Statute of the International Criminal Court, there is still insufficient access to justice for women victimized by gender violence in conflict; (2) to combat impunity for gender violence it is necessary to use international strategies, tools and pressures, not only to prosecute perpetrators, but to also create national justice systems that can and will address gender violence; and, (3) the means of impacting

65. *Id.*

66. MEDECINS SANS FRONTIERES, THE CRUSHING BURDEN OF RAPE: SEXUAL VIOLENCE IN DARFUR 2 (Mar. 8, 2005), www.doctorswithoutborders.org/publications/reports/2005/sudan03.pdf [hereinafter MEDECINS SANS FRONTIERES, THE CRUSHING BURDEN OF RAPE]. Medecins Sans Frontieres Head of Mission in Sudan, Paul Foreman, and Regional Coordinator in Darfur, Vincent Hoedt, were jailed by the Sudanese government in May 2005 because of this document. Press Release, Medecins Sans Frontieres, Welcomes Dropping of Charges Against Its Representatives in Sudan (June 20, 2005), <http://www.msf.org/msfinternational.html>. Charges were publishing false reports, undermining society in Sudan, and spying. *Id.* All charges were dropped in June 2005. *Id.*

67. MEDECINS SANS FRONTIERES, THE CRUSHING BURDEN OF RAPE, *supra* note 66, at 3.

68. Hoge, *supra* note 37, at A4.

the overall problem and underlying causes of gender violence are not being adequately addressed.

Part I introduces the problem of gender violence generally, reviewing its nature and scope. Part II looks at the historical aspects of gender violence. Part III reviews international humanitarian law and its treatment of sexual violence against women in war. After an overview of applicable humanitarian law and documents, this section analyzes the World War II international military tribunals and the Fourth Geneva Convention to determine their treatment of gender violence. Part IV looks at recent progress in gender violence justice through the precedents of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the language of the Rome Statute of the International Criminal Court, particularly progressive changes in gender violence definition, scope and prosecution.

Moving into the present, Part V spotlights the ongoing conflict in Darfur as an example of continuing gender violence against women. It reviews the nature of the Sudan and this contemporary conflict, and applicable law categories. Since Darfur represents the first United Nations Security Council referral to the ICC, this part examines initially the path to the ICC, and then the particular ICC statutory and procedural provisions of import to gender violence victims. The article then moves to measures that could be taken beyond international criminal prosecution to both expand the scope of justice for Darfur's sexual violence victims, and to alleviate their continued suffering. It examines the potential of complementarity as a strategy to combat impunity and improve Sudan's domestic justice system, before turning generally to transitional justice possibilities to promote positive national change. Reparations, critically important in transitional justice, are scrutinized as a resource for women whose bodies became part of the battlefield in Darfur.

Part VI seeks to address practical international tactics to eliminate, rather than just litigate, gender violence atrocities. It narrows in on vehicles intended to make progress in combating gender violence: the Beijing Platform for Action and Security Council Resolution 1325. It then reviews Sudanese Women's Priorities from the April 2005 Oslo Donors' Conference. Part VII concludes with the author's final comments.

II. GENDER VIOLENCE IN HISTORY

The ancient Greeks viewed rape as socially acceptable behavior well within the rules of warfare.⁶⁹ Women were "legitimate booty, useful as

69. BROWNMILLER, *supra* note 3, at 33.

wives, concubines, slave labor or battle-camp trophy.”⁷⁰ Women were included as part of the spoils of warfare in the common axiom to the victor go the spoils.⁷¹

During the middle ages in Europe, if a city refused to surrender upon the victor’s demand, the rules of combat allowed soldiers to rape women occupants.⁷² Throughout the ages, “triumph over women by rape became a way to measure victory, part of a soldier’s proof of masculinity and success, a tangible reward for services rendered . . . [and] an actual reward of war.”⁷³

Women were considered the property of men, under the lawful ownership of a father, husband, slave master, or guardian.⁷⁴ Rape, then, became a property crime, or a crime against a man’s honor. Sexual assault was paired with property crimes when sexual assault was reported prior to World War II, as in, “[t]here was much looting and rape” or “[t]here were many instances of rape and pillage.”⁷⁵ While modern times may be somewhat more enlightened,⁷⁶ it is easy to see how, historically, sexual violence against women was a message between men:

[R]ape by a conqueror *is* compelling evidence of the conquered’s status of masculine impotence. Defense of women has long been a hallmark of masculine pride. Rape by a conquering soldier destroys all remaining illusions of power and property for men of the defeated side. The body of a raped woman becomes a ceremonial battlefield, a parade ground for the victor’s trooping of the colors. The act that is played out upon her is a message passed between men—vivid proof of victory for one and loss and defeat for the other.⁷⁷

In the middle ages, access to vanquished women was used as an incentive to capture a town.⁷⁸ Even as gender violence was prohibited by customary law, crimes were largely ignored or tolerated by superiors, some of

70. *Id.*

71. PETER KARSTEN, *LAW, SOLDIERS, AND COMBAT* 5 (1978).

72. DONALD WELLS, *WAR CRIMES AND LAWS OF WAR* 91 (2d ed. 1991).

73. BROWNMILLER, *supra* note 3, at 35; see Tina R. Karkera, Comment, *The International Criminal Court’s Protection of Women: Hands of Justice at Work*, 12 AM. U. J. GENDER SOC. POL’Y & L. 197, 217 (2003).

74. See LEWIS OKUN, *WOMAN ABUSE, FACTS REPLACING MYTHS* 3-5 (1986).

75. ASKIN, *WAR CRIMES*, *supra* note 3 at 51.

76. In the new ICC Statute, however, rape is actually listed after pillage in Article 8. Rome Statute of the International Criminal Court art. 8(b)(xxii), July 17, 1998, 37 I.L.M. 1002 [hereinafter Rome Statute].

77. BROWNMILLER, *supra* note 3, at 38.

78. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 296 (2003) [hereinafter Askin, *Prosecuting Wartime Rape*].

whom believed sexual violence before battle enhanced the soldiers' aggression or power cravings, and that post-battle rape was a well-deserved reward, a chance for soldiers to release tensions and relax. It was not a priority to enforce prohibitions against rape, as rapes were considered incidental by-products of conflict.⁷⁹

Prior to the mid-1800s, custom, domestic military codes, and religious instruction constituted the laws of war. Before international humanitarian law was codified, rape crimes were prohibited by custom.⁸⁰ Italian lawyer Lucas de Penna urged in the 1300s that wartime rape be punished as severely as peacetime rape.⁸¹ Sir Peter Hagenbach was sentenced to death in 1474 for war crimes which included rapes that were committed by his troops.⁸² In the 1550s, the respected jurist Alberico Gentili determined in his survey of the literature on wartime rape that it was unlawful to rape women, including combatants, in wartime.⁸³ Hugo Grotius also determined in the 1600s that sexual violence in wartime and peacetime must be punished alike.⁸⁴

The Lieber Code which codified the customary laws of war into U.S. army regulations in 1863, clearly listed rape as one of the most serious war crimes, contrary to later documents which used language which tended to trivialize the sexual violence. Article 44 of the Code declared that "all rape is prohibited under the penalty of death," and Article 47 stated "crimes punishable by all penal codes, such as . . . rape . . . are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred."⁸⁵

The 1907 Hague Conventions⁸⁶ and regulations indicated "family honour and rights must be respected," a phrase which has caused some

79. *Id.* at 296-97. For a detailed historical analysis, see also ASKIN, WAR CRIMES, *supra* note 3, at 1-48.

80. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 299.

81. *Id.*; see also RICHARD SHELLY HARTIGAN, THE FORGOTTEN VICTIM: A HISTORY OF THE CIVILIAN 50 (1982).

82. William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 4-5 (1973).

83. See ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 258-59 (John C. Rolfe trans., 1995) (1612).

84. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 656-57 (James Brown Scott ed., Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646).

85. Adjutant Gen.'s Off., U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, Gen. Ord. No. 100 (Apr. 24, 1863), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>; [hereinafter LIEBER CODE]. The Lieber Code is also known by its official title, General Orders No. 100.

86. Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, reprinted in 2 AM. J. INT'L L. 90 (1908) [hereinafter Hague Convention].

concern with its vagueness, but which is commonly understood to prohibit sexual assault.⁸⁷ The 1919 War Crimes Commission established a response to ruthless atrocities committed during World War I, including “rape” and “abduction of girls and women for the purpose of forced prostitution” among the listed offenses deemed punishable.⁸⁸

There is a sense among all cultures and peoples that it is not right: assaulting or killing an enemy soldier and assaulting or “killing women and children because they belong to the enemy are not equivalent acts.”⁸⁹ But gender violence persists. As codified protections afforded to civilians evolved and society purportedly advanced, protection against gender violence was an exception. “A free hand with [a] girl seems always to have been a basic component of what the common soldier hopes for, believes he deserves, and feels entitled [to receive.] . . . The literature of war is full of evidence of this disagreeable dark edge to military behavior.”⁹⁰ Protection did not improve for women during the twentieth century, the bloodiest in history.⁹¹ Women’s situations during armed conflict even appear to have worsened.⁹² Despite the impermissibility of rape in war throughout centuries, and despite treaties, laws and prosecutions, gender violence continues to be standard operating procedure in war.⁹³

87. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 299.

88. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919, *reprinted in* 14 AM. J. INT’L L. 95, 114 (1920).

89. MARCO SASSOLI & ANTOINE A. BOUVIER, INT’L COMM. OF THE RED CROSS, HOW DOES LAW PROTECT IN WAR: CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 69 (1999).

90. Geoffrey Best, *Restraints on War by Land Before 1945*, in RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT 17, 26 (Michael Howard ed., 1979); *see also* KARSTEN, *supra* note 71, at 6 (reporting on ancient Greek battles, the crusades, and rape crimes in major wars).

91. *See, e.g.*, JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY 1-2 (1999); ROBERT CONQUEST, REFLECTIONS ON A RAVAGED CENTURY *passim* (2000).

92. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 297.

93. Jocelyn Campanaro, *Women, War and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2557-58 (2001); Hannah Pearce, *An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture*, 14 INT’L J. REFUGEE L. 534, 534-35 (2002).

III. INTERNATIONAL HUMANITARIAN LAW AND GENDER VIOLENCE

A. THE TREATMENT OF WOMEN IN INTERNATIONAL HUMANITARIAN LAW AND DOCUMENTS

The chief international humanitarian law documents that regulate contemporary armed conflicts are the following: the 1907 Hague Conventions and Regulations,⁹⁴ the four 1949 Geneva Conventions along with annexes to the Conventions,⁹⁵ and the two 1977 Additional Protocols⁹⁶ to the Geneva Conventions. All or parts of these instruments are now recognized as comprising customary international law.⁹⁷ The four Geneva Conventions are binding universally, regardless of whether States are parties to the treaties or not.⁹⁸ The Conventions dictate the treatment of the sick, wounded, and shipwrecked combatants, civilians, and prisoners of war during periods of armed conflict.⁹⁹

Although international humanitarian law instruments provide general and detailed instruction on the treatment of protected persons during armed conflict, protections for women are strangely minimal and weak in light of the detail given other issues.¹⁰⁰ For example, humanitarian instruments delineate conditions in which sports and games are allowed prisoners (GC

94. Hague Convention, *supra* note 86. Hague Law governs the conduct of hostilities and the duties of combatants.

95. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention or GC (I)]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at C, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention or GC (II)]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 1356 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention or GC (III)]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention or GC (IV)].

96. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, (entered into force Dec. 7, 1978) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

97. Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96-1372 (Oct. 2, 1995), *reprinted in* 35 I.L.N. 32 (1996) [hereinafter Tadic Appeals Chamber Decision on Jurisdiction].

98. *Id.*

99. *See generally* First Geneva Convention, *supra* note 95 (protecting the wounded and sick armed forces on land); Second Geneva Convention, *supra* note 95 (protecting the wounded and sick armed forces at sea); Third Geneva Convention, *supra* note 95 (protecting prisoners of war); Fourth Geneva Convention, *supra* note 95 (protecting civilians).

100. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 294.

III), how many cards and letters prisoners should be allowed to receive (GC III), and the maximum number of belligerent warships which can be in the ports of a neutral party (Article 15 of the Hague Convention IV). There is no such exhaustive detail, however, and very little mention, of either female combatants or civilians.¹⁰¹

There is also almost nothing documenting regulations for the treatment of women in the World War II war crimes trial collections either. For example:¹⁰²

In the entirety of the Hague Conventions and Regulations, one single article (IV, art. 46) vaguely and indirectly prohibits sexual violence as a violation of “family honour.” The forty-two-volume set of transcripts of the Nuremberg trial contains a 732-page index. Neither “rape” nor “women” is included in any heading or sub-heading in this index, despite the fact that crimes of sexual violence committed against women were extensively documented in the transcripts.¹⁰³

In the five supplementary indexes to the twenty-two-volume set documenting the Tokyo trial, “rape” is only included under the subheading ‘atrocities.’ Even then, a mere four references are cited, representing but a minuscule portion of the number of times rape and other forms of sexual violence were included within the International Military Tribunal for the Far East (IMTFE) transcripts.¹⁰⁴

The four 1949 Geneva Conventions came after the Second World War and the Nuremberg and Tokyo war crimes trials. Within the 429 articles that comprise the four 1949 Geneva Conventions, only one sentence of one article (IV, art. 27) explicitly protects women against “rape” and “enforced prostitution,” and only a few other provisions can be interpreted as prohibiting sexual violence.

The 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict omits any reference to sexual violence.¹⁰⁵

101. *Id.*

102. *Id.* at 295 (providing a partial list of examples).

103. *Id.* at 295 n.36.

104. *Id.* at 295 n.37.

105. *Id.* at 295 n.38 (citing Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, U.N. GAOR, 29th Sess., Supp. No. 31, at 146, U.N. Doc. A/9631 (Dec. 14, 1974)).

An obvious place for the inclusion of explicit prohibitions of sexual violence would have been paragraph 5, which states: "All forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal."¹⁰⁶

One article in the Fourth Geneva Convention and in each of the two 1977 Additional Protocols explicitly prohibits rape and forced prostitution.¹⁰⁷ Article 27 of the Fourth Geneva Convention states what protected persons are, under any circumstances, entitled to

respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.¹⁰⁸

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."¹⁰⁹ 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." International humanitarian law instruments approach sexual violence as an affront to personal honor, rather than as criminal violence against women, perhaps reflecting past historic attitudes in turn reflected in many domestic criminal systems. Even though the Conventions and Protocols link rape with crimes of honor or dignity instead of crimes of violence, rape and forced prostitution are at least included. While the phrasing mischaracterizes the character of the offense, minimizing the

106. *Id.*

107. Fourth Geneva Convention, *supra* note 95, art. 27; Protocol II, *supra* note 96, art. 4; Protocol I, *supra* note 96, art. 76.

108. Fourth Geneva Convention, *supra* note 95, art. 27.

109. The language in Protocol I is changed from enforced prostitution to forced prostitution in both protocols. Protocol I, *supra* note 96, art. 76; Protocol II, *supra* note 96, art. 4.

violent nature of the crime, it at least arguably provides potential protection.¹¹⁰

It is generally held that serious violations of the Geneva Conventions can be criminally punished as crimes of war. For examples, the Nuremberg trials recognized that it “is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty, if it is made a crime that international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations recognize generally.”¹¹¹

Customs of war have played an important part in reinforcing and supplementing the humanitarian law and documents of the Hague and Geneva Conventions. The post World War II international war crimes tribunals and, more recently, the Yugoslav and Rwandan Tribunals further expanded this area of law.¹¹²

B. THE WORLD WAR II INTERNATIONAL MILITARY TRIBUNALS AND GENDER VIOLENCE

The world was shocked by the intentional extermination and unfathomable cruelty toward millions of innocent civilians during World War II—indiscriminately, men, women, and children were brutalized, murdered, tortured, starved, and forced into slave labor and deplorable prison camp conditions. Besides these horrific crimes, women and girls were also subject to rape, sexual slavery, and other forms of sexual violence and persecution.¹¹³ With the Nuremberg International Military Tribunal (IMT) and Tokyo Tribunal (IMTFE), focus was on those responsible for waging aggressive war, and the trials largely ignored sexual violence.¹¹⁴ The IMT Charter did not include sexual violence and the Tribunal did not directly prosecute such crimes, perhaps because of Allied’s abuses also, despite that gender violence crimes were extensively documented.¹¹⁵ Gender-related crimes, however, were included as evidence of the atrocities which were

110. Dorean M. Koenig & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 11-16 (Kelly D. Askin & Dorean M. Koenig eds., 2000).

111. U.S. v. List, 2 Trial of War Criminals Before the International Military Tribunal, Nuremberg 759, 1239 (Nov. 1945-Oct. 1946) (commonly known as the Hostage Case).

112. Kelly Askin, *Women and International Humanitarian Law*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 43 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

113. ASKIN, WAR CRIMES, *supra* note 3, at 49-95.

114. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 300-01.

115. In the advance on Germany, an estimated two million women were sexually abused by Russian troops with Stalin’s blessing that, “[t]he boys are entitled to their fun.” GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY, THE STRUGGLE FOR GLOBAL JUSTICE 306 (1999).

prosecuted during the trial, and can be considered subsumed within the IMT Judgment.¹¹⁶

The Nuremberg Tribunal recognized sexual violence as torture: “Many women and girls in their teens were separated from the rest of the internees . . . and locked in separate cells, where the unfortunate creatures were subjected to particularly outrageous forms of torture. They were raped, their breasts cut off.”¹¹⁷

[W]omen were subjected to the same treatment as men. To the physical pain, the sadism of the torturers added the moral anguish, especially mortifying for a woman or a young girl, of being stripped nude by torturers. Pregnancy did not save them from lashes. When brutality brought about a miscarriage, they were left without any care, exposed to all the hazards and complications of these criminal abortions.¹¹⁸

Later Nuremberg trials held by the Allied Forces under the auspices of Control Council Law No. 10 (CCL10),¹¹⁹ which listed rape as a crime against humanity,¹²⁰ still gave gender crimes only minimal attention, most often for sterilization, forced abortion, and sexual mutilation arising in the trial of prison camp medical doctors.¹²¹

The Tokyo Charter did not specifically list any sex crime. The Tokyo Indictment, however, did include raping of civilians as “inhumane treatment,” “mistreatment,” “ill-treatment,” and a “failure to respect family honour and rights.”¹²² Rape crimes, therefore, were expressly prosecuted, even though the extent was limited and they were grouped with other war crimes.¹²³ The IMTFE held General Iwane Matsui, Commander Shunroku Hata, and Foreign Minister Hirota criminally responsible for a number of crimes committed by their subordinates, including rape.¹²⁴ War crime trials in Jakarta found some Japanese defendants guilty of enforced prostitution for selling Dutch women into sexual servitude to the Japanese military.¹²⁵

116. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 301 n.67 (citing the official documents of the Nuremberg Trial).

117. *Id.* at 301.

118. *Id.*

119. *Id.*

120. *Id.* at 301-02.

121. See Goldenberg, *supra* note 9.

122. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 302 n.74.

123. *Id.* at 302.

124. THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 446-54 (B.V.A. Roling & C.F. Ruter eds., 1977).

125. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 302 n.77 (citing Trial of Washio Awochi, 13 L. REP. TRIAL WAR CRIMINALS 122-25 (1949)).

When the U.S. Military Commission tried General Tomoyuki Yamashita, for failing to exercise command control of his troops who committed atrocities in Manila, referred to as the “Rape of Manila”, it was for failing to prevent, halt, or punish the gender violence of his troops. Although Yamashita insisted that he did not know of the behavior of his men because there were communications breakdowns, he was busy with strategy-planning, and he had no direct notice, he was held criminally responsible, sentenced to death, and executed.¹²⁶

C. UPDATING HUMANITARIAN LAW FOR CONTEMPORARY PROTECTION AGAINST GENDER VIOLENCE

While women and girls have been subjected to often extreme sexual violence during wartime, even in the twenty-first century, the humanitarian documents regulating armed conflict either minimally incorporate, ignore, inappropriately characterize, or simply fail to mention these crimes. Because men did the drafting and enforcing of humanitarian law provisions, it primarily fell upon men to enumerate, condemn, and prosecute these crimes; they neglected to do so.¹²⁷

There have been enormous gender justice advancements with the international criminal law applicable to armed conflict through the International Criminal Court (ICC), and the jurisprudence of the Yugoslav and Rwandan Tribunals. Major leaps forward in just a little over the last decade have been fuelled by these three entities.¹²⁸ But because international humanitarian law governs the ways wars are fought, not just the liability of war criminals, existing international humanitarian law must be improved and implemented more fully to protect women from gender violence. The amenability of humanitarian law to fundamental change, however, has been criticized: “IHL has been largely impervious to any fundamental critique of the underlying causes for its inadequacies,” particularly with respect to its treatment of women.¹²⁹ There are a range of other actions which do not require

126. *In re Yamashita*, 327 U.S. 1, 5 (1946).

127. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 295; *see also* Christine M. Chinkin, *Peace and Force and International Law*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 212 (Dorinda G. Dallmeier ed., 1993). “Despite the far-reaching consequences of conflict upon women, their voices are silenced in all levels of decision-making about war. . . . The whole area of the use of force is the one from which women’s exclusion is most absolute.” *Id.*

128. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 289.

129. JUDITH G. GARDAM & MICHELLE J. JARVIS, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW* 5 (2001). Humanitarian law has often taken the brunt of criticism for non-enforcement of gender violence protections, but domestic systems and human rights law does not punish sexual violence adequately either. *See* Christine M. Chinkin, *Women: the Forgotten Victims of Armed Conflict?*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF*

modifying the Conventions which might be achievable to better protect women with humanitarian law: revising the commentaries to the Geneva Conventions and Additional Protocols; expanding information dissemination and training in international humanitarian law, including more women in decision-making on armed conflict related issues, acknowledging the impact of gender on decision-making, founding a center of expertise on gender issues and armed conflict; and, increasing the focus of the International Committee of the Red Cross on women.¹³⁰

A review is also needed of humanitarian law and its traditional notions of state's duties to protect, and battlefield war.¹³¹ Battlefields are no longer remote; they involve homes, schools, communities and women's bodies.¹³² The most dramatic current threats to women in war arise in internal conflict, against a backdrop of collapsed states or oppressive regimes, and involve a number of non-state actors over which state and international institutions may have little control,¹³³ or which the state uses as a buffer. "By the turn of the century no less than ninety-three percent of major violent conflicts" globally were being fought within states instead of between them.¹³⁴ A common feature of such conflicts is the widespread violation of humanitarian law.¹³⁵

But there is reason to hope in the considerable progress made in expanding the scope of wartime protection in the past dozen years. While the laws of warfare have, for centuries, both implicitly and explicitly prohibited rape of combatants and non-combatants, those prohibitions were enlarged by the Rome Statute and the Tribunals to include other forms of sexual violence, including sexual slavery, forced impregnation, forced maternity, forced abortion, forced sterilization, forced marriage, forced nudity, sexual molestation, sexual mutilation, sexual humiliation, and sex trafficking.¹³⁶ Beyond that broadening, the ICC and Tribunals also

INTERNATIONAL HUMANITARIAN LAW 23, 26 (Helen Durham & Timothy L.H. McCormack, eds. 1999); Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 294-98.

130. GARDAM & JARVIS, *supra* note 129, at 253.

131. Claude Bruderlein, *The End of Innocence: Humanitarian Protection in the Twenty-First Century*, in CIVILIANS IN WAR 221, 233 (Simon Chesterman ed., 2001).

132. Noelyn Heyzer, U.N. Dev. Fund for Women, Dag Hammarskjöld Lecture 2004, *Women, War and Peace: Mobilizing for Security and Justice in the Twenty-First Century* (Sept. 22, 2004).

133. *See* Bruderlein, *supra* note 131, at 222 (discussing the threats presented by internal conflicts to civilians). In 1998, of twenty-five ongoing armed conflicts, twenty-three were internal in nature. *Id.*

134. Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in POST-CONFLICT JUSTICE 55, 56 (M. Cherif Bassiouni ed., 2002).

135. *See* Heyzer, *supra* note 132.

136. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 305.

expanded principles of accountability, criminal liability and victim protection.

IV. PROGRESS IN GENDER VIOLENCE DEFINITION, DELINEATION AND ENFORCEMENT AT THE TRIBUNALS AND INTERNATIONAL CRIMINAL COURT

A. THE TRIBUNALS AND ICC: CREATED IN AN ERA OF GENDER VIOLENCE

Laws prohibiting wartime sexual violence languished largely ignored for centuries, and treaties and customary practices overwhelmingly failed to take women and girls, and crimes committed against them, into account.¹³⁷ The recent and rapid “progress in prosecuting various forms of gender-related crimes is unparalleled in history and has an established critical precedential authority for redressing these crimes in other fora and conflicts.”¹³⁸ It is not surprising they were born in an era of conflicts noted for gender violence.

As the result of findings of widespread and systematic rape, and “ethnic cleansing,” from a commission of experts established by the United Nations Security Council,¹³⁹ the International Criminal Tribunal for the former Yugoslavia (ICTY) was created with the mandate to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”¹⁴⁰ When violent genocide erupted in Rwanda the following year, the UN both appointed a special rapporteur for Rwanda and a commission of experts to investigate serious crimes committed during the armed conflict, including massive gender violence.¹⁴¹ In the hundred-day period when 600,000 or more people were slaughtered in Rwanda, “[r]ape was the rule and its absence the exception.”¹⁴² The International Criminal Tribunal for Rwanda (ICTR) was subsequently created, and both Tribunals were authorized to prosecute war crimes, crimes against humanity and genocide. The terms “rape” and “sexual violence” are included in Article 5 of the ICTY Statute

137. *Id.* at 289-90.

138. *Id.* at 288.

139. S.C. Res. 780, ¶¶ 36-37, U.N. Doc. S/780/1992 (Oct. 6, 1992).

140. S.C. Res. 827, ¶ 29, U.N. Doc. S/827/1993 (1993) [hereinafter ICTY Statute].

141. See Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 305 nn.94-95 (citing Human Rights Comm. Res. S-3/1.L, 3d.sp. Sess., U.N. Doc. E/Cn.4/S-3/1.L (1994); S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg. at 11-12, U.N. Doc. S/935/1994 (July 1, 1994)).

142. Special Rapporteur of the Comm’n on Human Rights, *Report on the Situation of Human Rights in Rwanda*, ¶ 16, U.N. Docs. E/CN.4/1996/68 (Jan. 29, 1996), available at <http://www.hrw.org/reports/1996/Rwanda.htm>.

and Article 3 of the ICTR Statute. Rape is most often prosecuted successfully as a crime against humanity, which is included in both provisions when it is committed in a widespread and systematic attack against a civilian population.¹⁴³

The International Criminal Court (ICC) with its jurisdiction over the most serious crimes of concern to the international community holds much promise for enforcement of humanitarian law principles. Criminal law prohibitions related to gender violence are “all the more remarkable given the relatively limited approach in the Rolling Text prior to the Rome Diplomatic Conference.”¹⁴⁴

Throughout both the Preparatory Committee negotiations and the subsequent Rome Conference, gender issues were contentious and the source of numerous debates.¹⁴⁵ Women’s organizations and their supporters established the Women’s Caucus for Gender Justice in the ICC to advance women’s issues and to ensure that the ICC Statute included provisions addressing gender violence concerns.¹⁴⁶ The Rome conference produced a final draft of the ICC Statute incorporating gender-based crimes in progressive and previously uncharted ways.¹⁴⁷ War crimes, crimes against humanity, genocide, and aggression are the general categories of crimes which fall under ICC jurisdiction, and include gender violence.¹⁴⁸

The ICTY, the ICTR, and the ICC, and the ways they have contemporaneously developed, created the perfect legal storm that spawned major changes in the definition, scope and enforcement of gender violence justice. A review of how the Tribunals have applied, interpreted, expanded and given life to the gender violence law in armed conflict follows. Also

143. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 360 (1999).

144. Timothy McCormack, *Crimes Against Humanity*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 179, 195 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004). He credits the Women’s Caucus, which he terms “the most successful single issue lobby group operating in Rome,” and says it was impossible to ignore its presence and effectiveness. *Id.*

145. Brook Sari Moshan, *Women, War and Words: The Gender Component and the Permanent International Criminal Court’s Definition of Crimes Against Humanity*, 22 *FORDHAM INT’L L.J.* 154, 175 (1998).

146. Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 *COLUM. HUMAN RIGHTS L. REV.* 401, 425 n.97 (1998). The women’s caucus was created in February 1997 and represented approximately three hundred NGOs. *Id.*

147. *See* Moshan, *supra* note 145, at 176-79 (discussing both victories and failure for women’s advocates).

148. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 26 (2d ed. 2004).

considered is the potential of the ICC's sexual offenses and victim-protective language and procedures.

B. PROGRESS IN DEFINING RAPE AND SEXUAL VIOLENCE

The Rome Statute did not define rape¹⁴⁹ and the landmark *Akayesu* Trial Chamber Judgment was the first of either Tribunal to do so.¹⁵⁰ The case involved Jean-Paul Akayesu, a *bourgmestre* (mayor-like official) of Taba commune in Rwanda who was indicted on twelve counts of genocide, crimes against humanity, and war crimes for the murder, extermination, torture, and cruel treatment committed at Taba. Amazingly, there were no charges in the indictment for gender-related crimes, even though both women's and human rights organizations had documented rape and other forms of sexual violence.¹⁵¹ It took unsolicited stories of sexual horror, and a woman judge, to put sexual violence directly before the Tribunal.¹⁵² During Akayesu's trial, a witness spontaneously testified about the details of a gang rape of her six-year-old daughter by three Interahamwe soldiers.¹⁵³ Other testimony followed by another witness who was both a victim and observer, of other rapes in the Taba community by members of the Hutu militia. Judge Navanethem Pillay of South Africa, a judge with extensive expertise in international human rights law and gender-related crimes, was on the bench. The compelling witness testimony supplemented by international pleas to include sexual violence in the charges against Akayesu, resulted in the trial being adjourned so that the Office of the Prosecutor could investigate charges of sexual violence and consider amending the indictment to include such charges if warranted.¹⁵⁴

The investigation revealed Tutsi women suffered horrific acts of sexual violence, mutilations, and rape, often repeatedly and publicly.¹⁵⁵ Many incidents occurred outside and near the bureau communal. Policemen armed with guns and the accused himself were present while some of these

149. *Id.* at 47.

150. Judge Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime & Punishment in the International Arena*, 25 NOVA L. REV. 463, 475 (2001).

151. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 318; Nowrojee, *supra* note 20; *Rwanda Report*, *supra* note 6.

152. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 318.

153. *Id.*

154. *Id.*; see *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 416 (Sept. 2, 1998); see also *Prosecutor v. Akayesu*, Amicus Brief Respecting the Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Sexual Violence within the Competence of the ICTR, May 1997 (prepared by Joanna Birenbaum, Lisa Wyndel, Rhonda Copelon & Jennifer Green).

155. *Akayesu*, Case No. ICTR-96-4, ¶ 706.

rapes and sexual violence were being committed.¹⁵⁶ The indictment was amended to charge Akayesu with rape and “other inhumane acts” as crimes against humanity and war crimes, cross-referencing the paragraphs alleging rape crimes with the genocide counts.¹⁵⁷

The Trial Chamber in *Akayesu* defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”¹⁵⁸ It said rape “is a form of aggression” and the elements of the crime “cannot be captured in a mechanical description of objects and body parts.”¹⁵⁹ The Trial Chamber expressly fashioned the definition of rape more broadly than national jurisdictions, to include “acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.” The Chamber, as an example, declared the “thrusting of a piece of wood into the sexual organs of a woman as she lay dying—constitutes rape in the Tribunal’s view.”¹⁶⁰ Sexual violence, a broader category than rape, was defined as “any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”¹⁶¹ The *Akayesu* definition of rape was subsequently addressed and adopted by the ICTY in the *Celebici* Trial Chamber Judgment.¹⁶² *Celebici*, however, is better known for its other features, since the ICTY chose another definitional path for rape.

The *Furundzija* Judgment builds upon the jurisprudence established by the Tribunals addressing sexual violence, but it found that the definitions of rape in the *Akayesu* and *Celebici* judgments suffered from a lack of specificity, and resorted to national legal systems to craft what the court considered a broader definition.¹⁶³ Its definition, based on its review, defined rape as: (i) [T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or

156. *Id.* ¶¶ 706-07.

157. *Id.* ¶ 708.

158. *Id.* ¶ 688.

159. *Id.*

160. *Id.* ¶ 686.

161. *Id.* ¶ 688.

162. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 479 (Feb. 20, 2001).

163. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 184 (Dec. 10, 1998); McDonald, *supra* note 150, at 477. Arguably, the added specificity and addition of body parts narrows the *Akayesu* definition.

a third person.¹⁶⁴ This definition adds sexual penetration of the mouth of the victim by the perpetrator's penis, which would generally be classified as sexual assault in many systems, and carry a lower penalty.¹⁶⁵ This newer definition, affirmed by the Appeals Chamber with the Trial Chamber's 1998 findings when Furundzija's appeal was denied, was more explicit than the prior definitions in the Tribunals, and, unequivocally, encompassed oral sexual acts.¹⁶⁶

The Trial Chamber of ICTY in the 2001 *Kunarac*¹⁶⁷ case, however, found the requirements of force or threat of force to be narrower in *Furundzija* than was required by international law.

In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundzija* definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.¹⁶⁸

An individual's sexual autonomy is violated "wherever the person subjected to the act has not freely agreed to it and is otherwise not a volunteer participant" the Chamber held.¹⁶⁹ The Trial Chamber also elaborated on a victim's inability to refuse sex from "an incapacity of an enduring or qualitative nature (e.g., mental or physical illness, or the age of minority) or of a temporary or circumstantial nature (e.g., being subjected to psychological pressure or otherwise in a state of inability to resist)."¹⁷⁰ The Tribunal also looked at surprise, fraud and misrepresentation as impacting an informed or recent refusal.¹⁷¹

The Chamber modified the elements of rape as articulated in *Furundzija* by removing the reference to "coercion or force or threat of force," and substituting the broader provision "where sexual penetration occurs without the consent of the victim."¹⁷² The Trial Chamber further interpreted the "defense" of consent to find where the victim is "subjected to or threatened with or has reason to fear violence, duress, detention or

164. *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 176-84.

165. *Id.* ¶ 174.

166. McDonald, *supra* note 150, at 478.

167. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment (Feb. 22, 2001).

168. *Furundzija*, Case No. IT-95-17/1-T, ¶ 438.

169. *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶ 427.

170. *Id.* ¶ 442.

171. *Id.* ¶ 452.

172. *Id.* ¶ 460.

psychological oppression” or “reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear”, apparent consent which might be given by the victim is not freely given, and will therefore be considered absent.¹⁷³

The Rome Statute of the ICC and its Elements of Crimes are the first international instruments to codify the elements of rape. They will likely have a profound effect on the interpretation and status of sexual crimes in both domestic and international tribunals. The Elements of Crimes set forth the criteria for finding the crime against humanity of rape under the Rome Statute:

(1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

(2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

(3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

(4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.¹⁷⁴

The elements for the war crime of rape can be found at Art. 8(2)(b)(xxii)-1 for international conflicts, and 8(2)(e)(vi)-1 for non-international conflicts. Paragraphs (1) and (2) are identical to rape as a crime against humanity, but the elements then vary because of the nature of the crime: (3) The conduct took place in the context of and was associated with an international [or non-international] armed conflict; and (4) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

173. *Id.* ¶ 464.

174. PREPARATORY COMM’N FOR INT’L CRIMINAL COURT, FINALIZED DRAFT TEXT OF THE ELEMENTS OF CRIMES, Addendum Part II, Art. 7(1)(g)-1, U.N. Doc. PCNICC/2000/1/Add. 2 (2000) [hereinafter ICC Elements of Crimes], available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement>.

Where the Rome Statute has the more mechanical nature of the ICTY definitions, it does insure the concept of invasion is gender neutral.¹⁷⁵

C. PROGRESS IN DELINEATING GENDER CRIMES

A dramatic example of enlarging crimes related to sexual violence is in the Rome Statute of the ICC. It specifically incorporates into crimes against humanity “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”¹⁷⁶ The “laws and customs of war” similarly develop the specifics of sexual crimes as essentially new law.¹⁷⁷ The enumerated offenses are identical except, instead of including “any other form of sexual violence of comparable gravity,” it substitutes “any other form of sexual violence also constituting a grave breach of the Geneva Conventions” for international conflicts or “any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions” for non-international conflicts.¹⁷⁸ The definitions of crimes against humanity and war crimes specifically address the prosecution of gender-based war crimes. Particular articles of the Statute including gender crime issues are Article 6 (defining genocide), Article 7 (defining crimes against humanity), and Article 8 (defining war crimes).

Many who supported the inclusion of specific gender crimes share the position that “the International Criminal Court is perhaps the most innovative and exciting development in international law since the creation of the United Nations,”¹⁷⁹ and that gender crimes needed to be prominently checklisted in the new Statute and integrated with other serious international crimes. For gender crimes the impact may have important far-reaching implications since most perpetrators will necessarily need to meet justice at a national level:

The influence of the Rome Statute will extend deep into domestic criminal law, enriching the jurisprudence of national courts and challenging prosecutors and judges to display greater zeal in the repression of serious violations of human rights. National courts have shown, in recent years, a growing enthusiasm for the use of international law materials in the applications of their own laws. A phenomenon of judicial globalisation is afoot. The Statute

175. SCHABAS, *supra* note 148, at 48.

176. *Id.* at 46-47; ICC Elements of Crimes, *supra* note 174, art. 7(1)(g).

177. SCHABAS, *supra* note 148, at 62-63; Rome Statute, *supra* note 76, art. 8(2)(b)(xxii).

178. Rome Statute, *supra* note 76, arts. 8(2)(b)(xxii), (e)(vi).

179. SCHABAS, *supra* note 148, at 25.

itself, and eventually the case law of the International Criminal Court, will no doubt contribute in this area.¹⁸⁰

The dark side to the detailed codification is the realistic concern of ICC authorities that the greater the detail in the provisions, the more loopholes for defense arguments.¹⁸¹ While promoters of the detail may have justifiably seen the extensive list as promoting visibility for gender crimes and serving as a reminder of their seriousness,¹⁸² the precise and complex provisions may be a narrowing of the potential scope of prosecutions by concerned states, cloaked in arguments about the need for precision in legal texts, and the sanctity of the principle of legality.¹⁸³ There is warranted concern that “the detailed terms of Article 8 may indirectly contribute to impunity in their inability to permit dynamic or evolutive interpretations. As the Appeals Chamber of the Yugoslav Tribunal recently recalled, citing Nuremberg, the laws of armed conflict “are not static, but by continual adaptation follow the needs of a changing world.”¹⁸⁴ Authorities contend that because definition tended to bring some crimes to the “lowest common denominator,” many of the Rome Statute provisions restrict current law.¹⁸⁵ Gender-related crime provisions which did not have parallels in earlier texts, and the criminalizing of atrocities in internal conflicts, however, were not deemed to be in that category.¹⁸⁶

With its power surpassing its potential pitfalls, however, the delineation of specific gender crimes may provide positive examples for enforcement and prosecution at both international and national jurisdictions. As the ICTY recognized in *Furundzija*, “the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.”¹⁸⁷

D. PROGRESS IN PROSECUTING GENDER VIOLENCE

The jurisdiction of the Yugoslav Tribunal includes grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide

180. *Id.* at 24.

181. *Id.* at 55.

182. Rhonda Copelon, *International Conference: Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 MCGILL L.J. 217, 234 (2000).

183. SCHABAS, *supra* note 148, at 55.

184. *Id.* (citing Prosecutor v. Kunarac, Case No. IT-96-23, Appeals Chamber Judgment, ¶ 67 (June 12, 2002)).

185. LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 267 (2002).

186. *Id.*

187. SCHABAS, *supra* note 148, at 24.

and crimes against humanity.¹⁸⁸ Because the conflict in Rwanda was internal in nature, the ICTR¹⁸⁹ had jurisdiction based on Common Article 3 of the Geneva Conventions and Additional Protocol II, which provide a minimum code of conduct for non-international conflicts. Through the prosecution of gender crimes, the Tribunals have particularly expanded and clarified notions of humanitarian law, crimes against humanity and genocide in some significant areas.

1. *Sexual Violence as a Campaign of Terror*

In a 1997 landmark case involving sexual violence, *Tadic*,¹⁹⁰ the ICTY held a low-level member of the Bosnian Serb forces operating in Prijedor at the notorious Omarska detention camp guilty for his participation, generally, in a widespread and systematic campaign of terror that included beatings, torture, sexual assaults, and other physical and psychological abuse of the most heinous nature. He was also found guilty for aiding and abetting the sexual mutilation of a male prisoner.¹⁹¹ Female victims would not testify against him out of fear, so male victims were the subjects of the case. Among the many precedent-setting features of the case were making rape and sexual violence constituent elements of a widespread campaign of terror, and not just a soldier's random outlet for sexual energy. It also clarified that the "widespread and systematic" requirement of crimes against humanity, meant just that rape must be part of a widespread campaign that might include many crimes, and that it was not necessary that the raping be widespread.¹⁹²

2. *Sexual Violence as Torture*

In the 1998 *Furundzija* case, the ICTY considered rape and sexual threat and coercion as torture generally, and underscored the importance of a single victim in violations of humanitarian law. *Furundzija* was a sub-commander of the Jokers, a special military police unit of the Croatian Defense Counsel with a frightening reputation.¹⁹³ A civilian Bosnian Muslim woman, Witness A, was arrested and taken for questioning to the Joker's headquarters where she was verbally interrogated by *Furundzija* while another sub-commander physically assaulted her. The interrogators

188. S.C. Res. 827, arts. 2-5, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

189. S.C. Res. 955, art. 4, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

190. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Trial Chamber Judgment (May 7, 1997).

191. *Id.* ¶ 45.

192. *Id.*; see also *Violence Against Women Report*, *supra* note 21, at 9.

193. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 184 (Dec. 10, 1998).

made her stand nude before them and another group of laughing soldiers. The second sub-commander repeatedly ran a knife up Witness A's inner thigh and threatened to stick it inside her and cut her sexual organs if she failed to cooperate.¹⁹⁴ Throughout the day, that sub-commander raped Witness A several times and in a variety of ways—orally, vaginally, and anally—sometimes in the presence of Furundzija and others. Another victim, Witness D, who knew Witness A, was beaten in the same room and forced to watch the rapes of Witness A.¹⁹⁵

Even though Furundzija did not commit the actual rape, he was charged with torture and “outrages upon personal dignity, including rape.”¹⁹⁶ It was determined that his behavior and presence, in facilitating, encouraging, and tacitly approving the sexually assaultive behavior, met the “objective elements of rape.”¹⁹⁷ The sexual crimes were attributable to Furundzija because the other sub-commander had committed the rapes as part of the interrogation process in which Furundzija participated.¹⁹⁸

The Trial Chamber adopted the Torture Convention definition of torture with its “state actor” requirement. It explained that multiple persons may be involved in the torture process and being part of the process may create liability. The Trial Chamber explained it was common “to ‘compartmentalize’ and ‘dilute’ the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process.”¹⁹⁹ In that scenario, the Chamber said all the persons would be equally accountable.²⁰⁰

The Trial Chamber added to the list of prohibited purposes behind the Torture Convention's definitions of torture saying “among the possible purposes of torture, one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity.”²⁰¹ Part of the purpose in raping Witness A was clearly to “degrade and humiliate her.”²⁰²

194. *Id.* ¶ 72.

195. *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 124-30.

196. *Id.*; Prosecutor v. *Furundzija*, Case No. IT-95-17/1-PT, Indictment, Amended-Redacted (June 2, 1998).

197. *Furundzija*, Case No. IT-95-17/1-T, ¶ 185.

198. *Id.* ¶ 270.

199. *Id.* ¶ 253.

200. *Id.* ¶¶ 254, 257.

201. *Id.* ¶162.

202. *Id.* ¶¶ 124, 130.

That Witness A was raped with both soldiers and Witness D in proximity could have been an aggravating factor to the torture.²⁰³ Likewise, Witness D, who was beaten and interrogated while Witness A was being raped in the same room, was also found to have been tortured by the rape. He was victimized because he was required to watch sexual attacks on a woman, and, particularly, a friend.²⁰⁴

“Outrages upon personal dignity including rape” were also charged, and the Trial Chamber found Witness A “suffered severe physical and mental pain, along with public humiliation, at the hands of Accused B (the other sub-commander) and what amounted to outrages upon her personal dignity and sexual integrity.” The Trial Chamber found Furundzija’s “presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him.”²⁰⁵ The Appeals Chamber upheld the imposed ten-year sentence for torture, and eight years imprisonment for outrages upon personal dignity.²⁰⁶

In the *Celebici* case, the ICTY adopted the elements of torture contained in the Convention against Torture,²⁰⁷ applying them to sexual abuse.²⁰⁸ The main case involves the Celebici detention camps. There, Serbs were confined after Bosnian Muslims and Bosnian Croats attacked Konjic, an area claimed by both the Serbs (as Konjic Municipality) and by the Croatian Democratic Union (as the Croatian Community of Herceg-Bosna). In the prison camp, prisoners were “killed, tortured, sexually assaulted, beaten, and otherwise subjected to cruel and inhuman treatment.”²⁰⁹

Charges of the four accused included war crimes as grave breaches of the 1949 Geneva Conventions under Article 2 of the ITCY Statute, or as violations of the laws or customs of war for violations of Common Article 3 of the Geneva Conventions under Article 3 of the ICTY Statute. Prime perpetrators of the sexual violence were Zdravko Mucic and Hazim Delic. Mucic was acting commander of the camp and Delic worked there. They were charged with individual responsibility and command responsibility for failing to prevent, halt, or punish crimes committed by subordinates.²¹⁰

203. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 330.

204. *Furundzija*, Case No. IT-95-17/1-T, ¶ 267.

205. *Id.* ¶ 273.

206. *Id.* ¶ 295.

207. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2(2), S. Treaty, Doc. No. 100-20, 1465 U.N.T.S. 85, 114 (*entered into force* June 26, 1987) [hereinafter *Convention Against Torture*].

208. *Prosecutor v. Delalic*, Case No. IT-96-21-I, Indictment, ¶ 2 (Mar. 19, 1996) [hereinafter the *Celebici* Indictment].

209. *Id.*

210. *Id.* ¶¶ 7-8.

Another person charged was Esad Landzo, a guard, and the fourth, Zejnil Delalic, who had alleged authority over the camp, was ultimately acquitted.

One of Delic's victims "was raped by three different persons in one night and on another occasion she was raped in front of other persons."²¹¹ His other victim, Witness A, "was subject to repeated incidents of forcible anal and vaginal intercourse . . . Hazim Delic raped Witness A during her first interrogation and continued to rape her every few days over a six week period thereafter."²¹² Delic's individual responsibility for the rape of both victims was charged by the prosecutor. The Trial Chamber clearly found that sexual violence or rape can be torture if it meets the elements of the offense.²¹³ The Trial Chamber considered rape to be a despicable act which strikes at the very core of human dignity and physical integrity, causing severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long-lasting, it held.²¹⁴

Since Delic raped one victim to obtain information on the whereabouts of her husband, and subsequently to brutally punish her for not providing information, to punish her vicariously for the acts of her husband, or to coerce or intimidate her, the Trial Chamber found there had been discrimination on the basis of sex because the violence was inflicted on her because she was a woman, a prohibited purpose for the offense of torture.²¹⁵ Delic intended "intimidating not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness."²¹⁶ The Trial Chamber determined that Delic repeatedly raped Witness A specifically for the purposes of intimidating, coercing, and punishing, and determined that these rapes caused severe mental and physical pain and suffering.

The ICC Elements of Crimes set out comparable elements of the war crime of torture for international and non-international conflicts at Articles 8(2)(a)(ii)-1 and 8(2)(c)(i)-4, and torture as a crime against humanity requiring a widespread or systematic attack at Article 7(1)(f).

211. Prosecutor v. Delalic, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 14 (Feb. 20, 2001).

212. *Id.* ¶ 394.

213. *Id.* ¶¶ 480, 496.

214. *Id.*

215. *Id.*

216. *Id.*

3. *Rape as Sexual Enslavement*

Greatly contributing to the law of sexual slavery, the 2001 *Kunarac*²¹⁷ case was the first conviction of rape as a crime against humanity in the Yugoslav Tribunal and first ever conviction of an accused for enslavement involving rape. Besides those milestones, the case articulated the elements of rape and torture under international law, and made extensive holdings regarding the indicia of enslavement.²¹⁸ Also referred to as the *Foca* trial with its earlier version, *Gagovic et al.*, it has been applauded for making it clear that resistance per se, or non-consent, or even physical force are not required in order to find the crime of rape.²¹⁹

Although eight men were accused of various forms of sexual violence, only three were in the custody of the Tribunal: Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic. Kovac and Vukovic were Bosnian Serb military members of a unit which had taken over the municipality of Foca in 1992.²²⁰ Kunarac lead a special reconnaissance unit of the Bosnian Serb army. In Foca, the Serbs separated Muslim and Croatian men from the women and children and isolated the women and children in gymnasiums and schools. The Serb forces then systematically raped, gang-raped and publicly raped many of the women and young girls. Some of the females were taken out of the facilities to be raped and then returned. Others were held at other sites for easy sexual access by their captors on a long term basis.²²¹

Kunarac and Kovac held women in their apartment, where they were required to provide household and sexual services on demand. Kunarac insisted he thought one of the women he imprisoned in his apartment consented to a sexual relationship with him. She initiated sexual activity with Kunarac because she had been threatened by another military person, “Gaga,” that he would kill her if she did not satisfy the desires of his commander, Kunarac.²²² The Trial Chamber was not impressed by Kunarac’s

217. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment (Feb. 22, 2001).

218. Askin, *Prosecuting Wartime Rape, supra* note 78, at 333. See generally Christopher Scott Maravilla, *Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia’s Decision in Prosecutor v. Kunarac, Kovac, & Vukovic on International Humanitarian Law*, 13 FLA. J. INT’L L. 321 (2001).

219. Dorean Marguerite Koenig, *Two Transformations of Sexual Assault—The First in Domestic Law and the Second in the United Nations International Criminal Courts for Yugoslavia and Rwanda and the ICC Treaty*, 50 WAYNE L. REV. 185, 198 (2004).

220. *Kunarac*, Case No. IT-96-23-T, ¶¶ 49, 51, 52.

221. Askin, *Prosecuting Wartime Rape, supra* note 78, at 333 & n.242 (citing Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Amended Indictment (Dec. 1, 1999, Mar. 3, 2000)).

222. *Kunarac*, Case No. IT-96-23-T, ¶¶ 644-45.

claim of mistaken fact, finding it unrealistic that Kunarac could have believed there was consent in light of the woman being detained by hostile forces during an ongoing war.²²³

The Trial Chamber did not find compelling that women being held in Kunarac's apartment could have escaped on occasions when they found the door open. It determined that physical barriers were rendered irrelevant where psychological or logistical barriers were present.²²⁴ The judgment is clear that neither physical restraint nor detention is a required element of enslavement, but other factors such as fear of retribution or the dangers of escape, or psychological barriers are sufficient for enslavement.²²⁵

Kunarac was convicted of both rape and enslavement as crimes against humanity, the Trial Chamber finding:

FWS-191 was raped by Dragoljub Kunarac and. . . FWS-186 was raped by DP6, continuously and constantly whilst they were kept in the house. . . FWS-191 and FWS-186 were denied any control over their lives. . . . They had to obey all orders, they had to do household chores, and they had no realistic option whatsoever to flee. . . . They were subjected to other mistreatments, such as Kunarac inviting a soldier into the house so that he could rape FWS-191 for [a hundred] Deutschmark if he so wished. On another occasion, Kunarac tried to rape FWS-191 while in his hospital bed, in front of other soldiers. The two women were treated as the personal property of Kunarac and DP6.²²⁶

Kovac locked two women up in his apartment for about four months, psychologically imprisoning them also, and making them cook for him, serve him, and do the household chores for him. He subjected them to degrading treatment, beating, and humiliation. He demonstrated possession, had complete control over their fate, and treated them as his property.²²⁷ Kovac also disposed of his enslaved women. One young girl of twelve was traded to a soldier for a box of cleaning powder and never seen again.²²⁸

Importantly, the Trial Chamber found that free will or consent is vitiated or irrelevant when certain conditions are present: "The threat or use of force or other forms of coercion; the fear of violence, deception or false

223. *Id.* ¶ 646.

224. *Id.* ¶ 740.

225. *Id.* ¶ 750.

226. *Id.* ¶¶ 741-42.

227. *Id.* ¶¶ 780-81.

228. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 340.

promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socioeconomic conditions."²²⁹ This case found indicia of enslavement while finding two of the accused guilty of rape and enslavement as crimes against humanity for slavery of a sexual nature.²³⁰ The Appeals Chamber upheld the Trial Chamber's holding concerning rape, torture and enslavement.²³¹

Kovac was also convicted of outrages upon personal dignity for making women and girls dance nude on a table while he, and occasionally other soldiers, watched them for entertainment. The Trial Chamber found:

[Kovac] certainly knew that, having to stand naked on a table, while the accused watched them, was a painful and humiliating experience for the three women involved, even more so because of their young age. The Trial Chamber is satisfied that Kovac must have been aware of that fact, but he nevertheless ordered them to gratify him by dancing naked for him. The Statute does not require that the perpetrator must intend to humiliate his victim, that is that he perpetrated the act for that very reason. It is sufficient that he knew that his act or omission could have that effect.²³²

In the ICC, the crime against humanity of sexual slavery is in Article 7(1)(g). War crime prohibitions of sexual slavery can be found at Article 8(2)(b)(xxii) for international conflicts and 2(e)(vi) for non-international conflicts. The coordinating ICC Elements of Crimes provisions are at Article 7(1)(g)-2, Article 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2.

4. *Rape as Genocide*

Article 4 of the ICTY Statute and Article 2 of the Rwandan Tribunal Statute make acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and complicity in genocide, punishable as acts of genocide. The Statutes mirror the Genocide Convention's definition:

[A]ny one of the following acts, [when] committed with [an] intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life

229. *Kunarac*, Case No. IT-96-23-T, ¶ 542.

230. *Id.* ¶ 540.

231. *Prosecutor v. Kunarac*, Judgment, IT-96-23 & IT-96-23/1 (June 12, 2002).

232. *Kunarac*, Case No. IT-96-23-T, ¶¶ 773-74.

calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.²³³

In Rwanda “between April 7 and mid-July 1994,” some 600,000 to “700,000 men, women and children were systematically slaughtered and hundreds of thousands of others were tortured, raped, sexually enslaved and otherwise abused” after “Hutu leaders incited militia and the Hutu public to hunt down and quash their Tutsi neighbors and Tutsi sympathizers, [culminating] in the swiftest raping and killing spree in recorded history.”²³⁴ It is not surprising, in light of such atrocity, that *Akayesu* presented the first ever conviction for sexual violence based on genocide.

The *Akayesu* judgment recognized sexual violence as causing “extensive harm and that it is intentionally used during periods of mass violence to subjugate and devastate a collective enemy group.”²³⁵ The decision found rape part of the genocidal regime carried out by Hutus, “an integral part of the process of destruction.”²³⁶ “Sexual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself.”²³⁷ The Tribunal noted the collective nature in targeting of the broader group.

While there were no allegations that Akayesu himself committed rape crimes, the Trial Chamber held him accountable for sexual violence for his role in ordering, instigating, or aiding and abetting the rapes, forced public nudity, and sexual mutilation, facilitating the commission of the crimes.²³⁸ The ICTR held, “by virtue of his authority,” Akayesu “sent a clear signal of official tolerance for [the] sexual violence” perpetrated on Tutsi women at Taba.²³⁹ The Tribunal found “a widespread and systematic attack against the civilian ethnic population of Tutsis” and convicted Akayesu of individual responsibility for the sex crimes.²⁴⁰ He was found guilty of genocide

233. Convention on the Prevention and Punishment of the Crimes of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

234. Kelly D. Askin, *A Decade in Human Rights Law: A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993-2003*, 11 HUMAN RIGHTS BR. 16 (2004).

235. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 320.

236. Prosecutor v. Akayesu, Case No. ICTR-96-4, Trial Chamber Judgment, ¶ 731 (Sept. 2, 1998).

237. *Id.* ¶ 732.

238. *Id.* ¶¶ 692-94.

239. See Prosecutor v. Krstic, Case No. IT-98-33, Appeals Chamber Judgment, ¶¶ 134-43 (Apr. 19, 2004) (discussing specific intent and aiding and abetting genocide).

240. *Akayesu*, Case No. ICTR-96-4, ¶¶ 693-95.

(and crimes against humanity of extermination, murder, torture, rape, and other inhumane acts) and sentenced to life imprisonment.²⁴¹

In the Rome Statute of the ICC, genocide is prohibited by Article 6. The Elements of Crimes include an Introduction in Article 6 and five substantive sections, 6(a)-(e). Genocidal gender offenses could fall within genocide by killing, 6(a); genocide by causing serious bodily or mental harm, 6(b); genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, 6(c); or genocide by imposing measures intended to prevent births, 6(d). Article 6(b) of the Elements of Crimes includes a specific footnote reference to rape as an example of serious bodily or mental harm.²⁴²

5. *Command Responsibility for Gender Violence*

The ability to hold military superiors responsible for the sexually violent actions of their men is particularly important in eliminating the encouragement, acceptance, or tacit approval which has historically resulted in widespread rape in war. The *Celebici* decision importantly clarifies command responsibility for sexual crimes. In determining whether superiors could be criminally responsible for unlawful sexual assaults and other conduct of their subordinates, the Trial Chamber found that was a “well-established norm” of international customary and conventional law.²⁴³ Essential elements are: the existence of a superior-subordinate relationship; the superior knew or had reason to know that the criminal act was about to be or had been committed; and the superior failed to take the necessary and reasonable measure to prevent the criminal act or punish the perpetrator thereof.²⁴⁴

There must be “effective control” over subordinates committing the crime, “in the sense of having the material ability to prevent and punish the commission” of such crimes.²⁴⁵ Knowledge cannot be presumed, but it can be inferred from “the number, type, or scope of the illegal act; the length of time; the logistics, number, type, or rank of troops or officers involved; the geographical location or widespread occurrence of the illegal act; the location of the commander; the [tactical] operations; and the modus operandi of similar acts.”²⁴⁶ The Trial Chamber found that “reason to know” for

241. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Sentence, T2, ¶ 2 (Oct. 1998).

242. ICC Elements of Crimes, *supra* note 174, art. 6(b), ¶ 1, n.3.

243. Prosecutor v. Delalic, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 333 (Feb. 20, 2001).

244. *Id.* ¶ 346.

245. *Id.* ¶ 378.

246. Askin, *Prosecuting Wartime Rape*, *supra* note 78, 326.

command responsibility was satisfied if information “indicated the need for additional investigation in order to ascertain whether offenses were being committed or about to be committed” and “information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes.”²⁴⁷ The Trial Chamber cautioned, however, “law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers.”²⁴⁸ The *Celebici* case is particularly valuable for the articulation of superior responsibility for subordinates who perpetrate sexual violence generally, and in detention settings.

6. *Sexual Violence as Joint Criminal Enterprise*

The ICTY also expanded notions of joint responsibility for gender violence. The *Kvočka*²⁴⁹ case is one such example. For three months in 1992, Bosnian Serbs in Prijedor imprisoned over 3000 men and approximately 36 women in Omarska Camp. Its conditions were vile, and mistreatment was pervasive. The Trial Chamber found that “female detainees were subjected to various forms of sexual violence.”²⁵⁰

In referring to sexual violence, the Chamber pointed out that the term covers a broad continuum of crimes such as rape, molestation, sexual slavery, sexual mutilation, forced marriage, forced abortion, enforced prostitution, forced pregnancy, and forced sterilization.²⁵¹ Five accused who either worked in, or visited often, the Omarska prison camp, were charged with sexual violence as persecution. Only one of the five, Mlado Radic, was charged with physically committing the sexual violence. The case developed the common purpose doctrine/joint criminal enterprise theory from the *Tadic* Appeals Chamber Judgment. The Trial Chamber set out when a joint criminal enterprise may exist, and found it could be for the purposes of rape or forced impregnation.²⁵² It also held joint criminal enterprise liability could possibly be incurred by knowingly working in the criminal environment of Omarska. Sexual violence was not only foreseeable, but inevitable at Omarska: “[I]n Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were

247. *Delalic*, Case No. IT-96-21-T, ¶ 393.

248. *Id.* ¶ 395.

249. *Prosecutor v. Kvočka*, Case No. IT-98-30-T2, Trial Chamber Judgment (Nov. 2, 2001).

250. *Id.* ¶ 108.

251. *Id.* ¶ 180 & n.343.

252. *Id.* ¶ 307.

often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity.”²⁵³

The Trial Chamber found Radic guilty of rape and torture but the judgment is perhaps most significant for its joint criminal enterprise findings, particularly in light of the Tribunal’s mission to reach those of highest responsibility, and the difficulty of otherwise holding perpetrators responsible for individually committed rapes. The decision can be interpreted as imposing a burden on those detaining females to ensure that adequate protections are devised to prevent sexual abuse, and to monitor the facilities to guarantee compliance with the preventive measures.²⁵⁴

E. PROGRESS IN PROCEDURAL PROTECTION FOR GENDER VIOLENCE VICTIMS

1. *Victim Protection at the Yugoslav Tribunal*

The Yugoslav Tribunal, in part because of the nature and savagery of gender violence in the underlying conflict, developed groundbreaking protective rules of evidence and procedure, particularly: Rule 69, Protection of Victims and Witnesses; Rule 75, Measures for the Protection of Victims and Witnesses; and Rule 96, Evidence in Cases of Sexual Assault.²⁵⁵ The Tribunal was the international spearhead in judicial struggles to balance the rights of victims with the right of the accused to a fair trial.²⁵⁶

Rule 69 allows a Judge or Trial Chamber to order the non-disclosure of the identity of a victim at risk in pre-trial proceedings, until such person is brought under the protection of the Tribunal. It has a proviso, that however, “the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.”²⁵⁷

253. *Id.* ¶ 327.

254. *Id.*

255. International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), *entered into force* 14 March 1994, *amendments adopted* 8 Jan. 1996 [hereinafter ICTY Rules of Procedure and Evidence]. Rule 69 was last amended in 2001, Rule 75 in 2002.

256. See Vincent M. Creta, Comment, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 Hous. J. Int’l L 381 (1998); Alex C. Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal for the Former Yugoslavia: Balancing Witnesses’ Needs Against Defendants’ Rights*, 46 HASTINGS L.J. 909, 912-15 (1995); Kathleen M. Pratt & Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN’S L.J. 77, 82-86 (1994); Anne M. Hoefgen, Comment, “There Will Be No Justice Unless Women are Part of the Justice,”: *Rape in Bosnia, the ICTY and “Gender Sensitive” Prosecution*, 14 WIS. WOMEN’S L.J. 155 (1999).

257. ICTY Rules of Procedure and Evidence, *supra* note 255, Rule 69 (A), (C).

Rule 75 allows measures for victim privacy and protection “provided that the measures are consistent with the rights of the accused.”²⁵⁸ Measures may include in camera proceedings to determine whether to prevent public disclosure of a victim’s identity or whereabouts; expunge identifying information, put testimony through voice distortion, assign a pseudonym, hold closed sessions, or use one-directional closed circuit television.²⁵⁹

Rule 96 has been termed one of the most progressive rules in the history of gender jurisprudence by Kelly Askin, a noted authority on gender violence. According to Askin, “without the protective language of Rule 96, a defense attorney could demoralize and devastate such a survivor on the stand,” since many gender violence cases involve acquiescence to the rape or assault for survival.²⁶⁰ The Rule provides that in cases of sexual assault:

- (i) no corroboration of the victim’s testimony shall be required;
- (ii) consent shall not be allowed as a defence if the victim
 - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

(Amended 3 May 1995)

- (iii) before evidence of the victim’s consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;

(Revised 30 Jan 1995)

- (iv) prior sexual conduct of the victim shall not be admitted in evidence.²⁶¹

These ICTY procedural protections, and its Rule 34 Witness and Victims Unit which requires the Registry to provide counselling and support for sexual assault survivors and witnesses, were precursors to the more extensive protections at the ICC.

258. *Id.* Rule 75 (A).

259. *Id.* Rule 75 (B).

260. Askin, WAR CRIMES AGAINST WOMEN, *supra* note 3, at 304; *see also* Chinkin, *supra* note 129, at 31-32.

261. ICTY Rules of Procedure and Evidence, *supra* note 255, Rule 96.

2. *Victim Protections at the ICC*

If the situation in Darfur results in the ICC charging individuals with war crimes or crimes against humanity involving gender violence, Darfur victims will find ICC procedures have been developed for their protection. The Prosecutor has acknowledged both the challenges of, and his commitment to victim protections in the ongoing Darfur investigation.²⁶²

Following the models of the ICTY and the ICTR, and reflecting their practical experience in an important way, the Rome Statute evinces a much greater concern for the problems unique to victims and witnesses than any of its predecessor instruments,²⁶³ and attempts to accommodate the special needs of gender violence victims. It mandates the creation of a Victims and Witnesses Unit to provide protective measures, security arrangements, counselling, and other appropriate assistance for witnesses, victims, and others at risk on account of witness testimony.²⁶⁴ The Unit, within The Registry, provides in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the court, and others who are at risk on account of testimony given by such witnesses.²⁶⁵ The Unit staff is to include individuals with expertise in trauma, including trauma related to sexual violence.²⁶⁶ Regulations of the Registry, published April 19, 2006, propose specifics and procedures for victim protections.²⁶⁷

Procedural safeguards mandate gender sensitivity during the investigation and prosecution of sexual violence.²⁶⁸ Article 54 both requires and permits the Prosecutor to take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the court, and in doing so respect the interests and personal circumstances of victims and witnesses. The Prosecutor must respect age, gender and health, and

262. REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, MR. LUIS MORENO OCAMPO TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1593, at 5 (2005) [hereinafter REPORT OF THE PROSECUTOR], available at http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf.

263. SADAT, *supra* note 185, at 84.

264. Rome Statute, *supra* note 76, art. 43(6); PREPARATORY COMM'N FOR INT'L CRIMINAL CT., FINALIZED DRAFT OF THE RULES OF PROCEDURE AND EVIDENCE, Rules 16-18, PCNICC/2001/Add.1 (2000) [hereinafter ICC Rules of Procedure and Evidence].

265. SADAT, *supra* note 185, at 84.

266. Rome Statute, *supra* note 76, art. 43(6); ICC Rules of Procedure and Evidence, *supra* note 255, Rules 16-19.

267. Regulations of the Registry, Chapter 3, Responsibilities of the Registrar Relating to Victims and Witnesses, 54-70, ICC-BD/03-01-06 (Mar. 6, 2006), available at http://www.icc-cpi.int/library/about/officialjournal/ICC-BD_03-01-06_English.pdf.

268. *Id.* at 84-85; Ruth B. Philips, *Too Close to Home? International Criminal Law, War Crimes and Family Violence*, 24 T. JEFFERSON L. REV. 229, 232 (2002).

take into account the nature of the crime, particularly where it involves sexual violence, gender violence or violence against children.²⁶⁹ He or she may take necessary measures, or require that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.²⁷⁰ The court and the Prosecutor shall both take protective measures for the physical and psychological well being, dignity and privacy of victims and witnesses—the Prosecutor particularly during the investigation and prosecution stages.²⁷¹

The Trial Chambers shall ensure that a trial is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.²⁷² Article 68 mirrors language of Article 54 in directing the court to have regard for all relevant factors, including age, gender and health, and the nature of the crime. Article 68 is also of importance in establishing protective measures, security arrangements, counselling and assistance through the Victims and Witnesses Unit.²⁷³

The court can take various protective measures needed to ensure the safety and personal interests of victims. Article 68(2) provides for in camera hearings in the case of sexual violence, and Article 68(5) dictates when the disclosure of evidence may be withheld where there is grave endangerment to the security of a witness or their family.

In camera proceedings or presentation of evidence by electronic or other special means shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the court.²⁷⁴ The Prosecutor shall also appoint advisors with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.²⁷⁵

Article 75 provides for reparations to victims. The court is directed to establish principles relating to reparations, “including restitution, compensation and rehabilitation”²⁷⁶ and is given considerable flexibility in making awards.

While there was debate about the role of victims at the ICC, it followed the trend toward restorative justice, and recognized a growing emphasis on

269. Rome Statute, *supra* note 76, art. 54, ¶ 1.

270. *Id.* art. 54, ¶ 3(f).

271. *Id.* art. 68(1).

272. *Id.* art. 64, ¶ 2.

273. *Id.* art. 68, ¶ 4.

274. *Id.* art. 68(2).

275. *Id.* art. 42, ¶ 9.

276. *Id.* art. 75, ¶ 1.

the importance of victims in international human rights law.²⁷⁷ In a general principle, as part of the ICC rules, the Preparatory group directed:

A Chamber in making any direction or order, or other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular children, elderly persons, persons with disabilities and victims of sexual or gender violence.²⁷⁸

Victims may also participate in the court proceedings. They may intervene before the Pre-Trial Chamber when the Prosecutor is seeking authorization to proceed with an investigation at his or her own initiative.²⁷⁹ At the trial stage, victims can intervene when their interests are affected, and their views and concerns may be presented at any stage as long as it is not prejudicial to, or inconsistent with, the rights of the accused to a fair and impartial trial.²⁸⁰ Legal representatives can also present their views and concerns.²⁸¹ Victims, of course, can testify during the trial, but also may provide testimony subsequent to a guilty plea where the Trial Chamber feels it is in the interest of the victims to have the Prosecutor present additional evidence.²⁸²

Victims of gender violence will also find a significant number of female judges on the court. Article 36(8)(a) requires that States Parties shall, in the selection of judges, take into account the need, within the membership of the court, for a fair representation of female and male judges, and the legal expertise of those judges on specific issues, including violence against women.²⁸³ Women judges have added a critically important dimension to the Yugoslav and Rwanda Tribunals, and may impart equally valuable gender-grounded perspectives at the ICC. It has been said that who interprets the law is at least as important as who makes the law.²⁸⁴ Finally, the application and interpretation of law must be

277. SCHABAS, *supra* note 148, at 172.

278. Rome Statute, *supra* note 76; ICC Rules of Procedure and Evidence, *supra* note 255, Rule 86.

279. Rome Statute, *supra* note 76, art. 15(3).

280. *Id.* art. 68(3).

281. *Id.*

282. *Id.* art. 65(1)(c)(iii) and 4(a).

283. *Id.* art. 36(8)(a)(iii) and 8(b). On the current Court, seven judges are female, and eleven are male.

284. Philips, *supra* note 268, at 231 n.11 (citing Judge Navanethem Pillay, *Gender-Based Persecution, Expert Paper*, United Nations Expert Group Meeting on Gender-Based Persecution, at 6, U.N. Doc. EGN/GBP/1997/EP.2 (1997) (“[W]ho interprets the law is at least as important as who makes the law, if not more so. . . . I cannot stress how critical I consider it to be that women

consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender.²⁸⁵

The Rome Statute has been referred to as “perhaps the most comprehensive example of the ‘mainstreaming’ of women’s human rights discourse, with watershed provisions that define multiple forms of sexual violence and mandate gender-sensitive investigation and prosecution of this violence.”²⁸⁶ Those accomplishments, however significant and important, do not in themselves bring gender violence justice.

Although the female-friendly provisions included in the formation of the ICC are necessary and appreciated, they are not the great leap that some women’s organizations claim. Women’s groups and the international community still have much to do to protect women against violence and to punish the perpetrators of this violence, especially wartime rape.²⁸⁷

A number have already expressed their concern and disappointments with the gap between the promise of the court and its reality.²⁸⁸

F. CONTINUED ISSUES OF CONCERN

The Tribunal Judgments, the Rome Statute’s attention to gender violence crimes, and the evolution of victim-sensitive protections and procedures in the Tribunals and the ICC have greatly advanced the access of women victimized by gender violence to legal justice. The Rome Statute has incorporated the successes and experiences of the Tribunals to improve the law and potential prosecution of gender violence crimes. While advancements in the law have been remarkable, there are still a number of problem issues—some generic, some practical and some technical.

It has been said that “progress in carrying out investigations and creating systems to protect victims and witnesses has not been commensurate with the requirements of timely justice, thus resulting in few guilty

are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary.”)).

285. Rome Statute, *supra* note 76, art. 21, ¶ 3.

286. Philips, *supra* note 268, at 231.

287. Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Code*, 16 BYU J. PUB. L. 317, 319 (2002).

288. *E.g.*, Gender Justice Team of the Coalition for the Int’l Criminal Ct., Recommendations to the Fifth Session of the Assembly of States Parties from 23 to 25 November and 27 November to 1 December 2006 6, 13 (Nov. 26, 2006), available at <http://www.iccnw.org/documents>; Women’s Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2006*, available at <http://www.iccwomen.org/publications/resources/docs>.

verdicts.”²⁸⁹ Rape and sexual assault case investigations are difficult under the best of conditions but in global conflict that is magnified and the problems are practical and numerous:

[T]he dispersal of victims and witnesses across all regions of the world; the unwillingness of women to speak of crimes committed against them through humiliation, shame, fear of public or family ostracism or fear of reprisal; the intervention of too many people wanting accounts of their experiences, including the media, NGOs, support agencies, etc., and eventually, official investigators; the passage of time and the desire not to relive such atrocities; and the feeling that rape and sexual assault were not in fact of major concern compared with the loss of community, home and possessions and the death or disappearance of family members.²⁹⁰

Even under the best of conditions, only a very small number of those who perpetrated thousands of rapes and countless instances of gender violence in contemporary conflicts, are likely to be tried,²⁹¹ perpetuating impunity. That impunity gives rise to related issues. Particularly, women may fear coming forward under any international circumstances since local protections are not in place and most of the perpetrators will never be prosecuted. Raped women know all too well the unavailability, unwillingness, or inadequacy of government security systems to protect them, even if there are laws which are clearly adequate. Post-conflict law enforcement and justice systems may remain male-dominated and infiltrated with the perpetrators of military sexual violence. Especially in refugee camps and small villages, women are highly visible and vulnerable, making it simply too risky to cooperate. Survival may dictate that silence is preferable to justice.

Protecting international victims is also difficult and expensive, and cannot be accomplished without the allocation of funding and assistance of trained personnel. It is simply too early to tell if the improvements in international law and procedural protections will be properly funded and implemented for violence victims. Vigilance and scrutiny is critical in the

289. The Secretary-General, *Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* 17, U.N. Doc S/2004/616 (Aug. 23, 2004) (citing Human Rights Watch) [hereinafter *Transitional Justice Report*].

290. Christine Chinkin, *Amicus Curiae Brief on Protective Measures of Victims and Witnesses*, 7 CRIMINAL LAW FORUM 179, 185 (1996).

291. Kritz, *supra* note 134, at 83. The small number of convictions at the international level presents enormous barriers to gender violence justice in countries with inadequate justice systems, since most perpetrators of sexual violence will need to be dealt with domestically, but there are ways the ICC and international community can help address those issues that will be considered in later sections. *Id.*

early stages of the ICC, both for its proper development and integrity, and for the benefit of other systems which look to the court as a model.

Then there are problems with even getting the accused before the court. While the ICC improves substantially on the two ad hoc Tribunals in many ways, in others it will do no better, and may not even equal the operations of the Tribunals.²⁹² For one thing, neither the Judges nor the Prosecutor has the power to compel witnesses to either come before the ICC or testify.²⁹³ As do the Tribunals, the ICC lacks a police force of any kind to arrest indicted persons and to enforce orders.²⁹⁴ That has been a serious problem for the ICTY²⁹⁵ and will no doubt plague the ICC.

With the ad hoc Tribunals having primacy jurisdiction, however, they at least had the ability to require States to deliver defendants to them; the ICC, bound by its principle of complementarity, does not.²⁹⁶ Even in Security Council referrals, such as Darfur, where there is a general feeling that such referrals have been endowed with “primacy” jurisdiction, at least insofar as State cooperation goes,²⁹⁷ a reading of the Statute does not support that presumption.²⁹⁸ Failures to cooperate with the court may not be directly sanctioned but must be referred to the Assembly of States Parties or, in the case of a Security Council referral, back to the Council.²⁹⁹

Overall, there is potential for much improved justice for gender-violence victims, but credibility is everything to those who have suffered such personally devastating crime, and the protections in law and procedure must translate into deeds. Justice must also be available at both international and national levels, and much must still be done to address the root causes of gender violence, which continues to occur with disturbing regularity in conflicts throughout the world despite law reforms.

292. SADAT, *supra* note 181, at 85.

293. *Id.* at 257-58; Rome Statute, *supra* note 76, art. 93.

294. SADAT, *supra* note 181, at 85.

295. *Id.*; Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 15, 17 (1997).

296. SADAT, *supra* note 181, at 85.

297. Michael P. Scharf, Amer. Society of Int'l Law, Results of the Rome Conference for an International Criminal Court (1998), <http://www.asil.org/insights/insigh23.htm>.

298. SADAT, *supra* note 181, at 258.

299. *Id.*

V. ONGOING GENDER VIOLENCE DESPITE LEGAL PROGRESS

A. THE CASE OF DARFUR

Despite progress made by the Tribunals in combating impunity for major perpetrators of gender violence, women continue to be victimized at alarming rates in armed conflict today. Darfur is only one of the ongoing conflicts where sexual violence is inherent. Since the situation in Darfur has already been referred to the ICC, and will be scrutinized as the first Security Council referral there, its sexual violence aspects may also receive heightened attention, making it an appropriate case study.

1. *The Setting: Sudan and Darfur*

The Sudan is located in the northeastern part of the African continent. In its 967,498 square miles, there are 570 tribes.³⁰⁰ The Sudan is considered a Least Developed Country, and ranks 139 in the 2004 UNDP's Human Development Index.³⁰¹ The discovery of oil holds promise for the future of Sudan's economy. Currently, however, sixty-six percent of the population is employed in agricultural activities.³⁰² Among its thirty-nine million inhabitants, Islam is the predominant religion, particularly in the north, while Christianity and animist traditional African religions are more prevalent in the south.³⁰³ The World Bank estimates the literacy rate for those over age fifteen at sixty percent, sixty-nine percent for males and forty-six percent for females.³⁰⁴

Sudan was a colony of Great Britain from 1821 until it became an independent state on January 1, 1956.³⁰⁵ Since independence, Sudan has had ten years of intermittent democracy, the latest period between 1985 and

300. U.N. Int'l Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties, Sudan*, HRI/CORE/1/Add. 99/Rev. 1 (Nov. 10, 1999).

301. U.N. DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2004, at 141 (2004), available at http://hdr.undp.org/en/media/hdr04_complete.pdf.

302. U.N. Int'l Human Rights Instruments, *supra* note 300. While attempts were made to use demographic statistics from Sudan, its census information was only accurate as of 1992, and other information required updating from 1999—its most recent United Nations core document submission.

303. *Id.*; see also FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, COUNTRY PROFILE: SUDAN 5 (2004) [hereinafter LIBRARY OF CONGRESS], available at <http://lcweb2.loc.gov/frd/cs/profiles/Sudan.pdf>.

304. LIBRARY OF CONGRESS, *supra* note 303, at 6.

305. U.N. Econ. Soc. Council on Implementation of the International Covenant on Economics, *Initial Reports Submitted by States Parties under Article 16 and 17 of the Covenant in Accordance with the Programmes Established by Economic and Social Council Resolution 1998/4*, U.N. Doc. E/1990/5/Add.41 (Oct. 29, 1998).

1989.³⁰⁶ During the rest of its independence, Sudan has been ruled by military regimes, which came to power through *coups d'état*.³⁰⁷ Since 1989, General Omar Hassan El-Bashir has governed, following a military *coup d'état* organized with the Muslim Brotherhood.³⁰⁸ After an internal power struggle in 1999, President El-Bashir declared a state of emergency, dissolving the Parliament and suspending important provisions of the Constitution.³⁰⁹ A state of emergency continues today.

Not only is Sudan Africa's largest country, it has had its longest civil war. Conflict between the north and the south, which erupted in 1983, has had a devastating impact on the Sudan. More than two million people have died, and 4.5 million have been forcibly displaced.³¹⁰ In June 2002, the regime and the Sudan People's Liberation Army agreed that, once a peace agreement would be reached, a referendum on the right to self-determination in southern Sudan would be held within six years.³¹¹

Darfur is located in the western part of the Sudan, and comprises approximately 250,000 square kilometers with an estimated population of six million persons.³¹² Darfur borders Libya, Chad and the Central African Republic. Its three states of North, South, and West Darfur have only a few major towns, and the majority of the population, before the current conflict, lived in small villages and hamlets, often of only a few hundred families.³¹³ Subsistence and limited industrial farming and cattle herding comprised the bulk of the economy.³¹⁴ The tribes of Darfur share the same religion (Islam) and generally speak Arabic, sometimes in addition to their own language.³¹⁵ Land-ownership in Darfur has been traditionally communal, with "dar" meaning homeland.³¹⁶ Because Darfur is part of the Great Sahara region, most land remains arid, and there has been a progressive fight for scarce resources, causing tensions between agriculturalists and

306. Int'l Comm'n of Inquiry on Darfur, *Report to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004*, 18, U.N. Doc. S/2005/60 (Feb. 1, 2005) [hereinafter Darfur Commission Report], available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

307. *Id.*

308. *Id.*

309. U.N. Econ. Soc. Council, *supra* note 305, at 18-19; LIBRARY OF CONGRESS, *supra* note 303, at 11.

310. LIBRARY OF CONGRESS, *supra* note 303, at 6.

311. *Id.* at 3.

312. Darfur Commission Report, *supra* note 306, at 20.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

cattle herders.³¹⁷ Movement of cattle and nomadic shifts, formerly tolerated, aggravated tensions as water and pasture become scarcer.³¹⁸

Progressively escalating since 2002 has been a kind of hyper-violent chaos that is engulfing Darfur. It has morphed from a land, power and political struggle to rebellion and brutal counterinsurgency, to a now lethal free-for-all between dozens of armed groups, with civilians, even aid workers and peacekeepers, serving as targets.³¹⁹

2. *The Conflict*

Gender violence is a prominent feature of the current conflict in Darfur, which has complex roots. Contributing factors include: the intentional weakening of tribal government and traditional law by the central government, desertification; the availability of modern weapons from civil war in Sudan and from its neighbors; and, the early emergence of two primary rebel groups which cite the reasons for their rebellion as including socio-economic and political marginalization of Darfur and its people.³²⁰

The initial rebels, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) began their first military activities in late 2002.³²¹ The government, still preoccupied with civil war in the south, called upon local tribes to assist in fighting the rebels, aggravating tensions between different tribes.³²² Mostly Arab nomadic tribes without a traditional homeland, and wishing to settle because of encroaching desertification, responded to the recruitment.³²³ The new recruits were called “Janjaweed,” a traditional Darfurian term the civil population uses to denote an armed bandit or outlaw on a horse or camel.³²⁴ Victims of attacks say “Janjaweed” have the support, complicity or tolerance of the Sudanese State authorities, and who benefit from immunity for their actions.”³²⁵ Sudanese state authorities claim that any violations committed by the Janjaweed have no relationship to state actors.³²⁶ The most significant

317. *Id.* at 21.

318. Victor Tanner, *Not Just Relief*, WORLDVIEW MAGAZINE ONLINE, Spring 2005, available at <http://www.worldviewmagazine.com/issues/article.cfm?id=149&issue=37>.

319. Jeffrey Gettleman, *Darfur Rebels Attack Base of Peacekeepers; 10 Are Killed*, N.Y. TIMES, Oct. 1, 2007, available at http://www.nytimes.com/2007/10/01/world/africa/01cnd-darfur.htm?_r=1&oref=slogin.

320. Darfur Commission Report, *supra* note 306, 22-23.

321. *Id.* at 22.

322. *Id.* at 23.

323. *Id.* at 24.

324. *Id.*

325. *Id.* at 31-32.

326. *Id.* at 31.

characteristic of the conflict has been “Arab African” attacks on “Black African” civilians, leading to widespread death, the destruction by aerial assault and burning of entire villages, hideous sexual violence, and the displacement of large parts of the civilian population.³²⁷ “Hundreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages.”³²⁸ It has been often cited that 180,000 people have died in the hostilities and about 10,000 people a month are dying as a result of the conflict, although there is not universal agreement.³²⁹ No one knows for certain the number of deaths in Darfur, and mercurial estimates range from 50,000 to as high as 400,000.³³⁰ Most trusted authorities estimate deaths are higher than 200,000, possibly “much higher.”³³¹ Over three million people have been displaced in Darfur.³³² Nearly 14,000 aid workers from 13 U.N. agencies and 80 NGOs are helping 3.8 million people with food, medicines and water, at least to the extent they are not hampered by government.³³³

3. *The Law Which Applies to Gender Violence in Darfur*

International human rights law, international humanitarian law, and international criminal law apply to the Darfur situation. All provide for the protection of women and would prohibit sexual and gender violence. Human rights law protects at all times, in both conflict and peace, creating duties between the State and individuals. International humanitarian law applies only in situations of armed conflict.³³⁴ All the parties to the conflict recognize it as an internal armed conflict.³³⁵ That designation determines

327. *Id.* at 22-25.

328. *Id.* at 59.

329. *UN's Darfur Death Estimate Soars*, BBC NEWS, Mar. 14, 2005, <http://newsvote.bbc.co.uk/go/pr/fr/-/2/hi/africa/4349063.stm>; Evelyn Leopold, *Over 180,000 Darfur Deaths in 18 Months-UN Envoy*, REUTERS, Mar. 15, 2005, <http://www.worldrevolution.org/article/1804>.

330. *Darfur's Real Death Toll*, WASH. POST, Apr. 24, 2005, at B06, available at <http://www.washingtonpost.com/wp-dyn/content/article>; Press Release, Amnest Int'l, SUDAN: Sudanese Government Must Support ICC Investigation of War Crimes in Darfur, AFR 54/058/2005, at 1 (June 6, 2005); *Ailing Professor Fights for Darfur's Dead*, BOSTON GLOBE, Apr. 24, 2005 <http://www.boston.com/news/world/africa/articles/2005/04/24>; see also Eric Reeves, *Sudan Research, Analysis, and Advocacy*, <http://www.sudanreeves.org>.

331. John Hagan and Alberto Palloni, *Death in Darfur*, 313 SCIENCE 1578, 1579 (2006).

332. *Id.* at 1579.

333. Eur. Parl. Ass. Res. 1570, 6-7 (Oct. 2, 2007).

334. SASSOLI & BOUVIER, *supra* note 89, at 67.

335. Darfur Commission Report, *supra* note 306, at 27.

which law to apply.³³⁶ In the past, impunity often resulted from internal conflicts with non-state actors, but that is no longer necessarily the case.³³⁷

The Geneva Conventions, including the grave breaches provisions, are not broadly applicable to internal armed conflict (except to the extent their provisions have become customary law which would then apply to both international and internal conflict); common Article 3 of the Geneva Conventions and Additional Protocol II apply to non-international armed conflict. The International Court of Justice has indicated that common Article 3 provisions “constitute a minimum yardstick applicable to any armed conflict as they are ‘elementary considerations of humanity.’”³³⁸ It has also been held in *Tadic* (interlocutory appeal) that the main body of international humanitarian law also applies to internal conflicts as a matter of customary law.³³⁹ Such customary rules applicable to the current armed conflict in Darfur and protection of women there from gender violence include:

- 1) the protection of civilians against violence to life and person³⁴⁰
- 2) the prohibition on deliberate attacks on civilians;³⁴¹
- 3) the prohibition on indiscriminate attacks on civilians,³⁴² even if there may be a few armed elements among civilians;³⁴³
- 4) the prohibition of attacks aimed at terrorizing civilians;³⁴⁴
- 5) the prohibition on the forcible transfer of civilians;³⁴⁵
- 6) the prohibition on torture and any inhuman or cruel treatment or punishment;³⁴⁶ and
- 7) the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence.³⁴⁷

336. See William A. Schabas, *Theoretical and International Framework: Punishment of Non-State Actors in Non-International Armed Conflict*, 26 *FORDHAM INT'L L.J.* 907 (2003) [hereinafter Schabas, *Theoretical and International Framework*].

337. *Id.* at 918.

338. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 218 (June 27).

339. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96-137 (Oct. 2, 1995), *reprinted in* 35 *I.L.N.* 32 (1996).

340. Geneva Conventions, *supra* note 95, Common Art. 6; *Tadic*, Case No. IT-94-1-AR72, §§ 98, 117, 132.

341. *Tadic*, Case No. IT-94-1-AR72, §§ 100-102.

342. *Id.*

343. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Trial Chamber Judgment, § 638 (May 7, 1997).

344. *BRITISH MANUAL OF THE LAW OF ARMED CONFLICT* § 15.8 (2004).

345. Protocol II, *supra* note 96, art. 8(2)(e)(vii).

346. Geneva Conventions, *supra* note 95, art. 3(1)(a).

347. *Id.* art. 3(1)(c).

In the area of human rights, Sudan has ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). It has signed, but not yet ratified, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention). Sudan has not ratified the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) or the Convention on the Elimination of Discrimination Against Women (CEDAW). At the regional level Sudan has ratified the African Charter on Human and People's Rights (AC).³⁴⁸

While these treaties cover a broad base of human rights, some of the particularly relevant provisions as applied to women and gender violence are: (1) the right to life, and to not be "arbitrarily deprived" of it;³⁴⁹ (2) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;³⁵⁰ (3) the right to freedom of movement, to choose one's own residence and hence not to be displaced arbitrarily;³⁵¹ (4) the right to health;³⁵² (5) the right to an effective remedy for serious violations of human rights;³⁵³ (6) the right to reparations for violations of human rights;³⁵⁴ (7) the obligation to bring to justice the perpetrators of human rights violations³⁵⁵ and the right to liberty.³⁵⁶ These provisions apply to women at all levels of society, in times of peace and war.

348. Survivors' Rights Int'l, *The Sudan: A Prominent Case for the International Criminal Court*, http://www.survivorrightsinternational.org/sudan/sudan_internatl.htm.

349. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 6(1), AC Art. 4 [hereinafter ICCPR]. The right to life is *jus cogens* (General Comment 29, at § 11).

350. *Id.* art. 7, AC art. 5.

351. *Id.* art. 12, AC art. 12(1).

352. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, Art. 12 [hereinafter ICESCR]

353. ICCPR, *supra* note 349, art. 2(3), AC art. 7(1)(a).

354. *Id.* arts. 2(3), 9(5), 14(6). Human Rights Committee General Comment 31 (May 26, 2004) requires that States Parties make reparation to individuals whose Covenant rights have been violated. Human Rights Comm'n, International Covenant on Civil and Political Rights, General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13, ¶ 16 (May 26, 2004) [hereinafter General Comment 31]. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, central to the efficacy of Art. 2(3), is not discharged. *Id.*

355. ICCPR, *supra* note 349, art. 2(3). Human Rights Committee General Comment 31 states "a failure by a state party to investigate allegations of violations could in and of itself give

Although Sudan has signed the Rome Statute establishing the International Criminal Court (ICC), it has not yet ratified the Statute, but is bound to refrain, as a signatory, from “acts which would defeat the object and purpose” of the Statute.³⁵⁷ The situation in Darfur, referred to the ICC by the UN Security Council, is likely to result in criminal actions being initiated.³⁵⁸ ICC definitions for crimes against humanity and war crime provisions applying to conflicts of a non-international nature,³⁵⁹ previously discussed, will be applied in any gender violence cases that come before the ICC. Genocide may also be a consideration, although the United Nations Darfur Commission did not find genocide being committed generally and would leave it to a court to decide specific cases.³⁶⁰

4. *Atrocities Against Women Civilians in Darfur*

In Darfur, women have been summarily and indiscriminately killed, bombed, tortured, abducted, forcibly displaced and sexually abused.³⁶¹ There is story after story of mind-numbing violence, of gang-rapes of women and girls, and children being torn away and beheaded or thrown onto a fire alive.³⁶² NGOs have documented in detail hundreds of cases of rape and other forms of sexual violence in Darfur.³⁶³ There has been retribution against entities speaking out about the nature and extent of gender

rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.” General Comment 31, *supra* note 354, ¶ 15.

Where the investigations . . . reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with the failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6).

Id. ¶ 18.

356. ICCPR, *supra* note 349, art. 10.

357. *See* Vienna Convention on the Law of Treaties, art. 18, May 23, 1969 (providing ratification by Sudan on April 18, 1990).

358. S. C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); Rome Statute, *supra* note 76, arts. 17, 58.

359. Rome Statute, *supra* note 76, art. 8.

360. Darfur Commission Report, *supra* note 306, at 53.

361. AMNESTY INT’L, DARFUR: RAPE AS A WEAPON OF WAR: SEXUAL VIOLENCE AND ITS CONSEQUENCES AI INDEX: AFR 54/076/2004, ¶ 3.1 (2004).

362. Don Cheadle & John Prendergast, ‘*Never again*’—*again*, USATODAY.com, http://www.usatoday.com/news/opinion/editorials/2005-03-01-darfur-edit_x.htm.

363. HUMAN RIGHTS WATCH, SEXUAL VIOLENCE AND ITS CONSEQUENCES AMONG DISPLACED PERSONS IN DARFUR AND CHAD 3 (2005) [hereinafter HUMAN RIGHTS WATCH, SEXUAL VIOLENCE IN DARFUR]; AMNESTY INT’L, LIVES BLOWN APART: CRIMES AGAINST WOMEN, IN TIMES OF CONFLICT, AI INDEX: ACT 77/075/2004 3 (2004); *see also* AMNESTY INT’L, DARFUR: RAPE AS A WEAPON OF WAR, *supra* note 361, ¶ 3.1.

violence. One NGO Director was arrested and the organization's Darfur coordinator jailed after disclosure of the large number of sexual violence victims presenting in their clinics.³⁶⁴

Rape and sexual assault have been used by government forces and government-backed Janjaweed militia as a deliberate strategy with the aim of terrorizing the population, ensuring its movement and perpetuating its displacement.³⁶⁵ While there are many pressures for women not to report victimization,³⁶⁶ the numbers of sexual assaults are thought to be in the tens of thousands³⁶⁷ Rapists and sexual abusers operate with impunity and the support of government entities. The following are some examples:

In Krolli village, South Darfur, residents gathered in the police station, seeking protection from Janjaweed attacks. Police held the civilians there several days while the militia selected young women for rape. Treatment of men who protested included being shot in both legs and hung naked from a tree. If a woman protested she might be beaten and then raped in front of the group.³⁶⁸

In Goz Baggarr, North Darfur, fifty Janjaweed militia on October 18, 2004, attacked the village women. "The men didn't just rape them but afterwards they cut off their sexual parts and sewed them up," one witness said.³⁶⁹

Girls as young as seven and eight have been raped;³⁷⁰ one 12-year-old taken by soldiers and raped for two days now isolates herself, believing she is khasrana (damaged).³⁷¹ Another 12-year-old was captured by Janjaweed on horseback after her father was killed,

364. *Darfur's Real Problem*, WASH. POST, at A22, June 3, 2005 (discussing the actions against Medecins Sans Frontieres on May 30 and 31, 2005).

365. AMNESTY INT'L, *DARFUR: RAPE AS A WEAPON OF WAR*, *supra* note 361, at 94.

366. *See* AMNESTY INT'L, *LIVES BLOWN APART*, *supra* note 363, at 16.

Survivors of rape and their children are likely to be ostracized by their community. Married women may be 'disowned' by their husbands. Unmarried women may never be able to marry because their communities consider them 'spoiled'. Raped women who are not able to marry or who have been abandoned are deprived of the 'protection' and economic support that men are traditionally expected to provide in Sudan.

Id.; AMNESTY INT'L, *DARFUR: RAPE AS A WEAPON OF WAR*, *supra* note 361, ¶ 4.1 (explaining that stigma attaches to both rape victims and their children of the rape); HUMAN RIGHTS WATCH, *SEXUAL VIOLENCE IN DARFUR*, *supra* note 363, at 10-12 (reporting forced marriage to minimize shame; pregnancy is thought to only result from consensual sex, causing ostracism when becoming rape-impregnated).

367. *E.g.*, AMNESTY INT'L, *LIVES BLOWN APART*, *supra* note 363, at 26.

368. HUMAN RIGHTS WATCH, *SEXUAL VIOLENCE IN DARFUR*, *supra* note 363, at 3-4.

369. *Id.* at 4-5.

370. *Id.* at 4.

371. *Id.* at 10.

and raped in the open in front of others by six men, and then taken away and held by the military and Janjaweed for ten days.³⁷²

In Tawila, a girl's school was targeted while the children were sleeping, with 41 of the children and teachers who tried to protect them gang-raped by up to 14 militia and soldiers, resulting in many civilian killings.³⁷³

Pregnancy is no protection: a woman from Muray was raped and later lost her baby; another from Disa was raped by a soldier and delivered her baby alive; Aziza, an 18-year-old woman, had her stomach slit as a soldier said, "It is the child of an enemy." She died.³⁷⁴

Sexual slavery is enhanced by breaking women's and girl's legs to keep them from escaping.³⁷⁵

Reaching the "safety" of refugee camps offers no guarantee of protection. Of almost 500 women and girls treated by one medical group in a 5-month period in 2004-2005, 82 percent of the rapes occurred when they had to leave camps in search of water, firewood or grass for animal fodder. A third of these women and girls were raped by multiple perpetrators.³⁷⁶

Sexual cuttings, gang rapes, rapes of girl children, lethal insertions of nails into girls' vaginas, beatings of mothers with their babies until the infants died, are described in the most expansive documentation of Darfur conflict crimes by the Coalition for International Justice and U.S. State Department's Atrocities Documentation Project in July and August 2004 when 1,100 refugee interviews were conducted.³⁷⁷

Cultural and religious taboos placing a high premium on chastity and so-called purity, dictating that women are "spoiled goods" if they have sex voluntarily or involuntarily outside of marriage,³⁷⁸ are socially, psychologically, and economically devastating to Darfur women.³⁷⁹ There

372. AMNESTY INT'L, LIVES BLOWN APART, *supra* note 363, at ch. 1, Introduction.

373. Darfur Commission Report, *supra* note 306, at 88; AMNESTY INT'L, DARFUR: RAPE AS A WEAPON OF WAR, *supra* note 361, at 3.1.

374. AMNESTY INT'L, DARFUR: RAPE AS A WEAPON OF WAR, *supra* note 361, ¶ 3.1.

375. AMNESTY INT'L, LIVES BLOWN APART, *supra* note 363, at ch. 3.

376. Medecins sans Frontieres, *The Crushing Burden of Rape*, *supra* note 66, at 7.

377. Andrew S. Natsios, *Moving Beyond the Sense of Alarm*, in GENOCIDE IN DARFUR, INVESTIGATING THE ATROCITIES IN THE SUDAN 25, 38-39 (2006).

378. Askin, *Prosecuting Wartime Rape*, *supra* note 78, at 7.

379. See AMNESTY INT'L, DARFUR: RAPE AS A WEAPON OF WAR, *supra* note 361, ¶¶ 4.1, 7.

are also severe medical consequences to the sexual violence: internal bleeding, fistulas, incontinence; the risk of contracting sexually transmitted infections including HIV/AIDS, STIs and hepatitis; complications of pregnancy; and the exacerbating effects of not having access to health-care.³⁸⁰ Female genital mutilation and circumcision, practiced in Sudan, increase the risk of injuries during rape and consequently the likelihood of getting sexually transmitted infections.³⁸¹ Psychologically, effects can be lifelong and crippling, including depression, isolation and suicidal ideation.³⁸²

B. DARFUR AND THE ICC: GENDER VIOLENCE IN THE FIRST SECURITY COUNCIL REFERRAL

1. *Darfur's Path to the ICC*

The very creation of the ICC may be seen as a global response to the extreme atrocities perpetrated in the last century, including gender violence. Unfortunately, in all too many cases, terrible crimes went unpunished and a perceived culture of impunity protected the perpetrators. National courts often did not investigate the crimes adequately, or at all.³⁸³ The situation in Darfur, according to findings in the Darfur Commission Report, fits that category.³⁸⁴ Although it is not the first case with serious gender violence features at the ICC, it is the first such case at the ICC brought without the consent of the country involved, giving it both added scrutiny and importance.

The Security Council's power to trigger proceedings before the court based on Chapter VII of the Charter of the United Nations³⁸⁵ was an early feature of the developing ICC. The Security Council's referral would make the court's jurisdiction in such actions binding and legally enforceable on

380. HUMAN RIGHTS WATCH, *SEXUAL VIOLENCE IN DARFUR*, *supra* note 363, at 12-13.

381. AMNESTY INT'L, *DARFUR: RAPE AS A WEAPON OF WAR*, *supra* note 361, ¶ 4.2.

382. *Id.* (labeling effects "serious psychological problems").

383. Philippe Kirsch, *The International Criminal Court: A New and Necessary Institution Meriting Continued International Support*, 28 *FORDHAM INT'L L.J.* 292, 299 (2005).

384. Darfur Commission Report, *supra* note 306, at 110-15.

385. Lionel Yee, *The International Criminal Court and The Security Council: Articles 13(b) and 16*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 143, 146-47 (Roy S. Lee ed., 2002); INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION, *DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT*, G.A.O.R., 49th Sess., Supp. No. 10, A/49/10, Art. 23 (1994). The ILC is a body of experts named by the UN General Assembly and charged with the codification and progressive development of international law, and the mandate to draft the statute of an international criminal court derived from Article VI of the Genocide Convention. SCHABAS, *supra* note 148, at 8 n.331.

all States, even non-parties to the Rome Statute,³⁸⁶ like Sudan. In Security Council referrals under Chapter VII, the Rome Statute applies to all human beings.³⁸⁷ On March 31, 2005, the Security Council, in a historic first, referred the situation in Darfur since July 1, 2002, to the Prosecutor of the International Criminal Court.³⁸⁸ Since then, the Prosecutor has reviewed voluminous information and determined, on June 1, 2005, the existence of sufficient information to believe that there are cases that would be admissible in relation to the Darfur situation and initiated an investigation.³⁸⁹

As has been a common step preceding a Security Council decision on whether to establish an accountability mechanism, UN Secretary-General Kofi Annan, on September 18, 2004, commissioned a report on the situation in Darfur under Chapter VII of the UN Charter, after the Security Council adopted Resolution 1564 requesting he do so.³⁹⁰ On October 25, 2004, the Secretary-General appointed the Commission with Antonio Cassese as Chairperson, and requested findings in three months. There were four key tasks: “(1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and (4) to suggest ways of ensuring that those responsible for such violations are held accountable.”³⁹¹ The Commission focused on incidents that occurred between February 2003 and mid-January 2005.³⁹²

In November 2004 and January of 2005, the Commission spent three weeks in Sudan, visiting all three states, while the Commission investigative team stayed throughout November, December and January.³⁹³ The Commission’s January 25, 2005 Report urged referral to the ICC, finding the likelihood that heinous crimes constituting war crimes and crimes against humanity, including rape and sexual violence, and torture.³⁹⁴

386. Roy S. Lee, *Introduction*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 385, at 35.

387. SADAT, *supra* note 185, at 113-14 & 113 n.43 (noting an acceptance of the common belief that the U.N. Charter is a constitution of the international community which “every State is bound to observe irrespective of its own will”) (citing Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529).

388. S.C. Res. 1593, *supra* note 358.

389. REPORT OF THE PROSECUTOR, *supra* note 262, at 5.

390. Bruce Zagaris, *Darfur Commission of Inquiry Finds Atrocities and Recommends Accountability Mechanisms*, 21 INT’L ENFORCEMENT L. REP. 158, 158 (2005).

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

Even before the Darfur Commission report was issued, United States (U.S.) resistance to a referral of the situation to the ICC was anticipated, and its opposition slowed the referral process.³⁹⁵ As expected, the Bush Administration on January 27, 2005, before the Commission report was officially transmitted to the Security Council, proposed establishing an African war crimes tribunal in Arusha, Tanzania, the site of the Rwanda Tribunal, to prosecute perpetrators of Darfur atrocities.³⁹⁶ The Bush administration maintained its approach would work better than an ICC referral because it involved African nations, built on the existing infrastructure of the International Criminal Tribunal for Rwanda, and would allow trial of crimes that predated ICC jurisdiction.³⁹⁷

The administration met with substantial opposition to its proposal.³⁹⁸ The High Commissioner for Human Rights, briefing the Security Council, expressed that such a tribunal would be “unduly time-consuming and expensive.”³⁹⁹ On March 30, a compromise was reportedly⁴⁰⁰ reached, and on March 31 the Security Council, on a vote of eleven in favor and four abstentions (Algeria, Brazil, China, and the U.S.) decided to refer the situation in Darfur to the ICC under Chapter VII of the United Nations Charter.⁴⁰¹ The U.S. reiterated its “long-standing and firm objections and concerns regarding the Court”, and its preference for a hybrid tribunal in Africa.⁴⁰² UN representative Anne Woods Patterson said the U.S. did not oppose the referral motion on the final vote because the U.S. strongly supported bringing to justice those responsible for the crimes and atrocities that had occurred in Darfur and ending the climate of impunity there.⁴⁰³

Other countries expressed regret for the compromise provisions of the referral, including the one requested by the U.S. giving protection from ICC investigation or prosecution to non-State party nationals and armed forces

395. Jack Goldsmith, *Support War Crimes Trials for Darfur*, WASH. POST, Jan. 24, 2005, at A15.

396. Colum Lynch, *U.S. Urges War Crimes Tribunal for Darfur Atrocities*, WASH. POST, Jan. 28, 2005, at A23.

397. Krishnadev Calamur, *U.S. to Fight Darfur Trials at World Court*, UPI, Feb. 1, 2005.

398. See Human Rights Watch, *U.S. Thwarts Justice for Darfur*, HUMAN RIGHTS NEWS, Mar. 24, 2005, <http://www.hrw.org/english/docs/2005/03/24/sudan10367.htm>; Human Rights Watch, *U.N.: Pass Resolution to Refer Darfur to ICC*, HUMAN RIGHTS NEWS, Mar. 25, 2005, <http://www.hrw.org/english/docs/2005/03/25/sudan10371.htm>.

399. Warren Hoge, *Human Rights Chief Urges U.N. to Act Quickly on Sudan*, N.Y. TIMES, Feb. 17, 2005, at A9, available at <http://www.nytimes.com/2005/02/17/international/africa>.

400. *Washington Will Let ICC Hold Darfur Trials: Report*, CBC NEWS, Mar. 20, 2005, <http://www.cbc.ca/world/story/2005/03/30/sudan-050330.html>.

401. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005).

402. *Id.*

403. *Id.*

members in Sudan.⁴⁰⁴ The representative of Sudan present for the vote accused the Security Council of continuing to use a policy of double standards, sending a message that exemptions were only for major powers, and claiming that the ICC was intended for developing weak countries, and was a tool to exercise cultural superiority.⁴⁰⁵

2. *The First Test of Complementarity and Its Impact on Gender Violence Justice*

“Complementarity,” which affords primacy to national legal systems for crimes within the ICC’s jurisdiction, is set out in the Preamble to the Statute where it expressly states that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”⁴⁰⁶ It was intended that the ICC not become involved where national systems genuinely investigate or prosecute the ICC crimes; instead, the ICC complements national jurisdictions by only acting when States are unwilling or unable genuinely to investigate or prosecute crimes within the jurisdiction of the Court.⁴⁰⁷ In the case of Darfur, officials claim to be able to prosecute, although the Darfur Commission Report has taken serious exception to that claim.⁴⁰⁸ In June 2005, however, Darfur rape trials got underway, making complementarity a potentially critical issue determining whether gender violence justice will take place in Sudan, at ICC or both, and having a major impact on the quality and nature of law, procedure, victim protection, and justice.

In June 2005 the ICC Prosecutor decided to open an investigation after reviewing the Darfur Commission Report and collecting thousands of documents and interviewing over fifty independent experts—part of this determination required considerations of admissibility, so the initial hurdle has been crossed.⁴⁰⁹ It was always highly unlikely the Prosecutor would have declined to take a case based on complementarity in light of a court system assessment such as Sudan received in the Darfur Commission Report,⁴¹⁰ but the possibility could have given rise to ongoing dialogue on the issue of the efficacy of Sudan’s national court prosecutions and

404. *Id.* Countries noting their displeasure included the Philippines, Argentina, Tanzania and Sudan. *Id.*

405. *Id.*

406. Rome Statute, *supra* note 76, at Preamble.

407. *Id.*

408. Darfur Commission Report, *supra* note 306, at 115.

409. REPORT OF THE PROSECUTOR, *supra* note 262, at 1-4; Press Release, ICC, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2005), <http://www.icc-cpi.int/press/pressreleases/107.html> [hereinafter ICC June 2005 Press Release].

410. Darfur Commission Report, *supra* note 306, at 110-15.

procedures. That may be of future value to justice for gender violence victims, since the ICC might create leverage with a country, like Sudan, which says it is willing and able to dispense justice, but has an aberrant judicial system which may be promoting impunity there. The ICC power to use complementarity to encourage conformance of national courts to appropriate standards of justice is a powerful tool in theory: to have any chance of bringing the potentially large number of Darfur gender violence perpetrators to justice the ICC and victims will need domestic remedies, and such power cannot be ignored.

3. *The Security Council Referral's Encouragement of Cooperation*

In its Resolution 1593 referral of the Darfur situation to the ICC, the Security Council, previously made aware of the judicial conditions and limitations through the Darfur Commission Report, nevertheless indicated its desire to have the court work with Sudan. The Resolution encourages the court “to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur.”⁴¹¹ It also encourages “the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary.”⁴¹² The Security Council further urged the ICC to include “the possibility of conducting proceedings in the region, and the Prosecutor has recently acknowledged the referral recommendations.”⁴¹³ Those three “encouragements” provide a broad invitation to the court and Prosecutor to look at the state of national justice as part of its international mission, if not mandate, for Darfur. Long term, that could provide more expansive and extensive access to post-conflict justice for Darfur’s gender violence victims than the limited prosecutions of sexual violence perpetrators at the ICC.

411. S.C. Res. 1593, *supra* note 358, ¶ 4.

412. *Id.* ¶ 5.

413. *Id.* ¶ 3; ICC June 2005 Press Release, *supra* note 409, at 2.

C. JUSTICE BEGINS AT HOME: BRINGING INTERNATIONAL ACCOMPLISHMENTS TO BEAR ON NATIONAL JUSTICE FOR GENDER VIOLENCE VICTIMS

1. *The ICC and Darfur: The Need for International Help at the National Level*

The day the ICC opens its courtroom doors is the day it starts working toward closing them permanently. That is because one of its duties is to assist and help strengthen national courts.

The commitment to constructing effective national justice was built into the very beginning of the ICC Statute.⁴¹⁴ “While the ICC must be able to act when national systems fail to provide justice for mass atrocity, its success will also be measured by its ability to bolster domestic judicial systems,”⁴¹⁵ according to Diane Orentlicher, Professor of International Law and frequent contributor to the United Nations. The case for ICC assistance to domestic legal systems is even stronger than that of the ICTY, she maintains, and “even the ICTY, which does not have a mandate to provide assistance to domestic courts in the Balkans, has been justifiably faulted for failing to contribute to ‘the development of courts and justice systems’ in the former Yugoslavia, ‘particularly in relation to war crimes.’”⁴¹⁶

The case for development is stronger at the ICC, Orentlicher maintains, because, “in contrast to the ICTY, which has primacy over domestic trials, the ICC Prosecutor must defer to a state that has jurisdiction and is pursuing the crime in question, unless that state is unwilling or unable genuinely to conduct the criminal proceeding.”⁴¹⁷

While not an explicit mandate to assist domestic prosecutors and judges, this feature of the Rome Statute reflects a strong bias in favor of local justice. More than that, it signifies the ICC’s unique potential to enlarge the space for domestic prosecutions by providing a credible threat of international prosecutions if domestic institutions fall short.⁴¹⁸

414. Rome Statute, *supra* note 76, at Preamble.

415. Diane F. Orentlicher, *Judging Global Justice: Assessing the International Criminal Court*, 21 WIS. INT’L L.J. 495, 507 (2003).

416. *Id.* at 507-08 (quoting David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 5, 12 (2002).

417. *Id.*

418. *Id.* at 508.

And so a key test of the ICC's success, it is reasoned, "will be the extent to which the looming prospect of prosecution in The Hague inspires governments to undertake on credible domestic investigations and, where warranted, prosecutions."⁴¹⁹

Some States have made significant strides in overcoming barriers to prosecution at home in light of increasing prospects that their nationals may be prosecuted before an international court.⁴²⁰

With respect to the ICC, this result is not by accident but design. Through its core commitment to complementarity, the Rome Statute affirms the enduring primacy of national Governments in combating impunity. Thus, far from displacing domestic courts in countries blighted by crimes against the basic code of humanity, the advent of a permanent international criminal court has reaffirmed the responsibility of States to ensure justice for international crimes committed in their territory and enhanced their capacity to meet this obligation.⁴²¹

For the many gender violence victims who will never make the trip from Darfur to The Hague, and for their many perpetrators who will never be indicted there, the ICC can provide two great benefits with impact outside of, and beyond the court: (1) pressure to move Sudan toward a workable, responsible, and legitimate justice system with laws and procedures modelled on the ICC's gender violence protections; and, (2) meaningful reparations for victims.

The fact that most of the alleged perpetrators still live in their home areas, many wielding "power as politicians, municipal officials, police officers and businessmen" even though charged at the international level, has been cited by both Bosnian and Rwandan women as reason for great fear, and silence.⁴²² There is much to be said for holding liable under command responsibility those leaders responsible for the commission of atrocities, and that must be done where appropriate through the ICC, but there are critical reasons to hold those actually committing gender violence also liable, whether that is done at the ICC or on the national level. Victims and survivors might derive more satisfaction and healing from participation in trials leading to convictions of their actual torturers and rapists; they

419. *Id.*

420. *Id.*

421. The Secretary-General, *Note of the Secretary-General on Impunity*, ¶ 25, delivered to the Economic and Social Council, U.N. Doc. E/CN.4/2004/88 (Feb. 27, 2004) [hereinafter Impunity Study].

422. *Violence Against Women Report*, *supra* note 21, ¶¶ 41-42.

might find greater catharsis from seeing such persons in the dock than from seeing their commanders—usually strangers to those victimized—who gave impersonal orders or encouraged such crimes generally.⁴²³

From the perspective of collective memory, some may claim that there is greater merit to devoting scarce resources to punishing low-level functionaries who actually inflict crimes on other human beings, since exposing both the banality of such individuals and their apparent indifference to the pain they directly inflict tells us more about how such barbarity can become routinized or widespread. Emphasis on such persons tends to produce accounts of atrocities that provide more satisfactory explanations of their bureaucratization.⁴²⁴

Unless the local and national levels of Darfur justice function justly, victims will be at risk, and in fear, of those who brutally raped and assaulted them, even though the crimes against them fall within “the most serious crimes of concern to the international community” contemplated by ICC Article 5. So is there a role the ICC can and should play to ensure justice for those women whose abusers will never come before the court? Some authorities think so.

2. *The Need to Use ICC Complementarity to Promote Improvements in Sudan’s National Justice System*

In Darfur’s current situation the ICC has major challenges working with government officials on national laws and court issues. Sudan’s Foreign Minister recently said, “The Sudanese judiciary is, and always has been, willing and capable of assuming its responsibilities.”⁴²⁵ In maintaining Sudan would never hand over war-crime suspects for trial at the International Criminal Court, Sudanese Foreign Minister Mustafa Osman Ismail said, “the government has brought before the courts persons involved in violations of human rights. Scores of such persons have already been arrested and tried.”⁴²⁶ The Justice Minister has also recently rejected calls for the extradition of those accused to face international justice.⁴²⁷ Rather,

423. MICHAEL P. SHARF, *BALKAN JUSTICE* 223 (1997).

424. Jose Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2092 (1998).

425. Iol.co.za., *Sudan Defends its Handling of Darfur*, Apr. 22, 2005, http://www.int.iol.co.za/index.php?click_id=68&art_id=qw1114177322740B235&set_id=

426. *Id.*

427. *Darfur Extradition Calls Rejected*, BBC NEWS, June 30, 2005, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/Africa/4636011.stm>. There have been no formal extradition attempts, however.

Sudan has indicated a special Sudanese Court will deal with perpetrators.⁴²⁸ The ICC Prosecutor has said he would follow the work of the tribunal.⁴²⁹

Those who might be named as perpetrators have expressed a similar preference for national courts, adding veiled threats.⁴³⁰ Ali Osman Taha, Sudan's first vice president, said: "We strongly believe that there are no grounds to warrant taking suspects out of the country. We strongly feel that such an action would very much help push things down, to degenerate rather than help people to reconcile." Taha said the Sudanese system was "competent and able and willing to do justice."⁴³¹

The UN-appointed Commission on Darfur reviewed the Sudanese justice system and its actions involving the current conflict:

The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur. Very few victims have launched official complaints regarding crimes committed against them or their families, owing to a lack of confidence in the justice system. Of the few cases where complaints have been made, most have not been properly pursued. Furthermore, procedural hurdles limit the victims' access to justice.⁴³²

The Darfur Commission provided an extensive overview of the Sudanese judicial system, applicable Sudanese laws, and actions taken by the Sudanese government and its quasi-judicial bodies.⁴³³ It found that "in view of the impunity which reigns in Darfur today, the judicial system has demonstrated that it lacks adequate structures, authority, credibility, and willingness to effectively prosecute and punish the perpetrators of the alleged crimes that continue to exist in Darfur."⁴³⁴

Restrictive laws that give broad powers to the executive have undermined the effectiveness of the judiciary and many of the laws in force contravene basic human rights standards. Sudanese

428. REPORT OF THE PROSECUTOR, *supra* note 262, at 4; Opheera McDoom, *Sudan Forms Special Court for Darfur Crimes*, SUDAN TRIBUNE, June 13, 2005, <http://www.sudantribune.com/spip.php?article10104>.

429. REPORT OF THE PROSECUTOR, *supra* note 262, at 4.

430. Opheera McDoom, *Suspected Darfur Militia Chief Rejects Foreign Court*, SUDAN TRIBUNE, May 11, 2005, http://www.sudantribune.com/spip.php?page=imprimable&id_article=9514.

431. Warren Hoge, *Sudan Rebuffs U.N. on Trying Darfur War-Crimes Suspects Abroad*, N.Y. TIMES, Feb. 9, 2005, at A1.

432. Darfur Commission Report, *supra* note 306, at 6.

433. *Id.* at 114-31.

434. *Id.* at 122.

criminal laws do not sufficiently proscribe war crimes and crimes against humanity, such as those carried out in Darfur. The Criminal Procedure Code has provisions that prevent the effective prosecution of these. Victims do not have confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. Many have feared reprisals in the event that they resort to the national justice system.⁴³⁵

One example directly regarding gender violence involves the Sudanese National Commission finding that “crimes had not been systematic or widespread constituting a crime against humanity as mentioned in the allegations.”⁴³⁶ The National Commission contended that the word “rape” with its legal and linguistic meanings, was not known to the women of Darfur in general, and that they believed the meaning of the word “rape” was to use violence to compel a person to do something against that person’s will, and not specifically to rape.⁴³⁷

Regarding scenes of a group rape that were videotaped within Darfur and shown outside the Sudan, the National Commission found “some of the persons who took part in this confessed that they were given sums of money as an incitement to play roles in those scenes” and that the video was fictitious.⁴³⁸

The Minister of Justice indicated he had lifted the normal immunity military forces and officials have, to try ten members of the regular forces on rape charges.⁴³⁹ Thirteen people, however, were tried and convicted for producing fake video implicating the military in the commission of rape.⁴⁴⁰

In response to United Nations pressures, in July 2004, the government of Sudan committed to undertake measures to end impunity for human rights violations in Darfur. Because of the widespread allegations of rape and other incidents of sexual abuse of women, the Minister of Justice agreed to establish Rape Committees for the three Darfur states.⁴⁴¹ The Committees were composed of three female members, a judge, a legal counsel from the Ministry of Justice, and a police officer. The mandate of the Committees, however, was “to investigate the crimes of rape in the three states of Darfur” making the investigatory mandate too narrow to

435. Zagaris, *supra* note 390, at 158.

436. Darfur Commission Report, *supra* note 306, at 124.

437. *Id.* at 130.

438. *Id.* at 124.

439. *Id.*

440. *Id.* at 129.

441. *Id.*

address the serious allegations of violence against women.⁴⁴² Means of redress or reparation for the victims was not brought within the scope of the mandate, limiting the effectiveness of the initiative.⁴⁴³ International law not only requires States to address human rights violations, they must also take measures to prevent such occurrences, and provide an effective remedy for violations.⁴⁴⁴

The Committees were not given sufficient time, adequate guidelines, and criteria for selection of cases for investigation and prosecution, or guidance as to the proper methods for investigating crimes constituting serious human rights violations. Government actions indicated “a lack of any serious commitment on the part of the government to investigate the allegations of widespread rape and to end impunity for [the] crimes.”⁴⁴⁵

The Sudanese investigation committees, after a three-week visit to Darfur’s regions, registered fifty rape cases, thirty-five of which were against unknown perpetrators.⁴⁴⁶ In cases where the perpetrators were unnamed or unknown, no further investigation was conducted.⁴⁴⁷

The Rape Committees had severe constraints because of the lack of resources and technical assistance, and because the approach adopted could not be conducive to achieving the objectives for which they were established.⁴⁴⁸ The problems faced by the Committees were many: (1) they placed undue burden on the affected population to produce evidence; (2) they lacked sufficient commitment to achieving their goals; (3) they could not mitigate distrust by the population; (4) they rejected too many cases; (5) they confined themselves to the crime of rape; (6) they did not process any other forms of sexual abuse; and, (7) they failed to record information on cases which could be further investigated.⁴⁴⁹

The Darfur Commission found

[t]he work of the rape committees does not provide a sound basis for any conclusions with regard to the incidence of rape in Darfur nor does it satisfy the requirement of State responsibility to investigate cases of serious violations of human rights and the accountability of those responsible.⁴⁵⁰

442. *Id.*

443. *Id.* at 127.

444. ICCPR, *supra* note 349, art. 2 (indicating Sudan is a Party to the Covenant).

445. Darfur Commission Report, *supra* note 306, at 127.

446. *Id.* at 128.

447. *Id.*

448. *Id.* at 121.

449. *Id.*

450. *Id.* at 123.

According to the Commission's findings, it is unlikely that the legal and judicial systems in Sudan in their present form are capable of addressing the serious challenges resulting from the crisis in Darfur. Victims often express lack of confidence in the ability of the judiciary to act independent and in an impartial manner.⁴⁵¹

If there is to be justice for gender violence victims at the national level, there will need to be willingness by Sudan to change, and major assistance from the international community. Hopefully, the ICC will play an important role in national justice development. The Prosecutor has already met Sudanese officials in the Netherlands and received information about the country's legal system.⁴⁵² A recent assessment of Sudanese laws affecting survivors of rape, a study at first invited and then prohibited by the Government of Sudan, found the laws to be disastrously flawed, imposing enormous obstacles to the reporting, documentation and prosecution of rape.⁴⁵³

Obtaining national justice has little chance of success in light of the current political realities in Sudan, even though officials there formed its specialized court to work on prosecutions⁴⁵⁴ and in June 2005 initiated trials of 160 alleged suspects.⁴⁵⁵ Among the names of persons responsible for abuses in Darfur given to the ICC Prosecutor⁴⁵⁶ may be those within, or responsible for, the Sudanese justice system. No high officials are among those being tried domestically—current trials are not the most serious cases.⁴⁵⁷ These actors may be resistant to their responsibilities to have a properly functioning national justice system because they are complicit with the perpetrators themselves. Even if not necessarily an element of the major offenses where atrocities are present—genocide, torture, and so on—they almost invariably imply State policy and involvement or, at the very least, tolerance.⁴⁵⁸

The justice system in the Sudan was one of the causes of the recently concluded north-south civil war, in part because Islamic justice was being imposed on the south—that area is primarily composed of those who

451. *Id.* at 110

452. Evelyn Leopold, *Sudan May Not be Trying Key Darfur Suspects*, Sudan Tribune, June 29, 2005, http://www.sudantribune.com/spip.php?page=imprimable&id_article=10423.

453. ADRIENNE L. FRICKE & AMIRA KHAIR, REFUGEES INTERNATIONAL, LAWS WITHOUT JUSTICE: AN ASSESSMENT OF SUDANESE LAWS AFFECTING SURVIVORS OF RAPE 5-6 (2007).

454. McDoom, *supra* note 430; REPORT OF THE PROSECUTOR, *supra* note 262, at 4.

455. Leopold, *supra* note 452.

456. S.C. Res. 1593, *supra* note 358, ¶ 4.

457. *Darfur Extradition Calls Rejected*, *supra* note 427.

458. Schabas, *Theoretical and International Framework*, *supra* note 336, at 912.

practice traditional African or Christian religions.⁴⁵⁹ “[N]on-Muslim minorities continue to have an inferior legal and political status.”⁴⁶⁰ While delegations from Islamic law traditions, including much of the Arab world, participated in the crafting of the Rome Statute⁴⁶¹ the penalties under the form of Shari’ah law practiced in Sudan are extreme, and do not comport with world views of human rights. The death penalty is common, as are amputations. Women may be publicly flogged or stoned to death for sexual behavior such as adultery.⁴⁶² Sudan’s classical interpretation of Shari’ah also mandates constitutional bias against non-Muslims.⁴⁶³

At some point in the future, however, with sufficient international pressures, there may be opportunities for the ICC and others on the world’s justice team to prompt, assist or require national justice changes that will truly impact the current impunity of Darfur’s sexual violence perpetrators.

While the Rome Statute does not dictate when it might make sense to establish alternative justice entities in countries recovering from savage conflict, the Prosecutor can and will play an important role in shaping public expectations and diplomatic positions concerning the appropriate forum(s) for prosecution, and has said he will analyze any national proceedings.⁴⁶⁴ With the convening of the U.N. to discuss Darfur in September 2007, and with peace talks slated for Libya in October 2007, the Prosecutor was most concerned with Sudan refusing to hand over a government minister and militia leader who remained free after ICC Judges had issued arrest warrants in April.⁴⁶⁵

3. *Transitional Justice Assistance Needed*

In the future, perhaps one of the new breeds of justice components, constructed out of national and international elements, or truth commissions, as mentioned by the Security Council in its ICC referral may be

459. Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 ILSA J. INT’L & COMP. L. 1, 4 (1998).

460. Ahmed T. el-Gaili, *Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan*, 45 HARV. INT’L L.J. 503, 546 (2004).

461. SADAT, *supra* note 181, at 81.

462. Gravelle, *supra* note 459, at 8-9; *see also* Essam Fawzy, *Muslim Personal Status Law in Egypt: the Current Situation and Possibilities of Reform through Internal Initiatives*, in WOMEN’S RIGHTS IN ISLAMIC FAMILY LAW 41 (Lynn Welchman ed., 2004); JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 39, 118 (3d ed. 2002) (referring to death by stoning as a penalty for adultery).

463. el-Gaili, *supra* note 460, at 546.

464. Gravelle, *supra* note 459, at 5; ICC June 2005 Press Release, *supra* note 409, at 2.

465. Maggie Farley, *Justice Urged as Topic for Darfur Talks*, L.A. TIMES, Sept. 21, 2007, http://http://www.latimes.com/news/nationworld/world/africa/la-fg-justice21se21.1_5068462.story?coll=la-africa.

helpful in dealing with the post conflict situation in Darfur. There are a variety of components in a new architecture of transnational justice that have been evolving, especially in the last decade.⁴⁶⁶ Advantages include: (1) they operate on location making justice visible and accessible to its primary audience; (2) they allow for a greater sense of local ownership; (3) they contribute to capacity-building of local justice; and, (4) they are inexpensive by international standards.⁴⁶⁷

[T]he proliferation of institutions newly able and willing to seek justice for atrocious crimes presents a challenge that long seemed unimaginable—the need to craft principled guidelines for choosing *among* a diverse range of courts empowered to bring wrongdoers to account.”⁴⁶⁸ There is no one correct legal response to mass atrocity, and there may be a number of options.⁴⁶⁹

Failure to discern the varieties of local conditions and diverse historical circumstances has often resulted in the replication of ‘one-size-fits-all’ strategies to deal with violence against women. Advocacy strategies that respond to circumstances in the West are often distorted when introduced into countries where the significance of certain abuses and the methods of their resolution are very different.⁴⁷⁰

It is widely accepted that “criminal prosecutions, when appropriate, hardly exhaust the needs of societies emerging from mass atrocity. Thus, for example, truth commissions and reparation programs are rarely seen today as mutually exclusive alternatives to prosecutions.”⁴⁷¹ Concepts may combine, or new ideas emerge. Neil Kritz maintains, with more work than it can do, the ICC would be set up for failure and subject to its critics charges of futility with the limited number of prosecutions it can hope to conduct, unless it explores and supports alternative sources of national

466. Orentlicher, *supra* note 415, at 506.

467. Kritz, *supra* note 134, at 75. Kritz urges a comprehensive approach to post-conflict justice and attention to the disconnect between retrospective and prospective justice, questioning the disparity in resource allocations (an estimated \$2 billion for the ICTY and ICTR when such fraction of funds for prospective reform would have had a dramatic effect). *Id.* at 84-85.

468. Orentlicher, *supra* note 415, at 506.

469. *See id.* n.40 (citing Neal J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 4 LAW & CONTEMP. PROBS. 127, 152 (1996)); Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 370 (1999); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 23 (1996).

470. Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUMAN RIGHTS L. REV. 259, 300 (2004).

471. Orentlicher, *supra* note 415, at n.40.

justice.⁴⁷² He suggests the ICC Prosecutor “consider the existence or contemplation of such mechanisms as truth commissions, hybrid tribunals, traditional justice, or non-criminal sanctions, and the impact of the ICC actions on these processes.”⁴⁷³ He outlines the benefits and examples of mixed justice models like East Timor and Sierra Leone, and innovations in Rwanda and elsewhere new approaches are being tried.⁴⁷⁴

There is room, too, for concepts of traditional rituals or tribal law.⁴⁷⁵ The Rwandans maintain that their *gacaca* program of local justice, will engage local villages in the process, return and reintegrate perpetrators into their home communities, and empty the prisons of untried cases within a relatively short time.⁴⁷⁶ Tribal discipline and tradition in Africa once made acts of sexual violence unacceptable, “but,” according to the United Nations under Secretary-General for Humanitarian Affairs, “there has been such a deterioration in the social and moral fabric that sexual violence has become a method of war, and not just soldiers do it, many civilians do, too; it’s like there are no barriers anymore.”⁴⁷⁷ Due regard should be given to informal traditions since where these are ignored or overridden the result can be the exclusion of large sectors of society from accessible justice.⁴⁷⁸ Darfur has local tribal models of justice, and the Prosecutor has expressed a commitment to such traditions.⁴⁷⁹ One commentator has suggested the use of a woman’s truth commission for gender violence issues which are otherwise often neglected in general truth commissions.⁴⁸⁰ Such a vehicle would have to be structured to comport with the cultural, social and legal barriers to admitting rape for Darfur’s victims.

When peace comes to Darfur, it cannot fully be achieved or maintained “unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.”⁴⁸¹ There is an element of urgency to the imperative restoration of the rule of law because of the heightened

472. Kritz, *supra* note 134, at 83.

473. *Id.* at 84.

474. *Id.* at 70-80.

475. See Marc Lacey, *Victims of Uganda Atrocities Choose a Path of Forgiveness*, N.Y. TIMES, Apr. 18, 2005, at A1 (describing a Ugandan tribal ritual of forgiveness performed by former Lord’s Resistance army rebels using raw eggs, twigs, and livestock).

476. Kritz, *supra* note 134, at 78.

477. Hoge, *supra* note 38, at 1.

478. Impunity Study, *supra* note 421, at 2.

479. REPORT OF THE PROSECUTOR, *supra* note 262, at 10.

480. See Gardam & Jarvis, *supra* note 4, at 26.

481. The Secretary-General, *Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 2, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter Transitional Justice Report].

vulnerability of women in particular.⁴⁸² In Darfur, as elsewhere, it will not be easy:

[H]elping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task. It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security.⁴⁸³

It will be particularly hard in Darfur, since inadequacies in the justice system have been clearly denied. It is possible then that the ICC and the United Nations will need to combine their pressures to strengthen the national courts through transitional justice. “Transitional justice” comprises:

[T]he full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.⁴⁸⁴

An effective program for combating impunity requires a comprehensive strategy comprising mutually enforcing measures at various levels, and includes broad participation of citizens and victims, with effective measures of truth, justice, reparations and guarantees of non-recurrence.⁴⁸⁵ Each component plays a necessary, but only partial, role.⁴⁸⁶

The United Nations, in the past, has incorporated in peace missions operations programs to train national justice sector officials, support local judicial reform bodies and advise host country rule of law institutions, strengthen domestic law enforcement and justice institutions, facilitate national consultations on justice reform, coordinate international rule of law

482. *Id.*

483. *Id.* ¶ 3.

484. *Id.* ¶ 8.

485. Impunity Study, *supra* note 421, at 5.

486. *Id.* at 5.

assistance, monitor and report on court proceedings.⁴⁸⁷ It can promote the participation of women, help vet and select national police, judges and prosecutors, draft constitutions or constitutional provisions, revise legislation, inform and educate the public, develop ombudsman institutions and human rights commissions, strengthen associations of criminal defense lawyers, establish legal aid, set up legal-training institutes and build the capacity of civil society to monitor the justice sector.⁴⁸⁸

Any transitional justice system must assess and respect the interest of victims in the design and operation. “Victims and the organizations that advocate on their behalf deserve the greatest attention from the international community.”⁴⁸⁹

Effective strategies for building domestic justice systems will give due attention to laws, processes (both formal and informal) and institutions (both official and non-official). Legislation that is in conformity with international human rights law and that responds to the country’s current needs and realities is fundamental. At the institutional core of systems based on the rule of law is a strong judiciary, which is independent and adequately empowered, financed, equipped and trained to uphold human rights in the administration of justice. Equally important are the other . . . services, fair prosecutions and capable associations of criminal defense lawyers (oft-forgotten but vital institutions) . . . Justice sector institutions must be gender sensitive and women must be included and empowered by the reform of the sector.⁴⁹⁰

Special challenges for victims of sexual assault can be addressed by encouraging implementation at the national level of the protections for victims the ICC so carefully included in the Statute, particularly (1) professional staff with specialized training in dealing with victims of sexual violence or traumatized victims, and (2) witness protection mechanisms.⁴⁹¹

But will there be an opportunity to implement such transitional justice options in Darfur? The ICC, with the help of the UN and its Security Council mandates from Resolution 1593 has the power to promote such measures as a means to strengthen the national courts—and improve the likelihood that gender violence victims will find justice.

487. Transitional Justice Report, *supra* note 465, at 5-6.

488. *Id.*

489. *Id.* at 7.

490. *Id.* at 12.

491. Impunity Study, *supra* note 421, at 15.

4. *Practical Progress: Reparations as a Way of Achieving Justice*

Most individuals who suffer loss and damage as a result of armed conflict do not receive compensation. When compensation for war-related loss has been awarded, it has usually been provided in a lump sum as part of an agreement between belligerent states, rather than awarded directly to victims.⁴⁹² A report of the U.N. Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies has confirmed the growing importance of reparations to societies in transition.⁴⁹³ In terms of global legal instruments, the principle is embodied in the Universal Declaration of Human Rights,⁴⁹⁴ in the work of the United Nations,⁴⁹⁵ where specific but widely ratified treaties incorporate the principle unambiguously.⁴⁹⁶

The victim compensation principle is enshrined in both civil and common law systems.⁴⁹⁷ It can be found in the Islamic world,⁴⁹⁸ the African human rights system,⁴⁹⁹ the Inter-American system,⁵⁰⁰ and the European one,⁵⁰¹ and in the Rome Statute of the ICC.⁵⁰²

At the beginning of the Rome Conference in June 1998, the proposal to include victims' reparations in the Statute did not garner universal

492. GARDAM & JARVIS, *supra* note 129, at 230.

493. Transitional Justice Report, *supra* note 465, at 18-19.

494. G.A. Res. 217A, ¶ 217A, U.N. Doc. A/810, Art. 12 (1948).

495. *See, e.g.*, Int'l L. Comm'n of the Gen. Assembly, *Draft Articles of Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10 (2001); U.N. Comm'n on Human Rights Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, U.N. Doc. E/CN.4/Sub.2/1990/10 (1990).

496. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2(2), S. Treaty, Doc. No. 100-20, 1465 U.N.T.S. 85, 114, Art. 14. The right to a remedy is embodied also in the Universal Declaration of Human Rights at Article 8, the International Covenant of Civil and Political Rights at Article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at Article 6, the Convention on the Rights of the Child at Article 39, and in international humanitarian law as found in Article 3 of the Hague Convention of October 18, 1907, Article 91 of Protocol Additional to the Geneva Conventions of August 12, 1949 (Protocol I) and Articles 68 and 75 of the Rome Statute.

497. Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 314-15 (2005).

498. Cairo Declaration on Human Rights in Islam, Art. 19 (Aug. 5, 1990).

499. African Charter on Human and People's Rights, Art. 25.

500. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980), *reprinted in* 9 I.L.M. 673, 682 (1970).

501. European Human Rights Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, 213, U.N.T.S.; Charter of Fundamental Rights of the European Union, Art. 47, 2000 O.J. (C. 364) 8, *reprinted in* 40 I.L.M. 266 (2001).

502. *See* Rome Statute, *supra* note 76, art. 79.

support.⁵⁰³ There were concerns that (1) awards might be made against States;⁵⁰⁴ (2) a criminal court might have difficulty with determining the form and extent of reparations, particularly with judges from different legal traditions;⁵⁰⁵ and, (3) legal systems that did not recognize the concept might have problems with it.⁵⁰⁶

What prevailed, however, was a belief that victims had an interest in restorative justice, and that individual and societal reconciliation and restoration could be enhanced by the availability of reparations, whether in the form of restitution, compensation, or something else.⁵⁰⁷ Provisions for reparations and principles relating to them are set out in Article 75 of the Rome Statute, and Article 109 deals with enforcement. ICC Procedural Rules on reparations include 93-99, and 212, 217-19, 221 and 222.

The court may respond to a request for reparations, or raise the issue on its own motion in exceptional circumstances, determining the scope and extent of damage, loss and injury to, or in respect of, victims.⁵⁰⁸ Reparation orders may be made directly against a convicted person or through the Trust Fund provided for in the Statute. The court may order money or other property collected through fines or forfeiture to be transferred, by order of the court, to the Trust Fund. The Fund can be used for the benefit of victims of crimes within the jurisdiction of the court, and the families of such victims.⁵⁰⁹

Victims of sexual violence in Darfur will have serious lasting consequences and injuries. They may not be able to get the rehabilitation they need—the medical and psychological care, the financial assistance—because resources are lacking within their communities. They likely have lost their homes, possessions and livelihoods. The ICC drafters understood the need to provide compensation for true restorative justice, and fashioned the ICC provisions on reparations in a way that assistance could be directed as needed. It is just necessary that whatever forms the reparations might take they must be sufficiently practicable, clear and precise to be capable of enforcement in the courts, or by the other relevant national authorities of States.⁵¹⁰

503. Christopher Muttukumaru, *Reparation to Victims, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, *supra* note 385, at 263.

504. *Id.*

505. *Id.* at 263-64.

506. *Id.* at 264.

507. *Id.*

508. Rome Statute, *supra* note 76, art. 75.

509. *Id.* art. 79, ¶¶ 1-3.

510. *Id.* at 167.

In the Security Council Resolution referring the situation in Darfur to the ICC, the Council encouraged states to contribute to the ICC Trust Fund for victims.⁵¹¹ Darfur victims seeking reparations may be dependent upon the Trust Fund contributions from States Parties, since Sudan, despite its improving economy and oil revenue potential, is still one of the poorest countries in the world. Also, for enforcement of fines and forfeiture measures, Article 109 refers only to States Parties, and Sudan is not one—although voluntary cooperation may be possible at some future time.

There is considerable need for assistance, however, for Darfur victims, many of whom are desperately poor, displaced, and in refugee status. Fashioning relief may require creative alternatives and solutions,⁵¹² but it could have an enormous effect on victims who will otherwise not have the experience of courtroom justice at The Hague.

Reparations provide a clear opportunity for the ICC to impact societies recovering from mass atrocity, and specifically Darfur's gender violence victims. Individuals who have endured sexual violence may be in need a full range of subsistence, and medical, psychological, and long term financial help. It will take considerable creativity and effort to provide such services in much of the ravaged areas of Darfur, but the possibility of using group awards could provide important capacity-building, or otherwise make needed recovery services available. Besides compensation for injuries, reparations could be particularly used to help women progress economically. They also could be used to eradicate domestic violence through education of both sexes, since education has been shown to have a direct connection to violence reduction on the domestic level.⁵¹³ The ICC can both use its Trust Fund to have a considerable impact on victims of sexual violence, and use its leadership to encourage national resources to be made available.

511. S.C. Res. 1593, *supra* note 378.

512. *See* Muttukumaru, *supra* note 512, at 263-64.

513. Fawzy, *supra* note 462, at 55 (study showed twenty-five percent of Muslim males with higher education surveyed accepted a man's right to physically punish his wife, while 100% of illiterate males accepted it, with 75.8% accepting the idea of severe physical punishment; 19.5% of all females surveyed accepted the notion of severe punishment and 23% light physical punishment by their spouses).

5. *Sudan's Duty to Provide Reparations Under UN Policy*

Reparations are a fundamental tenet of United Nations policy, explicitly recognized in every comprehensive human rights treaty.⁵¹⁴ Principles and Guidelines IX of United Nations Resolution 60/147⁵¹⁵ is a manifestation of that policy, which is given practical effect as international criminal law through Article 75 of the Rome Statute.⁵¹⁶ Principles and Guidelines IX reflects the scope of the right to reparations under international law.⁵¹⁷

The Basic Principles on the Right to a Remedy and Reparations, authored by M. Cherif Bassiouni and Theo van Boven, were 15 years in the making when they were adopted by the Commission on Human Rights April 13, 2005⁵¹⁸ and sent on to the Economic and Social Council with a further recommendation of adoption to the General Assembly.⁵¹⁹ The Principles and Guidelines, the General Assembly stated, "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms."⁵²⁰ States must, however, implement international human rights law and humanitarian law that emanates from treaties and domestic law "including reparations" by "implementing them in their domestic legal system."⁵²¹ The scope of that obligation includes the duty to provide effective remedies to victims, "including reparation."⁵²²

If the Economic and Social Council and General Assembly adopt the Basic Principles on the Right to a Remedy and Reparations, Sudan would clearly be reminded of its "duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."⁵²³ Where injuries are attributable to a State, as alleged gender violence by government troops and militia in Darfur, Sudan would be required pay

514. Impunity Study, *supra* note 421, at 19.

515. G.A. Res. 60/147, ¶ 15-23, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles and Guidelines on the Right to a Remedy and Reparation].

516. Impunity Study, *supra* note 421, at 19.

517. Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 515, at 7-9.

518. *Id.* at 2.

519. *Id.* at 2-3.

520. *Id.* at 3.

521. *Id.* at 4, I.1., 2.

522. *Id.* at 4, I.2(c).

523. *Id.* at 5, III.4.

reparations.⁵²⁴ States are also encouraged to establish reparations programs for third party liability situations where the party liable for the harm is unable or unwilling to compensate the victim.⁵²⁵ If not a substitute for critical funding needed by the victim, reparations may also be symbolic where an individual should, but cannot pay, as that, too, can, in itself, be a significant contribution to justice.⁵²⁶

The U.N. Basic Principles on the Right to a Remedy and Reparations would, for gender violence victims, require that they “be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”⁵²⁷ Some of the things specified include: compensation for physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services; return to one’s place of residence, restoration of employment and return of property; rehabilitation and various forms of “satisfaction” such as public apologies, official declarations or judicial decisions restoring dignity and reputation; and victim commemorations or tributes.⁵²⁸

VI. STEPS TO GENDER VIOLENCE EXTINCTION IN ARMED CONFLICT

A. GUIDELINES FOR MOVING FORWARD: TENTH ANNIVERSARY OF THE BEIJING PLATFORM

Much progress has been made in spotlighting war-related gender violence, and in developing the appropriate law to address its effects in armed conflict. Expectations are high for the new ICC and its gender-sensitive dimensions. The Tribunals have broken new ground in the jurisprudence of humanitarian law and sexual violence, and there is reason to hope the ICC will continue to expand those traditions. It is critical, however, that States recognize their responsibility to enforce humanitarian law principles, and have the capacity to enforce law, end impunity, prosecute perpetrators

524. *Id.* at 7-8, IX. Since the Basic Principles do not create new obligations, arguably Sudan already has that responsibility.

525. *Id.* at 7, IX. 16.

526. Muttukumar, *supra* note 512, at 263.

527. Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 515, at 7, IX. 18.

528. *Id.* at 7-9, IX. 18-23.

of violence and provide redress and compensation to survivors of gender-based violence.⁵²⁹ It is also critically important to ameliorate, or at least impact, the overall problem and its causes.

In 1995, United Nations world leaders of 180 governments and hundreds of NGOs met in Beijing, China, for United Nations conferences on the status of women. These meetings gave rise to the Beijing Platform of Action—one major area of which was Women and Armed Conflict (Critical Area E).⁵³⁰ It said, “An environment that maintains world peace and promotes and protects human rights, democracy and the peaceful settlement of disputes . . . is an important factor for the advancement of women. Peace is inextricably linked with equality between women and men and development.”⁵³¹ The international governments’ conference found humanitarian law to be systematically ignored in current forms of armed conflict, with massive violations of human rights, including planned rape of women.

The Beijing Declaration found these and other conflict atrocities impacting women “abhorrent practices that are strongly condemned and must be stopped immediately, while perpetrators of such crimes must be punished.”⁵³² It said, “violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including, in particular, murder, rape, including systematic rape, sexual slavery and forced pregnancy require a particularly effective response.”⁵³³ The Platform locked on the importance of women’s participation in the processes of preventing war, protecting civilians, resolving conflict and making and keeping the peace:

The equal access and full participation of women in power structures and their full involvement in all efforts for the prevention and resolution of conflicts are essential for the maintenance and promotion of peace and security. Although women have begun to play an important role in conflict resolution, peace-keeping and defence and foreign affairs mechanisms, they are still underrepresented in decision-making positions. If women are to play an equal part in securing and maintaining peace, they must be

529. *Id.* at 10, IX. 17.

530. Beijing Declaration, Platform for Action, E.131, U.N. Doc. A/CONF.177/20, Oct. 17, 1995.

531. *Id.*

532. *Id.*

533. *Id.* at E132.

empowered politically and economically and represented adequately at all levels of decision-making.⁵³⁴

Equal access and participation is far from reality. “While symbolic gestures have been made, women remain significantly underrepresented in conflict resolution processes.”⁵³⁵ Despite an estimated 50,000 rapes in the Balkan conflicts, not one woman participated in the regional delegations of the Dayton Peace Accords on Bosnia and Herzegovina. At the Rambouillet Interim Agreement for Peace and Self-Government in Kosovo, there was only one Kosovar woman, and at the first Arusha peace talks on Burundi, only two of the 126 delegates were women.⁵³⁶ The overall assessment on implementation of the Beijing Platform is similar: “very little in real terms has been achieved in addressing the affects of armed conflict on women.”⁵³⁷

B. THE UNREALIZED PROMISE OF RESOLUTION 1325

Follow-up from the Beijing world conference did result in women victims of armed conflict and gender violence actually getting to meet with Security Council members on what they had endured. The meeting prompted Security Council Resolution 1325.⁵³⁸ That document sets out a list of recommendations which, if implemented, would mean considerable progress in impacting the suffering of women in war.

Eliminating armed conflict entirely may be the only true guarantee that wartime gender violence will end, and establishing equality between men and women in economic, social, and political spheres is needed to truly eradicate the root causes and effects of violence toward women. But Resolution 1325 addresses many promising avenues for positive change. It looks at a full continuum of measures from prevention of conflict to behavior in conflict, and also to improvements of the behavior of non-combat military⁵³⁹ and peacekeepers involved in sexual crimes.⁵⁴⁰

Among recommendations, it:

534. *Id.* at E134.

535. U. N. INT’L RES. & TRAINING INST. FOR THE ADVANCEMENT OF WOMEN, WOMEN AND ARMED CONFLICT: NEW CHALLENGES, BEIJING AT 10: PUTTING POLICY INTO PRACTICE 4 (2004).

536. *Id.* at 4.

537. Gardam & Jarvis, *supra* note 4, at 5.

538. S.C. Res. 1325, U.N. Doc. S/Res/1325 (Oct. 31, 2000).

539. Isabelle Talleyrand, *Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women*, 27 SYRACUSE J. INT’L L. & COM. 151, 160 (2000).

540. Jennifer Murray, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 COLUM. HUMAN RIGHTS L. REV. 475, 521 (2003).

calls upon all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence and situations of armed conflict;

emphasizes the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes, including those relating to sexual and other violence against women and girls;

calls upon all parties to armed conflict to respect the civilian and humanitarian character of refugee camps in settlements, and to take into account the particular needs of women and girls;

reaffirms that consideration must be given to potential impact on the civilian population, bearing in mind the special needs of women and girls, when UN missions are undertaken;

invites a Secretary-General study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimensions of peace processes and conflict resolution;

calls for incorporating women and a gender perspective in negotiating and implementing peace agreements;

incorporates gender perspectives into peacekeeping operations;

expands the role and contribution of women in United Nations field-based operations, and especially among military observers, civilian police, human rights and humanitarian personnel;

urges the Secretary-General to appoint more women as special representatives and envoys;

calls for an increase in participation of women at decision-making levels in conflict resolution and peace processes;

urges Member States to ensure increased representation of women at all decision-making levels in national, regional, and international institutions, in mechanisms for the prevention, management, and resolution of conflict;

calls for all parties to armed conflict to respect fully, international law applicable to the rights and protection of women and girls, especially as civilians⁵⁴¹ and

541. *See id.* at 519-20.

recommends training and education of all parties dealing with gender violence in war and peacekeeping.

Overall, despite good intentions, clear recommendations and increased resolutions and expressions of concern for the topic, very little in real terms has been achieved in addressing the affects of armed conflict on women.⁵⁴² Near the end of 2004, the Secretary-General reported on the implementation of Resolution 1325 in “Women and Peace and Security.”⁵⁴³ While the report is most notable for its unfulfilled hopes and unmet goals, it reviews progress which has been made, and urges a redoubling of effort and implementation of further ideas. It finds the protection and promotion of the human rights of women and girls in armed conflict a pressing challenge.⁵⁴⁴

The reality on the ground is that humanitarian and human rights law are blatantly disregarded by parties to conflicts, and that women and girls continue to be subject to sexual and gender-based violence and other human rights violations. Much more sustained commitment and effort, including partnerships with men and boys, are required to stop the violence, end impunity and bring perpetrators to justice.⁵⁴⁵

The report notes inadequate resource allocations have contributed to the slow progress in implementing resolution 1325. But the Secretary-General reiterates:

Resolution 1325 holds out a promise to women across the globe that their rights will be protected and that barriers to their equal participation and full involvement in the maintenance and promotion of sustainable peace will be removed. We must uphold this promise. To achieve the goals set out in the resolution, political will, concerted action and accountability on the part of the entire international community are required.⁵⁴⁶

With the fifteen-year anniversary of the Beijing Platform for Action in 2010, and centuries of gender violence in armed conflict to eradicate, it is past time to take on the challenge.

542. Gardam & Jarvis, *supra* note 4, at 5.

543. S.C. Res. 814, U.N. Doc. S/2004/814 (Oct. 13, 2004).

544. *Id.* at 24, ¶ 119.

545. *Id.* at 24-25, ¶ 119.

546. *Id.* at 25, ¶ 121.

C. SUDANESE WOMEN'S PRIORITIES

Nothing is more essential in planning the war on violence against women than asking women what they need and listening to what they say. The April 2005 Symposium on Women's Rights and Leadership in Post-Conflict Sudan, held in Oslo April 10, 2005, did just that.⁵⁴⁷ Resulting recommendations were grouped into broad areas: governance and rule of law, gender-based violence, capacity building and institutional development, economic policy and management, livelihoods and productive sectors, basic social services, and education.⁵⁴⁸ Suggestions for change address underlying causation as well as symptoms, manifestation, and remediation.

Recommendations on gender-based violence are to:

1. Ensure the protection of women and girls in terms of safety from sexual and gender-based violence, especially in war-affected areas.
2. Create and strengthen institutional mechanisms so that women and girls can report acts of violence against them in a safe and confidential environment.
3. Enact legislation to protect women from sexual and gender-based violence and to end impunity for perpetrators thereof.
4. Increase ease of access to support services for survivors, including psychosocial counselling and ready availability of post-exposure prophylaxis kits.
5. Recognize the importance of HIV/AIDS in relation to human security as outlined in Security Council Resolution 1308 (2000) and ensure adequate education and awareness-raising, prevention and treatment on HIV/AIDS, specifically in connection with gender-based violence.
6. Collect and consolidate research and data on the impact of gender-based violence on women and girls, including as a result of armed conflict.⁵⁴⁹

In drafting the Oslo document Sudanese women articulated their recognition of the major impact of war on women and women's human rights, the erosion of capacities of women and the fundamental divisions the war

547. NORWEGIAN INST. OF INT'L AFFAIRS & U.N. DEV. FUND FOR WOMEN, SUDANESE WOMEN'S PRIORITIES AND RECOMMENDATIONS TO THE OSLO DONORS' CONFERENCE ON SUDAN 2 (2005).

548. *Id.* at 2-5.

549. *Id.* at 3.

creates. They supported equal citizenship rights, urgent legislative reform in the area of political and family rights, and programmes for addressing negative customs and practices which continue to foster women's marginalization and exclusion. The role of women in peace-building, peacemaking, reconstruction and sustaining families and communities amidst the ravages of war, poverty and HIV/AIDS, and their fundamental human right to be full and equal partners in all sectors and levels of society and its institutions, were recognized by the symposium participants.⁵⁵⁰

The Oslo participants called upon the donor conference to commit to principles of gender responsive resource allocation to reduce gender inequalities in law, policy and practice.⁵⁵¹ If the Sudanese women's comprehensive recommendations were implemented they would dramatically impact gender violence both in war and peace, serving as models for other societies ending conflict, in conflict, or at risk of conflict.

VII. CONCLUDING COMMENTS

Women generally do not start wars. They do not commonly perpetuate them, nor do they predominate in fighting them. Women are underutilized in the prevention of wars, and underrepresented in planning to end them. Therefore, it is a particularly cruel injustice that women should be deliberately targeted for such suffering in war.

Gender violence has been accepted for centuries as an inevitable consequence of war, and even a reward for its military participants. But violence toward women in armed conflict causes untold damage to individuals, families, communities and society⁵⁵² that lasts far beyond the conflict.⁵⁵³ Despite the positive work of the Tribunals and the promise of the ICC, violence against women in war is not abating and may be escalating, so further action is needed to address this persistent, pernicious and lethal problem. There have been remedies proposed, but little implementation effort.

550. *Id.* at 2.

551. *Id.* at 5. The recommendations, while recognizing the principle of fifty percent representation for women, but "cognizant of the context, situation and issues at stake," recommended thirty percent as a minimum threshold for women's representation. *Id.* at 2.

552. Rumna Chowdhury, *Kadic v. Karadvic—Rape as a Crime Against Women as a Class*, 20 LAW & INEQ. J. 91, 92 (2002).

553. *See, e.g.*, Philips, *supra* note 268, at 235-37; *see also* Beverly Balos, *A Man's Home is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 ST. LOUIS U. PUB. L. REV. 77, 78-79 (2004) (stating that different forms of violence are interrelated). U. N. INT'L RES. & TRAINING INST. FOR THE ADVANCEMENT OF WOMEN, *supra* note 535, at 8 (in post-conflict "Timor-Leste in 2001, forty percent of the reported crimes were cases of domestic violence or violence against women").

The world has done its duty in establishing the ICC which, despite the imperfections of political compromise, is well-equipped to deal with the most heinous of crimes, and their primary perpetrators. Those who took the lead and united to fight for the inclusion of law, procedures and programs to protect and serve victims of gender violence should be justly proud. If gender violence is properly charged and prosecuted, the ICC has the power to make enormous inroads into the elimination of violence against women. It must be made clear that the world considers rape and sexual violence to be militarily, legally, and personally reprehensible, whether the purpose is to harm women, to message men, or to excise masculinity. Bringing the “big fish” to justice, will signal the little piranhas that immunity may not always be possible for them. Efforts must put blame for the destruction of lives and community where it belongs—on those who commit and permit sexual violence.

But will that bring justice to the gender violence victims of Darfur, the women who have been physically, emotionally and psychologically devastated by sexual violence? For every person who commits or condones rape and sexual violence in war convicted at high levels, there are hundreds or thousands of perpetrators who are not brought to any type of justice. The women of Darfur will be living beside them, seeking civil protection from them, depending upon them for the basics of existence and the workings of government. If the national and local justice systems aren't willing or able to provide protection and prosecution, there will be no security. Also, if women remain unequal to men in law and life because of political purpose, prejudice and poverty, sexual violence survivors will continue to be at risk regardless of the achievements of the ICC.

It will gain a woman little to have assisted in the conviction of military rapists if she returns to a village which would have her flogged or stoned for perceived sexual indecency. If she can't feed her children or heal her body or mind from the debilitation of the violence against her, she may not feel as benefited from international justice as the world would want. That is why it is critically important that the ICC not only prosecute offenders, but also use its powers, particularly those arising from complementarity and reparations, to impact justice and incorporate international standards at the national level. The ICC, with the UN and the international community, must partner in a powerful global justice team to assist Sudan in improving its national court systems and access to justice for gender violence victims. As attention is focused on Darfur in the first Security Council referral and non-consensual case before the ICC, there should be no doubt that women's bodies are not permissible war weapons, that their beings are not battlefields. And there should be no question that the international

community is committed to eliminating gender violence and its root causes. The pressure is not just on the ICC, it is on the world.