

**Gender and the aftermath of war:
the response of international law to the impact
of armed conflict on women**

Olga Jurasz

**Department of Law and Criminology
Aberystwyth University
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SUMMARY

This thesis considers one of the most compelling challenges facing post-conflict societies: the situation of women in the aftermath of war and the adequacy (or not) of international law in addressing that situation.

This thesis assesses the key changes which occurred within international law in addressing the situation of women in the aftermath of conflicts. These changes were marked by developments concerning gender, armed conflict and post-conflict situations in specialised branches of international law, such as International Refugee Law (IRL), International Criminal Law (ICL), and International Human Rights Law (IHRL). Furthermore, the developments took place in the context of, and have been partially influenced by, other changes within the discipline, including the increased fragmentation and specialisation of branches of international law, greater attention to the role of gender within international law, and the emergence of the idea of *jus post bellum* as a legal framework addressing post-conflict situations. Whilst these developments are rarely (if at all) considered together, this thesis views them as closely linked and influential in shaping international legal responses to the situation of women in the aftermath of conflicts.

The examination of the research questions in relation to the four specialised branches of international law (International Humanitarian Law, IHRL, IRL, and ICL) reveals that the past 30 years resulted in proliferation of rules applicable to the challenges faced by women in post-conflict situations. However, with the exception of ICL, the responses of international law to this problem are predominantly of soft nature and, furthermore, are often disjointed. The thesis concludes that in order to be effective and enforceable, the soft law developments need to be translated into the language of positive obligations, duties, and paired with a strong accountability mechanism, which is absent from the current legal framework.

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DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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Date: 25th January 2016

STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Where *correction services have been used, the extent and nature of the correction is clearly marked in a footnote(s). Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

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STATEMENT 2

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TABLE OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights (Banjul Charter) 1981
ACHR	American Convention on Human Rights 1969
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
CAH	Crime against humanity
CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CEDAW	Convention on Elimination of All Form of Discrimination Against Women 1979
CEDAW Committee	Committee on Elimination of All Form of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECtHR	European Court of Human Rights
EU	European Union
ExCom	Executive Committee of the High Commissioner's Programme
GC	Geneva Convention
HRC	Human Rights Council
HRCttee	Human Rights Committee
IACtHR	Inter-American Court of Human Rights

IACmHR	Inter-American Commission on Human Rights
IAC	International armed conflict
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court 1998
ICC EOC	ICC Elements of Crimes
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ICISS	The International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for the Former Yugoslavia
ICTY	International Criminal Tribunal for Rwanda
IDMC	Internal Displacement Monitoring Centre
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IMTFE	International Military Tribunal for the Far East
IMTN	International Military Tribunal at Nuremberg
IRL	International Refugee Law
JCE	Joint criminal enterprise
NIAC	Non-international armed conflict
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
PIL	Public International Law
R2P	Responsibility to Protect
Refugee Convention	The Geneva Convention Relating to the Status of Refugees 1951
SCSL	Special Court for Sierra Leone
SGBV	Sexual and gender-based violence

TFV	Trust Fund for Victims
UDHR	Universal Declaration of Human Rights 1948
UKAIT	United Kingdom Asylum and Immigration Tribunal
UN	United Nations
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner on Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNSG	Secretary-General of the United Nations
UNSCR	United Nations Security Council Resolution
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
VAW	Violence Against Women
VCLT	Vienna Convention on the Law of Treaties 1969
WPS	Women, Peace and Security

Chapter 1

Introduction

This thesis considers one of the most compelling challenges facing post-conflict societies: the situation of women in the aftermath of war and the adequacy (or not) of international law in addressing that situation. Although the rules of international law have a profound effect on interstate relations, they also have real consequences for individual lives. Contemporary developments demonstrate that despite the heightened interest in the impact of armed conflict on women, international law and the United Nations do not respond to this problem in a synchronised, holistic nor, most importantly, adequate manner.

International law managed for centuries to evolve without paying any real consideration to gender. The analysis of seemingly neutral rules demonstrates that in fact international law, not unlike domestic law, is highly gendered.¹ As such, the international legal system represents mostly male experiences and is based on male assumptions which are reflected both in substantive law but also in its processes and in international organisational structures. Chinkin and Charlesworth aptly note the absence of women from international law-making and their rather limited participation in international courts and tribunals, international organizations and, more broadly, strategic state-level functions which, despite some improvements, continues today.² Feminist engagements with international law have uncovered many such gaps and continue to contribute to a valuable and constructive critique of modern international law. Whilst there have been some attempts to analyse the gender bias of international law before, the key impetus for (re)exploring the discipline from a feminist perspective was triggered off in the early 1990s by Charlesworth, Chinkin and Wright.³ The feminist

¹ Hilary Charlesworth, Christine Chinkin, *The boundaries of international law. A feminist analysis* (Manchester University Press 2000); Hilary Charlesworth, Christine Chinkin, 'The Gender of *Jus Cogens*' (1993) 15 Human Rights Quarterly 63; Hilary Charlesworth, 'The Hidden Gender of International Law' (2002) 16 Temple International and Comparative Law Journal 93.

² Charlesworth, Chinkin (2000), *supra* 1, 70-88.

³ Hilary Charlesworth, Christine Chinkin, Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613.

analysis of some of the key aspects of international law presented by these authors opened the gates to feminist international legal scholarship which has been successfully growing and developing for the past three decades, contributing substantive analyses of various aspects of general international law as well as specialised branches of the subject.

One of the areas in which feminist critique has become particularly prominent is the law on the use of force and, consequently, the law of armed conflict.⁴ The law on the use of force (*jus ad bellum*) and the law of armed conflict (*jus in bello*) reflect the gender bias of international law. International humanitarian law (IHL) in particular, it will be argued, was designed in such a way as to allow its rules to respond more readily to harms sustained by men than those experienced by women. Undoubtedly, armed conflicts affect everyone who is caught up in them: women, men and children. However, it is crucial to acknowledge that the type of impact and its nature depend on a number of factors, including the gender of the affected person. This issue will be explored further in Chapter 2 in the analysis of the gender-specific impact of armed conflict on women, demonstrating that gender plays a major role in shaping one's experience of armed conflict. Furthermore, the discussion presented in Chapter 2 shows that women not only experience conflict differently to men, but also that, contrary to a common view, the impact of armed conflict on women is not limited to sexual violence only.

The early feminist engagements with IHL focused on the analysis of IHL as *lex specialis* with particular attention given to the positioning of women within the IHL framework, the changing role of women during armed conflict, and to wartime sexual and gender-based violence (SGBV).⁵ Many of these critiques were advanced with references to the

⁴ Gina Heathcote, *The Law on the Use of Force. A Feminist Analysis* (Routledge 2011); Gina Heathcote 'Feminist Perspectives on the Law of the Use of Force' in: Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 114-128; Charlesworth, Chinkin (2000), *supra* 1, 250-274; Christine Chinkin, 'A gendered perspective to the international use of force' (1988-1989) 12 *Australian Year Book of International Law* 279.

⁵ Judith Gardam, 'A feminist analysis of certain aspects of international humanitarian law' (1988-1989) 12 *Australian Year Book of International Law* 265; Judith Gardam, 'Gender and Non-Combatant Immunity' (1993) 3 *Transnational Law & Contemporary Problems* 345; Judith Gardam, 'Women and the law of armed conflict- why the silence?' (1997) 46 *International and Comparative Law Quarterly* 55;

two major conflicts of the late 20th century, namely the war in the Former Yugoslavia and the conflict in Rwanda, which were characterised by grievous violations of IHL and international human rights law (IHRL) including prevalently “high levels of systematic and organised sexual violence”.⁶ Whilst the topic of conflict-related sexual violence certainly dominated the recent international legal scholarship on the scope and applicability of the modern law of war, a number of scholars have begun to look beyond sexual violence to analyse and comment on a broader spectrum of consequences of armed conflict on women, such as socio-economic and cultural dimensions of conflict-related violations, the role of women as perpetrators of international crimes, the role of women in transitional justice and their involvement in peace processes.⁷ Nonetheless, developments in some specialised branches of international law have remained strongly focused on SGBV. For instance, the adoption of the ICC Statute with its rich array of provisions explicitly classifying SGBV as a crime against humanity, war crimes and genocide as well as subsequent practice of the

Judith Gardam, Hilary Charlesworth, ‘Protection of Women in Armed Conflict’ (2000) 22(1) Human Rights Quarterly 148; Judith Gardam, Michelle Jarvis, ‘Women and armed conflict: the international response to the Beijing Platform for Action (2000-2001) 32 Columbia Human Rights Law Review 1.

⁶ UNSCR 820 (17 April 1993) UN Doc. S/RES/820, para.6 (describing rape in Bosnia and Herzegovina as ‘massive, organized and systematic’).

Christine Chinkin, ‘Rape and Sexual Abuse of Women in International Law’ (1994) 5 European Journal of International Law 326; Alexandra Stiglmayer (ed), *Mass Rape. The War against Women in Bosnia-Herzegovina* (University of Nebraska Press 1994); Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff 1997); Rosalind Dixon, ‘Rape as a crime in International Humanitarian Law: Where to from Here?’ (2002) 13(3) European Journal of International Law 697; Noëlle Quénivet, *Sexual Offences in Armed Conflict and International Law* (2005 Transnational Publishers); Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005).

⁷ Charlotte Lindsey, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women* (ICRC 2001); Charlesworth, Chinkin (2000), supra 1, 250-257; Judith Gardam, ‘The neglected aspect of women and armed conflict- progressive development of the law’ (2005) 52(2) Netherlands International Law Review 197; Carolyn Nordstrom, ‘Women, economy, war’ (2010) Vol.92 No.877 International Review of the Red Cross 161; Christine Bell, Catherine O’Rourke, ‘Peace agreements or pieces of paper? The impact of UNSC resolution 1325 on peace processes and their agreements’ (2010) 59 International and Comparative Law Quarterly 941; Fionnuala Ní Aoláin, Dina Francesca Haynes, Naomi Cahn, *On the Frontlines. Gender, War and the Post-Conflict Process* (OUP 2011); Catherine O’Rourke, *Gender Politics in Transitional Justice* (Routledge 2013); Fionnuala Ní Aoláin, ‘Political violence and gender during times of transition’ (2006) 15(3) Columbia Journal of Gender and Law 829; Nicole Hogg, ‘Women’s participation in the Rwandan genocide: mothers or monsters?’ (2010) Vol.92 No.877 International Review of the Red Cross 69; Alette Smeulers, ‘Female Perpetrators: Ordinary or Extra-Ordinary Women (2015) 15 International Criminal Law Review 207.

Office of the Prosecutor of the International Criminal Court (ICC OTP) demonstrate a strong and continuing commitment to prosecuting crimes involving SGBV.⁸

Furthermore, conflicts of the late 20th century challenged the application of the rules of IHL and brought into question their responsiveness to contemporary warfare. It became evident that actors in modern armed conflicts have little concern for the rules of IHL and that there exist major gaps in compliance with the rules of IHL. Moreover, many modern armed conflicts (e.g. in the Former Yugoslavia, Rwanda, Sierra Leone and the Democratic Republic of Congo) have continued to show alarming patterns of gender-specific violations and the gendered effects of contemporary warfare on women. The provisions of the Geneva Conventions 1949 and their Additional Protocols affording special protection to women appeared to have had little actual impact on the protection of women from atrocities and violations which very often have taken gender-specific forms. What is more, the precarious reality of the aftermath of these conflicts drew attention to the wide spectrum of gender-specific impact of armed conflict on women, which has been continuing for many years after peace agreements were signed and wars came formally to an end.

Consequently, the centre of the 'women and armed conflict' debate has shifted from focusing merely on IHL and rape as a weapon of war towards inquiring about the role of international law (as well as other disciplines) in post-conflict situations. In 2000, the United Nations Security Council (UNSC) adopted Resolution 1325 on Women, Peace and Security, which marked the first official recognition by the UNSC of the gendered dimensions of armed conflicts and their impact on women, the role of women in peacekeeping and women's participation in peace processes.⁹ United Nations Security Council Resolution (UNSCR) 1325 was a catalyst for the implementation of the Women, Peace and Security (WPS) Agenda at the UNSC, which has since passed further resolutions addressing these topics.¹⁰ Furthermore, in the context of

⁸ Crimes involving SGBV have been included in the majority of indictments issued by the ICC, however there have been no successful prosecutions to date.

⁹ UNSCR 1325 (31 October 2000) UN Doc. S/RES/1325.

¹⁰ UNSCR 1820 (19 June 2008) UN Doc. S/RES/1820; UNSCR 1888 (30 September 2009) UN Doc. S/RES/1888; UNSCR 1889 (5 October 2009) UN Doc. S/RES/1889; UNSCR 1960 (16 December 2010) UN

international legal scholarship, the idea of *jus post bellum* (or, “the law after the war”, explored in section 3.3. below) gained considerable momentum as a potential avenue for addressing the multiple challenges of transitioning from modern conflicts to peace.

However, a normative gap appears to have been created whereby international law provides special protection to women (through IHL) in recognition of the fact that women may be affected by conflict in particular ways, but ceases to engage with the scope of legal protection for women in the aftermath of conflict. It fails to recognize that the very nature of violations that IHL is attempting to protect women from have a long-term effect which has a real and significant impact on women’s lives long after the war is ‘over’ and IHL ceases to apply.

The engagement with the topic of gender and the aftermath of war is largely centred around a war / peace, IHL (*lex specialis*) / IHRL dichotomy. Whilst the distinction between IHL as *lex specialis* and IHRL as a general body of law applying both in peacetime and in conflict is generally legally correct, such an approach oversimplifies the contextual reality of the aftermath of war, the ‘greyzone’ between war and peace, which is riddled with many challenges originating in armed conflict. Thus, as noted by the CEDAW Committee, “the transition from conflict to post-conflict is often not linear and can involve cessations of conflict and then slippages back into conflict - a cycle that can continue for long periods of time”.¹¹ Furthermore, exclusive reliance on such a dichotomy ignores the development of various highly specialised branches of international law, such as international refugee law (IRL) and international criminal law (ICL), that often emerged in response to the challenges of armed conflicts and their aftermath. IHL and IHRL are specific bodies of law, but they are essentially specialised branches of the same discipline: public international law. Whilst scholarship engages in great depth with progressive developments of individual specialised branches of international law (and at times examines the theme of gender and armed conflict within those branches), the examination of the responses of international law to the

Doc. S/RES/1960; UNSCR 2106 (24 June 2013) UN Doc. S/RES/2106; UNSCR 2122 (18 October 2013) UN Doc. S/RES/2122; UNSCR 2242 (13 October 2015) UN Doc. S/RES/2242.

¹¹ CEDAW, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para.4.

situation of women in the aftermath of conflict from the perspective of international law as a *discipline* is needed. This thesis is an attempt to fill that gap.

1. Aims of the thesis

The aim of this thesis is to examine the type and adequacy of international law's responses to the gendered impact of armed conflicts on women. Therefore, the questions that this research addresses are:

- 1) How does public international law, through its specialised branches, respond to the gendered impact of armed conflict on women?
- 2) Is a gender perspective meaningfully incorporated into the design and implementations of legal developments within IHRL, IRL and ICL?
- 3) Do current responses adequately address the precarious situation of women in the aftermath of conflicts?

This thesis recognizes that the actual impact of armed conflicts on women is not universal *per se* and does vary depending on a number of factors. These may include, but are not limited to, the geo-political context in which the conflict occurred; the diverse roles that women played during armed conflict; and, the socio-economic position of women within the particular society prior to conflict. Therefore, the category of 'impact' is not homogenous. Nonetheless, amongst these types of impact exist some universal concerns relating to the situation of women in armed conflicts and in their aftermaths which, Ní Aoláin and Haynes note, "cut across jurisdictions and contexts".¹²

The main aim of this research has been to investigate the research questions in relation to four branches of international law: IHL, IRL, ICL and IHRL. The thesis starts with an exploration, from a gender perspective, of IHL as *lex specialis* offering women

¹² Fionnuala Ní Aoláin, Dina Francesca Haynes, 'The Compatibility of Justice for Women with Jus Post Bellum Analysis' in: Carsten Stahn, Jennifer S. Easterday, Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 175.

special protection in armed conflicts (Chapter 2). This chapter highlights the gendered nature of conflicts and their aftermath and also analyses the diverse implications of armed conflict on women, which are by far not limited to SGBV. The examination of these gender-specific implications sets the background for Chapters 3-6, which, in turn, examine the responses to issues identified in Chapter 2 from the perspectives of other specialised branches of international law, namely IRL, ICL and IHRL.

IHL, IRL, ICL and IHRL were identified as key branches of international law that already address (or are capable of addressing) some of the major and prevalent challenges associated with the gendered impact of armed conflicts. These selected areas of international law deal with the core aspects of the conflict and post-conflict reality for women, such as prevention of, and protection from, violations of IHL and IHRL, including the gender-specific forms of violations (Chapter 2); international protection afforded to women in the context of conflict-related displacement and seeking asylum from gender-related persecution (Chapter 3); international criminal accountability for gender-based crimes (Chapters 4 and 5); and practical forms of redress for violations of IHL and IHRL (Chapter 6).

The choice of these particular areas of international law also enabled the incorporation into the overall discussion of the themes of conflict-related migration, post-conflict accountability and redress. Whilst these are not the only areas of international law which may play a role in addressing the gendered impact of armed conflicts, they represent the main areas of IL which have seen developments related to gender and armed conflict. In fact, this thesis recognizes that other disciplines (such as security studies, development studies, psychology or public health) may be even more suitable and better equipped to provide certain types of assistance to women in post-conflict situations. However, this thesis focuses on an examination of responses to the gendered impact of armed conflicts on women exclusively from the perspective of international law. As such, it offers a detailed and critical examination of developments in IHL, IRL, ICL and IHRL with a view to indicate normative and practical gaps amongst current responses of IL to the gendered effects of armed conflicts on women.

2. Methodological approach

The research presented in this thesis is a result of the examination of primary and secondary sources relevant to the international legal responses to the gendered impact of armed conflict on women. The research consisted primarily of the examination of treaties, international case-law, reports of international bodies and organisations, books, journal articles and, where applicable, online commentary.

Some chapters in this thesis draw on examples from specific armed conflicts and jurisdictions. This is particularly the case in Chapters 4 and 5, which examine the prosecution of gender-based crimes before international criminal courts and tribunals. Case-law analysed in these chapters originates from the jurisprudence of the two ad hoc international criminal tribunals (the International Criminal Tribunal for the Former Yugoslavia (the ICTY) and the International Criminal Tribunal for Rwanda (the ICTR)), the Special Court for Sierra Leone (SCSL) and the ICC. These four courts have been chosen due to normative and jurisprudential developments advanced by them in relation to international prosecution of gender-based crimes. Although the SCSL is a hybrid court and therefore classified as ‘internationalised’ rather than ‘international’ *per se*, its jurisprudence on forced marriage as a gender-based crime necessitated reference to its work in Chapters 4 and 5. Furthermore, the thesis draws upon relevant developments from regional courts and regional legal systems, such as the EU Qualification Directive (Chapter 3) and case-law from the Inter-American Court of Human Rights (Chapter 6) and ECtHR (Chapters 3 and 6).¹³

Finally, this thesis is not based on a single theoretical framework of analysis. Given the scope of the thesis, no single theoretical approach seemed to provide an adequate structure for the examination of the research questions. In fact, the reliance on a single theory of IL could be seen as constraining the scope, exploration and presentation of arguments discussed in this work. Rather, this research has been

¹³ Directive 2011/95/EU of The European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Official Journal of the European Union 2011 L337/9 (20 December 2011).

inspired and informed by the three perspectives emerging in the context of modern international law (which are explored in greater detail in section 3 below):

- Gender as a factor shaping international law;
- Fragmentation of international law;
- The emergence of *jus post bellum*.

Furthermore, whilst this thesis does not rely upon a particular theory of international law or any specific strand of feminist theory as a basis for examination of the research question, it borrows from what Charlesworth describes as ‘feminist methods in international law’.¹⁴ This approach also mirrors Charlesworth’s caution against the “tendency in feminist scholarship to pigeonhole theorists into fixed categories” and the increased occurrence of divisions amongst feminist legal scholars themselves.¹⁵ Chinkin further observes that “(a) feminist approach takes as its central concern the position of women and denotes a form of analysis. It takes gender as its primary organising category, places women at the centre of inquiry, and works for an end to the oppression of and discrimination against women”.¹⁶

Accordingly, at the centre of this thesis lies the question of whether developments in modern international law benefit women (both on a normative and practical level) in the aftermath of conflicts. Are women’s concerns adequately addressed? Do these legal developments take into account a gender perspective, and if so, how? By posing these questions, this thesis aims to uncover the gaps and silences in the response of international law to the gendered impact of conflicts on women. In doing so, the research presented in this thesis employs gender as a key category of analysis. For the purposes of this thesis, the term ‘gender’ is understood as the social construction of

¹⁴ Hilary Charlesworth, ‘Feminist Methods in International Law’ (1999) 93(2) *American Journal of International Law* 379-394.

¹⁵ *Ibid.*, 381; Hilary Charlesworth, ‘Feminist Ambivalence about International Law’ (2005) 11 *International Legal Theory* 1, 2-4.

¹⁶ Christine Chinkin, ‘Feminism; Approach to International Law’, *Max Planck Encyclopedia of Public International Law* <<http://opil.ouplaw.com/home/EPIL>> accessed 17 November 2015.

the differences in roles, activities, behaviours and attributes between men and women as understood in a particular society.¹⁷

3. Conceptual framework of the thesis

The thesis analyses international legal responses to the gendered impact of armed conflict on women through the lens of three ‘trends’/ developments in modern international law. It considers the role and place of gender in the development of international law; secondly, it draws upon the concerns surrounding the fragmentation of modern IL; and thirdly, places the research question in the context of *jus post bellum* as a potentially new normative system in international law.

3.1. Gender as a factor shaping international law

Gender as a category of analysis entered the realm of international law fairly late. However, since the opening of the ‘feminist project in IL’ in the early 1990s by Charlesworth, Chinkin and Wright, attention to gender and gender analysis has increased within international (but still mostly feminist) scholarship as well as at the UN level. Commenting on this notable change, MacKinnon even observed that “(g)ender as reality, analysis, and rubric has created some of the fastest and most far-reaching transformations in international law in our time”.¹⁸

The first and immediately noticeable change related to the language used at an international level. The terminology of ‘gender’ as well as ‘gender mainstreaming’ has become common at the UN, in international organizations and in international law more broadly. Gender mainstreaming became a commonly (albeit often incorrectly)

¹⁷ This definition of the term ‘gender’ draws upon the definition of ‘gender’ in Article 3(c) of the Council of Europe Convention on preventing and combating violence against women and domestic violence 2011 (Istanbul Convention), CETS No: 210, which refers to gender as “socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”.

¹⁸ Catharine MacKinnon, ‘Creating International Law: Gender as Leading Edge’ (2013) 36 Harvard Journal of Law and Gender 105.

used term recognizing, at least in theory, the need to address gender concerns within the mainstream international law but also within initiatives and activities of international institutions.¹⁹ The UN Economic and Social Council defined gender mainstreaming as

“the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality”.²⁰

However, these efforts have yielded rather mixed results. On the one hand, institutional change, however minimal, has taken place. To this day, the language of ‘gender mainstreaming’ is omnipresent at an international level, with the vast majority of UN bodies and international institutions (e.g. the International Labour Organisation, the World Health Organisation, the World Bank) endorsing it.²¹ On the other hand, the strategy of gender mainstreaming has been criticised for addressing issues concerning women but failing to engage gender as a category of analysis, for instance by exploring the gender-related aspects of human rights violations, gender-related aspects of racial discrimination or structural causes of discrimination and violence against women.²² The consequence of these shortcomings was the ‘add women and stir’ approach, resulting in a limited genuine engagement with root causes of violations of women’s

¹⁹ See generally: Hilary Charlesworth, ‘Not Waving but Drowning: Gender Mainstreaming and Human Rights at the United Nations’ (2005) 18 Harvard Human Rights Journal 1.

²⁰ UNGA, ‘Report of the Economic and Social Council for 1997’, UN Doc. A/52/3, 18 September 1997, Chapter 4, Agreed conclusions, para.4 A.

²¹ WHO, *WHO Gender Policy: Integrating Gender Perspectives in the Work of WHO* (WHO Report, 2002) <<http://whqlibdoc.who.int/hq/2002/a78322.pdf>> accessed 17 November 2015;

ILO, *ILO Action Plan for Gender Equality 2010-2015* (2012) <http://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/gender/documents/publication/wcms_179106.pdf> accessed 17 November 2015; World Bank, *Engendering Development: Through Gender Equality in Rights, Resources and Voice* (World Bank Policy Research Report 2001)

<<http://documents.worldbank.org/curated/en/2001/01/891686/engendering-development-through-gender-equality-rights-resources-voice>> accessed 17 November 2015; UN Human Rights Council, Resolution 6/30: Integrating human rights of women throughout the UN system, UN Doc. A/HRC/RES/6/30, 14 December 2007.

²² Charlesworth, *supra* 19, 7-11.

rights and in producing limited knowledge about the factors underpinning the continued discrimination and subordination of women.

Furthermore, Charlesworth and Chinkin aptly observe that “the major practical problem with the process of gender mainstreaming has been translating worthy commitments into action”.²³ This is particularly evident in relation to the international legal responses to issues surrounding women, conflicts, peace and security. No doubt, the past two decades have seen important developments in that area, including institutional and attitudinal changes. In general, the topic of women and armed conflict is no longer neglected at an international level which, at the very least, is evident from multiple engagements of the UNGA, the UNSC and some of the UN treaty bodies regarding these matters. The adoption of the UNSCR 1325 in 2000, the establishment of the WPS Agenda and subsequent UNSC WPS Resolutions, the establishment of the Office of the Special Representative of the Secretary-General for Sexual Violence in Conflict (SRSG-SVC) in 2009, annual reports of the UNSG on Conflict-Related Sexual Violence (since 2012) and the CEDAW Committee’s General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations (2013) illustrate some of these fairly recent developments.²⁴ Rather, questions remain about the quality, real impact and efficiency of such engagements. In particular, have these international legal developments brought about substantive and real change in relation to the legal (as far as IL is concerned) situation of women in post-conflict societies? Also, what is the position of gender within these developments and actions?

²³ Charlesworth, Chinkin, (2000), *supra* 1, 195-196.

²⁴ The Office of the SRSG-SVC was established by UNSCR 1888 (30 September 2009) UN Doc. S/RES/1888, para.4. The first Special Representative, Margot Wallström, took office in April 2010. Since September 2012, the position of the SRSG-SVC is held by Zainab Bangura (information correct as of November 2015);

UNGA, UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. A/66/657* - S/2012/33*, 13 January 2012; UNGA, UNSC, Sexual violence in conflict. Report of the Secretary-General, UN Doc. A/67/792 - S/2013/149, 14 March 2013; UNSC, Sexual violence in conflict. Report of the Secretary-General, UN Doc. S/2014/181, 13 March 2014; UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. S/2015/203, 23 March 2015; CEDAW, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013.

In terms of substantive international law, the majority of changes took soft law form. Adoption of the UNSCR 1325 marked the first official recognition by the UNSC that women are not just victims in armed conflict. The resolution emphasizes diverse roles of women in conflict, conflict prevention and in peace building, stressing the importance of involving women in post-conflict decision-making mechanisms, peace negotiations and peace agreements. Subsequent UNSCR Resolutions followed, however, with mixed results. Whilst some resolutions (e.g. UNSCR 1888, UNSCR 1889, UNSCR 2243) carried the legacy of UNSCR 1325 by emphasizing structural inequality as a root cause of sexual violence in conflict, underscoring the agency of women in armed conflict and in countering violent extremism as well as the urgent need to involve women in all stages of post-conflict decision-making and peace processes, others took a step back, focusing exclusively on sexual violence and, what is more, reinforcing stereotypes attached to the issue of women and conflict. Otto notes the peculiarity of the “conservative gender politics” of UNSCR 1820, which perpetuated a number of myths surrounding conflict-related sexual violence resulting in a resolution “grounded in the old script of biological certainties, which accepts women’s inequality as natural and armed conflict as inevitable”.²⁵ Furthermore, whilst welcoming the inclusion in UNSCR 2243 of provisions related to the needs of, and harms experienced by, women in the contexts of terrorism, counter-terrorism and countering violent extremism, Ní Aoláin warns against the risk of securitizing women’s lives, especially in what may appear to be an already complex and fragile reality.²⁶ Nonetheless, a major weakness of UNSCR 1325 and subsequent WPS resolutions is that they were not enacted under Chapter VII of the UN Charter and, therefore, are not legally binding. As such, whilst WPS resolutions succeed in bringing the diverse issues surrounding women, peace and security onto the international agenda at the UNSC and suggest potential solutions, these ideas do not translate into obligations of states.

²⁵ Dianne Otto, ‘Power and Danger: Feminist Engagement with International Law through the UN Security Council’ (2010) 32(1) Australian Feminist Law Journal 97, 102-103; Dianne Otto ‘The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade’ (2009) 10(1) Melbourne Journal of International Law 11, 24.

²⁶ Fionnuala Ní Aoláin, ‘The UN Security Council’s New Resolution on Women, Peace and Security’ (*Just Security*, 15 October 2015) <<https://www.justsecurity.org/26720/unscr-2242/>> accessed 17 October 2015.

Looking beyond the UNSC, the responses of other branches of international law to the gendered impact of conflict on women have also remained largely confined to soft law developments. Exceptions to this general tendency originate mostly in ICL and take the form of the provisions of the ICC Statute listing sexual violence as an international crime, Article 7(1)(h) of the ICC Statute listing gender as a ground for persecution as a crime against humanity (CAH), as well as jurisprudence of international criminal courts and tribunals (Chapters 4 and 5).²⁷ In addition, the Arms Trade Treaty 2013 requires state parties to undertake an assessment regarding the potential use of exported conventional arms (including munitions and parts) “to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children”.²⁸

In the context of IRL, early engagements with ‘gender’ related primarily to the notion of gender-based persecution (Chapter 3) as gender is not included as a ground for persecution under the the Geneva Convention Relating to the Status of Refugees 1951.²⁹ In recognition of this gap and the pressing need to address the issue, in 2002 the UNHCR issued official guidelines on gender-related persecution which encouraged gender-sensitive interpretation of the five convention grounds.³⁰ In contrast, gender aspects of conflict-related migration have been much less explored, both at the UN level and in international legal scholarship. In fact, there exists a single UNHCR study comprehensively addressing these interconnected issues, with a majority of relevant literature addressing the issues of ‘gender and IRL’ or ‘armed conflict and IRL’ separately.³¹ However, a significant development which may be of particular relevance to the situation of women in conflict and post-conflict situations was achieved with the adoption of the EU Qualification Directive (QD). The QD created a mechanism which

²⁷ However, the limitations caused by the constrained definition of ‘gender’ in the ICC Statute remain: see section 2.3.1. of chapter 4.

²⁸ Article 7(4) Arms Trade Treaty 2013 (2 April 2013) (hereinafter: ATT 2013).

²⁹ The Geneva Convention Relating to the Status of Refugees 1951 (28 July 1951), 189 UNTS 150 (the Refugee Convention).

³⁰ UNHCR, *Guidelines on International Protection: Gender- Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01.

³¹ Information correct as of November 2015. The intersection between gender-based persecution, armed conflict and asylum is explored in detail in Chapter 3 of this thesis. Valerie Oosterveld, *Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention*, PPLA/06/2012 (UNHCR September 2012), <<http://www.unhcr.org/504dd7649.html>> accessed 9th May 2013.

makes subsidiary protection available to persons fleeing conflict-related gender-based persecution or who flee indiscriminate violence (including gender-based violence) in armed conflict.³² Nevertheless, the overall engagement with gender as a category of analysis in IRL remains limited and largely confined to the exploration of gender in the context of the Convention ground based on ‘membership of a particular social group’.

An attempt to address the situation of women in post-conflict situations has been demonstrated in some recent developments in IHRL. The CEDAW Committee General Recommendation 30 focuses specifically on addressing the situation of women in conflict and post-conflict settings, not only in light of CEDAW but also other international law instruments.³³ Importantly, and in contrast to many developments in other branches of IL, the Committee recognizes gender inequality and structural discrimination as a root cause of violence against women (VAW) and conflict-related violations of women’s rights.³⁴ Furthermore, the Committee noted the significance of, and the need for, transformative nature of international and domestic legal responses to the gendered impact of armed conflict on women and the situation of women in the aftermath, especially in relation to reparations.³⁵ The need for transformative reparations was also emphasized in the Nairobi Declaration on Women’s and Girls’ Rights to a Remedy and Reparation 2007 (a document created by women’s rights organizations and activists) and further mirrored in the UNSG’s Guidance Note on reparations for conflict-related sexual violence (2014).³⁶ Finally, commenting on the interdependence and interrelatedness of conflict-related human rights violations, the Committee emphasized the need to address not only conflict-related violations of civil and political rights of women, but also their economic, social and cultural rights.³⁷

³² For a detailed discussion see: section 5, Chapter 3.

³³ CEDAW, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013.

³⁴ *Ibid.*, paras.34, 77.

³⁵ *Ibid.*, paras.77, 79.

³⁶ Nairobi Declaration on Women’s and Girls’ Rights to a Remedy and Reparation (hereinafter the Nairobi Declaration) <https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf> accessed 17 July 2015, Article 3; UN OHCHR, ‘Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence’, June 2014, 3, <<http://www.unwomen.org/en/docs/2014/6/reparations-for-conflict-related-sexual-violence>> accessed 15 July 2015 (hereinafter: UNSG Guidance Note).

³⁷ *Supra* 33, para.76.

There can be no doubt that the last two decades saw some significant changes in relation to international legal responses to the gendered impact of conflicts on women. The topic has not only gained attention at an international level, but the increased interest in the gendered aspects of armed conflict has also triggered a range of advances that are more substantively examined in this thesis. However, despite the issue finally reaching international agendas, the majority of initiatives and legal developments in this field have focused on sexual violence. Only in some instances the analysis of gender and gender relations as a key factor shaping women's experiences of conflict is examined. Likewise, the actual impact of these developments and whether they contribute towards a meaningful change is yet to be seen and assessed.

At the same time, international legal scholarship regarding the situation of women in conflicts and their aftermath has gained considerable momentum. Analyses surrounding gender and armed conflict, gendered dimensions of post-conflict criminal and transitional justice, the role of gender in peacekeeping and peacebuilding (to name just a few aspects) became the focus of much of the feminist commentary on international law. However, Charlesworth challenges Halley's assertion that "feminism is running things" in international law and remains doubtful about the actual engagement of mainstream international law with feminist perspectives on the discipline.³⁸ Warning of an emergence of a feminist scholarly ghetto in international law, Charlesworth notes that "major writings in international law and theory hardly engage with feminist perspectives on IL or, in fact, any outsider perspectives whatsoever".³⁹ Rather, feminist engagements with mainstream international law continue to be a "decorative frill on the edge of the discipline".⁴⁰ Mindful of these

³⁸ Janet Halley, *Split Decisions – how and why take a break from feminism* (Princeton University Press 2006) 20; Hilary Charlesworth, 'Talking to Ourselves: Should International Lawyers Take a Break from Feminism?' in: Sari Kouvo, Zoe Pearson (eds), *Feminist Perspectives on contemporary International Law. Between Resistance and Compliance?* (Hart Publishing 2011) 22.

³⁹ Hilary Charlesworth, 'Feminist Ambivalence about International Law' (2005) 11 *International Legal Theory* 1, 2 (noting the exception of Fernando Tesón, who, albeit very critically, responds to feminist perspectives on international law); Sadat also raises the issue of a 'gender ghetto' in context of international criminal law: Leyla Nadya Sadat, 'Avoiding Creation of a Gender Ghetto in International Criminal Law' (2011) 11 *International Criminal Law Review* 655.

⁴⁰ Hilary Charlesworth, 'Talking to Ourselves: Should International Lawyers Take a Break from Feminism?' in: Sari Kouvo, Zoe Pearson (eds), *Feminist Perspectives on contemporary International Law. Between Resistance and Compliance?* (Hart Publishing 2011) 18.

developments and their limitations, this thesis looks at how gender is used and positioned within the responses of the selected four branches of international law to the gendered impact of armed conflict on women.

3.2. Fragmentation of international law

In 2006, the International Law Commission (ILC) issued a report authored by Martti Koskenniemi addressing the impending issue of fragmentation of international law.⁴¹ Fragmentation of IL refers to the substantive change in the discipline whereby matters that used to be governed by 'general international law' have become addressed by the specialised regimes within the discipline, such as IRL, ICL, IHRL, law of the sea or environmental law. The key concern, and the ultimate rationale for the report, was that this "specialised law making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law".⁴²

In addition to 'substantive fragmentation of IL' which refers to the emergence of specialised and relatively autonomous branches of international law addressing specific issues (such as IRL, ICL, international environmental law) an 'institutional fragmentation' is taking place, marked by the proliferation of specialised institutions within the individual branches of international law. One example of such fragmentation was the emergence of multiple UN agencies addressing the issues of women and women's rights, which were unified in June 2010 under a single agency called UN Women.⁴³ Similarly, an expansion and greater specialisation of institutions within the field of IHRL can be observed. It is marked by co-existence of, at the very

⁴¹ International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of International Law Commission finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006.

⁴² *Ibid.*, para.8.

⁴³ UN Women brought together United Nations Development Fund for Women (UNIFEM), International Research and Training Institute for the Advancement of Women (INSTRAW), Office of the Special Advisor on Gender Issues and Advancement of Women (OSAGI) and Division for the Advancement of Women (DAV).

Hilary Charlesworth, Christine Chinkin, 'The New United Nations "Gender Architecture": A Room with a View?' (2013) 17 Max Planck Yearbook of United Nations Law 1-60.

least, regional human rights courts, regional commissions on human rights and the UN treaty bodies, all of which have powers of pronouncing on interpretation of international and regional human rights treaties as well as general IHRL. Another layer of complexity is added by the jurisprudence of international criminal courts and tribunals which frequently invoke international human rights norms in their judgments, offering further interpretations of IHRL.

In this busy context, is fragmentation something international lawyers should worry about? The fragmentation debate unveiled polarised views reflected in a rich literature on the subject.⁴⁴ Some international lawyers have referred to this development in terms of a threat to the unity of international law, ‘dangers’, ‘risks’ and expressing general anxiety about the effects of fragmentation.⁴⁵ In contrast, other scholars and practitioners acknowledge that ending fragmentation is an unrealistic project and instead point towards the benefits of fragmentation and potential transformative and modernising effects of its occurrence within the discipline.⁴⁶ In addition, some commentators also draw attention to further fragmentation taking place within already specialised branches of PIL, such as ICL or IHRL, some examples of which are covered in this thesis.⁴⁷ Arguing in favour of fragmentation, Simma noted that the emergence of specialised branches of international law and proliferation of tribunals did not prevent the development of international law, but in fact “these sub-systems

⁴⁴ Gerhard Hafner, ‘Pros and Cons Ensuing from Fragmentation of International Law’ (2004) 25(4) *Michigan Journal of International Law* 849; Joost Pauwelyn, ‘Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands’ (2004) 25(4) *Michigan Journal of International Law* 903; Margaret A. Young, *Regime Interaction in International Law. Facing Fragmentation* (CUP 2012); Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013); Mads Andenas, Eirik Bjorge (eds), *A Farewell to Fragmentation. Reassertion and Convergence in International Law* (CUP 2015).

⁴⁵ Martti Koskeniemi, Paivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553; ICJ, *The Proliferation of international judicial bodies: The outlook for the international legal order*. Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000, <<http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>> accessed 17 October 2015.

⁴⁶ Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20(2) *European Journal of International Law* 265; Mads Andenas, Eirik Bjorge, ‘Introduction: from fragmentation to convergence in international law’ in: Mads Andenas, Eirik Bjorge (eds), *A Farewell to Fragmentation. Reassertion and Convergence in International Law* (CUP 2015) 1.

⁴⁷ Carsten Stahn, Larissa van der Herik (eds), *The Diversification and fragmentation of international law* (Martinus Nijhoff 2012); Marjan Ajevski, ‘Fragmentation of International Human Rights Law- beyond conflict of laws’ (2014) 32(2) *Nordic Journal of Human Rights* 87.

of international law may show (...) the way forward for general international law”.⁴⁸ Furthermore, Simma accurately notes that “the expertise that lawyers will accumulate by working within them, as well as bodies of case law of the various courts and tribunals mandated to interpret and enforce these regimes, will contribute to a growing and ever more dense corpus of law which responds to the needs of the specific regime”.⁴⁹

However, the question paramount to the topic explored in this thesis is how the phenomenon of fragmentation influences the type and nature of international legal responses to the gendered impact of armed conflict and position of women in the aftermath? What does fragmentation of IL mean in practice for securing women’s rights during and after armed conflict?

3.2.1. Fragmentation of international law: a gender and post-conflict perspective

As explored at the beginning of this chapter, the traditional, unitary system of international law has proven not to respond adequately to the position of women whether in peacetime, during armed conflicts or in their aftermath. In particular, the masculine structures of international law reinforced the strict application of public/private dichotomies, largely ignoring their gendered impact on women.⁵⁰ Furthermore, for many decades the gendered aspects of armed conflict and the breadth of their impact were occupying the boundaries of the discipline with very little, if any, real engagement from the ‘mainstream international law’. For instance, in the aftermath of World War II, harms sustained by women during that conflict remained largely unaddressed. The lack of international prosecutions of sexual violence committed in the course of that conflict at Nuremberg and the absence of

⁴⁸ Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20(2) *European Journal of International Law* 265, 276.

⁴⁹ *Ibid.*, 276.

⁵⁰ Charlesworth, Chinkin (2000), *supra* 1, 56-59; Hilary Charlesworth ‘The public/ private distinction and the right to development in international law’ (1988-1989) 12 *Australian Year Book of International Law* 190; Christine Chinkin, ‘A Critique of the Public/ Private Dimension’ (1999) 10(2) *European Journal of International Law* 387.

apologies and reparations for comfort women on the Far East front are classic examples of such silences. It was not until 1979 (i.e. over 30 years since the adoption of the UDHR) that the first UN treaty addressing women's rights and prohibiting discrimination against women (CEDAW) was created. Finally, to this day there exists no UN treaty addressing violence against women and gender-based violence in general, despite the pervasiveness of this problem globally.⁵¹

Set against this background, Koskenniemi's claim that "only a coherent legal system treats legal subjects equally" is questionable.⁵² Feminist international lawyers have long questioned the equal status of women under international law as well as within its structures. Until the relatively recent engagement of certain parts of international law with women's issues, women's rights were marginalised and, despite a few examples to the contrary, little attention continues to be paid to the gender dimensions in the development of mainstream international law. This is despite the clear commitment of the UN to the principles of equality and non-discrimination, which are embedded in Article 1 of the UN Charter, the UDHR, and have more recently been considered as one of eight UN Millennium Development Goals.⁵³ Furthermore, not only do these two principles underpin the key IHRL, IHL and ICL treaties, they are also thought to constitute *jus cogens*. In the view of the Inter-American Court of Human Rights "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws".⁵⁴

⁵¹ However, there exist regional instruments addressing these issues: Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women 1994 (Belém do Pará Convention), The Istanbul Convention 2011.

⁵² ILC, para.491.

⁵³ Article 1(3) of the UN Charter list as one of the purposes of the United Nations "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". UNGA, 'Resolution adopted by the General Assembly: United Nations Millennium Declaration', UN Doc. A/RES/55/2, 18 September 2000, para.6.

⁵⁴ Charlesworth, Chinkin (1993), *supra* 1; *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, IACtHR, 17 September 2003, para.101.

Arguably, it was precisely the fragmentation of IL that enabled the engagement of the discipline with previously marginalised issues relevant to gendered impact of conflicts on women. The emergence of increasingly specialised branches of international law has generally allowed for more precise addressing of issues through normative and institutional developments. The exception to this general pattern of fragmentation of responses is the WPS agenda, which arguably sits within ‘mainstream international law’ due to its positioning within the UNSC structures. Still, the WPS resolutions consistently engage with ‘fragmented’ branches of international law and call upon state obligations under particular treaties.

However, the rapid development of ICL and the increased specialisation within the field of IHRL were placed at the forefront of shaping responses to some aspects of gendered impact of conflicts on women. International prosecutions of conflict-related gender-based crimes, albeit demonstrative of some shortcomings (explored in Chapters 4 and 5), marked a significant step towards ending impunity for gender-based crimes, especially those involving conflict-related sexual violence. The normative impact of ICL developments should not be undervalued either. The work of the ICTR and the ICTY initiated the closing of certain normative gaps in international law, for instance by creating a definition of rape as well as of other sexual offences in international law.⁵⁵ Subsequent advances such as the coming into force of the ICC Statute and accompanying ICC EOC further strengthened that emerging ICL framework.

In parallel, some level of engagement with gendered aspects of armed conflict and its effects on women could be observed within the IHRL framework, particularly with regard to reparations (discussed in Chapter 6). The 2005 Basic Principles on the Right to a Remedy and Reparation, whilst not referring to gender directly and articulated in a soft law form, nonetheless provided long-overdue guidance on reparations for violations of IHRL and IHL.⁵⁶ The topic of gender and reparations was further explored

⁵⁵ The normative advances made by the ICTY and the ICTR are discussed in detail in chapter 4 of this thesis.

⁵⁶ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,

in the Nairobi Declaration and formed a key focus of the UNSG's Guidance Note on Reparations for Conflict-Related Sexual Violence.⁵⁷ In comparison, despite the proliferation of the UN human rights treaty bodies highlighted in the 2006 ILC Report, their involvement with issues surrounding gendered effects of armed conflicts and the situation of women in their aftermath is rather scarce.⁵⁸ With the exception of the CEDAW Committee's General Recommendation No.30, which specifically addresses the rights of women in conflict and post-conflict contexts, other treaty bodies have so far resisted addressing these issues in a substantive and comprehensive manner from the perspective of their respective treaties. In its most recent work, the CEDAW Committee also considered issues of gender-sensitive and transformative reparations, conflict-related forced marriage and gendered aspects of conflict-related displacement.⁵⁹ Furthermore, General Recommendation No.30 emphasizes complementarity between state obligations under CEDAW with IHL, ICL and IRL in relation to securing and delivering women's rights in post-conflict contexts.⁶⁰ The UN Committee Against Torture commented on a gender-inclusive understanding of torture, and stressed the state obligation to prevent acts of torture perpetrated by non-state actors, including various forms of GBV.⁶¹ In addition, the Committee emphasized the gender aspect of redress and compensation for victims of torture and the need for gender-sensitive procedures accompanying judicial and non-judicial proceedings.⁶² However, the Human Rights Committee (HRCttee) and the Committee on Economic, Social and Cultural Rights (CESCR), which overlook the two key human rights treaties, ICCPR and ICESCR, have demonstrated little engagement with the topic

UN Doc. A/RES/60/147, adopted by the General Assembly on 16 December 2005 (hereinafter: 2005 Basic Principles)

⁵⁷ Supra 36.

⁵⁸ Supra 41, para.492.

⁵⁹ CEDAW GR 30, paras. 77-79 (reparations); CEDAW and CRC, Joint general recommendation No.31 of the Committee on Elimination of All Forms of Discrimination Against Women / general comment No.18 of the Committee on the Rights of the Child on harmful practices, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014, para.22 (forced marriage); CEDAW GR 30, paras.53-57 & CEDAW, General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, UN Doc. CEDAW/C/GC/32, 5 November 2014, para.14 (gender, conflict-related displacement, asylum)

⁶⁰ CEDAW GR 30, paras.19-24.

⁶¹ UN Committee Against Torture, General Comment No.2: Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, paras.18, 22.

⁶² UN Committee Against Torture, General Comment No.3: Implementation of article 14 by State parties, UN Doc. CAT/C/GC/3, 19 November 2012, paras.33-35.

of gender, armed conflict and post-conflict situations. The HRCtee limited its comments on women's rights in and after armed conflict to brief and general statements, without incorporating gender as a category of analysis.⁶³ Likewise, the CESCR has not yet commented on economic, social and cultural rights of women in the aftermath of conflict.

Fragmentation of international law enabled the shaping of international legal responses to the gendered effects of armed conflicts, but at the same restricted these efforts predominantly to soft law. Some mainstream international law developments, such as the much celebrated WPS agenda at the UNSC, offer merely "rhetorical comfort" by bringing issues of women, conflicts and peace to the institutional realm of international law, but fail to create mechanisms to ensure implementation and observance of the key goals of the WPS agenda.⁶⁴ This feature has serious implications for the accountability of states in relation to addressing the situation of women in the aftermath of conflicts. Ní Aoláin also warns of the difficulties of reforming a fragmented system comprised of multiple arenas addressing issues concerning women, peace and security.⁶⁵ Furthermore, the disjointed nature of international legal responses to these issues appears to prioritise some areas of response over others, for instance international criminal justice over securing and giving effect to economic, social and cultural rights of women in the aftermath.

Overall, the developments regarding women and armed conflict show that fragmentation, whilst resisted by some, enabled international law to respond to the events, demands and problems arising in a highly politicised and increasingly globalised modern international scene, including the gendered impact of armed conflicts on women. Nonetheless, the likely benefits of designing such specific responses carry the possible danger of sidelining them to the realm of soft law and the limbo of non-enforcement.

⁶³ UN Human Rights Committee, General Comment No.28: Article 3 (equality of rights between men and women), UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, para.8.

⁶⁴ Fionnuala Ní Aoláin, 'International law, gender regimes and fragmentation: 1325 and beyond' in: Cecilia M. Baillett, *Non-State Actors, Soft Law and Protective Regimes. From the Margins* (CUP 2012) 62.

⁶⁵ *Ibid.*, 61-62.

From the perspective of this thesis, the areas of international law to which the research questions relate may be perceived as an already specialised regime comprised of a range of international legal responses to the situation of women in the aftermath of conflict. Some may even argue that this is sub-system of *jus post bellum*—a new and highly specialised branch of IL in the making (discussed in section 3.3. below). In light of these factors, the remaining chapters of this thesis analyse how fragmentation of IL enabled responses within four branches of international law (IHL, IRL, ICL and IHRL) and assesses their adequacy from a gender perspective.

3.3. *Jus post bellum*

The third and final perspective which informs the research presented in this thesis is *jus post bellum* as an emerging field of international law designed to address and regulate post-conflict situations and challenges arising as a result of conflicts. Its development can be seen as a direct result of the ongoing process of fragmentation of international law (discussed in section 3.2.) and an attempt to respond to a number of factors which have influenced modern warfare and peace processes.

The classical distinction between war and peace (and, accordingly, between the ‘law of war’ and ‘the law of peace’) is being increasingly challenged. The change in typology of armed conflicts, the rise of internal violence and the increased participation of non-state actors in modern conflicts mean that the applicability of the *jus in bello* is no longer determined by a formal declaration of a state of war by the state. Furthermore, it has become increasingly difficult to draw a clear distinction between different phases of modern armed conflict.⁶⁶ Similarly, peace processes, especially those following non-international armed conflicts, have become internationalised affairs rather than matters left to the discretion of individual states.⁶⁷ Finally, modern

⁶⁶ In that respect, Österdahl and van Zadel note the example of Israeli-Palestinian conflict: Inger Österdahl, Esther van Zadel, ‘What Will *Jus Post Bellum* Mean? Of New Wine in Old Bottles’ (2009) 14(2) *Journal of Conflict and Security Law* 175, 176.

⁶⁷ Carsten Stahn, ‘Jus Post Bellum: Mapping the Discipline(s)’ in: Carsten Stahn, Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008) 100.

international law has started to recognize that the dichotomous nature of the ‘law of war’ and the ‘law of peace’ is not suitable to respond to a number of challenges arising in post-conflict reality and that cessation of the conflict requires further steps to facilitate peacebuilding. As such, international law created mechanisms which address some of the challenges arising in the process of transition from conflict to peace, including international accountability for IHL and IHRL violations (Chapters 4 and 5), return of property and post-conflict reparations (Chapter 6) and conflict-related migration (Chapter 3).

Although Schwarzenberger and Jessup considered issues of international legal regulation of the transition between war and peace as long ago as the 1940s and 1950s, it was not until the early 2000s that the topic of *jus post bellum* attracted immense interest of international legal scholars.⁶⁸ Thus far, the debates surrounding *jus post bellum* have yielded more questions than answers. Not surprisingly, there are various views on the status of *jus post bellum* and the substantive content of this newly forming area of international law. The name itself gives rise to some basic questions regarding the scope of *jus post bellum*: what law does it comprise (*jus*); what is its temporal and contextual scope (*post*); what types of conflicts are addressed (*bellum*)?⁶⁹ *Jus post bellum* is often considered a part of other fields and concepts such as international conflict and security law, *lex pacificatoria*, peacebuilding, transitional justice or R2P.⁷⁰ It is referred to as ‘the right way to end the war’, but also as ‘new

⁶⁸ Georg Schwarzenberger, ‘Jus Pacis, Ac Belli?’ (1943) 37 *American Journal of International Law* 460; Phillip Jessup, ‘Should International Law Recognize an Intermediate Status Between Peace and War’ (1954) 48 *American Journal of International Law* 98.

Carsten Stahn, ‘“Jus ad Bellum”, “Jus in Bello”, “Jus post Bellum”? – Rethinking the conception of the Law of Armed Force’ (2006) 17(5) *European Journal of International Law* 921; Carsten Stahn, Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008); Vincent Chetail (ed), *Post-Conflict Peacebuilding. A Lexicon* (OUP 2009); Larry May, Andrew T. Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (CUP 2012); Larry May, *After War Ends: a Philosophical Perspective* (CUP 2012); Brett Bowden, Hilary Charlesworth, Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict. Great Expectations* (CUP 2012); Carsten Stahn, Jennifer S. Easterday, Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014).

⁶⁹ These questions are explored by Easterday: Jennifer Easterday, ‘What is Jus Post Bellum?’ (2012) 106 *American Society of International Law Proceedings* 335, 335-336.

⁷⁰ Nigel D. White, Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar Publishing 2013); Nigel D. White, *Advanced Introduction to International Conflict and Security Law* (Edward Elgar Publishing 2014) chapter 7 (Post-conflict law); Christine Bell, *On the Law of Peace. Peace Agreements and the Lex Pacificatoria* (OUP 2008); Vincent Chetail (ed), *Post-Conflict*

wine in old bottles'.⁷¹ There exists a general lack of consensus amongst scholars regarding the scope and status of *jus post bellum*: some consider it to be a completely new and separate branch of international law which will require creation of new principles and norms, whilst others see it as an umbrella term for various instruments applicable to the situations of transition from conflict to peace.⁷² However, approaching *jus post bellum* as a brand new branch of international law which is yet to be created carries some potential risks and limitations, especially from a practical law-making point of view. Arguably, the formation of a new regime within the existing structure of public international law and in accordance with principles of international law making would require the creation of a number of multilateral treaties as well as soft law instruments. This raises an immediate issue of consensus being reached between states regarding the content of such a treaty (or treaties). An attempt to codify *jus post bellum* would test the general willingness of states to engage in a complex and time-consuming process of interstate treaty negotiations as well as states' readiness to be bound by international obligations set out in new instrument(s). Sceptical about the latter aspect, Bell rightly observes that "there is no clear will or capacity to agree a new 'fifth' Geneva Convention or suchlike".⁷³

Jus post bellum is also thought to constitute an extension of just war theory into post-conflict situations and therefore rooted in the moral nature of obligations.⁷⁴ However, the construction and application of a *jus post bellum* regime does not need to rely exclusively on moral obligations. In fact, it can be argued that it is paramount that

Peacebuilding. A Lexicon (OUP 2009; Carsten Stahn, 'R2P and Jus Post Bellum: Towards a Polycentric Approach' in: Carsten Stahn, Jennifer S. Easterday, Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 102-122.

⁷¹ Richard M. O'Meara, 'Jus Post bellum: Reflections on the Right Way to End the War' (2011) 6 *Journal on Terrorism and Security Analysis* 35; Österdahl, Zadel, supra 66.

⁷² For instance, Stahn (supra 67 and 68) as well as Österdahl & van Zadel (supra 66) advocate the creation of the new framework of *jus post bellum*. In contrast, Cryer remains skeptical about the need for a new legal framework: Robert Cryer, 'Law and the Jus Post Bellum: Counseling Caution' in: Larry May, Andrew T. Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (CUP 2012) 233-238.

⁷³ Christine Bell, 'Peace settlements and international law: from *lex pacificatoria* to *jus post bellum*', in: Nigel White, Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar Publishing 2013) 543.

⁷⁴ Larry May, *After War Ends: a Philosophical Perspective* (CUP 2012); Brian Orend, 'Jus Post Bellum: The Perspective of a Just War Theorist' (2007) 20 *Leiden Journal of International Law* 573. However, Bellamy argues that it is premature to include *jus post bellum* as an element of a just war theory: Alex J. Bellamy, 'The Responsibilities of Victory: Jus Post Bellum and the Just War' (2008) 34(4) *Review of International Studies* 601

international law principles and norms underpin the very structure and substantive content of this legal framework. Positioning the 'jus' of *jus post bellum* within international law allows the placement of greater emphasis on international obligations of states, which is of particular relevance in the context of the enforcement of states' human rights obligations as well as ensuring compliance and accountability. In addition, Österdahl and van Zadel suggest that labelling of the law applicable to post-conflict situations may help "put the post-conflict phase in the centre of the attention of the international community as well as complete the available international law on armed conflict with a post-conflict category which may make the idea of a legal framework for the post-conflict phase more legitimate".⁷⁵

This thesis approaches *jus post bellum* as an emerging regime in the context of fragmented international law. However, as this thesis suggests, there is a great need for synchronisation of the often disjointed developments in international law which relate to post-conflict situations in general and the situation of women in the period transition from conflict to peace in particular. In this context, *jus post bellum* emerges as a possible method of framing and organising various advances made by specialised branches of international law (such as ICL, IRL or IHRL) which share a common goal of addressing challenges associated with the aftermath of war and the period of transition to durable peace.

3.3.1. The gender of *jus post bellum*

There has been very little engagement of international legal scholars with the question of a gender dimension of the new *jus post bellum* framework, particularly from a feminist perspective.⁷⁶ This stands in stark contrast with the amount of feminist critique of the law on the use of force and of IHL. Yet the nature and type of international (and domestic) legal responses to post-conflict situations is of great significance to women affected by conflict and bears real consequences for their lives.

⁷⁵ Österdahl, van Zadel, *supra* 66, 185.

⁷⁶ A notable exception is: Ní Aoláin, Haynes, *supra* 12.

Viewed from the perspective of the aftermath, the transition from conflict to peace can be seen as an opportunity to revisit social, political and legal structures, including those that perpetuated gender inequality and structural discrimination of women. But does a new, post-conflict design of the legal landscape carry a guarantee of a better outcome for women than '*jus ante bellum*'?⁷⁷ If *jus post bellum* is to be merely treated as a continuation of ideas underpinning *jus ad bellum* and *jus in bello* (or indeed as a missing element of that legal triad), then it is likely to reproduce and reinstate, indeed entrench and perpetuate, the gender biases, shortcomings and silences permeating these areas. As such, it may replicate systems and processes which effectively exclude women's active involvement in post-conflict processes and limit the transformative potential of post-conflict reconstruction by ignoring the gendered aspects of conflicts and their implications for women in the aftermath. Therefore, it is imperative to ask who is the beneficiary of the *jus post bellum* framework?

May's assertion that the *jus post bellum* framework is designed to benefit "the average citizen" puts in question the responsiveness of such a framework to the needs of women.⁷⁸ This approach carries a potentially dangerous assumption that female and male experiences of conflict are universal and therefore do not warrant a more nuanced and gender inclusive approach within the *jus post bellum* framework. However, all phases of conflict end with different challenges and in many aspects impact differently on men and women. Therefore, recognition of the gendered nature of the impact of armed conflict, as well as taking into account experiences of both men and women, is a crucial part of forming a truly universal *jus post bellum* which (unlike general international law) does not privilege the experiences of men over those of women. Furthermore, the focus of *jus post bellum* needs to include legal responses to a wide range of factors and issues arising from the gendered impact of armed conflict. While *jus post bellum* is rightly not limited in its application to women only, it is nevertheless important that the framework provides meaningful legal responses to issues faced by women in the aftermath and incorporates gender as a core factor

⁷⁷ In this context, the term '*jus ante bellum*' was created and used to describe the legal system before the conflict.

⁷⁸ Larry May, *After War Ends: a Philosophical Perspective* (CUP 2012) 5.

throughout the stages of its development. As such, it is crucial that the framework focuses not only on addressing sexual violence (which currently dominates the international legal discourse surrounding women and war) but also takes into consideration a broad range of issues relevant to women in post-conflict situations, such as conflict-related migration (Chapter 3), provision of adequate and gender-sensitive reparations (Chapter 6) or securing economic, social and cultural rights for women.

Ní Aoláin and Haynes question the implications of *jus post bellum* for women, especially its potential to become “another normative framework which may merely clutter the legal landscape, with the overall outcome of less rather than more legal enforcement for women”.⁷⁹ For instance, would a new *jus post bellum* framework add anything to the existing UNSC resolutions on women, peace and security which already emphasize the need to include women in peacebuilding in post-conflict processes more generally? Or, would it rather weaken certain already existing and, admittedly, slowly evolving developments?

As this thesis demonstrates, various specialised branches of international law have been responding to some aspects of the gendered impact of armed conflict on women. Undoubtedly, with time new instruments of both a soft and hard law nature are likely to be added to this framework, such as any future WPS resolutions of the UNSC. If *jus post bellum* is treated as an international legal framework bringing together the existing principles and norms regarding post-conflict situations and future developments in this field, it is crucial that it engages with, and integrates, the gender perspective. On a normative level, a gender perspective needs to be incorporated into the development of the *jus post bellum* doctrine and its substantive content in order to create a set of principles which respond adequately to gendered experiences of conflict and post-conflict needs of both women and men. For instance, gender analysis should be incorporated into the design of any future instruments (whether of a hard or soft law nature) addressing post-conflict situations. Also, greater attention should be given to the intersectional nature of women’s experiences of conflict and to

⁷⁹ Supra 12, 162.

mechanisms which emphasize existing positive obligations of states and strengthen accountability in the post-conflict context. Otherwise, *jus post bellum* is likely to become no more than yet another framework reinforcing the undesirable ‘add women and stir’ approach, bringing little, if any, meaningful change.

International legal responses to the gendered impact of armed conflict on women, which form the core of this thesis, inherently belong to the conceptual notion of *jus post bellum*. However, a prudent approach to *jus post bellum* would involve identification of relevant existing laws pertinent to the situation of women in the aftermath, assessment of their scope and effectiveness and, finally, consideration of possible augmentation of these principles within the broader *jus post bellum* framework.⁸⁰ A similar approach has been adopted for this thesis and is presented with regard to four areas of international law: IHL (Chapter 2), IRL (Chapter 3), ICL (Chapters 4 and 5) and IHRL with particular focus on post-conflict reparations (Chapter 6).

As demonstrated by this research, individual components of international legal principles and norms with regard to the situation of women in post-conflict situations are identifiable and are being continuously developed. Furthermore, the relationships and interactions between those individual developments have hitherto been only partially explored and conceptualised, resulting in the existence of disharmonised legal principles and mechanisms. However, each of these legal responses, when examined from a gender perspective, unveils certain shortcomings and gender biases which often stand in the way of building a coherent and effective international legal response to the situation of women in the aftermath of conflict. It is in this context that *jus post bellum*, although in itself a fragmented regime, can be seen as a tool for unifying these developments and therefore bridging the gap between increased specialisation of international law and the pressing need for harmonisation of legal developments applicable to post-conflict situations.

⁸⁰ This approach is also favoured by Ní Aoláin and Haynes: *supra* 12, 170.

4. Structure of the thesis

Following the introduction, the thesis starts with a critique of IHL and discussion of the impact of armed conflict on women (Chapter 2). Chapter 2 sets out the wider context for examination of the research question by looking at how international law protects women in armed conflict and exploring the gendered dimension of conflict. The next four chapters (chapters 3-6) focus on analysis of international legal responses to the gendered aspects of armed conflict on women and the situation of women in the aftermath within three specialised branches of international law: IRL, ICL and IHRL.

Chapter 3 addresses the intersection between armed conflict, gender and asylum. By examining the impact of conflict-related migration and displacement on women, the chapter reviews the nature of responses of IRL to issues of conflict-related gender-based persecution as well as challenges faced by women who flee conflict situations. Chapters 4 and 5 focus on international criminal law and international prosecutions of gender-based crimes. Chapter 4 provides analysis of the jurisprudence of the ad hoc international criminal tribunals, the SCSL and the ICC with regard to gender-based crimes committed in contemporary armed conflicts. Chapter 5 considers points raised in the preceding chapter in the context of limitations of ICL in relation to achieving 'post conflict gender justice'. It suggests that various shortcomings in the prosecution of gender-based crimes at an international level can be attributed to procedural and evidentiary factors, both at the pre-trial and trial stage of international criminal proceedings.

Chapter 6 explores the issue of reparations for women who have suffered violations of IHL and/or IHRL in armed conflict. Given that reparations can be viewed as an essential part of the process of transition from conflict to peace and securing post-conflict justice, the chapter applies gender analysis to the existing international framework in relation to reparations. In particular, it discusses the issue of gender-sensitive reparations under IHRL and at the ICC.

Chapter 7 brings together the main themes explored in this thesis and presents conclusions of the thesis.

5. Terminology

In the context of this thesis 'gender' is understood as the social construction of the differences in roles, activities, behaviours and attributes between men and women as understood in a particular society. This is in contrast to category of 'sex' which refers to biologically determined differences between men and women.

The term 'post-conflict' is used to refer to the 'greyzone', a period of transition from conflict to durable peace. It challenges the traditional dichotomy between 'war' and 'peace' in recognition of the fact that many challenges stemming from the effects of armed conflict continue despite peace agreements being concluded.⁸¹

Although the thesis focuses on women, it is recognized that issues discussed here are equally relevant to girls. However, girls may also have additional needs which are addressed through instruments relevant to children's rights. The situation of girls is discussed in greater detail in the context of child soldiering (Chapters 4 and 5).

Throughout this thesis, international law should be read as public international law (PIL).

The content of this thesis reflects the law as of 1 January 2016.

⁸¹ This is reflected in Bell's view that "post-settlement does not mean 'post-conflict', although the literature often assumes that it is" (supra, 70).

Chapter 2

Gender, armed conflicts and international law

1. Introduction

International law creates measures and provisions aimed at the protection of women in armed conflict through international humanitarian law (IHL) as a specialised body of law. In addition to the general protection afforded to all civilians and persons no longer participating in hostilities, IHL foresees special protection for women. Nevertheless violations of IHL and IHRL occur on a mass scale in contemporary armed conflicts.¹ Furthermore, these violations are often directed against women due to their gender and result in gender-specific harms.

The gendered nature of armed conflicts is a result of construction of male and female gender roles within a particular society. This dynamic also creates general patterns of experiences of armed conflict, albeit those may vary depending on individual circumstances. For instance, whilst men might particularly fall victims to killings and enforced disappearances, women disproportionately experience sexual violence. However, as the discussion in this chapter will illustrate, the gendered impact of armed conflict on women is not limited to sexual violence and continues long after hostilities have come to an end, having a real and everyday impact on women's lives.

This chapter examines the scope of protection afforded to women under IHL and analyses the positioning of gender within it. The broader international legal framework regarding women in armed conflict is also discussed. Furthermore, the chapter provides an analysis of the impact of armed conflict on women and considers various challenges for modern international law in addressing these issues both at a normative and practical level.

¹ UNSC, Sexual violence in conflict. Report of the Secretary-General, UN Doc. S/2014/181, 13 March 2014; UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. S/2015/203, 23 March 2015.

2. Gender and International Humanitarian Law

The international law of armed conflict is traditionally divided into two main categories: *jus ad bellum*, which relates to the use of force, and *jus in bello*, which determines the set of rules applicable during armed conflict.² The principal legal instruments that provide protection to victims of armed conflict are the four Geneva Conventions of 1949 (GC I –IV 1949) and their two Additional Protocols of 1977 (AP I & AP II 1977), which deal with international armed conflicts (IACs) and non-international armed conflicts (NIACs).³ In Pictet’s view, the rules of IHL comprise

“international rules established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use methods, and means of warfare of their choice, or to protect persons and property that are, or may be, affected by conflict”.⁴

They are granted to all men and women without, at least in principle, any discrimination.⁵ All four Geneva Conventions of 1949 and their Additional Protocols of 1977 clearly state that all persons falling under a specific category of protection must be “treated humanely (...) without adverse distinction founded on sex”.⁶ The statement regarding equality of protection of prisoners of war is also expressed in Article 14 GC III 1949, which provides that:

² In addition to *jus ad bellum* and *jus in bello*, the framework of *jus post bellum* is emerging (discussed in section 3.3. of chapter 1).

³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GC II); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GC III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV); Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), of 8 June 1977 (AP I); Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), of 8 June 1977 (AP II).

⁴ Jean Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) xxvii.

⁵ Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press/ ICRC 2005) (CIHL Study), Vol. I: Rules, Rule 88 <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88> accessed 1 December 2015; Frits Kalshoven, *Constraints on the waging of war* (ICRC 1987) 42-43; Charlotte Lindsey, *Women facing war. ICRC study on the impact of armed conflict on women* (ICRC 2001) 19.

⁶ Article 12 GC I & GC II; Article 3(1) GC IV.

“Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men”.

The prohibition of sex discrimination applies equally in conflicts of a non-international character. Common Article 3 to the Geneva Conventions prohibits discrimination on various grounds, including sex:

“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”.

This provision is highly important, especially in the context of contemporary armed conflicts, the majority of which are of internal character.

In the context of sex discrimination, it is essential to distinguish between the prohibition of discrimination and the principle of differentiation. IHL explicitly prohibits sex discrimination in the application of its rules to protected persons. Nevertheless, IHL recognizes certain specific needs and vulnerabilities of women during war and grants them further, additional, protection and rights. Therefore, under the Geneva law framework, women are entitled to both general protection, applicable equally to all combatants, civilians and persons *hors de combat*, as well as to special protection as parties particularly vulnerable to armed conflict and certain types of violence.

2.1. Special protection

The specific needs of women may vary according to the situation in which they find themselves during armed conflict. Although the majority of women experience armed conflict as civilians, mostly due to their traditional gender roles within the society as wives, mothers and carers, some women take an active part in warfare, both in regular

forces and in guerrilla, resistance or insurgent groups.⁷ Many girls also become child soldiers, as illustrated by the conflicts in Sierra Leone or in the Democratic Republic of Congo.⁸

IHL contains a range of provisions regarding special kinds of protection for women.⁹ However, Gardam aptly notes that although over 40 provisions of IHL deal specifically with women, they focus on women's relationship with others in the context of armed conflict rather than protecting women in their own right.¹⁰ For instance, the IHL framework sets out specific protection rules in relation to pregnant women and mothers of young children.¹¹ They are set out throughout the GC IV as well as in AP I and relate mostly to the provision of food, clothing, medical assistance, evacuation and transportation.¹²

Furthermore, IHL prohibits acts of sexual violence against both sexes, but additional emphasis is added in the language of the Geneva Conventions, aimed at preventing the commission of these acts against women. This reflects the fact that whilst both men and women fall victim to sexual violence, women are disproportionately affected by such acts, in particular wartime rape.¹³ Geneva Convention IV, AP I, and AP II state

⁷ Charlotte Lindsey, *Women facing war. ICRC study on the impact of armed conflict on women* (ICRC 2001) 23.

⁸ The topic of girl soldiers as well as prosecution of crimes committed against them was discussed in, section 3.2.2.1. of Chapter 4.

⁹ J. de Preux, 'Special protection of women and children' (1985) 248 *International Review of the Red Cross* 292-302.

¹⁰ Judith Gardam, 'A New Frontline for Feminism and International Humanitarian Law' in: Vanessa Munro, Margaret Davies (eds) *Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2012) 223.

¹¹ For criticism of this approach see in particular: Judith Gardam, 'A feminist analysis of certain aspects of international humanitarian law' (1988-1989) 12 *Australian Year Book of International Law* 266; Judith Gardam, 'Women and the law of armed conflict: why the silence?' (1997) 46(1) *International and Comparative Law Quarterly* 55, 58-60; Judith Gardam, 'An alien's encounter with the law of armed conflict' in: Ngaire Naffine, Rosemary J. Owens, *Sexing the subject of law* (Sweet & Maxwell 1997) 241-246; Hilary Charlesworth, Judith Gardam, 'Protection of women in armed conflict' (2000) 22 *Human Rights Quarterly* 148; Judith Gardam, Michelle Jarvis, *Women, Armed Conflict and International Law* (Kluwer International 2001) Chapters 3 & 4.

¹² See: Articles 16-18, 21-23, 38, 50, 89, 91 and 127 GC IV; Article 70 (1) and Article 76 (2) AP I.

¹³ The prohibition of rape was already recognized in Article 44 of the Lieber Code 1863: "All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense".

that women shall be protected “in particular against rape, enforced prostitution, or any form of indecent assault”.¹⁴ IHL views these forms of conflict-related sexual violence (CRSV) as an attack on women’s honour and dignity, but fails to reflect the gender-based aspect of these crimes.¹⁵

In the context of non-international armed conflict, Article 3 does not explicitly mention rape or other forms of sexual violence but it prohibits, irrespectively of the sex of the person, “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages on personal dignity, in particular humiliating and degrading treatment”.¹⁶ When classified as torture or cruel and inhuman treatment, rape may also be a grave breach of the Geneva Conventions as “torture or inhuman treatment (...) wilfully causing great suffering or serious injury to body and health”.¹⁷

Additionally, in light of modern developments in IHL and advances in the field of international criminal law (ICL), acts of CRSV have been recently recognized as war crimes and crimes against humanity (CAH). As such they have also been prosecuted on the international level by the ad hoc international criminal tribunals (International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)), marking a major stepping stone in bringing the long overdue impunity for wartime criminal acts to an end.¹⁸

Nevertheless, despite additional humanitarian protection given to women in times of conflict as well as recent ICL advances in the punishment of prohibited wartime acts, women continue to suffer gender-based harms. Furthermore, gender-based violations often continue after armed conflict has come to an end, making the gendered aspect of the aftermath particularly challenging for women.

¹⁴ Article 27 GC IV; Article 76(1) AP I; Article 4(2)(e) AP II.

¹⁵ For further critique of this point see section 2.1. below.

¹⁶ Article 3 (1)(a) GC I-IV 1949; Article 3 (1)(c) GC I-IV 1949.

¹⁷ Article 50 GC I; Article 51 GC II; Article 130 GC III; Article 147 GC IV.

¹⁸ Prosecution of conflict-related sexual violence is discussed in detail in section 3 of Chapter 4.

2.2. The feminist critique of IHL

Whilst principles of equality and non-discrimination underpin the IHL framework, a gender analysis of IHL reveals that, similarly to general international law, IHL is highly gendered.¹⁹ To a great extent, this is revealed by the way in which women are portrayed as subjects of IHL. The core emphasis of IHL on the mothering, caring and reproductive roles of women shapes a particular picture of women within IHL, which attributes special protection to them not as to independent and equal subjects but due to their association with others, especially children. Such positioning effectively diminishes the level of protection afforded to women who do not have children and emphasizes the stereotypical and essentialist view of women and their traditional gender roles.

By failing to conceptualise gender-based violations as rooted in inequality and structural discrimination, IHL also appears to assume that its rules apply in a gender equal society. IHL provisions largely ignore these issues, although they are the root causes of gender-based violations against which the framework is attempting to protect. The language of IHL reflects the lack of understanding of the gendered character of conflict as well as its diverse and gender-specific impact on women. IHL provisions purporting to protect women from sexual violence portray these crimes as attacks on women's 'honour' or violations of the 'special respect' attributed to women rather than as violations entrenched in gender inequality and gender discrimination.²⁰ Although the decisions of the ad hoc international criminal tribunals provided much needed clarification on the gendered nature of IHL violations (see Chapter 4), the framework of Geneva law nonetheless remains uninformed by such a perspective.²¹

¹⁹ For a critique of IHL see: Helen Durham, Katie O'Byrne, 'The dialogue of difference: gender perspectives on international humanitarian law' (2010) Vol.92 No.877 *International Review of the Red Cross* 31-52; Gardam, Jarvis, *supra* 11; Gardam (1988-1989), *supra* 11, 266; Gardam (1997), *supra* 11, 58-60.

²⁰ Gardam, Jarvis, *supra* 11, 96-97.

²¹ Lindsey argues that IHL must be read with an appreciation of a temporal context of 1940s: "(...) honour is a code by which many men and women are raised, and by which they define and lead their lives. Therefore the concept of honour is more complex than merely a "value" term" (Charlotte Lindsey, 'The Impact of Armed Conflict on Women' in: Helen Durham, Tracey Gurd (eds) *Listening to the Silences: Women and War* (Martinus Nijhoff 2005) 33).

Furthermore, the strong focus of the IHL framework on the notion of military necessity prioritizes men as combatants and addresses the interests and rights of women (particularly those on the enemy side) to a much lesser extent. Gardam rejects the notion of the apparently neutral nature of the principle of military necessity and demonstrates its strong influence on the shaping of IHL:

(...) military necessity in fact incorporates a hierarchy of values. It assumes that the military victory of the State is pre-eminent. From this flows seemingly logical value judgment that the life of the combatant is more important than that of the civilian, even more so if that civilian belongs to the “enemy” State. (...) The military resist strongly the notion that combatants should assume risks to protect the civilian population. But their position is not immune to challenge. It assumes that war is inevitable (...)”.²²

Furthermore, whilst IHL provides protection to civilians and persons no longer participating in hostilities, it does not take into account protection from violence *caused* by conflict, for instance sexual violence within refugee camps or violence within the same armed group. The latter is particularly detrimental to the protection of girl soldiers from sexual and gender-based violence to which they are subjected by other members of their armed groups.

Finally, the weak point of the IHL framework lies, unsurprisingly, in its enforcement. IHL’s effectiveness is brought into question by the general shortcomings in its implementation. Although the four Geneva Conventions 1949 are universally applicable and the vast majority of states have ratified the two Additional Protocols, the warring parties in modern conflicts rarely implement the rules of IHL. This puts in question the preventative aspect of IHL but also problematizes the issue of accountability for violations of IHL. Whilst developments in ICL, most notably the decisions of the ICTY, the ICTR and the SCSL, have given some substance to IHL, the ultimate responsibility for establishing accountability for violations of IHL lies with domestic courts. However, ensuring an effective and gender-sensitive system of judicial enforcement of IHL in the aftermath of war is challenging.²³

²² Gardam (1997), *supra* 11, 72.

²³ For further discussion see section 5, Chapter 5.

2.3. International legal framework addressing gender and armed conflict

Prior to the adoption of the Geneva Conventions 1949, there was little in the way of special protection to women in armed conflict. Article 46 of the Hague Regulations 1899 provided for “family honour and rights to be respected” whilst the 1929 Geneva Convention recognized that women can be combatants and therefore, as prisoners of war, should be “treated with all due regard for their sex”.²⁴ Beyond that there was little of relevance.

However, since the adoption of the Geneva Conventions, there has been greater attention to issues of women and armed conflict, both in mainstream international law as well as its specialised branches (such as IHRL and ICL).²⁵ In 1974, the General Assembly adopted the Declaration on the Protection of Women and Children in Emergency and Armed Conflict followed by the adoption of the two Additional Protocols to the Geneva Conventions 1949 in 1977.

In addition to major advances in ending impunity for conflict-related gender-based crimes in ICL (discussed in detail in Chapter 4), IHRL also developed the law applicable to the situation of women in conflicts and in their aftermath. The application of the Convention on All Forms of Discrimination Against Women 1979 (CEDAW) to conflict prevention, conflict and post-conflict situations was confirmed by the CEDAW Committee.²⁶ The Committee emphasized states’ obligations to apply the Convention in diverse situations where they exercise jurisdiction (territorial and extraterritorial), including occupation, lawful and unlawful military actions in another state, peacekeeping missions and during involvement in post-conflict reconstruction.²⁷ States’ due diligence obligations in situations of armed conflict and in its aftermath have been stressed by the CEDAW Committee and further applied by the regional human rights courts and the Inter-American Commission on Human Rights, especially

²⁴ Article 46 of the Regulations Concerning the Laws and Customs of War on Land 1899; Article 3 of the Convention between the United States of America and Other Powers relating to Prisoners of War 1929.

²⁵ See Chapter 1.

²⁶ CEDAW, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013.

²⁷ *Ibid.*, para.9.

in the context of sexual violence against detainees.²⁸ Furthermore, regional human rights instruments, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, the Belém do Pará Convention 1994 and the Istanbul Convention 2011 include substantive provisions regarding the protection of women in armed conflict.²⁹

Especially in the past 15 years or so, there has been an increase in developments regarding women and armed conflict at the United Nations. As discussed in Chapter 1, the UNSCRs on Women, Peace and Security brought issues of the gendered impact of armed conflict on women and their position in the aftermath of conflicts to the political agenda of the UNSC, thereby increasing their visibility at the international level.³⁰ Nonetheless, the UN-level developments still largely focus on CRSV, with little attention paid to other aspects of the gendered impact of armed conflict on women. Furthermore, they do not generally focus on the underlying causes of CRSV (e.g. by linking it to structural discrimination and inequality) and extremely rarely engage in gender analysis of violations of non-sexual nature, such as violations of economic, social and cultural rights of women.³¹ However, a more explicit link between gender, armed conflict and human rights protection is made in more recent instruments, such

²⁸ Ibid., para.15; CEDAW, General Recommendation No.19 on Violence Against Women, UN Doc. A/47/38, 1992; CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, UN Doc. CEDAW/C/GR/28, 16 December 2010; *Aydin v. Turkey*, Application No.23178/94, 27 September 1997; *Raquel Martí de Mejía v. Peru*, Inter-American Commission on Human Rights, Case 10.970, Report No. 5/96, 1 March 1996.

²⁹ Article 11 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003 (Maputo Protocol); Article 9 Belém do Para Convention 1994; Article 2(3) Istanbul Convention 2011. The soft law developments at a regional level include Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region (18 June 2008).

³⁰ See section 3.1. of Chapter 1.

³¹ Diane Otto, "'Gender Comment': Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?' (2002) 14 Canadian Journal of Women and Law 1-52; Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict', paper series commissioned by the Office of the High Commissioner for Human Rights (2009) <http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf> accessed 12 May 2010; The recent report of the UN High Commissioner for Human Rights regarding the protection of economic, social and cultural rights in armed conflict does not engage with the gender aspect of this issue: UNGA, Report of the United Nations High Commissioner for Human Rights, UN Doc. E/2015/59, 19 May 2015.

as the Istanbul Convention 2011 (mentioned above) and the Arms Trade Treaty 2013, which recognizes the link between militarism and gender-based violence (Article 7(4)).

3. The gendered impact of armed conflict on women

Women experience armed conflict differently than men due to different male and female gender roles within the particular society and gender relations arising from them.³² The detrimental and gender-specific position of women and girls in armed conflict was recognized at the international level during The Fourth World Conference on Women in 1995, where it was noted that 'while entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex'.³³

Women's experiences of armed conflict are underscored by their gender roles within a particular social context, but they are by far not uniform. Whilst there exist some common aspects, women's actual experiences depend on a range of factors, such as age, race, class, nationality, employment, socio-economic status and, finally, their combatant or civilian status.³⁴ Paradoxically though, situations of armed conflict may also enable women to take on roles, which they would not have been able to perform

³² Gardam (1997), supra 11, 58; Charlesworth, Gardam, supra 11, 150; Christine Chinkin, Hilary Charlesworth, *The boundaries of international law: a feminist analysis* (Manchester University Press 2000) 250-257; Dyan Mazurana, 'Gender and the Causes and Consequences of Armed Conflict' in: Dyan Mazurana, Angela Raven-Roberts, Jane Parpart (eds), *Gender, Conflict and Peacekeeping* (Rowman and Littlefield Publishers 2005) 29-43; ICRC, *International Humanitarian Law and Gender. Report Summary*, International Expert Meeting: 'Gender Perspectives on International Humanitarian Law', 4-5 October 2007 Stockholm, Sweden <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/ihl-women-report-051008/\\$File/ihl%20and%20gender.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/ihl-women-report-051008/$File/ihl%20and%20gender.pdf)> accessed 12 March 2010; Nevertheless, Goldstein argues that there exists a cross-cultural consistency of gender roles in war: Joshua S. Goldstein, *War and Gender: how gender shapes war system and vice versa* (CUP 2001) 1-3.

³³ United Nations, Report of the Fourth World Conference on Women, UN Doc. A/CONF. 177/20; 17 October 1995, para.135.

³⁴ Christine Chinkin, 'Gender and Armed Conflict' in: Andrew Clapham, Paola Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 677-678.

Hermann and Palmieri note that since the ancient times women have engaged in combat roles as members of regular armed forces, guerrillas, but also commanders in a number of conflicts: Irène Herrmann, Daniel Palmieri, 'Between Amazons and Sabines: a historical approach to women and war' (2010) Vol.92 No.877 *International Review of the Red Cross* 19, 21-26.

under 'normal' circumstances.³⁵ For instance, during World War II, women took on roles as skilled labourers and workers outside the family home.³⁶ More recently, women have become important socio-political players during the Arab Spring by publically protesting against their governing regimes as well as taking on roles of activists, particularly using social media. Yet, their involvement did not generally translate into greater domestic protection of women's rights or into substantive equality in the aftermath of these revolutions.³⁷

During conflict, women's traditional gender roles (for example as wives, mothers and carers) become especially important from the social and political perspective. They are not only seen as paramount in ensuring the survival of a particular social, ethnic or religious group, but also in securing the maintenance and continuity of their traditions and customs. This is particularly the case in societies where women are strongly associated with their traditional gender roles, but also in the context of particular ethnic and religious groups. However, that also means that targeting women, often by acts of sexual and gender-based violence, becomes a politically and strategically important aspect of conflicts, especially those waged amongst ethnic groups, as illustrated by the conflicts in Rwanda and in the former Yugoslavia.

The situation of conflict reinforces the already existing inequalities of, and sex discrimination against, women in society, which may (and often do) intersect with other factors, leading to gender-based crimes and violations of women's rights both

³⁵ Fionnuala Ní Aoláin, 'International law, gender regimes and fragmentation: 1325 and beyond' in: Cecilia M. Baillett, *Non-State Actors, Soft Law and Protective Regimes. From the Margins* (CUP 2012) 55.

³⁶ Claudia D. Goldin, 'The Role of World War II in the Rise of Women's Employment' (1991) 81(4) *The American Economic Review* 741-756.

³⁷ Olga Jurasz, 'Women of the Revolution: the future of women's rights in post-Gaddafi Libya' in: Carlo Panara, Gary Wilson (eds), *The Arab Spring. New Patterns for Democracy and International Law* (Martinus Nijhoff 2013) 123; Yara Bayoumy, 'Analysis: Arab Spring nations backtrack on women's rights, poll says' (*Reuters* 11 November 2013) <<http://www.reuters.com/article/us-arab-women-spring-analysis-idUSBRE9AB00020131112>> accessed 1 December 2015; Elisabeth Johansson-Nogués, 'Gendering of the Arab Spring? Rights and (in)security of Tunisian, Egyptian and Libyan women' (2013) 44 (5-6) *Security Dialogue* 393-409; UN OHCHR, 'Women and the Arab Spring: an ongoing struggle for equal rights' (22 March 2013) <<http://www.ohchr.org/EN/NewsEvents/Pages/WomenandtheArabspringanongoingstruggleforequalrights.aspx>> accessed 1 December 2015.

during armed conflicts and in their aftermath.³⁸ The forthcoming sections explore the more specific aspects of the diverse nature of the gendered impact of armed conflict on women.

3.1. Conflict-related sexual violence

The significance of gender as a factor shaping the reality of war and determining its gender-specific impact on women can be best illustrated by the phenomenon of CRSV. CRSV has been defined by the UN Secretary-General as “sexual violence occurring in a conflict or post-conflict setting that has a direct or indirect causal link with the conflict itself”.³⁹ While men can also be victims of CRSV, women sustain specific harms caused by the acts of sexual violence at a disproportionate rate to men.⁴⁰ Furthermore, women are primarily exposed to these ruthless acts because of gender roles with which they are associated in society. Although sexual violence is by far not the only example of the gendered impact of armed conflict, it affects women disproportionately, leading to a wide range of short-, mid-, and long-term consequences.

However, CRSV is not limited to rape, as illustrated by the extensive scope of Article 7(1)(g) of the ICC Statute.⁴¹ Furthermore, sexual violence is used in conflict as an important element in commission of other crimes, such as enslavement, torture, terrorism, persecution or, as argued in section 3.2.2.1. of Chapter 4, the crime of enlistment, conscription and use of children to participate in hostilities.⁴² Acts of sexual

³⁸ Christine Chinkin, Hilary Charlesworth, *The boundaries of international law: a feminist analysis* (Manchester University Press 2000) 251.

³⁹ UNGA, UNSC, Report of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), UN Doc. A/65/592-S/2010/604, 24 November 2010, para.5.

⁴⁰ The ICTY raised an issue of male rape in *Čelebići (Prosecutor v. Mucić et al. (Čelebići Case))*, Trial Judgment, IT-96-21-T, 16 November 1998). Also, the precedential case of *Nyiramasuhuko* from the ICTR demonstrated that women, like men, can be prosecuted for rape crimes: *Prosecutor v. Nyiramasuhuko*, Trial Judgment, ICTR-98-42-T, 24 June 2011.

⁴¹ The Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3; Individual crimes of sexual violence are discussed in section 3 of Chapter 4.

⁴² *Prosecutor v. Kunarac et al.*, Trial Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para.542 (enslavement); *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1T, 10 December 1998, paras.264-269 (torture); *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Appeals Judgment, SCSL-04-15-A, 26 October 2009, para.990 (terrorism); *Prosecutor v. Kvočka et al.*, Trial Judgment, IT-98-30/1-T, 2 November 2001, paras.181-183 (persecution).

violence are often forced to be performed by the victims in front of family members (or even between family members themselves) with a deliberate aim to assert power over women but also to cause pain and suffering not only to the primary victim but also to family members as secondary victims.⁴³

3.1.1. CRSV – a historical perspective

The sexual abuse of women during war has been well documented.⁴⁴ For centuries, sexual violence, in particular rape, has constituted a seemingly inseparable and omnipresent element of armed conflicts, whether of international or internal character, severely affecting women and crossing all cultural and geographical boundaries.⁴⁵

Historically, in ancient times, victory in war automatically granted the ‘right to rape’. Rape was considered as “socially acceptable behaviour well within the rules of warfare” and was conducted almost simultaneously with acquiring the property of the defeated.⁴⁶ Irrespective of their social status, women were perceived as property and

⁴³ Witnessing acts of sexual violence may also amount to torture: *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1T, 10 December 1998, para.267.

⁴⁴ UN Commission on Human Rights, Report on the Situation of Human Rights in Territory of the Former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992, UN Doc. E/CN.4/1993/50, 10 February 1993; Christine Chinkin, ‘Rape and Sexual Abuse of Women in International Law’ (1994) 5 European Journal of International Law 326; Binaifer Nowrojee, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (Human Rights Watch 1996); Human Rights Watch, ‘Kosovo: rape as a weapon of ‘ethnic cleansing’’ (1 March 2000) <<https://www.hrw.org/report/2000/03/01/kosovo-rape-weapon-ethnic-cleansing>> accessed 12 March 2010; Elisabeth Rehn, Ellen Johnson Sirleaf, *Women, War and Peace. The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-building* (UNIFEM 2002); Human Rights Watch, *We’ll Kill You If You Cry. Sexual Violence in the Sierra Leone Conflict* (Human Rights Watch 2003) <<http://www.hrw.org/reports/2003/01/16/well-kill-you-if-you-cry>> accessed 1 October 2013; UNGA / UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. A/66/657*-S/2012/33*, 13 January 2012; UNGA, UNSC, Sexual violence in conflict. Report of the Secretary-General, UN Doc. A/67/792 - S/2013/149, 14 March 2013; UNSC, Sexual violence in conflict. Report of the Secretary-General, UN Doc. S/2014/181, 13 March 2014; UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. S/2015/203, 23 March 2015.

⁴⁵ For a diverse account of historical perspectives on sexual violence in conflict see: Elizabeth D. Heinemann (ed), *Sexual Violence in Conflict Zones: from Ancient World to the Era of Human Rights* (University of Pennsylvania Press 2011); Irène Herrmann, Daniel Palmieri, ‘Between Amazons and Sabinas: a historical approach to women and war’ (2010) Vol.92 No.877 International Review of the Red Cross 19-30.

⁴⁶ Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Kluwer Law International 1997) 21.

therefore, as such, became the main targets of the winning troops. The experience of the two World Wars in the 20th century also bears the stain of extreme wartime sexual violence, which victimised women from all parties to the armed conflict, as the perpetrators existed amongst both enemy and 'friendly' forces. This factor created a significant obstacle in prosecuting rape during the Nuremberg Trials, "not because the Germans were not guilty of rape, but because the allied forces, especially the Russians and the Moroccan forces under French control, were also guilty of many rapes".⁴⁷

Furthermore, during the Holocaust, many women were subjected to a range of sexual harms, including forced nudity, forced sterilization, forced abortions and medical experimentation, primarily in relation to their reproductive functions.⁴⁸ Sexual abuse and sexual slavery were a common practice on the Far East front, taking the form of 'comfort stations' where 'comfort women' were forcibly held and forced into prostitution by the Japanese military. Women held in sexual slavery were treated not only as a reward for soldiers, but also used as an element of incentive for the future fighting. Rape and sexual abuse perpetrated at comfort stations was therefore considered essential to the successful pursuit of military goals. Copelon explores this argument even further by describing at least four such military purposes: "the need of soldiers to "have sex"/rape to keep them fighting; the need to avoid antagonizing the local populations by preventing rape of women in communities being occupied; the need to minimize sexually transmitted diseases among the troops; and the need to keep rape from international scrutiny".⁴⁹ Commenting on the enslavement of comfort women on the Japanese front during the Second World War, Chinkin rightly observes that "confining women for the sole purpose of sexual service at the bidding of military personnel deprives them of the rights of ownership to their bodies - the embodiment of slavery".⁵⁰ However, it was only in early 2000s that international law recognized in the groundbreaking judgment of the ICTY in *Kunarac* that elements of control and

⁴⁷ Jeri Laber, 'Bosnia: Questions About Rape' (25 March 1993) 40(6) *The New York Review of Books* 3.

⁴⁸ Fionnuala Ní Aoláin, 'Rethinking the Concept of Harm and Legal Categorization of Sexual Violence During War' (2000) 1 *Theoretical Inquiries in Law* 307, 320-321, 326-329.

⁴⁹ Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217, 222.

⁵⁰ Christine Chinkin, 'Women's International Tribunal on Japanese Military Sex Slavery' (2001) 95(2) *American Journal of International Law* 335, 341.

ownership (which are indicative on enslavement) are inclusive (amongst others) of sex, prostitution, abuse and control of sexuality.⁵¹

Nevertheless, in the context of modern armed conflicts, such as in the Former Republic of Yugoslavia and in Rwanda, more clearly than ever before rape and other forms of sexual violence were employed as a method of warfare “with aims similar to deliberate targeting of the civilian population: the destruction of its culture and morale”.⁵² Specifically during the conflicts in Yugoslavia and Rwanda, the attention of the international community was drawn to the use of acts of sexual violence on a massive scale as an effective method of conducting a policy of ethnic cleansing and genocide (discussed in detail in section 3.3. of Chapter 4).⁵³ In the context of ethnic cleansing, which usually, yet not always, involves killing of the group members, rape appears as a very calculated and effective strategy. Principally, systematic rapes committed against women of a targeted ethnic origin intend to transmit a new ethnic identity to the child, therefore resulting in producing babies of the ethnicity of the perpetrator and therefore, automatically not of the victim’s own ethnic group.⁵⁴

CRSV remains rife in situations of extreme political violence and in modern armed conflicts, which, albeit of a different character than ‘old wars’, result in violations rooted in gender inequality and gender discrimination.⁵⁵ Sexual violence was an important aspect of ‘forced marriages’ committed during the war in Sierra Leone,

⁵¹ *Kunarac et al.*, IT-96-23 & 23/1, Trial Judgement (22 February 2001), paras.542-543. Consequently, the decision of the ICTY in *Kunarac* constituted the first ever conviction for enslavement in conjunction with rape.

⁵² Gardam (1997), supra 11, 59.

⁵³ UN Commission on Human Rights, Report on the Situation of Human Rights in Territory of the Former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992, UN Doc. E/CN.4/1993/50, 10 February 1993; Nowrojee, supra 44; Alison Des Forges, ‘Leave None to Tell the Story. Genocide in Rwanda’ (Human Rights Watch 1999) <<https://www.hrw.org/reports/pdfs/r/rwanda/rwanda993.pdf>> accessed 10 March 2010.

The ICTR held in its landmark judgement in *Akayesu* that “[Rape] constitute[s] genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such” (*Prosecutor v. Akayesu*, ICTR 96-4-T, Judgement, Trial Chamber I, 2 September 1998, para.731).

⁵⁴ The Trial Chamber in *Karadžić et al.* confirmed that ‘the systematic rape of women... is in some cases intended to transmit a new ethnic identity to the child’: *Prosecutor v. Karadžić et al.*, IT-95-18-R61, IT-95-5-R61, Transcript of Hearing, 2 July 1996, para.94.

⁵⁵ Regarding contemporary war and conflict see: Mary Kaldor, *New and Old Wars*, 3rd ed. (Polity Press 2012).

where women were coerced into conjugal duties (both of a sexual and nonsexual nature), but also had to endure forced pregnancies and subsequent care for children born out of 'forced marriage'. Finally, UNSCR 2242 highlights the impact of terrorism and violent extremism on women, which can be illustrated by the deliberate targeting of Yezidi women and girls by so-called Islamic State in Iraq and subjecting them to sexual violence and sexual slavery.⁵⁶

3.1.2. The phenomenon of CRSV

Sexual violence is not only the oldest, most severe and most common consequence of warfare experienced specifically by women, but it is also one with a wide spectrum of impact that continues long after the conflict has come to an end. Yet, there is still relatively little known about this phenomenon.

It is now generally acknowledged that CRSV, in particular rape, constitutes a deliberate strategy of war which, through relying on very particular sociological, cultural and psychological aspects of the outcome of the act, purports to attack and weaken the targeted community. It is understood that CRSV often serves other military purposes, such as ethnic cleansing or even genocide. As emphasized in UNSCR 1820, sexual violence is a tool of war, contributing to the international destabilization, humiliation, and degradation of a population or an ethnic group.⁵⁷

However, as illustrated by modern armed conflicts, CRSV is not uniform in nature. It manifests itself through various patterns, occurs in many different contexts, and is committed by a multitude of perpetrators. During the conflict in Rwanda, sexual violence was an integral part of genocide whereby Tutsi women were targeted, raped and, in the majority of instances, killed. Rwandan genocide exposed the intersectional

⁵⁶ UNSCR 2242 (13 October 2015) S/RES/2242; Amnesty International, 'Iraq: Yezidi women and girls face harrowing sexual violence' (23 December 2014) <<https://www.amnesty.org/en/latest/news/2014/12/iraq-yezidi-women-and-girls-face-harrowing-sexual-violence/>> accessed 1 December 2015; Amnesty International, 'Escape from hell: torture and sexual slavery in Islamic State captivity in Iraq' (December 2014) <https://www.amnesty.org.uk/sites/default/files/escape_from_hell_-_torture_and_sexual_slavery_in_islamic_state_captivity_in_iraq_-_english_2.pdf> accessed 1 December 2015.

⁵⁷ UNSCR 1820 (19 June 2008) S/RES/1820, Preamble.

nature of CRSV, particularly in relation to ethnicity, as women were targeted both due to their gender and their ethnicity.⁵⁸ The conflict in the former Yugoslavia further emphasized the intersectionality of CRSV, but also exposed the public nature of sexual violence. In that context, women were frequently raped by soldiers, policemen and other state agents, many of whom were known to the victims from before the war. Furthermore, the use of rape camps (such as those in the Bosnian town of Foča) and the widespread perpetration of sexual violence on forcibly detained women emphasized the role of CRSV in the context of enslavement. This was further illustrated by patterns of sexual violence in the Sierra Leone civil war, where sexual violence was an integral part of ‘forced marriages’.

Sexual violence in detention, at checkpoints as well as sexualised torture have been a common occurrence during the conflicts in Libya and in Syria.⁵⁹ Recent UN reports document the use of sexual violence, particularly sexual slavery, by the so-called Islamic State in Iraq and in Syria as a means of “spreading terror, persecuting ethnic and religious minorities and suppressing communities that oppose its ideology”.⁶⁰ Furthermore, the conflict in Syria has exposed the rise of forced and child marriage since the beginning of the conflict, particularly amongst refugee and internally displaced populations.⁶¹ Whilst forced marriages are arranged in order to ‘protect’ girls from sexual violence (or, in cases of rape, to ‘reinstate’ the family honour), they nonetheless carry their own risk of girls being sexually exploited.⁶²

CRSV has a variety of perpetrators, who can be state actors, military or non-state actors, such as gangs or rebel groups. Furthermore, sexual violence can be perpetrated

⁵⁸ See generally: Doris Buss, ‘The curious visibility of wartime rape: gender and ethnicity in international criminal law’ (2007) 25 Windsor Yearbook of Access to Justice 3.

⁵⁹ UNGA / UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. A/66/657*-S/2012/33*, 13 January 2012, paras.35-38, 87-88.

⁶⁰ UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. S/2015/203, 23 March 2015, para.28-29, 61.

⁶¹ Ibid., para.61; Save the Children, ‘Too young to wed. The growing problem of child marriage among Syrian girls in Jordan’ (2014) <https://www.savethechildren.org.uk/sites/default/files/images/Too_Young_to_Wed.pdf> accessed 1 December 2015.

⁶² Save the Children, Ibid., 3-6.

by persons from the same community, for instance by child soldiers.⁶³ Many of the victims are also sexually abused by members of peacekeeping forces and even trafficked from refugee or IDP camps, sometimes with the involvement of peacekeepers, soldiers or even humanitarian aid personnel.⁶⁴ Women can also be perpetrators of CRSV, including rape. For instance, a study by Cohen indicates that female combatants in Sierra Leone participated in 25% of RUF's gang rapes.⁶⁵

Despite the widespread use of sexual violence in conflict and the involvement of various types of perpetrators, relatively little is known about the underlying causes of CRSV. Wood's research confirms that there exist variations in its levels and severity. For instance, Wood notes the absence of sexual violence on the part of the Tamil insurgent group, the Liberation Tigers of Tamil Eelam (LTTE), during the conflict in Sri Lanka, despite their engagement in other forms of violence against civilians.⁶⁶ According to Wood, this can be explained by the strict enforcement of the absolute prohibition of sexual violence by the command leadership of the group, which is reflective of Tamil's social and cultural mores regarding sexual violence.⁶⁷ Low levels of sexual violence have also been noted in the context of the majority of Marxist-Leninist insurgent groups but also in the Israeli/ Palestinian conflict which challenges the commonly assumed view of high occurrence of CRSV in ethnic and religious conflicts.⁶⁸

⁶³ *The Case of the Prosecutor v. Thomas Lubanga Dyilo*, Opening Statement, ICC-01/04-01/06 (26 January 2009) 30.

⁶⁴ 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' (2002-2003) 34 *Columbia Human Rights Law Review* 475; United Nations, 'Secretary General's Remarks at Meeting with Permanent Representatives of Troop and Police Contributing Countries on Sexual Exploitation and Abuse' (17 September 2015) <<http://www.un.org/sg/statements/index.asp?nid=8982>> accessed 1 December 2015; Marie Deschamps, Hassan B. Jallow, Yasmin Sooka, 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers. Report of an Independent Review on Sexual Exploitation and Abuse by Peacekeepers in the Central African Republic' (17 December 2015) <<http://www.un.org/News/dh/infocus/cenafrirepub/Independent-Review-Report.pdf>> accessed 2 January 2016.

⁶⁵ Dara Kay Cohen, 'Female combatants and the perpetration of violence: wartime rape in the Sierra Leone Civil War' (2013) 65(3) *World Politics* 383, 399.

⁶⁶ Elisabeth Jean Wood, 'Armed groups and sexual violence: when is rape rare?' (2009) 37(1) *Politics & Society* 131, 143-148.

⁶⁷ *Ibid.*, 149-150.

⁶⁸ Elisabeth Jean Wood, 'Sexual violence during war: variations and accountability' in: Alette Smeulers (ed), *Collective Violence and International Criminal Justice. An Interdisciplinary Approach* (Intersentia 2010) 313.

Furthermore, a study of conflicts in 20 African countries showed that 59% of 177 armed groups participating in civil wars between 2000 and 2009 were not reported to have engaged in sexual violence.⁶⁹

These figures put in question the premise that sexual violence is the most effective tactic of war: if it is, then why do all groups not use it? Wood suggests that the variation in use of sexual violence depends on the culture and organisation within individual armed groups which in turn influences the 'repertoire of violence' of the particular group.⁷⁰ However, even where sexual violence is not explicitly ordered, it may nonetheless be tolerated. That said, a study of perpetrators, victims and witnesses of sexual violence in the DRC showed that only 37% of perpetrators agree that sexual violence occurs because there is no punishment, with a further 28% linking the occurrence of sexual violence with an order given by a commander.⁷¹ Also, contrasting perceptions of the underlying causes of sexual violence are present amongst perpetrators and victims of CRSV. In the perpetrators' view, sexual violence is committed out of revenge (62%) and frustration (87%). They also emphasize that such behaviour is normal within the armed group and even amounts to a group activity (68%).⁷² In contrast, victims attribute the occurrence of CRSV to the overall lack of control and impunity regarding the commission of these acts as well as to the perpetrator's attempt to prove their strength (70%) and to control communities.⁷³

Overall, the mono-causal theory is unlikely to provide a comprehensive explanation of the underlying causes of CRSV. The causes are multiple, complex and often co-exist together.⁷⁴ Nonetheless, recent studies confirm that sexual violence in conflict is not

⁶⁹ Ragnhild Nordås, 'Sexual Violence in African Conflicts', Peace Research Institute Oslo (PRIO) Policy Brief No. 1, 2011 <<http://www.usip.org/sites/default/files/missing-peace/Ragnhild-Nordas.pdf>> accessed 1 December 2015.

⁷⁰ Elisabeth Jean Wood, 'Conflict-related sexual violence and the policy implications of recent research' (2014) Vol.96 No. 894 *International Review of the Red Cross* 457, 461, 466-470.

⁷¹ Roos Haer, Tobias Hecker, Anna Maedl, 'Former Combatants on Sexual Violence During Warfare. A Comparative Study of the Perspectives of Perpetrators, Victims, and Witnesses' (2015) 37(3) *Human Rights Quarterly* 609, 621.

⁷² *Ibid.*, 625.

⁷³ *Ibid.*, 625, 627.

⁷⁴ *Ibid.*, 626.

inevitable and, as such, can and should be prevented.⁷⁵ However, it should not be forgotten that CRSV is yet another form (although differing in the contextual aspect) of the 'everyday' violence against women, enabled by structural discrimination and inequality. However, despite the greater interest in, and the acknowledgement of, direct physical harms to women at an international level, deep and continuing discrimination and inequality are rarely addressed as underlying factors of CRSV.⁷⁶

3.2. Socio-economic impact of armed conflict on women

Consideration of the impact of armed conflict on women is usually focused on the consequences originating from the elevated level of sexual and gender-based violence present throughout the conflict, leading to gross violations of women's human rights. Although this aspect certainly remains important, it is not the only way in which women experience conflict. Furthermore, the consequences of harms sustained by women as a result of conflict-related violations of IHL and IHRL can last long after the conflicts have come to an end. Therefore, in order to gain a full picture of the ways in which conflict influences women's lives in the aftermath, it is equally necessary to consider other ways in which women are affected, including social and economic perspectives.

3.2.1. Women and their new gender roles

The state of armed conflict brings a significant, inherent to wartime, change to the local economy, socio-economic structures and divisions of labour within the affected society.⁷⁷ Armed conflict brings destruction of all kinds: extensive mortality, especially reflected by deaths of civilians, damage to public goods and private property, loss of infrastructure and resources such as livestock and crops, and lack of access to public

⁷⁵ Elisabeth Jean Wood, 'Conflict-related sexual violence and the policy implications of recent research' (2014) Vol.96 No. 894 *International Review of the Red Cross* 457, 478.

⁷⁶ Fionnuala Ní Aoláin, 'International law, gender regimes and fragmentation: 1325 and beyond' in: Cecilia M. Baillett, *Non-State Actors, Soft Law and Protective Regimes. From the Margins* (CUP 2012) 66.

⁷⁷ Mazurana et al, supra 44, 5; United Nations, 'Women, peace and security. Study submitted by the Secretary-General Pursuant to Security Council Resolution 1325 (2000)' (2002) <<http://www.un.org/womenwatch/daw/public/eWPS.pdf>> accessed 10 March 2010, 22 (UN WPS Study).

services, e.g. hospitals and schools.⁷⁸ These changes are normally accompanied by the high levels of violence, the rise of militarism and the emergence of war-specific, informal and highly gendered economies run by warlords or criminal militias, which exploit women and girls.⁷⁹ This includes the risk of women becoming victims of human trafficking, serving as sexual slaves for militia commanders and soldiers, performing forced labour or domestic servitude.⁸⁰

As a result of demographic changes caused by men being killed during atrocities or fleeing, women are in most cases faced with undertaking suddenly emerging, additional roles that they may not have performed before, such as becoming the heads of households in order to ensure the survival of themselves and their dependants. In addition to their traditional gender roles (e.g. as mothers, wives and carers), women become responsible for the provision of basic supplies, food and fresh water, maintenance of household and, where possible, cultivation of land. The performance of these new roles is significantly hindered by the circumstances of the war itself: the risk of physical attacks, sexual violence or use of landmines.

Bop describes further obstacles to the new gender role of the main family provider created by the social 'prejudicial assumption that only men are heads of families', which consequently weakens the household from which men are absent.⁸¹ Particularly vulnerable in such situations are girls who head households as they are marginalized as bearing the stigma of being without parents.⁸² They also experience additional risks to

⁷⁸ Humberto Lopez, Quentin Wodon, 'The Economic Impact of Armed Conflict in Rwanda' (2005) 14(1) *Journal of African Economies* 586, 587.

⁷⁹ Mazurana, *supra* 44, 5.

⁸⁰ CEDAW, General Recommendation No. 30, paras.39-41; UN Commission on Human Rights, Report on contemporary forms of slavery. Systematic rape, sexual slavery and slavery-like practices during armed conflict. Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para.10.; Christine Chinkin, 'Women's International Tribunal on Japanese Military Sex Slavery' (2001) 95(2) *American Journal of International Law* 335; Nowrojee, *supra* 44, 52-54 (describing sexual slavery during Rwandan Genocide).

⁸¹ Codou Bop, 'Women in Conflicts, Their Gains and Their Loses' in: Sheila Meintjes, Anu Pillay, Meredith Turshen (eds), *The Aftermath. Women in post-conflict reconstruction* (Zed Books 2001) 27-28.

⁸² UN WPS Study, *supra* 77, 23.

Furthermore, Lopez and Wodon note, as a result of armed conflict there is an increased amount of households headed by children, especially girls. In post-conflict Rwanda, estimated 85 000 households were headed solely by children, in addition to a large share of households headed by women (Lopez, Wodon, *supra* 78, 587).

their personal safety exacerbated by the lack of protection usually guaranteed by the guardians or relevant authorities. Furthermore, in circumstances of general shortage of food and water supplies, often exacerbated by imposition of economic sanctions, women and girls might be forced to exchange sexual favours for supplies in order to ensure survival of themselves and their dependants.⁸³

The substantive change in economic relations accompanied by the imposition of new gender roles forces women to seek alternative, non-traditional methods of providing sufficient income and necessities for their families. As a result, many women and young girls may “engage in risky economic endeavours such as prostitution, smuggling, and begging” as well as trafficking of drugs and weapons, which entail a high risk of violence.⁸⁴ Economically desperate women very often become victims of human trafficking, which also increases the risk of exposure to sexual violence and further violations of their rights.

3.2.2. The socio-economic impact of CRSV

When viewed from a gender perspective, CRSV carries a broad spectrum of consequences for women’s lives in the aftermath of conflict. Victims of CRSV suffer from the traumas of witnessing or directly experiencing rape, sexual torture or other forms of sexual abuse. Their future social/ community life is often marked by these tragic events, with the outcome of women being often stigmatized and ostracised by their partners, husbands, families and communities. Such level of social isolation is frequently combined with the lack of professional psychological assistance and further exacerbated by economic hardships characteristic to conflict and post-conflict reality. Furthermore, for many women the incidence of rape renders future marriage impossible, as they are strongly associated with the stigma of having been raped by the enemy and/or bearing the enemy’s children.⁸⁵ The latter issue has both social and

⁸³ Meredith Turshen, Clotilde Twagiramariya, ‘Favours’ to Give and ‘Consenting’ Victims. The Sexual Politics of Survival in Rwanda’ in: Meredith Turshen, Clotilde Twagiramariya (ed), *What do women do in wartime. Gender and conflict in Africa* (Zed Books 1998) 108-109.

⁸⁴ Mazurana et al, supra 32, 7; UN WPS Study, supra 77, 24.

⁸⁵ On rape and forced impregnation see generally: Siobhán K. Fisher, ‘Occupation of the womb: forced impregnation as genocide’ (1996) 46(1) *Duke Law Journal* 91-133.

economic aspects: experience of social isolation on the one hand and bearing the financial burden of bringing up children on the other.

Finally, the mere threat of rape often forces women to flee their homes and seek refuge in internally displaced persons (IDPs) camps or refugee camps, inherently contributing to one of the largest problems in current armed conflicts: displacement.

3.2.3. Women and conflict-related displacement

During conflict, many women are forced to flee their homes, causing the greatest problem in modern armed conflicts - displacement.⁸⁶ The flight is mainly triggered by the surrounding circumstances of continuing warfare, which results in danger to women's lives and personal security or in necessary evacuation of civilians, the majority of whom are women and girls.⁸⁷ Women are also often subjected to severe sex discrimination and gender-based persecution, which may combine with discrimination and abuse on other grounds, such as ethnicity, religion and class and create an additional reason for escaping a particular territory.⁸⁸ Furthermore, forced evictions are frequently used as a strategy of war, in particular in the context of 'natural resources wars', aimed at gaining overall control over a resource-rich areas.⁸⁹ Becoming a refugee adds an additional dimension to the existing vulnerability of women to the effects of armed conflict. The loss of property, in particular the family home, has serious implications for women's survival and their everyday lives. The absence of traditional, long-established, community support networks and often the lack of basic supplies, such as cooking pots and utensils, creates obstacles to the

⁸⁶ The United Nations High Commissioner for Refugees (UNHCR) estimated that at the end of 2014, there were 59.5 million forcibly displaced people worldwide: UNHCR, *2014 Global Trends. World at War*, 18 June 2015 <<http://unhcr.org/556725e69.html>> accessed 9 November 2015, 2.

⁸⁷ Charlesworth, Gardam, *supra* 11, 153; Judith Gardam, Michelle Jarvis, 'Women and armed conflict: the International Response to the Beijing Platform for Action' (2000-2001) 32 *Columbia Human Rights Law Review* 1, 18-22 (generally on women refugees in armed conflict).

⁸⁸ CEDAW, General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, UN Doc. CEDAW/C/GC/32, 5 November 2014, para.16.

⁸⁹ Gardam, Jarvis (2000-2001), *supra* 87, 19; Mazurana et al. describe occurrence of this form of forcible displacement 'from the territories surrounding diamond mines in Sierra Leone and Angola, the timber-producing areas in Indonesian islands, and the oil fields of Colombia and southern Sudan': Mazurana et al, *supra* 32, 5.

conduct of daily life.⁹⁰ It also leaves women fully dependent on support provided by persons in charge of refugee camps, the majority of which are run by men. The gender imbalance represented by the domination of male personnel in camps plays an important role as a factor inhibiting the adequate response to the needs of female refugees. Gardam and Charlesworth describe an example of the provision of supplies as basic as feminine hygiene materials being ignored by male relief workers and officials, as well as limited access to medical treatment and reliable birth control.⁹¹ In addition, Gardam identifies 'cultural conditioning and taboos' as factors hindering female participation in decision-making regarding planning and resource allocation in camps, "despite the fact that women are generally far more experienced in food production, distribution and preparation than men".⁹² In recognition of this particular problem, the need for inclusion of women in the decision-making process has been recognized and recommended by the UNHCR:

'to understand fully and address the protection concerns of refugee women, they themselves must participate in planning, protection and assistance activities. Programmes which are not planned in consultation with the beneficiaries, nor implemented with their participation, cannot be effective. Since a large proportion of refugees are women, many solely responsible for their dependent children, it is essential that they be involved in planning and delivery of assistance activities if these are to be properly focused on their needs'.⁹³

In the context of conflict-related displacement, women's security and personal safety becomes frail and open to various forms of abuse which is further exacerbated by their separation from their families and community.⁹⁴ In particular, women are exposed to the risk of sexual violence and exploitation, both during the flight and while in refugee camps⁹⁵. The presumed 'safe haven' of refugee camp frequently becomes a place of

⁹⁰ Lindsey, *supra* 7, 88-89.

⁹¹ Charlesworth, Gardam, *supra* 11, 154.

⁹² Gardam, Jarvis (2000-2001), *supra* 87, 21; Charlesworth, Gardam, *supra* 11, 155.

⁹³ UNHCR, 'Guidelines on Protection of Refugee Women', July 1991, <<http://www.refworld.org/docid/3ae6b3310.html>> accessed 9 May 2012, para.11.

Women's involvement in decision-making is further emphasized by the UNSCR WPS resolutions.

⁹⁴ CEDAW, General Recommendation No. 32, para.14.

⁹⁵ UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response*, May 2003

<<http://www.refworld.org/docid/3edcd0661.html>> accessed 15 May 2013; Human Rights Watch, *Sexual Violence and Its Consequences among Displaced Persons in Darfur and Chad*, 12 April 2005

gender-based persecution, in some cases reinforced by the administrators of the camps or even humanitarian personnel.⁹⁶ Women are attacked and raped while trying to conduct their daily duties, e.g. when leaving the camps in order to collect firewood or fresh water. However, sexual abuse occurs also within the camps, most commonly when women use public washing and bathing facilities, which are rarely separated from those used by men and often located in distant, and therefore less secure, parts of the refugee camp.⁹⁷ This arrangement significantly increases the risk of gender-based violence and victimisation of women, but also violates cultural and privacy norms.⁹⁸ Moreover, many women suffer from escalated levels of domestic violence while in camps, rooted in the imbalance between “overburdened refugee women and girls and, on the other hand, a dangerous level of inactivity suffered by displaced men and adolescent boys”.⁹⁹

A lot of female refugees living in foreign countries face distinctive difficulty in rebuilding their lives in new, unknown circumstances.¹⁰⁰ Bop describes this particular, conflict-induced, detrimental influence of war on women’s lives as the ‘loss of identity’.¹⁰¹ The sudden disintegration of social networks – separation from family, particular ethnic group or community – results in loss of ‘reference points for individuals’, whilst living as a refugee in a foreign country introduces additional challenges.¹⁰² Adjustment to the ‘new life’ is particularly hard: women face linguistic and cultural barriers, which, together with lack of education or vocational skills, may inhibit their chances to carry out day-to-day activities and decreases their chances for employment and financial support. In addition to losses in physical and psychological health, female refugees often face a challenge of ‘cultural bereavement’, a grieving for

<<http://www.hrw.org/reports/2005/04/12/sexual-violence-and-its-consequences-among-displaced-persons-darfur-and-chad>> accessed 15 May 2013, 7.

⁹⁶ UN WPS Study, *supra* 77, 29; Gardam, Jarvis (2000-2001), *supra* 87, 21; Charlesworth, Gardam, *supra* 11, 157.

⁹⁷ Lindsey, *supra* 7, 66.

⁹⁸ *Ibid.*

⁹⁹ UN WPS Study, *supra* 77, 27.

¹⁰⁰ Charlesworth, Gardam, *supra* 11, 153.

¹⁰¹ Bop, *supra* 81, 25-26.

¹⁰² *Ibid.*, 26.

home, language, and traditions.¹⁰³ Such factors again increase women's vulnerability: in order to secure their living needs they might be forced to become illegal workers, turn into prostitution or be trafficked.

Finally, women seeking asylum, especially victims of sexual violence and gender-related persecution, are particularly vulnerable as a result of the gender-insensitive system of refugee status determination (discussed in Chapter 4). Although gender is not included as a ground for persecution within the meaning of the 1951 Refugee Convention, it nonetheless plays an integral part in determining and contextualising the experiences of refugee women.¹⁰⁴ Baroness Hale noted in *Fornah*:

'The world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society. States parties to the Refugee Convention, at least if they are also parties to the International Covenant on Civil and Political Rights and to the Convention on the Elimination of All Forms of Discrimination Against Women, are obliged to interpret and apply the Refugee Convention compatibly with the commitment to gender equality in those two instruments'.¹⁰⁵

As such, gender should be considered as an essential factor in an 'inquiry into the specific characteristics and circumstances of the individual claimant, similarly to other factors such as the sex and/or age of the claimant'.¹⁰⁶ Inclusion of this perspective would effectively encourage a gender-sensitive approach to the definition of refugee in international law, inclusive of gender-specific forms of persecution and stressing "that persecution is not necessarily or only caused by the victim's sex as the ultimate factor, but by the perpetrator's ideology, dictating that people deviating from their attributed gender role shall be persecuted".¹⁰⁷

¹⁰³ See generally: Inger Agger, *The Blue Room. Trauma and Testimony among Refugee Women. A psycho-social exploration* (Zed Books 1994); Rehn, Sirleaf, supra 44, 36.

¹⁰⁴ Heaven Crawley, *Refugees and Gender. Law and Process* (Jordans 2003) 6-7.

¹⁰⁵ *Secretary of State for Home Department (Respondent) v. K (FC) (Appellant) and Fornah (appellant) v. Secretary of State for Home Department (Respondent)* [2006] UKHL 46, para.86.; This approach is further supported by the CEDAW Committee: CEDAW, General Recommendation No. 32, para.13.

¹⁰⁶ Rodger Haines, 'Gender- Related Persecution' in: Erika Feller, Volker Türk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 325.

¹⁰⁷ UNHCR, 'Position Paper Gender- Related Persecution', 1 January 2000
<<http://www.refworld.org/docid/3bd3f2b04.html>> accessed 9 May 2012, 1.

Although the Refugee Convention can (and should) be interpreted in a gender-sensitive manner, such an interpretation is not always adopted in the practice of State parties to the Convention. Decision makers remain reluctant to accept gender-related persecution as falling within the scope of a definition of a refugee in international law. As demonstrated in Chapter 3, this approach continues to be a large obstacle for many conflict-affected and victimised women, leaving them in rather discriminatory and vulnerable position.

3.2.4. Subsistence harms

Subsistence harms are commonly experienced in armed conflict, but they also have gendered implications. According to Sankey, subsistence harms are “deprivations of the physical, mental and social needs of human subsistence, perpetrated against individuals or populations in armed conflict or as an act of political repression, where the perpetrator acts with intent or with knowledge of the inevitable consequences of such deprivations”.¹⁰⁸

Attacks on homes, livelihoods as well as forced displacement result in subsistence harms, such as shortages of food, lack of access to clean and fresh water during armed conflict and in its aftermath. These harms have real and severe implications for the everyday lives of the survivors, taking the form of physical and mental suffering but also impact on the ability of women to carry out the traditional roles of providing and preparing food for their families.¹⁰⁹ In addition, food shortages in conflict and post-conflict situations mean that women are likely to be more susceptible to malnutrition than men mainly because of inequitable distribution of food and ‘gender preferencing’, a traditional restriction, which still occurs in many countries.¹¹⁰ Food

¹⁰⁸ Diana Sankey, ‘Towards recognition of subsistence harms: Reassessing approaches to socioeconomic forms of violence in transitional justice’ (2014) 8(1) *International Journal of Transitional Justice* 121, 122.

¹⁰⁹ Diana Sankey, ‘Gendered Experiences of Subsistence Harms: A Possible Contribution to Feminist Discourse on Gendered Harm?’ (2015) 24(1) *Social & Legal Studies* 25, 32.

¹¹⁰ Gender-preferencing (as defined by Lindsey) means ‘giving food to men and boys as a priority while limiting women’s and girls’ intake’ (Lindsey, *supra* 7, 77). This issue is also discussed by Chinkin and Wright: Christine Chinkin, Shelley Wright, ‘The hunger trap: women, food and self-determination’ (1992) 14 *Michigan Journal of International Law* 262-321.

insecurity may also increase the risk of women being subjected to sexual violence or forced to exchange sexual favours for basic supplies.¹¹¹

Furthermore, subsistence harms may intersect with other types of harms, as demonstrated in *Krstić*. The case revealed a range of gendered subsistence harms suffered by women as a result of the mass killing of men and boys in Srebrenica in July 1995. Witness testimonies in *Krstić* demonstrated how pre-conflict, patriarchal gender relations and the absence of men in post-conflict reality increased women's vulnerability to subsistence harms, particularly in relation to heading households, loss of livelihoods, and reestablishing their lives in the aftermath.¹¹²

3.2.5. Women's physical and mental health

The experience of armed conflict has severe impact on women's physical and mental health. This is due not only to the high levels of indiscriminate violence in conflict, but also because of gender-specific forms of harms suffered by women. Whilst men's health remains strongly affected as well, primarily as a result of taking active part in combat, women are particularly exposed to certain types of harms, especially those associated with their reproductive roles.

Due to their reproductive roles, women require supplementary care, especially in time of pregnancy and when nursing. However, in conflict and in post-conflict situations, these needs are hardly ever met.¹¹³ Women are left without appropriate antenatal and postnatal care, including extensive failure to provide adequate level of nutrition which

The Special Rapporteur on the right to food makes the link between the empowerment of women, gender equality and the right to food, but fails to address the post-conflict aspect: UN Human Rights Council, Report submitted by the Special Rapporteur on the right to food, Olivier De Schutter. Women's rights and the right to food., UN Doc. A/HR/22/50, 24 December 2012.

¹¹¹ CEDAW, General Recommendation No. 30, para.54.

¹¹² *Prosecutor v. Krstić*, Trial Judgment, IT-98-33-T, 2 August 2001, para.91. However, whilst some testimonies emphasized women's agency rather than victimhood, the judgment did not reflect the ability of some women to successfully adapt to life in post-conflict reality: Doris Buss, 'Knowing Women: Translating Patriarchy in International Criminal Law' (2014) 23(1) Social & Legal Studies 73-92.

¹¹³ UN WPS Study, *supra* 77, 18.

result in increase in maternal and infant mortality rates.¹¹⁴ In addition, conflict situations aggravate any already existing deficiencies in healthcare. These shortcomings are further exacerbated for victims of sexual violence, who require immediate medical and psychological assistance. Physical injuries originating from acts of sexual violence may cause severe complications mainly in relation to women's reproductive health. Women who become pregnant as a result of wartime rape face risk of negligently conducted abortions (if at all available), miscarriages, or pregnancy and childbirth without access to appropriate sanitary conditions and required medical assistance. Such difficulties can lead to maternal and infant deaths as well as they may prove detrimental to future (planned) pregnancies or may impede having a normal sexual life.¹¹⁵ Further consequences of conflict affecting women's health include contracting STIs, development of fistulas, mutilation and, in case of adolescent girls, too early pregnancies.¹¹⁶

Acts of CRSV also exacerbate the risk of contracting HIV/AIDS.¹¹⁷ Armed conflict aggravates conditions where HIV/AIDS thrive, such as poverty, displacement, lack of access to education, as well as (especially in post-conflict settings) prostitution and trafficking for purposes of sexual exploitation. Disrupted access to healthcare and basic medicines during and after armed conflict puts women and girls at a greater risk of unwanted pregnancy, reproductive injuries and contracting HIV or AIDS.¹¹⁸ The seriousness and disproportionate impact of HIV/AIDS on women and girls in conflict and post-conflict situations was emphasized in UNSCR 1983, which also viewed it as a major obstacle to gender equality and empowerment of women.¹¹⁹

¹¹⁴ Henrik Urdal, Chi Primus Che, 'War and gender inequalities in health' in: Theodora-Ismene Gizelis, Louise Olsson (eds) *Gender, Peace and Security. Implementing UN Security Council Resolution 1325* (Routledge 2015) 116-118.

¹¹⁵ UN WPS Study, supra 77, 18.

¹¹⁶ CEDAW, General Recommendation No. 30, paras.50, 52(c).

Bop reports that a study of the acts of violence suffered by women in Rwanda indicated that 66.7% of the women surveyed have AIDS, in: Bop, supra 81, 33. It is estimated, that during conflict in Sierra Leone, 70 per cent to 90 per cent of rape survivors had contracted STIs, in: UN WPS Study, supra 77, 20.

¹¹⁷ CEDAW, General Recommendation No. 30, para.37.

¹¹⁸ Ibid., paras.37, 50, 54.

¹¹⁹ UNSCR 1983 (7 June 2011) UN Doc. S/RES/1983, Preamble, para.3.

Mental health problems resulting from traumatic experiences of armed conflict, although equally significant to losses in physical health, are relatively rarely taken into consideration. The problem of post-traumatic stress disorder (PTSD) and high level of depression is often addressed in the context of reintegration of combatants (both male and female), the gender aspect of PTSD and other forms of psychological impact of conflict on women are addressed less frequently.¹²⁰ Nevertheless, the problem is significant as it continues to affect women in the aftermath of conflict on the daily basis and may continue long after the end of conflict or even for the rest of their lives. In addition, the recovery from trauma is additionally hindered by the inability to discuss it, as it is perceived as a private matter or unavoidable consequence of war, as opposed to a human rights violation.¹²¹

The search for missing children, partners and other family members who disappeared during the conflict add yet another dimension to the post-conflict trauma.¹²² As Crettol and La Rosa note:

“the painful effects of their loved ones’ absence are often accentuated by the psychological, economic, social and legal problems with which they have to contend and which are frequently disregarded or denied”.¹²³

No access to information about missing persons causes high level of mental distress as well as prevents women from achieving a closure and, however difficult, progressing with their lives. Furthermore, as the majority of missing persons are male, their

¹²⁰ Rehn, Sirleaf, supra 44, 42; Fionnuala Ní Aoláin, ‘Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies’ (2009-2010) 35 *Queen’s Law Journal* 219, 228-231.

¹²¹ Amani El-Jack, *Gender and Armed Conflict. Overview report*, Institute of Development Studies, August 2003, <<http://www.bridge.ids.ac.uk/reports/cep-conflict-report.pdf>> accessed 1 December 2010, 19-21. However, Sideris considers the multidimensional element of wartime rape trauma: “Victims respond to the lived experience of a discrete incident of violence, and to the social destruction of which it is an integral part. This interdependence of the individual and social dimensions of the trauma of rape in war provides victims with an opportunity to avoid privatisation of the damage and to recognise the socio-political intent of attacks” (Tina Sideris, ‘Rape in War and Peace. Social Context, Gender, Power and Identity’ in: Sheila Meintjes, Anu Pillay, Meredith Turshen (eds), *The Aftermath. Women in post-conflict reconstruction* (Zed Books 2001) 149).

¹²² International Centre for Transitional Justice, ‘The Disappeared and Invisible. Revealing the Enduring Impact of Enforced Disappearances on Women’ (March 2015) <<https://www.ictj.org/sites/default/files/ICTJ-Global-Gender-Disappearances-2015.pdf>> accessed 1 December 2015.

¹²³ Monique Crettol, Anne-Marie La Rosa, ‘The missing and transitional justice: the right to know and fight against impunity’ (2006) Vol.88 no. 862 *International Review of Red Cross* 356.

disappearance has a serious impact on the economic dimension of women's lives after the conflict.

4. Gender and the aftermath of war

The gendered impact of armed conflict continues long after the conflict has come to an end. The diverse consequences of armed conflict for women (discussed in the preceding sections) strongly shape the everyday lives of women in the aftermath. However, the aftermath of conflict brings additional challenges, particularly in relation to women's participation and their position in the new, 'post-conflict' social, political, economic and legal order.

Although the commitment to gender mainstreaming and inclusion of women in post-conflict processes is expressed by States at an international level (e.g. by adopting UNSCR 1325 and subsequent WPS Resolutions), these concepts are rarely effectively implemented in post-conflict reality. Despite calls in UNSCR 1325 for equal participation and full involvement of women at all decision-making levels, especially in peace processes, conflict-resolution and post-conflict reconstruction, women remain in the minority of the many actors engaged in such processes.¹²⁴ For instance, a study by UN Women showed that out of 31 peace negotiations conducted between 1992 and 2011 women accounted for only 4% of signatories, 2.4% of chief mediators, 3.7% of witnesses and 9% of negotiators.¹²⁵ The exclusion of women from decision-making processes in the aftermath of conflict is further reflected in the observation made by a Kosovar woman working at the UN Mission in Kosovo:

“When it comes to the real involvement in the planning for the future of this country, our men tell foreign men to ignore our ideas. And they are happy to do so – under the notion of “cultural sensitivity”. Why is it politically incorrect to ignore

¹²⁴ UNSCR 1325 (31 October 2000) UN Doc. S/RES/1325, Preamble.

¹²⁵ UN Women, 'Women's Participation in Peace Negotiations: Connections between Presence and Influence' (October 2012)
<<http://reliefweb.int/sites/reliefweb.int/files/resources/03AWomenPeaceNeg.pdf>> accessed 1 December 2015.

the concerns of Serbs or other minorities but “culturally sensitive” to ignore the concerns of women?”¹²⁶

Furthermore, securing women’s economic, social and cultural rights is commonly neglected in the aftermath and illustrated by high rates of unemployment, lack of access to education, as well as lack of access to an adequate standard of living and food. However, state parties to the International Convention on Economic, Social and Cultural Rights have positive obligations to protect and deliver such rights, without discrimination.¹²⁷ In addition, as the discussion on reparations for gender-based harms in Chapter 5 will illustrate, women’s access to reparations for harms suffered during armed conflict remains problematic.

Finally, structural discrimination and gender inequality remain the key obstacles to realisation of women’s rights in the process of transition from conflict to durable peace. They also contribute to the perpetuation of ‘everyday’ gender-based violence that thrives in post-conflict settings.¹²⁸ Therefore, in order to make a real and practical change to the lives of women in the aftermath, addressing matters of gender inequality and structural discrimination must form an integral part of peace settlements but also be prioritised in the rebuilding of the rule of law in post-conflict societies.

5. Conclusions

Analysis of IHL from a gender perspective reveals some troubling characteristics. Whilst IHL framework provides women with special protection, it does so primarily in relation to protection from certain forms of sexual violence and mostly due to women’s association with other persons. Furthermore, IHL fails to recognize the gender-based nature of harms sustained by women in armed conflict and their relationship with gender inequality and discrimination.

¹²⁶ Rehn, Sirleaf, *supra* 44, 125.

¹²⁷ CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), UN Doc. E/C.12/2005/4, 11 August 2005, para.18.

¹²⁸ Rashida Manjoo, Calleigh McRaith, ‘Gender-Based Violence and Justice in Conflict and Post-Conflict Areas’ (2011) 44 *Cornell International Law Journal* 11, 13.

Whilst international law has been developing a broader framework on women and armed conflict through its specialised branches (particularly IHRL), the prevention of CRSV and other gender-based violations remains the key challenge. Although there exist some studies on CRSV, relatively little is still known about the underlying causes of this phenomenon, making it even more challenging to tackle. Nonetheless, the exclusive focus of IHL in granting women special protection from sexual violence should not be allowed to obstruct attention being given to other non-sexual harms experienced by women in conflict, such as violations of economic, social and cultural rights or forced displacement.

The consequences of armed conflict continue to affect women's lives in the aftermath. However, they are frequently exacerbated by the existence of gender inequality and structural discrimination in the newly rebuilt political and legal systems, leading to further violations of women's civil and political but also economic, social and cultural rights. In that context, ensuring women's participation in all stages of decision-making in conflict prevention, resolution and reconstruction is a crucial step towards gender equality in post-conflict settings. Finally, whilst many of these issues need to be effectively addressed by individual states, greater emphasis on, and enforcement of, the state's positive human rights obligations and due diligence is necessary to secure, protect and deliver human rights to women in the aftermath.

Chapter 3

International Refugee Law, Gender and Armed Conflict

1. Introduction

Women are particularly exposed to the effects of armed conflict and especially vulnerable when they are victimized due to their gender, for example in the event of sexual violence. As discussed in Chapter 2, the impact of armed conflict on women is not limited only to sexual violence, but includes a range of diverse consequences that significantly impair and endanger women's lives during the war and in its aftermath. One danger which proves particularly challenging to female victims of contemporary armed conflicts is forced displacement and, often, the subsequent attempt to gain asylum.

Modern armed conflicts are the primary cause of forced displacement. The UNHCR estimates that at the end of 2014 there were 59.5 million forcibly displaced people worldwide.¹ Consistently throughout the years, around 50 percent of displaced persons were women.

Gender-based persecution becomes especially serious in times of armed conflict, when the political significance of women's gender makes them particularly vulnerable and exposed to the risk of suffering serious harm.² Although IHL distinguishes women as persons specifically vulnerable to armed conflict, and therefore eligible for special protection during hostilities, women are continuously targeted and disadvantaged due to their gender. The main area of concern is wartime sexual and gender-based violence, which victimises women in a severe, disproportionate and long-term manner, usually leading to further violations of their rights and perpetuation of gender discrimination. The gender-blindness of International Refugee Law (IRL) additionally

¹ UNHCR, *2014 Global Trends. World at War*, 18 June 2015 <<http://unhcr.org/556725e69.html>> accessed 9 November 2015, 2.

² For purposes of this thesis 'gender-based persecution' is understood to encompass acts of persecution experienced by women due to their identity and status as women within a particular society.

exacerbates their already inferior status by posing bars to women's eligibility for refugee status. This chapter explores how mechanisms of international law, and IRL in particular, respond to the most 'practical' consequence of war experienced by women—displacement and the struggle to secure asylum abroad. It focuses on the issue of (mis)treatment of claims of gender-based persecution, both within the decision-making system, by those involved in refugee-status determination procedures and also on the international, policy-oriented level. The problematic aspect of protection of internally displaced women is also addressed. The gender-focused analysis of the protection systems under IRL leads to further discussion about the scope of what is referred to in this chapter as 'alternative' systems of refugee protection. These include complementary protection mechanisms as well as a proposal regarding the emerging doctrine of responsibility to protect (R2P) as a basis for strengthening states' compliance with their human rights obligations towards asylum-seeking and internally displaced women (as well as asylum seekers and IDPs in general).

The argument put forward in this chapter does not negate or diminish the fact that displacement has adverse impact on male refugees and IDPs too. The problem affects men and women worldwide. Rather, the following discussion attempts to show that displaced women find themselves in a considerably more detrimental position to men when they seek asylum on grounds of gender-related persecution. This is due not only to the physical dangers associated with the displacement and what usually turns out to be a long and dangerous journey to the destination country where victims of persecution can claim asylum, but also shortcomings in the international system of refugee protection. It is argued that these key obstacles are caused primarily by the largely inadequate system of international refugee protection, which remains fundamentally gender-blind and, in its current form, continues to heavily disadvantage women who are persecuted for gender-related reasons.³

³ The feminist critique of IRL emerged only in the late 80s of the 20th century: Doreen Indra, 'Gender: A Key Dimension of Refugee Experience' (1987) 6 *Refuge* 3; Jacqueline Greatbatch, 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1(4) *International Journal of Refugee Law* 518.

Therefore, given that currently the majority of female asylum seekers originate from conflict-affected regions, the strengthening and implementation of an effective gender-sensitive response by IRL is crucial.⁴ It can also be seen as a primary task for international law in providing a comprehensive and realistic response to the practical problems and security of women in post-conflict situations.

2. The (Gender) Troubles of International Refugee Law

The 1951 Convention Relating to the Status of Refugees (The Refugee Convention) is the main legal instrument, which for more than the past six decades has defined and regulated the protection of refugees in the international context. It defines a refugee as a person who:

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country (...)”.⁵

The Convention includes the principle of *non-refoulement*, which is considered a cornerstone of international protection and is generally accepted as a principle of customary international law.⁶ It provides that no refugee should be returned to any country where he or she is likely to face persecution, torture or other ill-treatment on the basis of one (or more) of five grounds outlined in the Article 1 A (2) of the 1951 Convention, subject to exceptions in Article 33(2) of the Convention. These however

⁴ For purposes of this thesis ‘gender-sensitivity’ is understood as involving understanding of a specific way in which women experience persecution and acknowledgement of the fact that it may substantively vary from the male experience of persecution. These differences are rooted in different roles that men and women play in society (gender roles) and the different relationships that they have with the society. Gender-sensitivity in interpretation of the Convention and implementation of gender-sensitive status determination procedures are viewed by the author to be crucial in ensuring an equal outcome for both female and male applicants.

⁵ Article 1 (A)(2) The Geneva Convention Relating to the Status of Refugees 1951 (28 July 1951), 189 UNTS 150 (the Refugee Convention).

⁶ Article 33 RC 1951; Article 33(1) RC 1951 states: ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

Elihu Lauterpacht, Daniel Bethlehem, ‘The scope and content of the principle of *non-refoulement*: Opinion’, in: Erika Feller, Volker Türk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) 179; Jean Allain, ‘The *jus cogens* nature of *non-refoulement*’ (2001) 13(4) *International Journal of Refugee Law* 533, 538-558.

are to be interpreted restrictively and subject to due process safeguards, including no exceptions to this principle in cases of torture.⁷

From the perspective of women who flee gender-based persecution committed in the context of armed conflict, there are two main obstacles to a successful asylum claim:

- the element of an armed conflict, and
- interpretation of the meaning of persecution, especially when it is based on gender (gender-based persecution).

2.1. Armed conflict

The mechanism of the 1951 definition does not envisage international protection for persons who are fleeing their country as a result of internal or international armed conflict. Although this rule is not explicitly stated in the text of the Convention, it has so far been interpreted not to include persons merely fleeing armed conflict or situations, where high levels of violence are present.⁸ Storey accurately describes this situation as a 'war-flaw' manifested by the continuous "struggle of refugee law to deal coherently with claims for international protection by persons fleeing armed conflict".⁹ Therefore, applicants fleeing armed conflict will normally not be considered eligible for refugee protection under the 1951 Convention, unless they can prove that they qualify for refugee status in accordance with requirements set out in Article 1 (A)(2). In other words, the applicant fleeing an armed conflict must show 'differential impact'- a threat to themselves over and above the dangers associated with armed conflict in general - which would fall under one of categories outlined in Article 1 (A)(2). Storey and Wallace argue that such view is founded on two premises: firstly, in absence of racial, political, religious or other motivation behind the harm, there exists no exceptional risk of suffering harm (i.e. other than generally arising in situations of indiscriminate

⁷ *Chahal v. UK*, Application No. 70/1995/576/662, 11 November 1996, para.80-81; *Saadi v. Italy*, Application No. 37201/06, 28 February 2008, para.138; Elihu Lauterpacht, Daniel Bethlehem, *Ibid.*, 179.

⁸ This view is expressed in the UNHCR Handbook, para.164.

⁹ Hugo Storey, 'Armed Conflict in Asylum Law: the "War-Flaw"' (2012) 31(2) *Refugee Survey Quarterly* 1, 2.

violence); secondly, if the risk involved affects all alike differential risk cannot be established.¹⁰ In particular, this is the case where an applicant is fleeing non-international armed conflict, where the persecution is very likely to emerge from the hands of non-state actors. Thus, as noted by Lord Lloyd of Berwick in *Adan v. Secretary of State for the Home Department*,

“(...) where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show (...) a differential impact. In other words, he must be able to show fear of persecution for convention reasons over and above the ordinary risks of clan warfare”.¹¹

However, the approach of the House of Lords in *Adan* was rejected by the High Court of Australia in *Minister for Immigration and Multicultural Affairs v. Ibrahim*, which held that:

“(n)either the text, rationale or purpose of the Convention (...) entitles a decision-maker to reject a claim for refugee status merely because the applicant has failed to prove that he or she is exposed to a risk of harm different from that of others caught up in that conflict”.¹²

At the heart of the Refugee Convention lies its humanitarian object and purpose.¹³ Modern armed conflicts continue to be the major cause of humanitarian crises in the contemporary world and their primary victims are civilians. Many civilian war victims face persecution during and often after armed conflict. If the Convention is to be truly read in light of its humanitarian object and purpose, then its interpretation should be open to create avenues to include humanitarian refugees, who are in need of international protection as a result of increasingly serious dangers posed by modern armed conflicts. The existence of high levels of indiscriminate violence further facilitates a situation where serious violations of human rights are very likely to take place. Armed conflicts facilitate the occurrence of many forms of ill-treatment, often

¹⁰ Hugo Storey, Rebecca Wallace, ‘War and Peace in Refugee Law Jurisprudence’ (2001) 95(2) American Journal of International Law 349, 352.

¹¹ *Adan v. Secretary of State for the Home Department* [1998] 2 All ER 453 at 463.

¹² *Minister for Immigration and Multicultural Affairs v. Ibrahim* [2000] HCA 55, para.66 (per McHugh J).

¹³ Article 31(1) of the Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331, 23 May 1969) requires that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (emphasis added).

accompanied by the absence of an adequate state response to such acts or the failure of the state to implement adequate protection measures aimed at the prevention of such acts. In fact, very often it is the state that perpetrates persecutory acts and, further, violates some of its core non-derogable human rights obligations which continue to apply in armed conflict.¹⁴ Therefore, a situation of armed conflict actually appears to be precisely that, which refugee law is designed to address: “to interpose protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming”.¹⁵

However, the specificity of the situation faced by asylum seekers emerging from conflict zones has been legally recognized at regional level. Article 15(c) EU Qualification Directive extended complementary protection to persons fleeing situations of indiscriminate violence (discussed in further detail in section 4.3.3. below), while the 1969 Convention of the Organization of African Unity on Refugee Problems in Africa and 1984 Cartagena Declaration have broadened the 1951 Convention definition of a refugee to include people fleeing events of armed conflict and disturbances.

Alternatively, IHL offers a certain level of protection for refugees.¹⁶ However it is limited to civilian refugees who find themselves in a state that is involved in ongoing armed conflict.¹⁷

¹⁴ UN Human Rights Committee, General Comment No.29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras.7-9.

UN Human Rights Committee, General Comment No.31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para.11: ‘As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive’.

¹⁵ James C. Hathaway, *The Law of Refugee Status* (Butterworths 1991) 124.

¹⁶ Article 44 GC IV; Article 73 AP I.

¹⁷ Nevertheless, McAdam argues that such eligibility could be possibly inferred from the conceptual interpretation of Article 1 (A)(1) of the Refugee Convention. The article broadens the scope of beneficiaries of international protection to include any person, who: ‘has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization’. The eligibility for refugee status in this article is retrospective, thus it cannot be

2.2. Gender-based persecution

A well-founded fear of persecution is an essential element of the international definition of a refugee. Nevertheless, persecution is not defined in the 1951 Convention which leaves a significant margin of appreciation to states (and their evolving jurisprudence) regarding the interpretation of this important term.¹⁸ Accordingly, case law relating to the interpretation of 'persecution' remains somewhat inconsistent, in particular when the case involves an act of persecution, which falls outside the scope of the five Convention grounds, e.g. gender-related persecution.

The concept of persecution is rather complex and may encompass a range of situations, which essentially involve severe violations of basic human rights. Because acts of persecution may vary in type depending on circumstances, they should be assessed on a case by case basis as "little purpose is served by attempting to list all its known measures".¹⁹ While this indeed is true, there is nevertheless a pressing need to reconceptualise persecution and, within that context, gender-based persecution in particular, in order to ensure the 'proper and dynamic interpretation' of this core issue amongst decision makers.²⁰

Persecution can be described as a concept consisting of two major elements:

expressly invoked. However, McAdam argues that it conceptually broadens the scope of eligibility of applicants as it includes persons, who qualified as refugees under the pre-1951 mechanisms of protection, which protected primarily victims of armed conflict and communal violence. Accordingly, by recognizing their eligibility for the refugee status in Art. 1(A)(1), the 1951 mechanisms indirectly shows that persons fleeing armed conflict can actually benefit from the international protection guaranteed by the Refugee Convention.

Jane McAdam, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection', in: Jane McAdam, *Forced Migration, Human Rights and Security* (Hart Publishing 2008) 274.

¹⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng./REV.1, Geneva, 2nd ed., (1992), para.51.

However, in the European Union context, Article 9 of the Qualification Directive sets out common concept of persecution:

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) be an accumulation of various measures, including violation of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

¹⁹ Guy Goodwin-Gill, Jane McAdam, *The Refugee in International Law*, 3rd ed. (OUP 2007) 93.

²⁰ Jean-Francois Durieux, 'Of Wars, Flows. Laws and Flaws: A Reply to Hugo Storey' (2012) 31(3) *Refugee Survey Quarterly* 161, 166.

- serious harm, and
- the failure of state protection.²¹

Nonetheless, the Convention does not protect from any and all types of serious harm.²² Its application is limited to recognized situations, in which ‘there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population’²³ by virtue of the state’s core human rights obligations recognized by the international community.²⁴

Gender was not originally included as a reason for persecution in the Convention. Therefore, asylum cannot be claimed solely on the basis of persecution relating to one’s gender. Gender has been rather described and treated as an ‘informative perspective’ to the established five grounds for persecution.²⁵ Application of a gender perspective to the particular Convention ground is perceived to broaden the interpretative aspect of persecution to include women’s experiences, yet it has not been thus far interpreted to constitute an actual, separate ground for persecution. Nonetheless, gender can influence or determine the way in which women experience persecution or the type of harm that they suffer as a result of it.²⁶ Furthermore, a person’s gender can be the basis for persecution.

Since the Convention was adopted, there have been calls for the gender-sensitive interpretation of the Convention and, which is vital, implementation of a gender

²¹ *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489; *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah* [1999] 2 AC 629, 653; Rodger Haines, ‘Gender- Related Persecution’, in: Feller et al., supra 6, 330.

Hathaway adopts a human-rights based approach to persecution and defines it as ‘the sustained or systemic violation of basic human rights demonstrative of failure of state protection’: Hathaway, supra 15, 104-105.

²² Hathaway, supra 15, 103.

²³ Hathaway, supra 15, 103- 104.

²⁴ Haines describes core human rights as the rights contained in the international bill of rights, which comprises of the Universal Declaration of Human Rights (UDHR 1948), the International Covenant on Civil and Political Rights (ICCPR 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966), the Convention on Elimination of All Forms of Racial Discrimination (CERD 1965), the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW 1979), and the Convention on the Rights of the Child (CRC 1989). Haines, supra 21, 327.

²⁵ Haines, supra 21, 342.

²⁶ CEDAW, General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, UN Doc. CEDAW/C/GC/32, 5 November 2014, para.16.

perspective into refugee determination procedures.²⁷ Gender-related persecution was first expressly recognized by the UNHCR's Executive Committee (ExCom) in 1995, which stated:

“In accordance with the principle that women's rights are human rights [...] guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or gender-related persecution”.²⁸

In 2002, following the process of Global Consultations in 2001, the UNHCR issued *Guidelines on International Protection: Gender-Related Persecution* (the Gender Guidelines).²⁹ The Guidelines provide interpretative guidance for those involved in refugee status determination procedures. Their primary aim is to encourage (in the form of soft law) implementation of a gender perspective into refugee law and to explain the complexity of gender-related claims:

“even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. As such there is no need to add an additional ground to the 1951 Refugee Convention definition”.³⁰

Haines however argues that in fact, sex and gender are already included in the scope of the 1951 Convention, as ‘the text, object and purpose of the 1951 Convention require a gender-inclusive and gender-sensitive interpretation’.³¹ He finds further rationale for his opinion in the ICCPR, which prohibits discrimination (Article 2) and

²⁷ UNHCR, ‘Guidelines on Protection of Refugee Women’, July 1991, <<http://www.refworld.org/docid/3ae6b3310.html>> accessed 9 May 2012; UNHCR, ‘Position Paper Gender- Related Persecution’, 1 January 2000 <<http://www.refworld.org/docid/3bd3f2b04.html>> accessed 9 May 2012

For a comprehensive overview of the evolution of gender within the international refugee law context see: Alice Edwards, ‘Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010’, (2010) 29 (2) *Refugee Survey Quarterly* 21.

²⁸ ExCom, General Conclusion on International Protection, ExCom Conclusion No. 77 (XLVI), 20 October 1995, para.(g).

²⁹ UNHCR, ‘Guidelines on International Protection No.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’, HCR/GIP/02/01, 7 May 2002 <<http://www.refworld.org/docid/3d36f1c64.html>> accessed 9 May 2012.

³⁰ *Ibid.*, para.6.

³¹ Haines, *supra* 21, 326.

guarantees the right to equality before the law (Article 26). On the face of it, the premise of this argument appears right. It is true that one may infer the gender-inclusiveness of the Convention based on its conceptual reading (“in light of its object and purpose”) additionally supported by human rights law provisions. However, the adequate addressing of gender in IRL and in the context of persecution in particular, is more complex than inferring the supporting arguments for gender-sensitive interpretation of the Convention from the main principles of PIL and IHRL. In fact, if respect for principles of IHRL was nourished and implemented on both national and international level, as the author may seem to suggest, we would not have to remedy the persecution in the first place.

The actual challenge lies not in the fact that gender is not included as an independent ground for persecution in Article 1(A)(2). Indeed, not only it is doubtful whether state parties would agree to an attempt to amend the Convention to include gender as a sixth Convention ground, but it also remains doubtful whether it would actually achieve the desired effect. Rather, the problem is rooted in the failure (if not ignorance) of asylum decision-making bodies to implement a gender perspective into the refugee status determination procedure. This includes not only gender-sensitive interpretation of the Convention, but also applies to incorporating a gender perspective into procedures of status determination.³² For example, understanding of how gender may influence the way in which women describe their experience of persecution (especially when it involves sexual violence) is crucial to ensure that the credibility of the female applicant’s account is not undermined.³³

³² Asylum Aid & European Women’s Lobby, ‘Asylum is Not Gender Neutral: A practical advocacy guide for protecting women seeking asylum’, November 2007
<<http://www.asylumaid.org.uk/publications.php?id=70>> accessed 19 March 2012; Asylum Aid, ‘Unsustainable: the quality of initial decision-making in women’s asylum claims’, January 2011, <<http://www.asylumaid.org.uk/unsustainable/>> accessed 19 March 2012; Christel Querton/ Asylum Aid, ‘“I feel like as a woman I am not welcome”: A gender analysis of UK asylum law, policy and practice’, January 2012
<http://www.asylumaid.org.uk/wp-content/uploads/2013/02/ifeelasawoman_report_web_.pdf> accessed 19 March 2012.

³³ Credibility assessment is an essential element in asylum cases as the negative finding may lead to refusal of asylum claim. The UNHCR Handbook states that “the relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess validity of any evidence and the credibility of the applicant’s statements”. The problem with establishing credibility often arises in context of asylum

Although a gender-inclusive interpretation of the Convention has been encouraged on the international level, mainly in the form of the UNHCR Gender Guidelines, it was expressed in purely non-legally binding terms. For more than a decade, gender persecution has been recognized to encompass various acts, e.g. rape and sexual violence, trafficking, transgressing social mores, genital mutilation and domestic violence. Nevertheless, successful claims relating to gender-based persecution remain a minority. The current legal status quo, combined with the lack of a uniform approach to the issue across jurisdictions, continues to cause uncertainty in relation to asylum claims of females who suffered gender-related persecution and to perpetuate gender discrimination within the asylum process.

2.2.1. Gender-based persecution and international criminal law

Significant changes in international refugee law followed closely landmark developments in international humanitarian law, international human rights law and, in particular, international criminal law.³⁴ Especially important to this process was the gender dimension of these new advances. The armed conflicts in the former Yugoslavia and in Rwanda, which were characterised by exceptional levels of sexual violence and gender-related persecution, helped to bring to the attention of the international community the primarily gender dimension of harms sustained by women during armed conflict. This can play a significant role in informing and advancing the debate

claims made by women. Where claim is based on gender-based persecution, the authorities often not fail to engage a convention ground (especially PSG) to support the claim. Furthermore, limited awareness as to the gender dimension of persecution (e.g. lack of knowledge about FGM, as reported by Asylum Aid in 2011) and the lack of recognition of the impact of trauma on applicant's account of persecution lead to refusal of credibility of the asylum seeker and, in effect, refusal of asylum.

For a detailed analysis of the quality of initial decision making in gender-based asylum claims (including assessment of credibility) in the UK see: Asylum Aid, 'Unsustainable: the quality of initial decision-making in women's asylum claims', January 2011 <<http://www.asylumaid.org.uk/unsustainable/>> accessed 19 March 2012.

³⁴ To the contrary, Oosterveld argues that in light of the lack of the ICC jurisprudence on a crime against humanity of gender persecution, it is the role of international refugee law to inform the international criminal law (particularly the ICC) on the issue of understanding and interpretation of gender-related persecution (Valerie Oosterveld, 'Gender, Persecution and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution' (2006) 17 *Duke Journal of Comparative and International Law* 49). This argument is however questioned by the serious misrepresentations of international refugee law in relation to gender-related persecution, as discussed in this chapter.

Storey, *supra* 9, 21, 28-29; Durieux, *supra* 20, 166-167.

about the need for addressing the position of women fleeing gender-based persecution in armed conflict by the IRL. As noted by Storey, the ICL “jurisprudence contains a sophisticated tool kit - an abundance of judicial insights into the phenomenon of armed conflict and the relevant peremptory norms of international law to be applied to such situations”.³⁵ Given the struggle of IRL to adequately address situations of persons fleeing armed conflict, as well as the gender dimension of persecution, the jurisprudence of international criminal courts and tribunals appears to be a particularly useful and modern tool in addressing these two problematic issues. There is a close nexus between IRL and ICL.³⁶ Not only are the two regimes embedded within the broader principles of public international law, but they also strongly interconnect with regard to forced displacement and persecution. International crimes are linked to forced displacement, which often finds its cause in acts of gender-specific nature, including gender-based persecution.

The jurisprudence of the two main (at that time) international criminal tribunals- the ICTY and the ICTR - has established that acts of sexual and gender-based violence (especially rape and sexual enslavement) may amount to crimes against humanity, war crimes and genocide.³⁷ Furthermore, the Trial Chamber in *Akayesu* also held that rape may constitute a crime amounting to torture - an act that is absolutely prohibited in international law, prohibition of which is established as a *jus cogens* norm, an act which constitutes a fundamental breach of non-derogable human rights and, finally, amounts to persecution.³⁸

However, the jurisprudence of international criminal tribunals is principally important for two further reasons. Firstly, it provides an informative perspective into the

³⁵ Storey, *Ibid.*, 15.

³⁶ This point is emphasized by the CEDAW Committee in General Recommendation 30: CEDAW, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, paras.19-24.

³⁷ *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, paras.731-732; *Prosecutor v. Kunarac*, Appeals Judgment, IT-96-23/IT-96-23/1-A, 12 June 2002, paras.116-124.

³⁸ *Prosecutor v. Akayesu*, Judgement, ICTR-96-4-T, 2 September 1998, para.687, 690; *Prosecutor v. Furundžija*, Judgment, IT-95-17/1T, 10 December 1998, paras.155-157 (re: torture as a *jus cogens* norm of international law); Erika de Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law’ (2004) 15(1) *European Journal of International Law* 97-121.

meaning of persecution and classifies it as a crime against humanity.³⁹ In context of crimes against humanity, the Statute of the International Criminal Court (the ICC) defines persecution as

“the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”

and explicitly includes gender as a ground for persecution:

“1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, **gender** (emphasis added) as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”.⁴⁰

The decisions of international criminal tribunals make clear not only that acts of persecution can be performed solely on the ground of the victim’s gender, but also emphasize that gender-related persecution often takes place in the context of armed conflict, primarily through acts of sexual violence. Although the ICC Statute and the Statutes of the ICTY and the ICTR do not employ the language of ‘armed conflict’ per se, they explicitly state the condition of widespread or systematic attack against civilian population. This particular requirement in the vast majority of circumstances will encompass the situation of international or non-international armed conflict. Brought together, these two aspects suggest that gender is in fact in many circumstances the main reason for persecution and should be accommodated as such within the IRL regime. Furthermore, the existence of armed conflict significantly

³⁹ Article 7 (1)(h) ICC Statute, Article 7 (2)(g) ICC Statute, Article 5(h) ICTY Statute, Article 3(h) ICTR Statute.

The Appeals Chamber in *Blaškić* defined persecution as crime against humanity, which involves ‘an act or omission which... (1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and (2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)’ (*Prosecutor v. Blaškić*, Appeals Judgment, IT-95-14-A, 29 July 2001, paras.131-5). See also: Durieux, supra 20, 167.

⁴⁰ Article 7 (1)(h) ICC Statute, Article 7 (2)(g) ICC Statute.

exacerbates the circumstances in which gender-based persecution is highly likely to occur. This has been confirmed by the jurisprudence of the ICTY and the ICTR.⁴¹

The argument in support of the nexus between gender-based persecution and armed conflict can be additionally strengthened through analysis of the Elements of Crimes in the ICC Statute in relation to Article 7(1)(h). The elements of persecution (as a crime against humanity) require that:

“3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court”.⁴²

The link between gender-based persecution and any of the acts in Article 7(1) of the ICC Statute, in particular Article 7 (1)(g), shows that acts of sexual and gender-based violence which occur in armed conflict can amount to gender-based persecution. Furthermore, as has been confirmed by the decisions of international criminal tribunals, such acts are exacerbated by (if not inherent to) the events of armed conflicts, which are characterized by high levels of indiscriminate violence. Also, their primary victims are women, who, given the persecutory nature of the acts of sexual and gender-based violence, are very often forced to flee their country (or region) of origin in order to seek asylum from these serious and severe threats or even the acts themselves.

However, the statutes and decisions of international criminal tribunals cannot constitute a definitive framework against which refugee law should be assessed.⁴³

⁴¹ *Prosecutor v. Stakić*, Trial Judgment, IT-97-24-T, 31 July 2003, paras.234-236, 240-241, 244, 791-806, 826; *Prosecutor v. Krstić*, Trial Judgment, IT-98-33-T, 2 August 2001, paras.616-618; *Prosecutor v. Brdanin*, Trial Judgment, IT-99-36-T, 1 September 2003, para.1008; *Prosecutor v. Milutinović et al.*, Trial Judgment, IT-05-87-T, 26 February 2009, para.192, 199, 201; *Prosecutor v. Bagosora et al.*, Judgment and Sentence, ICTR-98-41-T, 18 December 2008, para.2210.

⁴² Article 7 (1)(h)(3) and Article 7 (1)(h)(4) ICC Elements of Crimes.

⁴³ *Prosecutor v. Kupreškić et al.*, Judgment, IT-95-16, 14 January 2000, paras.580-581.

Some commentators have also expressed concerns about the transposition of the definition of 'persecution' under ICL, which includes the requirement of discriminatory intent and that the crime be part of a widespread or systematic attack, into the refugee status determination procedure.⁴⁴ The fear is that some decision makers may use ICL as a tool in limiting the protective scope of the Refugee Convention rather than as a supportive tool in providing a modern and dynamic interpretation of the Convention.⁴⁵ The UNHCR in particular has recently expressed concerns that adoption of an ICL definition of persecution, inclusive of the requirement of widespread or systematic attack 'would undermine the international protection objectives of the 1951 Convention as this could be construed as meaning that persons would fall outside the Convention definition even if they nonetheless face serious threats to their life or freedoms, broadly defined'.⁴⁶ While the adoption of the ICL definition of persecution as a crime against humanity *ad litteram* in the IRL context may indeed have such effect, one should remain mindful of the fact that the element of widespread and systematic attack is required by ICL for the purposes of prosecuting persecution as a crime against humanity. In the IRL context this threshold is not relevant for purposes of establishing the existence of persecution or fear thereof. If this premise is accepted, then one is left with a modern and progressive definition of persecution, which also provides a much richer list of prohibited discrimination grounds than Article 1(A)(2) of the Refugee Convention.

Furthermore, instead of focusing on differences and incompatibilities, the debate should shift towards debating how ICL can complement IRL and draw links between these increasingly specialised areas of public international law.⁴⁷ Especially recent ICL

⁴⁴ Alice Edwards, Agnes Hurwitz, 'Introductory Note to the Arusha Conclusions on Complementarities between International Refugee Law, International Criminal Law, and International Human Rights Law' (2011) 23 (4) International Journal of Refugee Law 856, 857.

In ICL, the *actus reus* of persecution is constituted by an underlying act, which must discriminate in fact and deny a fundamental human right laid down in international law, whereas a *mens rea* element requires proof of discriminatory intent (*Prosecutor v. Krnojelac*, Appeals Judgment, IT-97-25-A, 17 September 2003).

⁴⁵ Durieux, *supra* 20, 166.

⁴⁶ UNHCR, Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions, April 2011 para.15, <<http://www.refworld.org/docid/4e1729d52.html>> accessed 15 June 2012.

⁴⁷ As noted by Martti Koskeniemi, 'what used to be perceived as governed by general international law has become an increasingly fragmented field with highly specialised areas, such as 'international refugee

jurisprudence could offer a modern perspective to the much older Refugee Convention, informative of the realities of contemporary armed conflict and gender-based persecution - an issue which, given the time of drafting of the Convention, was not expressly included. Furthermore, the gender-inclusiveness and sensitivity emerging from the recently developed (and still advancing) jurisprudence of international criminal law (in particular the ICC Statute, the decisions of the ICTY and the ICTR and the recently emerging jurisprudence of the ICC) confirms that gender-based persecution, especially where arising as a result of armed conflict or its immediate aftermath, is an issue that needs to be urgently and appropriately addressed in the international law context. As such, ICL can be seen as an increasingly progressive (in its gender-sensitive dimension) international legal framework which, through its jurisprudence, could act as an aid to interpretation of gender-related persecution in the refugee law context.

Finally, as the major advances in international criminal law are fairly recent (the results of the past 20 years of jurisprudence), they can be seen as crucial in terms of contributing to and complementing the modern interpretation of the Refugee Convention. The legal developments in the field of ICL can be of particular use in the context of the interpretative challenges of contemporary legal problems in IRL, which the Refugee Convention, now 65 years old, could not envisage due to the timing of its creation.⁴⁸ One example of such challenges is the gender-inclusive interpretation of the notion of persecution under the Refugee Convention, especially when gender-based persecution happens in the context of an armed conflict. The extensive ICL jurisprudence on gender-based crimes (which often amount to persecution) provides a modern legal perspective on the gender-aspect of these crimes - an aspect which has

law', 'international human rights law', 'law of the sea' etc. (...). The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place in relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law.', International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of International Law Commission finalized by Marti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para.8 <http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 8th May 2013.

⁴⁸ The significance and relevance of sources of international criminal law, in particular decisions of international criminal tribunals, have been acknowledged in the UNHCR Handbook (para.5) as well as in the leading case of the Canadian Supreme Court, *Mugesera v. Minister of Citizenship and Immigration* [2005] 2 SCR 100 (para.82).

been grossly neglected in public international law until the end of 20th century. Therefore, developments in ICL, especially those which are gender-related, should be taken into account in constructing the modern interpretation of the Refugee Convention and making it responsive to the challenges of the contemporary reality faced by asylum seekers.

3. Non-state actors of persecution and their impact on the IRL framework

In recent decades, there has been a proliferation of non-state actors on the international scene. The term 'non-state actors' encompasses a diverse range of entities, including militias, guerrilla fighters, religious groups, terrorist groups, private military contractors, multinational corporations, peacekeeping forces and NGOs. Their activities pose a major challenge to the regulation of their behaviour under international law, which traditionally regulates relations between states.⁴⁹ Actions of non-state actors do have an impact on other individuals and holding non-state actors accountable in international law for actions which constitute serious breaches of human rights, such as acts of persecution, remains the main challenge. In the context of the current discussion, the emergence and rapid growth of non-state actors of persecution sets a major challenge to the application of IRL.⁵⁰

Kälin rightly observes that the nature of persecution has significantly changed over the course of the past few decades.⁵¹ Nowadays, the threat of persecution is more likely to

⁴⁹ For further discussion on the issue of recognition of non-state actors in international law and whether they are bound by human rights obligations, see: Andrew Clapham, 'Human rights obligations of non-state actors in conflict situations' (2006) 863 *International Review of the Red Cross* 491; Jan Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors', in: Jarna Petman, Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff 2003) 351-369.

⁵⁰ For example, the EU Qualification Directive recognizes non-state actors of protection (Article 7(1)), which challenges the traditional concept of a State as the sole entity providing protection in IRL. The CJEU also confirmed such interpretation of Article 7(1) in *Abdulla and Others* by ruling that actors of protection may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory' (*Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, CJEU, C-175/08; C-176/08; C-178/08 & C-179/08, 2 March 2010, para.76.). However, O'Sullivan critiques this modern approach: Maria O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection under International Refugee Law?' (2012) 24(1) *International Journal of Refugee Law* 85-110.

⁵¹ Walter Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15(3) *Georgetown Immigration Law Review* 415.

emanate from non-state actors and the evolving nature of modern armed conflict, which is now primarily of internal character, supports this dynamic. Over time, non-state actors have developed into entities, which sometimes hold significant power and influence, often much stronger than the State. Nykänen refers to this modern phenomenon as a 'process of fragmentation of powers', where "such actors have gained positions in which they may use and abuse regulatory, financial, social, physical and other forms of power in various manners having a sweeping effect on the lives of individual human beings".⁵² This situation is mirrored in relations and behaviours present both during armed conflicts and in their aftermath, where non-state actors commit serious violations of IHL and IHRL, which may also include acts of gender-based persecution. Accordingly, this development has considerable implications for the prospective female asylum seekers, who escape their countries of origin due to this type persecution or the threat of it.

3.1. Non-state persecution

The main question in the ongoing debate about non-state actors and IRL is when non-state actors, as opposed to state agents, can be agents of persecution within the meaning of the Refugee Convention. The Refugee Convention does not explicitly state who can be the agent of persecution within the meaning of Article 1(A)2. Looking at other, more recent instruments, such as the Rome Statute of the ICC and the EU Qualification Directive, one may notice explicit reference to non-state actors. To that end, one may argue that the lack of explicit reference to non-state actors of persecution in the Refugee Convention means that it does not cover acts of persecution committed by non-state actors. However, Zimmermann notes the shortcomings of such an approach and rightly emphasizes that at the time when the Refugee Convention was created, non-state actors did not play such a big role in international law as they currently do.⁵³ Currently non-state actors, more than ever before, play an increasingly significant role on the international scene and state

⁵² Eeva Nykänen, *Fragmented State Power and Forced Migration: A Study of Non-State Actors in Refugee Law* (Martinus Nijhoff 2012) 1.

⁵³ Andreas Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (OUP 2011) 363

practice recognises that persecution may be by non-state actors. This is particularly evidenced in the context of non-international armed conflicts, where non-state actors are not only primary belligerents, but also entities responsible for committing international crimes and persecutory acts. Therefore, the Refugee Convention, as a living instrument, should reflect this major modern development in its contemporary interpretation and application. In order for the Refugee Convention to fulfil its protection objectives and to provide meaningful protection to modern day refugees, who increasingly often suffer persecution from hands of non-state actors, a modern reading of the Convention should adopt a wider construction of the agents of persecution, inclusive of non-state actors. Furthermore, in the broader context of IRL, protection from persecution by non-state actors should be recognised and afforded to those in need of such protection by mechanisms outside the Refugee Convention. Such steps have already been made in context of the subsidiary protection mechanisms, such as the EU Qualification Directive, which recognize persecution by non-state actors and extend the scope of effective protection available to persons fleeing persecution by non-state actors. The recognition of persecution by non-state actors, albeit limited, is also present in the UNHCR Handbook, which states that while “persecution is normally related to action by authorities of a country (...), it may also emanate from the sections of the populations (...) if they are knowingly tolerated by authorities, or if the authorities refuse, or prove unable to, offer effective protection”.⁵⁴ Non-state actors of persecution are now also recognized in Article 6 (c) EU Qualification Directive (QD) (discussed in further detail in section 5.2.2. below).

3.2. Two approaches to non-state persecution: ‘accountability approach’ and ‘protection approach’

While there is a general trend in IRL to recognise that persecutory acts can be attributed to non-state actors, there exists a lack of uniform and consistent approach of the courts adjudicating on that issue across jurisdictions. Two main approaches to

⁵⁴ UNHCR Handbook, para.65.

interpretation of persecution by non-state actors have emerged: the accountability approach and protection approach.⁵⁵

The accountability view developed primarily in civil law jurisdictions. It heavily relies on the attribution of the persecutory act committed by non-state actors to the state. This means that the state must be complicit in the persecution, either by way of engaging agents of the state in commission of persecutory acts or by remaining indifferent to the occurrence of persecutory acts. However, under this interpretation, proving the mere inability of the state to prevent or protect an individual from harms inflicted by non-state actors does not suffice to establish persecution, despite a genuine fear of suffering a serious harm. As such, the accountability view appears to rely on the similar premise to the principle of state responsibility for wrongful acts in international law. Under Article 2 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, in order for state responsibility to be established, a wrongful act must be first attributed to the state.⁵⁶ However, despite coincidental correlation between the accountability view and state responsibility, it is not suggested that state responsibility should form a part of the refugee definition. Whilst state responsibility can provide an informative perspective to the process of establishing the existence of the 'risk of harm amounting to persecution' (for instance by confirming 'the level of protection that may be due under universal and regional human rights instruments'), the qualification of refugee claim essentially does not rest on the notion of attribution of state responsibility for persecution.

In addition to being rather restrictive, the accountability view can be criticised for not complying with the object and purpose of the Refugee Convention. According to Zimmermann, the main question in IRL is one of whether the applicant is in need of protection by the third state rather than, as supported by the accountability view,

⁵⁵ For a general overview of the two approaches as well as regional developments in other jurisdictions see: Zimmermann, *supra* 53, 364- 366. However, Wilsher argues that in the context of United Kingdom's jurisprudence on non-state persecution, a third view developed, i.e. State culpability approach; in: Daniel Wilsher, 'Non-State Actors and the Definition of the Refugee in the United Kingdom: Protection, Accountability, Culpability?' (2003) 15(1) *International Journal of Refugee Law* 68.

⁵⁶ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *Yearbook of the International Law Commission* (2001) vol. II, Part Two (hereinafter: ILC Draft Articles).

whether the persecutory act can be attributed to the state.⁵⁷ This criticism is further supported by the UNHCR, which notes that the

“spirit and purposes of the Convention would be contravened and the system for the international protection of refugees would be rendered ineffective if it were to be held that an asylum seeker should be denied needed protection unless a state could be held accountable for the violation of his or her fundamental human rights by a non-governmental actor”.⁵⁸

However, the implementation of the EU Qualification Directive by EU member states enabled departure from the accountability approach in determination of cases involving non-state persecution. The harmonisation of the approach to the issue of non-state persecution across the EU means that the courts of member states are now obliged to interpret non-state persecution in accordance with Article 6 (c) of the QD.

In contrast, the protection approach assesses the question of non-state persecution through the lens of the ability of a state to protect individuals in its territory against serious human rights violations committed by non-state actors. To that effect, non-state persecution is accepted only in situations where the state is unable or unwilling to offer effective protection against such harm.⁵⁹ This approach developed primarily in Commonwealth jurisdictions. The House of Lords endorsed the protection approach in *Adan v. Secretary of State for the Home Department*, where it also confirmed the necessity of establishing the nexus between persecution at the hands of non-state actors and the lack of state protection.⁶⁰ Lord Lloyd emphasized that both tests (‘the fear test’ and ‘the protection test’) must be satisfied in cases involving the fear of non-state persecution:

“If the state in question can make protection available to such persons, there is no reason why they should qualify for refugee status. They would have satisfied the fear test, but not the protection test. Why should another country offer asylum to such persons when they can avail themselves of the protection of

⁵⁷ Zimmermann, *supra* 53, 364.

⁵⁸ UNHCR, Agents of Persecution – UNHCR Position, 14 March 1995

<<http://www.unhcr.org/refworld/docid/3ae6b31da3.html>> accessed 14 December 2012, para.3.

⁵⁹ Alice Edwards, ‘Age and gender dimensions in international refugee law’, in: Feller et al., *supra* 6, 59.

⁶⁰ *Adan*, *supra* 11.

their own country? But if, for whatever reason, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete. Both tests would be satisfied”.⁶¹

The view that the meaning of ‘persecution’ in cases of persecution by non-state agents consists of both the fear of ill-treatment and implied failure of the state to protect an individual against such ill-treatment, was later confirmed in *Horvath v. Secretary of State for the Home Department*:

“(…) in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme”.⁶²

In addition, the decision in *Horvath* opened the discussion about what amounts to a ‘sufficient’ protection by the state. In *Horvath*, the appellant, a Slovakian citizen of Roma origin, was experiencing alleged persecutory acts committed by non-state actors (groups of skinheads) and other discriminatory treatment from the local state authorities. The Slovakian police did not offer protection to Mr Horvath in situations when he experienced persecutory acts, but it was proven that they responded to other instances of persecution directed at citizens of Roma origin. Therefore, on the facts, the House of Lords held that the appellant failed to show the lack of sufficient protection from the state and did not allow the appeal.

However, the circumstances in this case gave rise to a fundamental question: in order to meet the standard required by the Refugee Convention, what is the test for determining whether there is sufficient protection against persecution in the person's country of origin?⁶³ It was established that there are two standards against which the sufficiency of state protection can be assessed.⁶⁴ The first one, supported by the

⁶¹ Ibid., at 458.

⁶² *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489 at 498.

⁶³ Ibid., at 494.

⁶⁴ The third standard was formulated and submitted before the House of Lords in *Horvath* by the Refugee Legal Centre. It proposed that the level of ‘protection should be such as to so reduce the risk to the applicant that his fear of persecution could not be said to be well founded’ ([2001] 1 AC 489 at 513). However, this view was rejected by the House of Lords.

majority at the House of Lords, is based on the existence of ‘a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agencies’ in the country in question.⁶⁵ The second standard refers to the level of protection by the state, which is ‘such that it cannot be said that the person has a well-founded fear’.⁶⁶

3.3. Gender-based persecution and non-state actors

The protection view has been also applied in cases involving gender-based violence. In *Islam* and *Shah*, a leading UK case on the meaning of a particular social group (discussed in section 4.1. below), repetitive acts of domestic violence against two Pakistani women inflicted by their husbands were recognized as persecution.⁶⁷ However, unlike in *Horvath*, in *Islam* and *Shah* the lack of state protection afforded to female victims of domestic violence was held to be sufficient to establish persecution. The question of sufficiency of the level of internal protection was not addressed, mostly because of the undisputable fact that the authorities in Pakistan operated a gender-bias and did not respond to incidents of violence against women.⁶⁸

In the context of the latter, Querton notes the important role of country-of-origin information (COI) in cases of non-state persecution.⁶⁹ The determination of whether the state provides protection where the serious harm emanates from private actors largely depends on COI.⁷⁰ This may have particularly negative impact on female applicants, especially when their claims are involving acts of gender-based persecution, as COI provides limited information on gender-related issues.⁷¹ Such

⁶⁵ supra 62, at 494.

⁶⁶ supra 62, at 494.

⁶⁷ *Islam v. Secretary of State for the Home Department* and *R v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah* [1999] 2 AC 629 (*Islam* and *Shah*).

⁶⁸ *Ibid.*, at 635-636, 639 (Lord Steyn regarding the situation of women in Pakistan).

⁶⁹ Querton, supra 32, 31-32.

⁷⁰ This view was confirmed by the AIT in *Horvath v. Secretary of State for the Home Department*, Appeal No. 17338, AIT/IAA, 28 September 1998, (para.21): “It is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin. In other words, the probative value of the evidence must be evaluated in light of what is known about the conditions in the claimant’s country of origin”.

⁷¹ Querton, supra 32, 32.

information, Oosterveld notes, may be difficult enough to collect during peace time, but it is extremely challenging to collect information on the situation of women during armed conflict when gender-based violence, persecutory acts and human rights violations are often underreported.⁷² Inaccurate COI, along with underestimated data, may consequently lead to speculative judgments about the (non)existence of persecution, which may invalidate the claim for refugee status. Baillot, Cowan and Munro express further concerns with regard to over-reliance on external sources of information (such as COI or country expert reports) within the asylum system.⁷³ The authors criticise the process in which stronger reliance is placed upon the external information rather than the female asylum seeker's narrative, particularly when gender-based persecution is involved, and point out the disempowering effect such process can have on claimants.⁷⁴ Furthermore, COI is often read selectively by those involved in the initial stage of the asylum determination procedure, which may result in a wrongful rejection of the claim to asylum.⁷⁵ That said, the vast majority of commentary and case-law on gender aspects of non-state persecution focuses mostly on domestic violence rather than on gender-based persecution by non-state actors in the context of armed conflict or its aftermath.⁷⁶

3.4. Analysis of current approaches to non-state persecution

While there exists a general trend towards application of the protection approach in non-state persecution cases, this approach is not without difficulties.

⁷² Valerie Oosterveld, *Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention*, PPLA/06/2012 (UNHCR September 2012) <<http://www.unhcr.org/504dd7649.html>> accessed 9th May 2013, 45.

⁷³ Helen Baillot, Sharon Cowan, Vanessa E. Munro, 'Crossing borders, inhabiting spaces: The (in)credibility of sexual violence in asylum appeals', in: Sharon A. FitzGerald (ed), *Regulating the International Movement of Women. From Protection to Control* (Routledge 2011) 111-131, 123.

⁷⁴ However, Piotrowicz notes the problem of potential untruthfulness of asylum seekers' claims and the dilemma faced by States with regard to addressing such situations: Ryszard Piotrowicz, 'Asylum Seekers, Good Faith and the State' (2013) 20 *International Journal on Minority and Group Rights* 263-278.

⁷⁵ *Asylum Aid* (2011), supra 32, 59-62.

⁷⁶ *Islam and Shah; Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14; Deborah Anker, 'Refugee Status and Violence Against Women in the "Domestic" Sphere: the Non-State Actor Question' (2000) 15 *Georgetown Immigration Law Journal* 391; Melanie Randall, 'Refugee Law and State Accountability for Violence Against Women: a Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution' (2000) 25 *Harvard Women's Law Journal* 281.

The 'sufficient protection test', established in *Horvath*, strongly focused on the existence and operation of a criminal law system in the country of origin, may lead to the conclusion that it is possible for an individual, who fears persecution by non-state actors on a Convention ground, to be returned to their country because the state attempts to operate a system of protection. This might mean that a female applicant who fears a gender-based act of persecution (e.g. FGM) at the hands of non-state actors (e.g. members of a family or a clan) could be returned to her country of origin in situations where the country's criminal laws prohibit such conduct.⁷⁷ In practical terms, this means that effectively it will be extremely difficult (if not impossible) for the applicant to show the insufficient level of internal protection, especially in the absence of a discriminatory policy of the state. This may be additionally challenging to prove in cases where non-state persecution takes gender-based form, mostly due to the unavailability of sufficient COI to support the claim otherwise.⁷⁸

Furthermore, such approach arguably moves away the focus of refugee inquiry from the ill-treatment of the applicant, which is likely to involve human rights violations ('the subjective test'), to the notion of the state agency in the commission of alleged acts ('the objective test'), demonstrated by the lack of sufficient internal protection available to the applicant. As such, it marks a departure from protecting the asylum seeker from persecution, which is the very object and purpose of the Convention, in favour of a state-centric approach, which finds support in the words of Lord Clyde in *Horvath*:

⁷⁷ Lambert rightly argues that approach adopted in *Horvath* contravenes the Article 33(1) of the Refugee Convention as well as the well-established principle of public international law that States may not invoke their domestic laws in order to avoid their international obligations. Rather, States are obliged to bring their domestic laws in conformity with international obligations. See: H el ene Lambert, 'The Conceptualisation of 'Persecution' by the House of Lords: *Horvath v. Secretary of State for the Home Department*' (2001) 13 (1&2) International Journal of Refugee Law 16, 28.

Macdonald QC and Toal also refer to the focus on failure of state protection in non-state persecution cases as 'an unnecessary distraction': Ian Macdonald, Ronan Toal, *Macdonald's Immigration Law & Practice*, 7th ed., (Butterworths 2008), para.12.54.

⁷⁸ Asylum Aid, 'Gender-related asylum claims in Europe. A comparative analysis of law, policies and practice focusing on women in nine EU Member States', May 2012, <http://www.asylumaid.org.uk/pages/campaign_for_gender_guidance_across_europe.html> accessed 23 January 2013, 52-54.

“(t)he sufficiency of state protection is not measured by the existence of a real risk of an abuse of rights but by the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate it”.⁷⁹

The judgment in *Islam* and *Shah* further illustrates this dynamic: it was not the ill-treatment itself (domestic violence), but the lack of state protection that was central in establishing persecution.

In the light of the above criticism, Wilsher queries the appropriateness of a human-rights based approach to the meaning of persecution.⁸⁰ Within the current framework of human rights law, only the state can be liable for breaches of human rights by failing to fulfil its duty to protect individuals against such violations. Accordingly, by adopting a human-rights based approach to persecution, one rejects the concept of ability of non-state actors to persecute alone.⁸¹ Rather, the state agency becomes central to determination of refugee status: claims based on persecution by non-state actors can be valid only when the persecution is accompanied by unwillingness or inability of the state to provide adequate protection.

Wilsher’s argument leads to another issue: does it actually matter, in a practical rather than normative and interpretative context, in what circumstances persecution occurs? Surely, from the victim’s/ asylum seeker’s perspective, the identity of the persecutor (i.e. state or non-state actor) and the context in which persecutory acts happen (be it civil war, international armed conflict or peacetime) are of limited significance. To the contrary, the main concern is caused by the fear of suffering a serious harm or the ill-treatment itself combined with the lack of effective protection against such harms - whether the state itself persecutes or not, or whether it is unable to prevent persecution by non-state actors, is of secondary importance to the individual concerned.⁸²

⁷⁹ Supra 62, at 516.

⁸⁰ Wilsher, supra 55, 98.

⁸¹ Ibid.

⁸² This argument is supported by Zimmermann, supra 53, 363. See also: Walter Kälin, ‘Refugees and Civil Wars: Only a Matter of Interpretation?’ (1991) 3(3) International Journal of Refugee Law 435.

3.5. Summary

Fleeing armed conflict and seeking asylum on grounds of gender-based persecution sets a major challenge to female victims. In fact, it appears that women in this particular position confront an obstacle of having to cross a 'double threshold' (if not double barrier) of evidencing their claim. First, the aspect of fleeing armed conflict or situation characterized by a high level of indiscriminate violence (e.g. in situation of civil war) is problematic due to the general non-recognition of humanitarian refugees (i.e. persons fleeing war, whether of international or non-international character) as persons entitled to benefit from international protection within the scope of the 1951 Convention. Secondly, the gender-based nature of the harm and persecution suffered by the claimant poses a significant interpretative difficulty, as gender is not explicitly included as an autonomous ground for persecution. The UNHCR Gender Guidelines should act as a reliable tool for persons involved in refugee status determination procedures where questions of gender-related aspects of interpretation of the Convention may arise. Nevertheless, the Guidelines have their practical limitations. They may provide interpretative guidance and encourage a gender-inclusive reading and application of the 1951 Convention but they are not legally binding. Furthermore, although they acknowledge gender-based persecution (in a soft law form), they reaffirm that the adoption of a gender-sensitive approach to the Convention does not invalidate the requirement that the refugee claimant must establish a well-founded fear of persecution for at least one of the five Convention reasons.⁸³ In effect, the claimant remains reliant on the (hopefully) good will and the level of gender-awareness and gender-sensitivity of the decision maker, who determines the refugee status.

4. Membership of a particular social group- a default category for gender-based asylum claims?

Membership of a particular social group (MPSG) is one of the grounds for persecution outlined in Article 1 A (2) of the Convention and one with, arguably, least clarity. However, the lack of a fixed definition of the meaning of a particular social group (PSG)

⁸³ UNHCR, Gender Guidelines, supra 29, para.4.

and the lack of a definitive list of groups which may fall under this category allows for a greater flexibility in determination of refugee status.⁸⁴ Furthermore, this feature allows the decision makers, at least in theory, to respond better and more adequately to the ever-changing characteristics and views of the society by including any groups that may have not yet emerged or not yet been recognized under a wide umbrella of PSG.

The basic yet essential question of what amounts to a PSG has been at the centre of refugee law debate for years. However, the demand for clarification became greater as the numbers and variety of asylum claims considered under the category of PSG increased over time. What also became clear was that the majority of claims involving gender-based persecution were considered under this ground. In light of the subject of this chapter, the role and importance of the PSG in the context of claims of gender-based persecution in armed conflict will be considered.

4.1. What is a PSG?

There have been many attempts to clarify the notion of PSG, both at the national and the international levels. The UNHCR Handbook defines a PSG as a group comprised of “persons of similar background, habits or social status”.⁸⁵ It further notes that “mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status, but there may, however, be special circumstances where membership can be sufficient ground to fear persecution”.⁸⁶

The analysis of state practice in relation to the interpretation of the meaning of a PSG allows to distinguish two dominant approaches based on (respectively):

⁸⁴ “The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.” in: UNHCR, Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02, <<http://www.unhcr.org/refworld/docid/3d36f23f4.html>> accessed 25 June 2012, para.3 [UNHCR PSG Guidelines].

⁸⁵ UNHCR Handbook, *supra* 18, para.77.

⁸⁶ UNHCR Handbook, *supra* 18, para.79.

- protected characteristics, and
- social perception.⁸⁷

The protected characteristics approach looks at whether members of the group in question share characteristics which are unchangeable or characteristics which are alterable but which are perceived to be fundamental to human dignity and human rights and therefore nobody should be required to change them. This approach was developed in the decision of the US Board of Immigration Appeals (BIA) in *Re Acosta* where the BIA relied on the doctrine of *ejusdem generis* in construing the meaning of a PSG.⁸⁸ It noted that in the light of this rule of interpretation, where each of the other Convention grounds “describes persecution aimed at an immutable characteristic”⁸⁹ PSG should be interpreted

“to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership”.⁹⁰

This approach was further reaffirmed in *Canada v. Ward*⁹¹ and can be summarized to include the following types of groups:

- (i) groups defined by an innate or unchangeable characteristics;

⁸⁷ For analysis of state jurisprudence in relation to the MSPG see: T. Alexander Aleinikoff, ‘Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’’, in: Feller et al., supra 6, 268-285.

⁸⁸ *Re Acosta*, 19 I. & N. Decisions 211, US Board of Immigration Appeals, 1 March 1985 (*Acosta*). The protected characteristics approach is also often referred to as *ejusdem generis* approach. *Ejusdem generis* (of the same kind) is a rule of statutory interpretation, according to which “when a list of specific items belonging to the same class is followed by general words, the general words are to be treated as confined to other items of the same class” (in: *Oxford Dictionary of Law*, 6th ed. (OUP 2006) 287).

However, as Aleinikoff rightly notes, “the five Convention grounds are not, however written in a manner that application of *ejusdem generis* appear appropriate. The Convention does not list four grounds and then add a fifth such as ‘and all other grounds that are frequently a basis for persecution’. (...) The suggestion that *ejusdem generis* can play a useful interpretative role may be based on a slightly different kind of argument that looks to the underlying motivation for the designation of particular categories” (Aleinikoff in: Feller et al., supra 6, 289-290).

⁸⁹ 19 I. & N. Decisions 211, 233.

⁹⁰ Ibid.

⁹¹ *Canada v. Ward* [1993] 2 SCR 689 (*Ward*).

- (ii) groups defined by a characteristic that is fundamental to human dignity such that a person should not be forced to relinquish it; and
- (iii) groups defined by a former status, unalterable due to its historical permanence.⁹²

An alternative interpretation of the meaning of a PSG emerged in Australia in *Applicant A*.⁹³ The social perception approach developed by the Australian High Court focuses on the question of whether a group shares characteristics which make it recognizable and distinctive from the rest of society:

“the collection of persons must be of social character, that is to say, the collection must be cognisable as a group in the society such that its members share something which unites them and sets them apart from society at large”.⁹⁴

The main premise of this approach is centred around the element of external perception of the PSG, which immediately raises the question of what standard should be used to determine the element of ‘social perception’, i.e. what it exactly entails and whether it is based on a subjective or objective test.

It was emphasized in *Applicant A* that the “existence of such a group depends in most, perhaps all, cases on external perceptions of the group” and that it “must be identifiable as a social unit” by the public, which is “aware of the characteristics or attributes that (...) unite and identify the group”.⁹⁵ The importance of the public perception element to the determination of existence of a PSG was later confirmed in *Applicant S v. Minister for Immigration and Multicultural Affairs*.⁹⁶ The judgment also clarified that the relevant test is whether the group is objectively cognisable, with the evidence of subjective social perception being relevant to the inquiry.⁹⁷ Furthermore,

⁹² UNHCR, The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group', April 2012, PPLA/2012/02 (UNHCR, *The 'Ground with the Least Clarity'*) <<http://www.unhcr.org/refworld/docid/4f7d94722.html>> accessed 10 June 2012, 7.

⁹³ *Applicant A v. MIEA* [1997] HCA 4 (*Applicant A*).

⁹⁴ *Ibid.*, 241.

⁹⁵ *Ibid.*, 264- 265.

⁹⁶ *Applicant S v. Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 (*Applicant S*).

⁹⁷ *Ibid.*, 400 (“Subjective perceptions held by the community are also relevant”), 410-411.

the later jurisprudence highlighted that the social group needs to be identified in the context of a particular society.⁹⁸

From the outset, commentators and adjudicators were divided as to which reading of the PSG should prevail and why.⁹⁹ Some favoured the protected characteristics approach due to its strong human-rights perspective to the definition of PSG, i.e. that it is to be limited to groups defined, similarly as the first four Convention grounds, in human rights terms. As Aleinikoff notes, this approach merits protection to “those who would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to give up an ‘immutable’ characteristic or because the basis of affiliation is the exercise of a fundamental human right”.¹⁰⁰ However, the main limitation of the protected characteristics approach is that it excludes certain types of groups which may also be persecuted. Such groups, for example, could be united not by immutable characteristics, but other types of associations recognizable within the particular society, such as the socio-economic position within the particular society as could be observed in *Montoya*.¹⁰¹

It is in the context of such limitations that the social perception analysis may appear as a more favourable approach to determination of a PSG.¹⁰² The social perception test can be described as more open and flexible due to the lack of restrictions posed by the element of immutable characteristic approach, i.e. the requirement that a defining

⁹⁸ *Islam v. Secretary of State for the Home Department* [1999] 2 AC 629, 652 (per Lord Hoffman).

⁹⁹ This approach has also been favoured in majority of common law jurisdictions. For overview of state practice in relation to the interpretation of the PSG see: Aleinikoff, *supra* 87, 268-285.

For a detailed overview of advantages and disadvantages of the two approaches see: James Hathaway, Michelle Foster, ‘Membership of a Particular Social Group. Discussion Paper No.4, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2000’ (2003) 15 *International Journal of Refugee Law* 477, 481- 484.

¹⁰⁰ Aleinikoff, *supra* 87, 294.

¹⁰¹ *Wilson Herman Lopez Montoya v. Secretary of State for the Home Department* [2002] EWCA Civ 620 (*Montoya*); The applicant in *Montoya*, who was a member of a wealthy landowners family in Colombia, faced threats of murder unless he paid large sums of money to a revolutionary group in Colombia. Other members of his family had been murdered by members of this group after they refused to pay or stopped payments. The IAT recognized that the status of being a prosperous private landowner in Colombia is a significant social identifier and that such landowners generally lack effective protection from the State. However, it concluded that these characteristics do not suffice to consider Mr Montoya as a member of a PSG as the alleged group (‘the prosperous landowners in Colombia’) is not based on immutable characteristics.

¹⁰² However, the EU Qualification Directive requires both the immutable characteristics test and the social perception test to be satisfied. For further discussion, see section 5.4. below.

characteristic of a member of a PSG must be innate or unalterable. The flexibility of the social perception approach was highlighted by the House of Lords in *Fornah*:

“if a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society”.¹⁰³

Therefore, it may encompass groups which are not defined by immutable characteristics, as well as responding better to the changing nature of a PSG by opening the avenue for inclusion of new groups that may have emerged (or, having had already existed, became to be persecuted), but whose characteristics are not necessarily innate or unchangeable, e.g. one’s profession. Furthermore, the social perception approach allows for the determination of a PSG in the context of a particular society, taking into account its historical, cultural and religious specificities. The importance of this element to a PSG inquiry was emphasized by Lord Hope of Craighead in *Islam and Shah*:

“As social customs and social attitudes differ from one country to another, the context of this inquiry is the country of the person’s nationality. The phrase can thus accommodate particular social groups which may be recognizable as such in one country but not in others or which, in any given country, have not previously been recognized”.¹⁰⁴

Despite differences between the two approaches, the vast majority of groups recognized as PSGs under the social perception approach would also be recognized using protected characteristics analysis. Thus, the UNHCR recommended that the combined approach is taken in order to address any protection gaps that may result from adopting a single test for MPSG. To this end, the UNHCR recommends a single definition of PSG, which incorporates the immutable characteristics approach and social perception approach:

¹⁰³ *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant), Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2006] UKHL 46, para.15. (Fornah).

¹⁰⁴ *Islam and Shah*, supra 21, at 657.

“a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”.¹⁰⁵

The above appears to be the most suitable and comprehensive approach taken so far towards a determination of the existence of a PSG. By incorporating the two approaches into a single definition, it allows both constructions to co-exist in refugee law and eliminates the protection gaps which may have arisen if only one of the approaches was applicable.

4.2. PSG and gender-based persecution

For the purposes of the current discussion, the main issue remains as to whether (and how) these two approaches to construction of a PSG can be applied to the situation of asylum-seeking women facing gender-based persecution during or as a result of armed conflict.

Both tests have been applied in cases which considered whether women can constitute a PSG for purposes of the Convention definition of a refugee. A central question in the PSG-related jurisprudence is whether gender can be seen as an innate characteristic by reason of which women are persecuted. In particular, the cases to which the above tests were applied dealt with women who transgressed social mores (e.g. women who refused FGM or forced marriage), but also groups such as women accused of adultery, homosexual women or victims of trafficking.

There are examples of positive state practice (at least when assessed from the gender perspective) where women were held to constitute a PSG and where gender-based persecution was considered under the heading of MPSG.¹⁰⁶ Moreover, as the leading case law on PSG indicates, the successful determination of a PSG in relation to women

¹⁰⁵ UNHCR, PSG Guidelines, supra 84, para.11.

¹⁰⁶ *Islam and Shah*, supra 21; *FM (FGM) Sudan CG* [2007] UKAIT00060; *MK (Lesbians) Albania CG* [2009] UKAIT00036.

who suffered (or are at risk of) gender-based persecution is possible irrespective of which test is applied. Gender was categorised as an immutable characteristic, which may form a PSG in *Ward* and further applied by the courts in New Zealand and the US.¹⁰⁷ On the other hand, the judgment in *Minister for Immigration and Multicultural Affairs v. Khawar*, the leading decision of an Australian High Court on the meaning of a PSG, confirmed that women can constitute a PSG:

“Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. Neither the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group. Women would still constitute a social group if such violence were to disappear entirely”.¹⁰⁸

If it is accepted that gender can be interpreted as an immutable characteristic and as such enable claims under the category of a PSG, then, on the face of it, there should not be any obstacles to applying this interpretation to women who fear or suffer gender-based persecution in armed conflict. Although other Convention grounds may also play a role (e.g. political opinion or nationality), women are primarily persecuted in the context of armed conflict due to their gender - a factor which gives rise to the premise that such women constitute a PSG. Nevertheless, despite several examples of leading case-law employing gender-inclusive application of a PSG test and a rather clear message emanating from the UNHCR Gender Guidelines and the UNHCR PSG Guidelines, there exist major challenges to successful recognition of gender-based claims based on MPSG.¹⁰⁹ Goodwin-Gill and McAdam capture the core of this problem:

“For women suffer particular forms of persecution as women, and not just or specifically because of political opinion or ethnicity. Even though men too may be sexually abused, their gender is not a consideration. Women may be raped because of their politics, but they are also raped because they are women and because rape inflicts a particular indignity and promotes a particular structure of male power”.¹¹⁰

¹⁰⁷ *Canada v. Ward*, supra 91, 739; UNHCR, *The Ground with the Least Clarity*, supra 92, 43-44.

¹⁰⁸ *Khawar*, supra 76, para.35.

¹⁰⁹ This problem was also noted by Foster in: UNHCR, *The Ground with the Least Clarity*, supra 92, 44.

¹¹⁰ Goodwin-Gill, McAdam, supra 19, 83.

This argument however is generally overlooked in the context of the refugee determination process and even more often dismissed for mainly two reasons.

The first reason is based on what Baroness Hale rightly called in *Fornah* 'a peculiarly cruel version of Catch 22': a difficulty involved in formulating the group in sufficiently narrow terms in order to avoid the 'floodgates' concern.¹¹¹ However, an attempt to narrow the group to include women who may be at risk of gender-based persecution in or as a result of events taking place during armed conflict immediately raises another concern. It has been established that experience of persecution which persons may have in common does not mean that they constitute a PSG.¹¹² In other words, the social group must exist independently of persecution or the fear of it, although the common experience of persecution may be an indicative factor in recognition of a PSG.¹¹³ Consequently, the dilemma remains:

'if not all the group is at risk, then the persecution cannot be caused by their membership of the group; if the group is reduced to those who are at risk, it is then defined by the persecution alone'.¹¹⁴

Gender-based persecution of women in armed conflict may then be seen as a characteristic, which 'unites' the victims and therefore excludes the possibility of categorising them as a PSG. However, is it not the case that in terms of legal categorisation women arguably already pre-exist in situations of an armed conflict as a distinctive group (PSG)? Gender has now been commonly acknowledged as an element shaping the reality of armed conflict. Furthermore, there is a long-standing recognition of women as a group, which is particularly vulnerable in situations of armed conflict and, therefore, a group which should be afforded special protection by IHL. It can also be argued that such a categorization can be seen as rooted in women's past common experience of gender-based persecution in armed conflict. This is particularly true when the persecution takes the form of an act of sexual violence (e.g. rape) - a

¹¹¹ *Fornah*, supra 103, para.113.

¹¹² *Ward* [1993] 2 SCR 689, 729; UNHCR, PSG Guidelines, supra 84, para.2.

¹¹³ *Applicant A*, supra 93, at 264.

¹¹⁴ *Fornah*, supra 103, para.113.

'practice' that has been a part of (mis)conduct in war for millennia; a (mis)conduct which has been victimising primarily women solely due to their gender.

The second challenge is posed by a remarkably common misperception and misconception of gender-based persecution. This type of persecutory acts is often ignored by those involved in the refugee status determination procedure. Similarly to the social perception test for determination of a PSG, the 'social' element is central to considerations about gender as a factor which determines the reason for persecution. As noted by Goodwin-Gill and McAdam, "gender is used by societies to organize or distribute rights and benefits; where it is also used to deny rights or inflict harm, the identification of a gender-defined social group has the advantage of external confirmation".¹¹⁵ Because gender is not a static factor and gender relations differ between various societies, the element of social perception of gender (and female gender roles in particular) must also be taken into consideration in relation to gender-based persecution.

As argued throughout this chapter, understanding of this 'gender dynamic' is particularly relevant in the context of armed conflict, when women are especially vulnerable to persecution primarily due to their gender. Furthermore, as shown in *Shah and Islam*, gender plays a major role behind persecution of women and, as stressed by Lord Steyn and Lord Hutton, can indeed be a characteristic unifying women into a PSG. Nevertheless, in cases where the sole reason for persecution is the applicant's gender, decision-makers generally continue to show strong reluctance to engage with PSG as a Convention ground.¹¹⁶ Further obstacles are posed by the incorrect application of the tests for determination of a PSG.

Finally, women's claims for asylum are also trivialised when the reason for persecution is not gender (e.g. membership of a political group), but persecution takes a gender-specific form (e.g. rape). Equally, when gender-based persecution takes the form of

¹¹⁵ Goodwin-Gill, McAdam, *supra* 19, 84.

¹¹⁶ Asylum Aid (2011), *supra* 32, 45.

non-gender-specific means (e.g. being flogged for not wearing a veil), the gender-element of the harm is often overlooked.

5. Seeking asylum in Europe: gender-based persecution, armed conflict and the EU Qualification Directive

5.1. The Qualification Directive

In 2004, the European Union adopted the ‘Qualification Directive’ (Council Directive 2004/83/EC), the core element of the Common European Asylum System. The Directive creates a scheme which allows third country nationals, who do not qualify as refugees under the 1951 Refugee Convention, but nevertheless are in need of international protection, to benefit from subsidiary, or complementary, protection.¹¹⁷

The main purpose of the QD is to combine the two systems of refugee protection: the international system of protection set out by the Refugee Convention with the concept of subsidiary protection. The Directive has been already acknowledged as a groundbreaking step in developing the law of refugee protection and has been described as “the most ambitious attempt to combine refugee and human rights law to date”.¹¹⁸ It is however argued in this chapter that the advances introduced by the Directive potentially go even further and are particularly significant for the protection of women fleeing gender-related persecution, especially in the context of armed conflict.

Effectively, the QD explicitly recognizes gender-specific acts as a means of persecution.¹¹⁹ Furthermore, the Directive recognizes the concept of ‘serious harm’ (Article 15), which includes “serious and individual threat to a civilian's life or person

¹¹⁷ The recast EU Qualification Directive (QD) was adopted in December 2011: Directive 2011/95/EU of The European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Official Journal of the European Union 2011 L337/9 (20 December 2011).

¹¹⁸ H el ene Lambert, ‘The EU Asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and International Law’ (2006) 55 *International and Comparative Law Quarterly* 161, 162.

¹¹⁹ Article 9(2)(f) QD: ‘Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of: (...) acts of a gender-specific or child-specific nature’.

by reason of indiscriminate violence in situations of international or internal armed conflict".¹²⁰ As such, it opens the possibility to seek international protection by persons fleeing conflict-affected zones - an option generally excluded under the 1951 Convention.¹²¹

5.2. The 1951 Refugee Convention vs. the Qualification Directive - what is new?

The Directive generally gives effect to the 1951 Convention definition. It also proposes a definition of persecution, which has thus far been open to varying interpretation by the courts and immigration tribunals across jurisdictions. The Qualification Directive defines persecution as acts, which must:

“(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)”.¹²²

The Directive repeats the five reasons for the persecution and its core is based on the notion of ‘well-founded fear of persecution’, reinstating the language of the 1951 definition. However, it goes further resulting in promising advances in relation to protection claims made by women who flee gender-based persecution in situations of armed conflict.

5.2.1. Acts of a ‘gender-specific nature’

The QD addresses acts of a persecutory character. In contrast to the international system of refugee protection outlined in the Refugee Convention 1951, the QD

¹²⁰ Article 15(c) QD: ‘Serious harm consists of: (...) (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’

¹²¹ UNHCR Handbook, supra 18, para.164: ‘Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol’.

¹²² Article 9(a) and (b) QD.

expressly refers to '(...) acts of sexual violence', as well as 'acts of gender-specific (...) nature'.¹²³ Such acts were omitted at the time of drafting of the Refugee Convention 1951. However, the UNHCR provides 'interpretative guidelines', which encourage reading of the Refugee Convention in a gender-sensitive manner.¹²⁴ Although their adoption was welcome and, at least in theory, marked a progression towards a gender-sensitive approach to refugee-determination procedures, the UNHCR Gender Guidelines remain limited in scope and possess primarily 'soft law' status.¹²⁵

Both terms in Article 9(2) are significant in that they clearly recognize acts of gender-related persecution as a possible ground for claiming protection. The first category of acts is of particular importance, principally in the context of modern armed conflicts, which have been characterized by an exceptionally high occurrence of acts of sexual violence.¹²⁶ The great majority of victims have been women, who were deliberately targeted due to their gender, i.e. due to their identity and status as women within the particular society. Furthermore, the addition of a category of 'gender-specific acts' opened a discussion about the status of this new element. It remains uncertain whether 'gender-specific acts' should be construed as a new ground, additional to those already present in the 1951 Convention. Nevertheless, at the very least, this phrase could be understood as inviting a gender-sensitive interpretation and application of the Refugee Convention.

This potential ambiguity leads to another question, namely that of the relationship between the QD and international law. Lambert notes that, especially if 'gender-specific acts' were understood as constituting a 'new ground', a question may arise regarding the compatibility of the EU Directive with the Refugee Convention, especially

¹²³ Article 9(2)(a) QD; Article 9(2)(f) QD.

¹²⁴ UNHCR, Gender Guidelines, supra 29.

¹²⁵ For further discussion regarding status of the guidelines see: James Hathaway, *The Rights of Refugees under International Law* (CUP 2005), 112-118.

¹²⁶ That argument does not deny that sexual and gender-based violence in fact have been an inherent part of most, if not all, historical armed conflicts. However, it is largely due to the events of modern armed conflicts, in particular war in the Former Yugoslavia and in Rwanda, that sexual violence emerged as an important issue in international law (e.g. as a crime against humanity) as well as in public discussion.

in relation to different entitlements that these two instruments warrant for what essentially may be the same type of persecutory harm.¹²⁷

However, the two instruments clearly differ in defining the eligibility of potential beneficiaries of asylum. The QD explicitly takes a narrower view on this issue: one of the main grounds of eligibility is a requirement that an applicant for subsidiary protection must not qualify for refugee status within the meaning of the 1951 Refugee Convention. Merely by virtue of this basic introductory provision, it can be seen that the preliminary characteristics of attempted beneficiaries of refugee protection are mutually exclusive: a person who qualifies as a refugee may not benefit from subsidiary protection afforded under the Qualification Directive and vice versa.¹²⁸ Accordingly, it can be argued that, due to this substantive difference, it is rather understandable that the two regimes (albeit rooted in the same general presumption) will not, in principle, guarantee the same level of protection.¹²⁹ Should they do so, the necessity for creation of a separate refugee protection regime under the QD which would merely repeat provisions already existing in the Refugee Convention could also be questioned.

¹²⁷ Lambert, *supra* 118, 188-189.

¹²⁸ However, persons, who benefit from subsidiary protection have a right to apply for refugee status under the 1951 Convention, which grants more rights and entitlements than the Qualification Directive does.

¹²⁹ However, EU Member States may provide a higher level of protection. The aim of the Qualification Directive is rather to guarantee the *minimum* standards (emphasis added). Recital 12 QD: "The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States". Article 1 QD states: "The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted". Article 3 QD states: "Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive".

However, Lambert argues, the two different kinds of status of a 'refugee' (i.e. the one determined by the scope of the Refugee Convention 1951 and the other qualified through the fulfilment of requirements set by the Qualification Directive) and, what follows from this distinction, different entitlements and refugee rights, may lead to the breach of two basic principles of international law, namely the principle of equality and the principle of non-discrimination (Lambert, *supra* 118, 176-177).

5.2.2. New actors of persecution

Article 6 (c) of the Directive explicitly recognizes that non-state actors can commit acts of persecutory nature or cause serious harm.¹³⁰ At the time when the QD was initially created, one of the key challenges was posed by divergent approaches amongst EU Member states towards asylum cases involving persecution by non-state actors.¹³¹ Therefore, one of the key aims of the Directive was to introduce a common concept of persecution and grounds thereof.¹³²

As discussed in section 3.2., under the IRL regime, an individual may seek international protection from persecution by non-state actors only in circumstances, where the state is complicit in commission of persecutory acts by non-state actors ('accountability approach') or where their own state fails in its duty to provide and apply adequate measures to save its nationals from the recognised threats or harms ('protection view'). Article 6(c) of the QD adopts the latter approach, which primarily focuses on the availability of protection against persecution or serious harm rather than the type of actor who commits persecution or serious harm. Nonetheless, despite the fact that such approach carries its own challenges, the inclusion of non-state actors of persecution in the Directive achieved its main goal: 'it is no longer possible for any EU member state to exclude the possibility in their national law that persecution can be inflicted by non-state actors'.¹³³ Finally, this is particularly important development from the perspective of women who flee gender-based persecution, as very often, particularly in conflict situations, women suffer serious harm inflicted by non-state actors.

5.3. The requirement of serious harm - armed conflict perspective

Generally, persons who are fleeing their country as a result of internal or international armed conflict are normally not considered eligible for refugee protection under the

¹³⁰ Article 6(c) QD.

¹³¹ UNHCR, *Asylum in the European Union. A study of the implementation of the Qualification Directive*, November 2007, 41, <<http://www.refworld.org/docid/473050632.html>> accessed 26 July 2012.

¹³² Recital 18 QD.

¹³³ Hugo Storey, 'EU Refugee Qualification Directive: a Brave New World?' (2008) 20(1) *International Journal of Refugee Law* 1, 9.

1951 Convention.¹³⁴ The scope of the Qualification Directive introduces however a significant change in this respect.

5.3.1. Article 15 (c)

One of the eligibility criteria set out by the Directive requires substantial proof that an applicant, should he/she be returned to the country of origin 'would face a real risk of suffering serious harm as defined in Article 15'.¹³⁵

Article 15 outlines three particular characteristics of what amounts to 'serious harm':

- a) Death penalty or execution; or
- b) Torture or inhumane and degrading treatment or punishment of an applicant in the country of origin; or
- c) **Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict** (emphasis added).

The two former provisions reflect the rights enshrined in Article 2 and Article 3 of the European Convention of Human Rights. Paragraph (c) introduces a new concept of 'serious harm', namely one, which explicitly recognizes a harm originating from the situations of indiscriminate violence in armed conflict.

This new approach constitutes a very significant development in refugee law for several reasons. First of all, it gives explicit recognition to the dangers to which civilians are constantly exposed by virtue of the high level of violence during ongoing hostilities. It also acknowledges the indiscriminate character of these dangers. Secondly, it brings within the notion of 'serious harm' threats arising as a result of both international and internal armed conflict, which broadens the scope of prospective beneficiaries of protection to include the victims of civil conflicts, which are the main type of armed conflict in contemporary setting.

¹³⁴ This view is also expressed in the UNHCR Handbook, supra 18, para.164.

¹³⁵ Article 2(e) QD.

Finally, Article 15(c) appears to require proof of a lesser degree of individual risk in order for an applicant to qualify for subsidiary protection than that required under Articles 15(a) and (b). The ‘real risk’ standard set out in Article 2(e) applied to the meaning of ‘serious harm’ in Article 15(c), effectively amounts to a requirement of proof of a ‘real risk of suffering a serious and individual **threat**’ (emphasis added), rather than a real risk of suffering the actual ill-treatment.¹³⁶ Accordingly, it marks an important step forward in the system of refugee protection, in that it opens the possibility of receiving subsidiary protection status for civilians (particularly civilian women, who constitute a majority of civilian population at the time, when hostilities take place), adversely affected by situations of conflict.

However, Article 15(c) poses some interpretative challenges. Two important issues arise in relation to the criteria set in Article 15(c): first, relating to the character of armed conflict and its severity, and, second, to the ‘individual’ aspect of harm.

5.3.2. Requirement of ‘armed conflict’¹³⁷

Unlike Articles 15(a) and (b), Article 15(c) is not codifying existing standards. Therefore, when interpreting and applying Article 15(c), one cannot rely upon established standards developed in case-law of the ECtHR, except with regard to the right to life guaranteed by Article 2 ECHR. However, the main difference between Article 15(c) and Articles 15(a) and (b), and the crucial one in the context of current discussion, is the requirement of internal or international armed conflict.¹³⁸ This element of Article 15(c) poses significant degree of interpretative difficulty, as different standards are applied in the practice of member states.¹³⁹ The ‘internal’ aspect of armed conflict

¹³⁶ This approach is also supported by Hemme Battjes, *European Asylum Law and International Law* (2006 Martinus Nijhoff) 239-240; for further discussion see also: Storey, *supra* 136, 33-36.

¹³⁷ See generally: H el ene Lambert, Theo Farrell, ‘The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence’ (2010) 22(2) *International Journal of Refugee Law* 237-273.

¹³⁸ Nevertheless, Articles 15 (a) and (b) may also be applied at time of armed conflict.

¹³⁹ UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007 <<http://www.unhcr.org/refworld/docid/473050632.html>> accessed 4 April 2011, 76-79; UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011 <<http://www.unhcr.org/refworld/docid/4e2ee0022.html>> accessed 30 July 2011.

present in Article 15(c) in particular raises a certain degree of uncertainty as to when the general violence reaches the level amounting to civil conflict.¹⁴⁰

A situation of non-international armed conflict (NIAC) is more difficult to determine than the existence of an international armed conflict. The level of intensity of indiscriminate violence must reach a sufficient threshold in order for internal disturbances or situations characterised by the high degree of violence to classify it as an internal armed conflict. However, the definition of NIAC has evolved in the context of ICL, primarily in the case-law of the ICTY. In *Prosecutor v. Tadić* (Jurisdiction), the ICTY established that a NIAC “exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.¹⁴¹ In addition, two further requirements must be satisfied:

- hostilities must reach a minimum level of intensity, and
- the parties to armed conflict must pose a minimum level of organisational structure.¹⁴²

This definition has been consistently applied since the judgment in *Tadić* in the case law of the ICTY and the ICTR. That said, there is no fixed definition of what constitutes the minimum levels of intensity and organisation as required by the *Tadić* definition. Rather, as suggested in *Prosecutor v. Limaj*, “the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis”.¹⁴³

¹⁴⁰ Kay Hailbronner (ed), *European Immigration and Asylum Law. A Commentary* (Hart Publishing 2010) 1147.

¹⁴¹ *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.70.

¹⁴² *Prosecutor v. Tadić*, Trial Judgment, IT-94-1-T, 7 May 1997, para.562; *Prosecutor v. Limaj*, Trial Judgment, IT-03-66-T, 30 November 2005, para.89; International Committee of the Red Cross (ICRC) Opinion Paper, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’, March 2008 <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 20 March 2013.

¹⁴³ *Prosecutor v. Limaj*, Trial Judgment, IT-03-66-T, 30 November 2005, para.90.

However, recent jurisprudence on the element of armed conflict in the context of Article 15(c) does not actually support the IHL- and ICL-led approach to defining NIAC. Instead, it largely focuses on the question of intensity of indiscriminate violence as a determinative factor, which characterises the existence of NIAC for purposes of Article 15(c). This approach has been confirmed in *QD & AH (Iraq) v. Secretary of State for the Home Department* by the UK Court of Appeal, which held that IHL as *lex specialis* “has defined and limited purposes, which do not include the grant of refuge to people who flee armed conflict” and therefore is not the correct legal framework against which Article 15(c) claims should be assessed.¹⁴⁴ This position was further endorsed by the UNHCR in Annex 2 of its submissions in *QD & AH (Iraq)*, where the UNHCR, while recognising the need for further guidance on the necessary intensity of violence, argued that “a number of features of “an armed conflict” important under IHL are of much less relevance to the scope of the protection offered by Article 15(c) of the Qualification Directive, given its different object and purpose”.¹⁴⁵ Furthermore, the UNHCR “considers that the term ‘international or internal armed conflict’ in Article 15(c) must be given a broad autonomous meaning [...]. It is therefore important that the requirements (...) are not too high”.¹⁴⁶

The alleged inadequacy of the IHL-based approach is problematic for several reasons. Firstly, Art. 15(c) adopts a set of IHL-specific terms which, naturally, are best defined and interpreted by the well-established body of IHL as *lex specialis*, which coined and developed these terms in first place. It is therefore questionable, Storey notes, what authority does the national decision maker or the UNHCR or even the CJEU have to define IHL-specific terms of ‘international armed conflict’ or ‘internal armed conflict’.¹⁴⁷

Secondly, the context of Article 15(c) is concerned with situations of armed conflicts, both of international and internal character. While the current framework of IRL,

¹⁴⁴ *QD & AH (Iraq) v. Secretary of State for the Home Department* [2009] EWCA CIV 620, para.16.

¹⁴⁵ *QD & AH (Iraq) v. Secretary of State for the Home Department* [2009] EWCA CIV 620, Submissions by UNHCR, Annexure 2: “Armed conflict” in IHL, para.10.

¹⁴⁶ UNHCR, *Safe at Last?*, supra 140, 103.

¹⁴⁷ Storey, supra 9, 28.

including the QD, favours an IHRL-based approach to international protection claims, it is questionable whether IHRL should be the only body of international law used in the assessment of asylum claims of individuals fleeing situations of armed conflict. It is generally recognised in international law, that IHL regulates conduct in situations of armed conflict, acting as a *lex specialis*.¹⁴⁸ IHL not only provides a valuable perspective into the context in which alleged persecution has taken place but also provides a legal framework for the determination of the existence of armed conflict, where a claim for subsidiary protection requires such assessment. There is no reason why IHL should not be used in the context of IRL as a specialist and established framework of reference when the claim for international protection is linked to the alleged persecution taking place in the context of armed conflict. In support of this rationale, Storey rightly notes that “treating IHL in certain contexts as a primary reference point and as a *starting point*, (...) does not mean treating it as the only relevant body of applicable law to be applied to situations of armed conflict to the exclusion of all other bodies of international law such as IHRL”.¹⁴⁹ However, the approach facilitating departure from IHL-inclusive interpretation of the key terms in Article 15(c) and encouraging overreliance on purely human-rights based approach to refugee claims involving armed conflict cases is arguably insufficient in assessing this type of claims.¹⁵⁰

5.3.3. ‘Individual harm’ vs. ‘indiscriminate violence’

While Article 15(c) appears to offer more to the protection regime, it poses one major interpretative challenge caused by the juxtaposition of the ‘individual’ character of the threat and the ‘indiscriminate’ nature of the harm. In the context of the complete provision, it remains unclear whether the individual character of harm must be shown, and if so, what is the relevant threshold for the subsidiary protection claim based on Article 15(c) to succeed?

¹⁴⁸ The International Court of Justice confirmed that in situations involving armed conflict IHL is *lex specialis*: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 66; *Legality of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 36; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168.

¹⁴⁹ Storey, *supra* 9, 15.

¹⁵⁰ Storey, *supra* 9, 32.

Prior to the implementation of the QD and subsequent jurisprudence, the leading British authority regarding refugee protection in armed conflicts was *Adan v. Secretary of State for the Home Department*.¹⁵¹ The House of Lords in *Adan* distinguished two types of harm: harm innate to the incidents of internal armed conflict and harm involving risks above this level. It was held that in order for the applicant fleeing situations of armed conflict or generalised violence to successfully establish claim for international protection, they must show ‘differential impact’, i.e. that (if returned) the applicant would be exposed to the risk of being persecuted over and above the ordinary risk associated with warfare.¹⁵² In other words, it must be shown that the applicant is at a higher risk of ill-treatment than other persons caught in situations of armed conflict or generalised violence. However, no clear guidance was issued in relation to when, if at all, the ordinary events of civil war amount to persecution. Furthermore, the approach taken by the UK House of Lords in *Adan* was criticised by the Australian Federal Court in *Minister for Immigration and Multicultural Affairs v. Abdi* where Wilcox J queried the adequacy of imposition of a proof of “a ‘second-tier’ or ‘differential’ or superadded persecution” on the applicant, given the purpose of the Refugee Convention and its broad, liberal and purposive interpretation.¹⁵³

Following the entry of the QD into force, the approach to armed conflict-related claims was influenced by the operation of the Article 15(c) of the Directive. However, the ‘exceptionality approach’ based on applicant showing an individual risk above the ordinary levels was still strongly present in the early (pre-*Elgafaji*) considerations of application of Article 15(c).¹⁵⁴ In *KH (Article 15(c) Qualification Directive) Iraq CG*¹⁵⁵ the UK Asylum and Immigration Tribunal (AIT) defined

‘(..) the concept of “indiscriminate violence” (affecting a civilian’s life or person) within Article 15(c) (...) as denoting violence which, by virtue of failing to

¹⁵¹ *Adan*, supra 11.

¹⁵² *Adan*, supra 11, 461.

¹⁵³ *Minister for Immigration and Multicultural Affairs v. Abdi* [1999] 87 FCR 280, 290-291 (para.39).

¹⁵⁴ *Elgafaji v. Staatssecretaris van Justitie*, CJEU, C-465/07 (17 February 2009).

¹⁵⁵ *KH (Article 15(c) Qualification Directive) Iraq CG* [2008] UKAIT 00023.

discriminate between military and civilian targets, violates peremptory norms of IHL'.¹⁵⁶

Definition of 'indiscriminate violence' established in *KH (Article 15(c) Qualification Directive) Iraq CG* extends the scope of Article 15(c) to include acts of violence that disproportionately strike the civilian population and are therefore committed in violation of the main rules of IHL, in particular the principle of distinction. An important example of such acts is wartime sexual violence, which is used on a mass scale to predominantly target civilian women. Furthermore, such acts may be seen as constituting gender-based persecution, in addition to amounting to a the violation of IHL and rules of international criminal law. That said, the UKAIT held that in order to establish existence of a 'serious harm' within the meaning of Article 15(c), the requirement of 'substantial individual threat' cannot be separated from the element of 'indiscriminate violence'.¹⁵⁷ To that end, under *KH* construction of Article 15(c), women fleeing armed conflict due to the risk of being exposed to gender-based persecution would essentially have to prove the 'individual' aspect of this threat. In conflict situations, where prevalence of gender-based violence being used as a weapon of war is high (and therefore likely to affect many women), the proof of 'differential impact' may be more difficult to establish by the female applicant.¹⁵⁸

A leading authority on the issue of interpretation of Article 15(c), can be found in *Elgafaji v. Staatssecretaris van Justitie*.¹⁵⁹ The CJEU in *Elgafaji* held that:

“'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place (...) reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, **solely on account of his presence on the territory** (emphasis added) of that country or region, face a

¹⁵⁶ Ibid., para.93.

¹⁵⁷ Ibid., para.123.

¹⁵⁸ Valerie Oosterveld, Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention, PPLA/06/2012, September 2012

<<http://www.unhcr.org/504dd7649.html>> accessed 9th May 2013, 29-32.

¹⁵⁹ *Elgafaji*, supra 157.

real risk of being subject to the serious threat referred in Article 15(c) of the Directive”.¹⁶⁰

In addition, the Court emphasized that:

“While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive (...) it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to **individualisation** (emphasis added). In that regard, the more the applicant is able to show that he is specifically affected by reasons of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection”.¹⁶¹

The ruling in *Elgafaji* employed a rather liberal interpretation of Article 15(c), which confirmed that a person may be exposed to a serious and individual harm merely by being present in certain territory. It shifted the nature of the threat from being purely personal towards a primarily situational and geographical dimension, defined by the mere existence of high levels of indiscriminate violence associated with armed conflict taking place in a particular country or region. As such, the judgment marked a significant departure from the test established by the UK House of Lords in *Adan*, which required the applicant fleeing armed conflict to show differential impact over and above the ordinary risks associated with conflict.¹⁶²

Furthermore, the ruling in *Elgafaji* introduced the ‘sliding scale’ approach to the determination of claims involving Article 15(c), whereby the higher the level of indiscriminate violence, the lower the level of individual risk of harm needs to be proved by the applicant.¹⁶³ Equally, this reasoning can be applied to cases where the level of indiscriminate violence is not exceptionally high, but the claim may nonetheless succeed as long as the individual is able to show that they possess individual, risk-related characteristic(s). Following *Elgafaji*, the applicant is not required to show that he or she is targeted due to individual risk factors inherent to one’s

¹⁶⁰ Ibid., para.35.

¹⁶¹ Ibid., paras.38-39.

¹⁶² *Adan*, supra 11, 461.

¹⁶³ Storey, supra 9, 25-27; For criticism of the ‘sliding-scale approach’ see: Durieux, supra 20, 172-175.

personal circumstances.¹⁶⁴ Rather, it is assessed whether personal risk factors or circumstances expose an applicant to greater risk of suffering serious harm in the context of indiscriminate violence.

In this context, given the prevalence of gender-based violence in modern armed conflicts, one may deduce that gender may amount to such a characteristic, especially when the applicant is female. This premise may be further supported by the fact that IHL (as a body of law specifically addressing situations of armed conflict) foresees women as specifically vulnerable persons in armed conflict and therefore in need of special protection, which is guaranteed under the Geneva Convention IV. Furthermore, modern armed conflicts have proven that women and girls have been specifically targeted for reasons associated with their gender and subjected to gender-specific forms of ill-treatment. These acts not only amounted to war crimes, grave breaches of the Geneva Conventions 1949 and crimes against humanity but also, arguably, constituted persecutory acts.

If one was to consider these types of gender-based harms in context of the 'sliding-scale' concept of Article 15(c), it would become evident that, irrespective of the place on the scale, female applicants should be able to establish sufficient grounds to avail themselves of protection under Article 15(c) of the Directive, especially when persecutory acts fall under Article 9(2) of the Directive. Therefore, it can be said that Article 15(c) opens the possibility for women, who fear or have been subjected to gender-based persecution in armed conflict, to fulfil a criterion of 'individual harm', which in turn may lead to a successful claim under the QD. Furthermore, Storey views the adoption of a sliding scale concept as a useful tool in overcoming the traditional and stereotypical "either or" approach, where "the level of armed conflict is such that everyone is at risk or no one is at risk".¹⁶⁵ As such, the mechanism of Article 15(c) may

¹⁶⁴ *Elgafaji*, supra 156, para.43: "the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances".

¹⁶⁵ Storey, supra 9, 27.

be seen as offering a partial solution to the great protection gap created by ‘the war-flaw’ and ‘gender-flaw’ of the IRL system.¹⁶⁶

The judgment of the CJEU in *Elgafaji* is also important in that it is binding on all EU member states.¹⁶⁷ However, despite the potential impact of this decision towards overcoming the long-existing limitations of the international protection available under the Refugee Convention, the legacy of *Elgafaji* also opens doors to interpretative inconsistencies in its application across the EU member states. The UNHCR study indicates that the core area of concern is the divergent interpretation of Article 15(c), especially in relation to the ‘sliding-scale’ concept.¹⁶⁸

5.4. PSG under the Qualification Directive

While the QD establishes a progressive framework under which claims relating to persecution in armed conflict can be successfully considered, its impact on other gender-based claims addressed under the category of MPSG remains somewhat limited. It is an undisputable advantage that the QD gives explicit recognition to acts of a gender-specific nature, leaving little place for decision-makers to doubt whether such acts may amount to persecution.¹⁶⁹ The ‘hard law’ status of Article 9(2) of the Directive is also likely to remedy the core shortcoming of the ‘soft law’ UNHCR Gender Guidelines, namely the failure of the decision-makers to consider and take into account the gender-specific aspect of persecution.

However, at the same time, the QD poses a major obstacle for claims based on gender-based persecution by the way in which it interprets PSG. As it was argued in the earlier

¹⁶⁶ Protection gaps in relation to claims involving gender-based persecution in armed conflict continue to exist where an applicant is seeking asylum outside the EU (where Qualification Directive does not apply). This is highly problematic in that applicants outside the EU, who do not qualify for international protection under the Refugee Convention are potentially left without any form of international protection.

However, for the purposes of this chapter (and within the scope of this thesis) the main focus remains on the EU Qualification Directive as a mechanism offering subsidiary protection to persons who do not qualify under the Refugee Convention but are nonetheless in need of international protection.

¹⁶⁷ For a detailed overview of EU states’ practice in relation to asylum seekers fleeing situations of indiscriminate violence see: UNHCR, *Safe at Last?*, supra 142.

¹⁶⁸ UNHCR, *Safe at Last?*, supra 142, 30.

¹⁶⁹ Article 9(2)(a) and 9(2)(f) QD.

part of this chapter, the vast majority of claims related to gender-based persecution tend to be considered under the heading of PSG. While the international framework uses the two tests for determination of PSG (immutable characteristics test and social perception test) interchangeably, the QD has a much more stringent threshold by combining the criteria present in both tests. To that effect, the definition of PSG in the QD states that:

- (d) a group shall be considered to form a particular social group where in particular:
 - (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, **and** (emphasis added)
 - (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.¹⁷⁰

This test has been subsequently confirmed in many cases involving determination of PSG under Article 10(1)(d) of the Directive, in particular in relation to the former victims of trafficking.¹⁷¹ However, the combined cumulative approach to the interpretation of PSG under Article 10(1)(d) is highly problematic. The combined cumulative test departs from the definition of a PSG adopted by the UNHCR in its PSG Guidelines, but also goes against established state practice in relation to PSG claims (i.e. determination of PSG by the use of one of the two tests). The Guidelines apply the combined alternative approach to determine the meaning of PSG:

“A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, **or** who are perceived as a group by society”.¹⁷² (emphasis added)

This definition was also applied in *Fornah*, in which further criticism regarding the level of threshold required in Article 10(1)(d) was expressed (obiter dicta):

¹⁷⁰ Article 10(1)(d) QD.

¹⁷¹ *SB (PSG-Protection Regulations- Reg 6) Moldova CG* [2008] UKAIT 00002; *AZ (Trafficked women) Thailand CG* [2010] UKUT 118.

¹⁷² UNHCR, PSG Guidelines, supra 84, para.11.

“If (...) this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of subparagraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority”.¹⁷³

Secondly, as expressed in *Fornah*, the approach adopted in the QD creates a threshold for the applicant to satisfy which is much higher than the one present under either of the two tests. This may prove particularly difficult in cases involving gender-based persecution, where the cumulative reading of Article 10(1)(d) adds to other challenges (described in sections 3.2. and 3.3. above), which applicants with gender-based claims for asylum need to overcome.¹⁷⁴ Nevertheless, there has been an attempt made by the UNHCR to address this matter. The UNHCR recommended the amendment of Article 10 (1)(d) to create a clear test based on two alternative limbs¹⁷⁵, so that subsidiary protection may be granted to the applicant “(...) both in cases where he or she is a member of a particular group and in cases where he or she is perceived to be such”.¹⁷⁶ However, despite these efforts, thus far there have been no attempts at the EU level at further clarification of the reading of Article 10 (1)(d) of the QD. Until such clarification is made, the interpretative ambiguity of this important provision continues to pose a double challenge to PSG cases and, in effect, creates potential protection gaps.

¹⁷³ *Fornah*, supra 103, para.16 (per Lord Bingham).

¹⁷⁴ For example, in *SB (PSG-Protection Regulations- Reg 6) Moldova CG* [2008] UKAIT 00002 [para.69], the UK Asylum and Immigration Tribunal failed to apply the alternative reading of the two limbs of PSG in Article 10(1)(d) QD 2004 (as established in *Fornah*). The Tribunal found that: ‘It would also be inconsistent with the insistence in the Jurisprudence we have considered that the question as to whether the group is a particular social group for the purposes of the Geneva Convention must always be considered in the context of the society in question. (...) If sub paragraphs (i) and (ii) are alternatives, then it may be said that it is possible to identify a particular social group without reference to evidence relating to any particular country. For example, it may be said that as ‘former victims of trafficking’ or ‘former victims of trafficking for sexual exploitation’ are, per se, members of a particular social group without the need to consider the evidence relating to the society in question, which does not seem to us to make sense. It is possible that former victims of trafficking for sexual exploitation may be members of a particular social group in one country, but not in another’ (paras.71 and 72). This interpretation of PSG has been included in UKBA Asylum Instruction on *Gender Issues in the Asylum Claim* (September 2010)

<<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/aspis/gender-issue-in-the-asylum.pdf?view=Binary>> accessed 3 July 2012

¹⁷⁵ i.e. by replacing the word ‘and’ with ‘or’.

¹⁷⁶ UNHCR, UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM (2009) 551, 21 October 2009), 29 July 2010, 8
<<http://www.unhcr.org/4c5037f99.pdf>> accessed 3 July 2012.

5.5. Developments at the Council of Europe level

It has been argued in the preceding sections of this chapter that the QD has the potential to advance protection of asylum-seeking women whose claims are based on gender-based persecution originating from situations of armed conflict. The analysis of the text of the QD and its evolving jurisprudence indicate that, while the difficulty of the 'armed conflict' element of claims can be now more readily overcome (largely thanks to the decision in *Elgafaji*), the 'gender flaw' of asylum claims remains. Arguably, the main impediment to the positive consideration of gender-based claims lies in the construction of Article 10 (1)(d). To some degree, these difficulties can also be attributed to the failed opportunity to explicitly include gender as one of the grounds for persecution in Article 2(c) of the Directive. However, as with the Refugee Convention, such inclusion, although most welcome, is not absolutely necessary to successfully determine gender-based claims.¹⁷⁷

Rather, the emphasis should rest on improving the willingness of decision-makers to interpret the core legal provisions in a gender-sensitive manner, as well as ensuring that the procedures involved in refugee-status determination take into account the specificity of women's claims arising from their gender.¹⁷⁸ These two elements of the inquiry into granting complementary protection status should be also considered in the context of recent legal developments on the Council of Europe level: the ECtHR decision in *M.S.S. v. Belgium and Greece* and the 2011 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention).¹⁷⁹ Although the two are not directly related to the QD, they may have an impact on the situation of asylum seeking women within the European Union.

¹⁷⁷ This view is supported by Anker, who argues that "the bars to women's eligibility for refugee status lie not in the legal categories per se (i.e., the non-inclusion of gender or sex as one of the five grounds) but in the incomplete and gendered interpretation of refugee law, the failure of decision-makers to acknowledge and reasons to the gendering of politics and of women's relationship to the state", in: Deborah Anker, 'Refugee Law, Gender and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133, 139.

¹⁷⁸ The importance of gender-sensitivity in procedures relating to gender-based claims is emphasized in the UNHCR, Gender Guidelines, supra 29, paras.35-36.

¹⁷⁹ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011; Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 12 April 2011, CETS no.210 (the Istanbul Convention 2011).

5.5.1. The CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence 2011 (The Istanbul Convention)

The Istanbul Convention, which came into force in August 2014, can be described as the “most far-reaching international treaty to date to address violence against women in a comprehensive manner”.¹⁸⁰ The Convention explicitly recognizes violence against women as a violation of human rights and a form of discrimination against women, which encompasses acts of gender-based violence committed against women in public and private sphere.¹⁸¹ The Convention also lists various categories of offences related to such violence, e.g. FGM, stalking, sexual harassment, forced marriage, domestic violence. The Convention also recognizes and addresses the problem of gender-based violence in the context of migration and asylum (Chapter VII).¹⁸² Article 60 obliges states to recognize that gender-based violence amounts to persecution and that it gives rise to an entitlement to subsidiary protection (Article 60(1)). Parties are also required to ensure gender-sensitive interpretation of the 1951 Convention (Article 60(2) in order to ensure recognition of the fact that gender-based violence may amount to persecution and that claims involving such persecution are properly examined. These elements are crucial to secure asylum for women suffering gender-based persecution and often decisive on the outcome of the application. Furthermore, Article 60 (3) obliges parties to the Convention to create and implement gender-sensitive procedures (including reception procedures) into the process of determination of claims for international protection. These may include very practical though important elements, such as: the identification of victims of violence against women as early in the process as possible, the separate accommodation of single men

¹⁸⁰ The Istanbul Convention came into force on 1 August 2014. Council of Europe, *Safe from Fear, Safe from Violence* (information leaflet on the Convention) <<https://edoc.coe.int/en/violence-against-women/6138-leaflet-safe-from-fear-istanbul-convention.html>> accessed 5 November 2015.

¹⁸¹ Article 3 (a) Istanbul Convention 2011.

Given that many forms of gender-based violence (e.g. domestic violence) are committed by non-state actors, recognition of such acts as human rights violations is potentially problematic. Under the current legal framework of human rights, non-state actors generally do not own human rights obligations and therefore acts committed by them are strictly not human rights violations.

¹⁸² Olga Jurasz, ‘The Istanbul Convention: a New Chapter in Preventing and Combating Violence Against Women’ (2015) Vol. 89/9 Australian Law Journal 619, 625-626.

and women, separate toilet facilities, provision of information to women and girls on gender-based violence and available assistance services.¹⁸³

The Istanbul Convention contributes to the establishment of a gender-sensitive approach to determination of gender-based asylum claims in Europe. Article 60 of the Convention codifies some of the existing provisions of the UNHCR Gender Guidelines and, to an extent, state practice, especially in relation to the recognition of acts of gender-based violence as constitutive of persecution. The Convention establishes these elements as legal obligations, which are legally enforceable by the courts of the state parties to the Convention, as opposed to the provisions of the 'soft-law' guidelines. As such, application of Article 60 should strengthen and ensure the application of the gender-sensitive reading of the Refugee Convention in systematic and coherent manner. Finally, implementation of gender-sensitive procedures in accordance with obligations set out in Article 60(c) is likely to resolve some of the core procedural flaws commonly occurring in consideration of cases involving gender-based persecution (such as lack of understanding of gender-related claims for asylum or lack of recognition of the impact of trauma), which may lead to wrongful dismissal of a claim for international protection or for subsidiary protection available under the Qualification Directive.¹⁸⁴

5.5.2. *M.S.S. v. Belgium and Greece* (2011)

The decision of the ECtHR in *M.S.S. v. Belgium and Greece* (*M.S.S.*) (although not concerning gender-based persecution in armed conflict) may have a positive impact on the way in which asylum claims of women persecuted in armed conflict (or in its

¹⁸³ COE, Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. Explanatory Report, 11 May 2011, CETS no.210 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a> > accessed 29 July 2013.

¹⁸⁴ Asylum Aid (2011), *supra* 32, 55-58; Baillot, Cowan and Munro note that cultural differences may heavily influence women's account of gender-based persecution, which may have severe impact on their credibility and may influence the outcome of the claim. For instance, the authors refer (p.118) to the account of asylum interpreter who suggested that women from the Democratic Republic of Congo are better educated about sex and therefore more able to be candid when talking about rape (Baillot et al., *supra* 73, 111-131, 116-123).

Furthermore of that decision makers engage with country of origin information in a selective manner.

aftermath) are considered. In the context of the core issues discussed in this chapter, the view of the ECtHR regarding asylum seekers is of particular relevance.

The ECtHR in *M.S.S.*, for the first time, considered asylum seekers as a ‘particularly unprivileged and vulnerable group in need of special protection’, in respect of whom states have heightened positive obligations to protect.¹⁸⁵ The language of vulnerability used in this judgment immediately brings to mind the very similar phraseology used to describe women in IHL: a group particularly vulnerable in times of armed conflict and therefore in need of special protection. But how does this approach translate into the situation of women seeking asylum from gender-based, conflict-related persecution?

The reasoning of the ECtHR used in *M.S.S.* can be used to support the argument that female asylum seekers, who have been persecuted because of their gender, especially when persecution happens in the context of, or as a result of, an armed conflict, are particularly vulnerable when it comes to the status determination process: they have not only experienced armed conflict, but have also been subjected to acts which often constitute gross violation of their human rights. Upon arrival in the country of destination, they may be exposed to asylum procedures which do not comply with recommendations of the UNHCR established in the UNHCR Gender Guidelines. Moreover, female asylum seekers may often be in need of special professional assistance, which hardly ever is provided.

Taking into account the type of ill-treatment associated with persecution, it may be argued that victims of gender-based persecution experience inhuman and degrading treatment as a part of their persecution, in line of the definition adopted by the court in *M.S.S.* and in the context of Article 3 ECHR. Persecution can be seen as a “premeditated (act), applied for hours at a stretch and causing either actual bodily injury or intense physical or mental suffering” and therefore amounting to inhuman

¹⁸⁵ The case concerned the expulsion of an Afghan asylum seeker to Greece by the Belgian authorities. Whilst in Greece he was subjected to degrading detention conditions in breach of Greece’s and Belgium’s obligations under Article 3 ECHR. The applicant was also exposed to the risk arising from the deficiencies in asylum procedures in Greece (Article 13, right to effective remedy).

treatment.¹⁸⁶ Furthermore, where gender-based persecution takes the form of acts of sexual violence, it can be viewed as degrading because it “humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance. (...) It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others”.¹⁸⁷ The latter is particularly relevant to acts of conflict-related sexual violence, which not only severely traumatises and humiliates the victim, but in context of some communities may also have a long-lasting ostracizing effect.

The notion of ‘inhuman and degrading treatment’ may be particularly important in the context of applicants who may not qualify as refugees under the Refugee Convention, but may nonetheless qualify for subsidiary protection under the Qualification Directive. In defining the concept of ‘serious harm’ for the purposes of the Directive, Article 15(b) explicitly refers to the wording of Article 3 ECHR (‘torture or inhuman or degrading treatment or punishment of an applicant’). Application of the definition of ‘inhuman and degrading treatment’ in *M.S.S.* may be useful in establishing whether an applicant for subsidiary protection under the QD suffered or is at risk of suffering ‘serious harm’ within the meaning of Article 15(b) QD.

The decision of the ECtHR in *M.S.S. v. Belgium and Greece* supports the argument that female asylum seekers who suffered gender-based or gender-specific persecution should be afforded special protection and gender-sensitive assistance during the process of applying for international protection. The most obvious way to realize that is through the comprehensive implementation of the gender-sensitive procedures into all stages of the refugee status determination process, which are recommended by the UNHCR Gender Guidelines and which may be in the future additionally reinforced by Article 60 of the Istanbul Convention. Finally, the decision in *M.S.S.*, with particular reference to obligations of states under Article 3, sets standards of treatment of

¹⁸⁶ *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011, para.220.

¹⁸⁷ *Ibid.*

asylum seekers in general by the receiving states, whether or not they have applied for international protection.

6. IDPs and gender - a contemporary challenge for international law?

While some persons are likely to cross international borders in order to seek asylum (i.e. to become a refugee), many more face internal displacement. Armed conflict and situations of generalised violence as well as human rights violations are (next to environment-related displacement) the key reasons for internal displacement. The Internal Displacement Monitoring Centre (IDMC) estimates that at the end of 2014 there were 38 million people displaced worldwide due to conflict and violence.¹⁸⁸ This is nearly twice more than the total number of refugees worldwide, which reached 19.5 million at the end of 2014.¹⁸⁹

6.1. The challenge of protecting IDPs

Internally displaced persons (IDPs) are persons who are forced to flee or leave their habitual place of residence and involuntarily move within the borders of the state. Unlike refugees, IDPs do not cross international borders and, therefore, are not eligible to claim international protection. While refugees can benefit from a specific legal regime of the Refugee Convention, which safeguards persons who fear persecution, the protection of IDPs is not governed by any specific, international, legally binding instrument. Unless they cross international borders and claim asylum, IDPs cannot benefit from protection mechanisms afforded by the 1951 Refugee Convention, even if they experienced persecution. However, irrespective of the differences of legal

¹⁸⁸ IDMC, *Global Overview 2015: People internally displaced by conflict and violence*, May 2015 <<http://www.internal-displacement.org/publications/2015/global-overview-2015-people-internally-displaced-by-conflict-and-violence>> accessed 8 November 2015, 7.

¹⁸⁹ UNHCR, *2014 Global Trends. World at War*, 18 June 2015 <<http://unhcr.org/556725e69.html>> accessed 9 November 2015, 2; The quoted number of refugees is inclusive of 5.1 million Palestinian refugees who are registered with the United Nations Relief and Works Agency for Palestinian Refugees (UNRWA).

regimes applicable to refugees and IDPs, both groups have protection needs, and there are questions about just who is responsible for providing such protection.¹⁹⁰

The issue of protection of IDPs remains unresolved and highly problematic. Although IDPs may have fled for similar reasons as refugees, they remain, in contrast to refugees, under the protection of their own government. Therefore, they are entitled to protection under national and international human rights law and, when internal displacement occurs in the context of an armed conflict, under international humanitarian law, including customary international humanitarian law (CIHL).¹⁹¹ This may in itself be problematic, given the context of internal displacement, which usually occurs in post-conflict situations or as a result of gross human rights violations within the country. In such situations, the state is likely to have a weak or ineffective law enforcement system or may be in the process of re-establishing the rule of law following a violent conflict, leaving IDPs in precarious and vulnerable position.

6.2. Gender dimension of internal displacement

Considering the issue of displacement from the gender perspective, the protection of internally displaced women poses significant challenges and calls for urgent implementation of legally binding protection measures. One of the dangers inherent to internal displacement is sexual and gender-based violence against internally displaced

¹⁹⁰ Catherine Phuong, 'Internally Displaced Persons and Refugees: Conceptual Differences and Similarities' (2000) 18(2) *Netherland Quarterly of Human Rights* 215-230; Catherine Phuong, *The International Protection of Internally Displaced Persons* (CUP 2005).

¹⁹¹ Article 49 (1) GC IV 1949; Article 17 (1) AP II 1977; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press/ ICRC 2005) (*CIHL Study*), Vol. I: Rules, Rule 129: The Act of Displacement <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule129> accessed 15 May 2013.

For commentary regarding the status of prohibition of displacement in CIHL see: Ryszard Piotrowicz, 'Displacement and Displaced Persons', in: Elizabeth Wilmshurst, Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 337-353.

The customary nature of the prohibition of forcible transfer of civilian population was also confirmed in *Prosecutor v. Tadić*, where the International Criminal Tribunal for the Former Yugoslavia (the ICTY) held that such prohibition, expressed in UN General Assembly Resolution 2675, 'is declaratory of principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind' (*Prosecutor v. Tadić*, Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, para. 112).

women and girls.¹⁹² Gender can be one of the core underlying reasons for displacement, with gender-specific acts being one of the key causes of flight of women and girls. Internally displaced women and girls often fall victims to sexual violence, especially in the context of inter-ethnic or inter-religious conflict, where sexual violence may also be particularly used as a method of ethnic cleansing.¹⁹³ Some of these risks continue even in IDP camps, where women and girls are sexually abused when carrying out their daily errands, such as collecting water. Particular vulnerabilities of internally displaced women, including rife sexual violence in IDP camps, risks of sexual exploitation, limited access to education, food and health services (including sexual and reproductive health) create a need for construction and implementation of the gender-inclusive approach to the regulation of the protection of IDPs.¹⁹⁴ Furthermore, many internally displaced women are likely to have suffered gender-specific ill-treatment at the hands of state or non-state actors, which may amount to persecution within the meaning of the Refugee Convention. While these acts would not be considered as persecution in the domestic context, they nonetheless amount to violations of human rights (when committed by the state) or criminal acts and should be addressed and remedied as such using domestic laws.

In recognition of the particular vulnerabilities of women and girls in situations of conflict-related displacement, the CEDAW Committee recommended that state parties to CEDAW take practical steps to prevent acts of gender-based violence and to protect

¹⁹² UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response*, May 2003

<<http://www.refworld.org/docid/3edcd0661.html>> accessed 15 May 2013.

¹⁹³ Human Rights Watch, *Sexual Violence and Its Consequences among Displaced Persons in Darfur and Chad*, 12 April 2005 <<http://www.hrw.org/reports/2005/04/12/sexual-violence-and-its-consequences-among-displaced-persons-darfur-and-chad>> accessed 15 May 2013.

¹⁹⁴ UN Human Rights Council, *Human rights of internally displaced persons*, A/HRC/RES/20/9, 17 July 2012, paras.13-14; Erin Mooney, *Internal Displacement and Gender*, Notes for Presentation by Erin Mooney, OHCHR to Humanitarian Principles Workshop: Focus on a Child Rights Approach to Complex Emergencies and Internal Displacement, 1 October 1998

<http://reliefweb.int/sites/reliefweb.int/files/resources/46D644B62064FFEDC1256C28002AB8DA-Internal_Displcmt_Gender.html> accessed 25th July 2011; UNICEF, *The Gender Dimensions of Internal Displacement: Concept Paper and Annotated Bibliography*, (November 1998)

<http://www.forcedmigration.org/sphere/pdf/watsan/WCRWC/unicef_idpgender_1998.pdf> accessed 25 July 2011.

displaced women from it.¹⁹⁵ Furthermore, the CEDAW Committee recognized the urgent need to provide displaced women and girls with access to medical services, education, legal assistance and, foremost, a safe environment.¹⁹⁶

6.3. The legal framework of IDP protection

The Guiding Principles on Internal Displacement (the Guiding Principles) remain the only international instrument adopted specifically in response to protection problems encountered by IDPs.¹⁹⁷ The Guiding Principles cover situations of internal displacement both during armed conflict and in peacetime and therefore incorporate relevant provisions from both IHRL and IHL. Although they are a soft law instrument and therefore not legally binding, they contain a comprehensive overview of the protection needs of IDPs and consolidate the existing norms and principles applicable in situations of displacement. Furthermore, the Guiding Principles contain a range of gender-specific provisions which are tailored to provide an effective and gender-sensitive response to the particularities of women's position as IDPs, including protection from gender-based violence.¹⁹⁸ As such, they are intended to provide guidance to governments and other actors who provide assistance and protection to

¹⁹⁵ CEDAW, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para.57(e).

¹⁹⁶ *Ibid.*, para.57(g).

¹⁹⁷ UN Commission on Human Rights, Internally Displaced Persons. Report of the Representative of Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998 (hereinafter: The Guiding Principles).

¹⁹⁸ Principles 11(2)(a) and (b) of the Guiding Principles 1998 prohibit rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault; slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children.

The Guiding Principles also include provisions regarding: no discrimination against IDPs on the basis of sex; protection and assistance to female heads of household and expectant mothers (Principle 4); in cases other than the emergency phases of a conflict, governments will try to involve affected women in the planning and management of their relocation (Principle 7); full participation of displaced women in the distribution of basic supplies (Principle 18); special attention to the health needs of women, including access to female health care providers and services, and counselling for victims of sexual abuses (Principle 19); equal rights for women and men to obtain documents such as personal identification documents, birth and marriage certificates, in their own names (Principle 20); special efforts to ensure the full and equal participation of women and girls in education programmes; Make education and training facilities available to IDPs, especially adolescents and women, whether or not living in camps (Principle 23).

the IDPs. However, in order to ensure the most effective protection, the implementation of the Guiding Principles into domestic law is necessary.¹⁹⁹

On 6th December 2012, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (The Kampala Convention) came into force.²⁰⁰ It is the first legally binding regional instrument specifically to address the protection needs and rights of IDPs in Africa. The Kampala Convention introduces a framework of protection obligations of states and other actors (e.g. international organizations, humanitarian agencies, members of armed groups) towards IDPs, and contains rules aimed at ensuring gender-inclusive protection of women in situations of internal displacement.²⁰¹ These include explicit reference to protection of women and girls from various forms of gender-based violence, including sexual violence and sexual exploitation, but also an obligation of states to provide adequate medical and professional support to victims of gender-based violence.²⁰² However, while these developments are most welcome, the critical question relates to the availability of such services in the state where IDPs are present as well as enforceability of state obligations towards IDPs.

6.4. Responsibility to protect and protection during conflict-related displacement

The inadequate system of protection of IDPs continues to cause unnecessarily high risk to the security of displaced individuals which is often combined with increased risk of

¹⁹⁹ Walter Kälin, 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool' (2005) 24 (3) Refugee Survey Quarterly 27, 33-35.

²⁰⁰ The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009 (Kampala Convention) <<http://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>> accessed 17 October 2015.

²⁰¹ Article 9(1)(d) Kampala Convention (protection from SGBV, forced labour, human trafficking and smuggling); Article 7(5)(f) Kampala Convention (prohibition of engaging IDPs, in particular women and children, in sexual slavery and trafficking in persons by members of armed groups during armed conflict).

²⁰² Article 9(2)(d) Kampala Convention (reproductive and sexual health, support for victims of sexual abuses) See also: Lauren Groth, 'Engendering Protection: an Analysis of the 2009 Kampala Convention and its Provisions for Internally Displaced Women' (2011) 23(2) International Journal of Refugee Law 221-251.

further human rights violations and, in some instances, even a threat to the life of the person.

The discussion below aims to propose and discuss alternative perspective relating to the protection of conflict-related refugees and IDPs, based on the concept of responsibility to protect (R2P).²⁰³ The practical application of this concept arguably has potential to enhance the existing framework for the protection of women, both as refugees and IDPs, fleeing gender-based persecution in armed conflict. The argument looks at the issue of protection through the lens of human security, with special focus on responsibility to protect as an emerging concept in international law and in practice of the United Nations. It attempts to analyse whether, and if so, to what extent, responsibility to protect may serve as an innovative idea leading to strengthening of the current system of international refugee protection as well as a concept capable of improving the gaps in protection of IDPs.

6.4.1. War, gender, displacement and the responsibility to protect (R2P)

The concept of responsibility to protect was introduced in 2001 in the Report of the International Commission on Intervention and State Sovereignty (the ICISS Report).²⁰⁴ The Report was concerned with ‘humanitarian intervention’- the question of whether forcible military intervention by a state or a group of states against another state can or should take place for the purpose of protecting the population of that state from the risk of suffering serious harm or from actual harmful acts, generally considered to be serious mass violations by that state of the human rights of its citizens or a section of its population.

²⁰³ The discussion below focuses primarily on the problem of granting protection to women, who flee gender-related persecution in armed conflict or its aftermath. It does not exclude the fact that women may suffer persecution for reasons other than gender (e.g. political opinion) or intersection between these grounds.

²⁰⁴ The International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’ (Ottawa: International Development Research Centre for ICISS, December 2001) <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 15 May 2013 (The ICISS Report).

R2P was founded on ‘the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – such as mass murder, rape and starvation - but when they are unable or unwilling to do so, that responsibility must be borne by the broader community of states’.²⁰⁵ The ICISS Report also proposed a new construction of the meaning of responsibility to protect, covering not only reactive measures, but largely focusing on a range of preventive and post-conflict measures, not only limited to military intervention.²⁰⁶ Stahn further notes the applicability of R2P in the post-conflict context, suggesting that it may converge with another emerging concept in international law: *jus post bellum*.²⁰⁷

The concept of R2P rests on the notion of the responsibility of states to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Usually these crimes are committed during armed conflict, whether of internal or international character.²⁰⁸ The reading of elements of the doctrine within the context of the prevalent occurrence of sexual and gender-based violence directed against women and girls in armed conflict, raises the question of the responsibility of the international community to take steps to prevent these acts from happening or to apply preventive as well as reactive measures aimed at protecting women from acts of gender-based violence of a persecutory nature. Sexual and gender-based violence in armed conflict has been recognized at an international level as posing threat to international peace and security. UNSCR 1820 clearly states that sexual violence used

²⁰⁵ The ICISS Report, viii.

²⁰⁶ Unlike the traditional idea of humanitarian intervention, the concept of R2P is composed of three elements: ‘the responsibility to prevent’, ‘the responsibility to react’ and ‘the responsibility to rebuild’, marking a rather significant conceptual shift towards the continuum of obligations of intervening states, especially in situations, where military intervention has taken place. See: The ICISS Report, xi, 19-46. However, Chesterman argues that there are grounds for doubting the extent to which international law actually is a barrier to intervention. The author argues that it was not concern about sovereignty that prevented timely intervention in Bosnia, Rwanda, Darfur, but the basic political fact that no state wanted to pay the price associated with saving strangers. Simon Chesterman, *Just war or just peace? Humanitarian intervention and international law* (OUP 2001) 231; Alex J. Bellamy, *Global Politics and the Responsibility to Protect. From words to deeds* (2011 Routledge) 3-4.

²⁰⁷ Carsten Stahn, ‘R2P and Jus Post Bellum: Towards a Polycentric Approach’ in: Carsten Stahn, Jennifer S. Easterday, Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 102-122.

²⁰⁸ That does not mean that the crime of genocide, ethnic cleansing and crimes against humanity cannot be committed outside situation of armed conflict. Only category of war crimes requires the existence of armed conflict: Article 8 ICC Statute.

as a weapon of war 'can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security'.²⁰⁹

Furthermore, the acts of gender-based violence may also amount to persecution as a crime against humanity and force victims (or persons at risk) of persecution to flee their place of origin and seek protection elsewhere.²¹⁰ If acts of conflict-related gender-based violence are recognized to be war crimes, crimes against humanity or genocide, one way of reacting to their occurrence ('responsibility to react') is through granting asylum to women, who seek international protection from these gruesome acts or their recurrence.

Barbour and Gorlick suggest that the granting of asylum (or other form of protection outside the 1951 Convention, e.g. complementary protection) can be viewed as a measure exercised by the state under the notion of R2P.²¹¹ The granting of asylum by the state can be seen to constitute a useful step in enhancing protection of the victims, but is also regarded as "the most practical, realistic and least controversial response to assisting victims of mass atrocities" within the R2P framework.²¹² Although the matter of access to asylum, as well as refugee and IDPs protection, were not raised in any of the documents advocating the R2P doctrine, they nevertheless constitute measures which, if applied by states, could increase protection of persons, whose security and lives would otherwise be in significant danger. This could, Feller notes, "in theory (...) go quite some way to redressing root causes of displacement, which from UNHCR's perspective is a positive step".²¹³

However, in order for this approach to have a real impact on cases involving conflict-related gender-based persecution, the decision makers need to apply gender-sensitive

²⁰⁹ UNSCR 1820 (19 June 2008) UN Doc. S/RES/1820.

²¹⁰ In context of crimes against humanity, Article 7(2)(g) of the ICC Statute defines persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

²¹¹ Brian Barbour, Brian Gorlick, 'Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims' (2008) 20(4) *International Journal of Refugee Law* 533-566.

²¹² *Ibid.*, 562.

²¹³ Erika Feller, 'The Responsibility to Protect: Closing the Gaps in the International Protection Regime', in: Jane McAdam, *Forced Migration, Human Rights and Security* (2008 Hart Publishing) 284.

reading of the Refugee Convention when determining the outcome of this type of applications for asylum. Unless states are willing to implement gender-sensitive procedures and develop a common practice of interpreting the Refugee Convention in a gender-inclusive manner (i.e. to recognize that persecution may be attributed solely to one's gender rather than one of the existing Convention grounds and that acts of gender-based violence in armed conflict are the prime example of persecution of women and girls), the fusion of R2P doctrine and international refugee law will remain yet another example of 'wishful thinking', which will be bound to fail its good cause.

6.4.2. R2P and IDPs- 'a fruitful marriage of two concepts'?

While the application of R2P in the refugee context focuses on the grant of asylum and the need for gender-sensitive reading of the Refugee Convention, application of R2P in context of IDPs focuses on fulfilling and enhancing protection obligations of states existing under IHRL framework.²¹⁴ These include soft-law instruments, such as The Guiding Principles, but also states' human rights obligations under IHRL.²¹⁵

In the absence of an adequate international and legally binding framework of protection of IDPs, the attention of scholars and professionals working in the field of internal displacement has shifted towards consideration of alternative mechanisms which may improve the protection of IDPs. Various commentators have expressed proposals for improvement of global IDP protection through measures taken under an umbrella of R2P.²¹⁶ Mooney in particular, argues in favour of the protection potential of the fusion of the IDPs protection system outlined in the Guiding Principles with

²¹⁴ The ICISS Report makes an explicit reference to the situation of refugees twice: firstly, advocating acting under R2P in order to prevent refugee flows and potential difficulties of remedying such situation (at 5, 70), and secondly, to avoid difficulties of facilitating the safe returns of refugees in post-conflict scenarios (at 42).

²¹⁵ Article 2(1) and Article 26 ICCPR (prohibition of discrimination), Article 7 ICCPR (prohibition of torture, inhuman or degrading treatment or punishment), Articles 9 and 12 ICCPR (right to liberty and freedom of movement), Article 11 ICESCR (right to food and housing), Article 13 ICESCR (right to education), Article 12 ICESCR (right to health).

²¹⁶ Nevertheless, it is rather evident that protection of IDPs was not envisaged as falling expressly under the threshold of R2P. Harris Rimmer rightly notes that 'the ICISS report itself shows that these obvious connections with refugee and IDP protection were not part of the foundation documents and that the conception of refugees in particular is very problematic': Susan Harris Rimmer, 'Refugees, Internally Displaced Persons and Responsibility to Protect', UNHCR New Issues in Refugee Research, Research Paper no.185 (March 2010) 8.

R2P.²¹⁷ In advocating the possibility of fusion of the two mechanisms, both Mooney and Harris Rimmer point out the common heritage of the two concepts.²¹⁸ The idea of ‘sovereignty as responsibility’, which rests at the core of R2P doctrine, was indeed created by Deng and Cohen as a foundation for the creation of The Guiding Principles.²¹⁹ Furthermore, the Guiding Principles prohibit the four crimes with which R2P is concerned - crimes, which often are the very cause of internal displacement.

However, the core gap in protecting IDPs is caused by the failure of states to fulfil their IHRL obligations. What, then, does R2P have to offer in this context? Arguably, the ‘responsibilities’ enshrined in the R2P doctrine are framed within the existing IHRL framework of obligations.²²⁰ IHRL is not only well-established legal framework, but some of its provisions have customary law status (e.g. prohibition of torture), creating a solid, monitored and legally enforceable and system of state obligations. Therefore, as Arbour notes,

‘whether we call it responsibility to protect or anything else, States do have a responsibility under existing international law *vis-à-vis* the people on their territory, to extend protection equally against genocide as against famine, disease, ignorance, deprivation of the basic necessities of life, discrimination and the lack of freedom. To suggest otherwise would be a very regressive and legally untenable position’.²²¹

R2P can be seen as a framework which reinforces and reformulates these already-existing human rights obligations of the state, but in no way acts as a substitute for the

²¹⁷ Erin D. Mooney, ‘Something Old, Something New, Something Borrowed...Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection’ (2010) 2 *Global Responsibility to Protect* 60-85.

²¹⁸ *Ibid.*, 73; Harris Rimmer, *supra* 216, 7.

²¹⁹ Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild, I. William Zartman, *Sovereignty as responsibility: conflict management in Africa* (Brookings Institution Press 1996); Roberta Cohen, Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution Press 1998).

²²⁰ Emma McClean, ‘The Responsibility to Protect: The Role of International Human Rights Law’ (2008) 13(1) *Journal of Conflict & Security Law* 123-152; McClean argues (at 150) that “international human rights law renders the contours and content of the doctrine more distinct, which is evidenced in the three dimensions of the responsibility to protect (...)”.

²²¹ Louise Arbour, ‘The responsibility to protect as a duty of care in international law and practice’ (2008) 34 *Review of International Studies* 445, 458; Mooney (*supra* 215) also supports this position: “The focus of R2P therefore must now overshadow the fact that a more extensive set of protection responsibilities exist, which also must be realised and often are equally demanding of attention and response” (at 85).

IHRL-based obligations. R2P is a complementary concept and application of it may encourage greater complementarity and coordination in places of convergence between R2P and IDP protection frameworks, collectively producing a more comprehensive response to the gaps in protection of IDPs.

6.4.3. The impact of R2P on protection of refugees and IDPs

The problem of displacement worldwide is mostly a result of the already existing failure to prevent human rights abuses - nonetheless one that requires reaction from states. But states do not have an obligation or 'responsibility to react' as such, at least not in legally defined terms. State parties to the Refugee Convention are under an obligation to grant asylum to an applicant who seeks asylum and is a refugee within the meaning of Article 1(A)(2) of the Convention. Similarly, states are bound under IHRL by the principle of *non-refoulement*, which prescribes that no refugee or asylum seeker should be returned to any country where he or she is likely to face persecution, ill-treatment or torture. In contrast, R2P is not a legally binding norm and various state obligations formulated under the umbrella of R2P are not legally enforceable.²²² It is also questionable how individual states view the concept of R2P and whether they are willing to embrace the R2P's vision of state sovereignty.

When discussing the possibility of applying elements of the R2P doctrine to enhance the existing protection regime in the context of conflict-related displacement, it is crucial to emphasize that R2P cannot be seen as a replacement for the Refugee Convention or any other IHRL instruments applicable to the protection of IDPs. Rather, the responsibility to protect reinforces obligations which already exist in international law through encouraging states to adopt international human rights instruments and/or strengthen their implementation. As Barbour and Gorlick note,

'R2P is much more akin to sovereignty, human rights, or due process: in other words, it is a concept that requires implementation of certain measures,

²²² Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) *American Journal of International Law* 99-120; Furthermore, Charlesworth rightly notes the limited impact of the doctrine of R2P on supporting women's equality: Hilary Charlesworth, 'Feminist Reflections on Responsibility to Protect' (2010) 2 *Global Responsibility to Protect* 232-249.

imposes rights and duties, places emphasis on certain obligations and fills protection gaps’,

such as those experienced by asylum seeking women and IDPs.²²³

Quite often, a trigger for change is found in the aftermath of tragic events, frequently linked to armed conflicts, which are marked by extreme levels of violence, inhumanity, excessive human suffering and loss of life. One may only hope that the ‘gender reform’ of the IRL and IDP protection regime will not have to be urged or justified by yet another human(itarian) catastrophe. In the current situation, R2P can be seen as a mediated compromise - a mechanism, which could provide states with foundation and encouragement for implementation of future gender-related developments in field of refugee and IDP protection. Working under its umbrella, states might find ways to improve the protection of women escaping armed conflict, or its aftermath, due to the fear of gender-based persecution.

7. Conclusion

This chapter discussed the current international system of refugee protection and its scope for protection of female applicants, who fear gender-based persecution in armed conflict and/or post-conflict situations. Although the IRL framework appears to progress gradually towards a gender-inclusive approach to refugee determination procedures, significant limitations remain. These limitations are primarily caused by the reluctance in implementation of a gender-inclusive reading of the Refugee Convention as well as gender-sensitive procedures into the refugee status determination process, which creates obstacles to granting asylum to victims of gender-based persecution. Furthermore, where gender is an integral part of the claim for international protection (i.e. where the person has been persecuted due to their gender or where the persecution took form of a gender-specific act) the decision-makers often fail to engage in the gender-inclusive reading the Convention ground of ‘membership of a particular social group’. In some cases, these procedural shortcomings may result in refusal of refugee status (or subsidiary protection),

²²³ Barbour, Gorlick, *supra* 214, 555.

followed by return of the applicant to the country of origin, where exposure to the likely harm of persecution may continue to exist.

Yet another difficulty in determination of conflict-related and gender-based asylum claims is posed by the element of 'armed conflict'. Under the traditional framework of IRL, persons who flee situations of armed conflict or generalised violence are not automatically eligible for refugee status. In order for such claims to be successful, it is essential for the candidate to prove 'differential impact' as per *Adan v. SSHD*. Persecutory acts involving gender-based violence, which are committed in the context of armed conflict are often automatically categorised as constituting a part of indiscriminate violence and therefore not falling under the scope of the Refugee Convention. However, the development of the concept of subsidiary protection has shown the potential of addressing protection gaps in cases of armed conflict-related claims. The interpretation of Article 15(c) of the QD has arguably broadened the protection scope to include persons who flee armed conflict due to the risk of suffering serious harm, therefore extending the protection to persons who are in danger of suffering serious harm, but who would not qualify for protection under the Refugee Convention. These situations are likely to include women and girls who suffered or are at risk of suffering gender-based persecution.

Chapter 4

International law and post-conflict accountability for gender-based crimes

1. Introduction

Accountability for crimes committed during armed conflict is an essential element of addressing the aftermath of war and an important part of the peace-building process. The substantive and rapid development of International Criminal Law (ICL) as a specific branch of public international law over the last decade of the 20th and the beginning of the 21st century has enabled successful international prosecutions of individuals guilty of war crimes, crimes against humanity and genocide by international criminal courts and tribunals.¹

The creation of the International Military Tribunal at Nuremberg (IMTN) and the International Military Tribunal for the Far East (IMTFE) in the aftermath of World War II brought the first successful prosecutions at an international level of military leaders guilty of war crimes and crimes against humanity.² Since then, two ad-hoc international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have been created in response to gross violations of human rights and IHL, which were committed during the war in the Former Yugoslavia and during the Rwandan genocide.³ The jurisprudence of the ICTY and the ICTR set major milestones by holding perpetrators of international crimes criminally accountable but also by developing a comprehensive

¹ International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of International Law Commission finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para.8 <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 8th May 2013.

See generally: Antonio Cassese, *International Criminal Law* (OUP 2008); Alexander Zahar, Göran Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2008).

² Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011).

³ UNSCR 827 (25 May 1993) UN Doc. S/RES/827; UNSCR 955 (8 November 1994) UN Doc. S/RES/955.

conceptual and procedural framework of ICL.⁴ The end of the 20th century also saw the proliferation of internationalised criminal courts, which were constituted either as a part of UN administration in the region (Kosovo and East Timor) or as a result of a bilateral agreement between the state and the UN (Special Court for Sierra Leone (SCSL) and Extraordinary Chambers in the Courts of Cambodia (ECCC)). Finally, the adoption of the Rome Statute of the International Criminal Court (ICC Statute) in 1998 led to the establishment of the world's first permanent international criminal court.⁵ In light of the fact that the terms of the international criminal tribunals will come to an end in the near future, the ICC will become the main international court for the prosecution of international crimes committed both during armed conflict and in peacetime.⁶

The work of the international criminal courts and tribunals focused on crimes committed in context of armed conflicts of the end of 20th century (ICTY, ICTR) and the beginning of 21st century (SCSL). One of the characteristic features of these conflicts was the extraordinarily high prevalence of sexual violence, in particular rape, which was used as a weapon of war.⁷ That said, acts of sexual violence committed in these conflicts were certainly not limited to rape and involved other forms of gender-based violence, such as forced marriage, sexual slavery, forced pregnancy and forced nudity. Whilst some men became victims of acts of sexual violence, the vast majority of

⁴ See generally: William A. Schabas, *The UN international criminal tribunals: the former Yugoslavia, Rwanda, Sierra Leone* (CUP 2006).

The legality and legitimacy of the ICTY were contested by the defendant in *Prosecutor v. Tadić*. However, these arguments were dismissed by the ICTY Appeals Chamber in its decision on jurisdiction: *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995. Christopher Greenwood, 'International Humanitarian Law and the *Tadić* Case' (1996) 7 *European Journal of International Law* 265; Colin Warbrick, Peter Rowe, 'The International Criminal Tribunal: the Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadić* Case' (1996) 45 *International and Comparative Law Quarterly* 691; Antonio Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2002) 25(2) *Leiden Journal of International Law* 491.

⁵ The Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3.

⁶ Article 1 and Article 5 (jurisdiction) ICC Statute.

⁷ Binaifer Nowrojee, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (Human Rights Watch 1996); Human Rights Watch, *Kosovo: Rape as a Weapon of "Ethnic Cleansing"* (Human Rights Watch 2000) <<http://www.hrw.org/reports/2000/fry>> accessed 1 October 2013; Human Rights Watch, *We'll Kill You If You Cry. Sexual Violence in the Sierra Leone Conflict* (Human Rights Watch 2003) <<http://www.hrw.org/reports/2003/01/16/well-kill-you-if-you-cry>> accessed 1 October 2013.

victims of such gender-based crimes were civilian women.⁸ This gruesome feature of armed conflicts was reflected in the judgments of international courts and tribunals. Furthermore, prosecution of gender-based crimes became one of the defining features of the jurisprudence of the ad hoc tribunals, which explicitly recognized and prosecuted gender-based crimes, especially sexual violence, at an international level. This chapter critically analyses and evaluates the approaches taken by selected international criminal courts and tribunals towards the prosecution of gender-based crimes committed against women in armed conflicts of the past 25 years. The case law, which will form the core part of this analysis, originates from the work of the ICTY, the ICTR, the SCSL and, to an extent, the ICC. The case law on gender-based crimes was originally conceptualised and developed by the judges at the ICTY and the ICTR. These cases formed the foundation stones of the international gender-based crimes jurisprudence and are the starting point of the analysis for purposes of the discussion presented in this chapter. In addition, the decisions of the SCSL in relation to gender-based crimes provide an informative perspective on how the 'gender jurisprudence' of the ICTY and the ICTR has been further developed and applied by an internationalised criminal court. The crime of forced marriage, which has been conceptualised and successfully prosecuted by the SCSL is of particular interest in the context of this chapter.⁹

Finally, the role and the work of the ICC in relation to prosecution of gender-based crimes are examined. The ICC Statute contains the most comprehensive list of gender-based crimes to date, which theoretically equips the court to best pursue prosecution

⁸ *Prosecutor v. Tadić*, Trial Judgment, IT-94-1-T, 7 May 1997, para.206; *Prosecutor v. Stakić*, Trial Judgment, IT-97-24, 31 July 2003, para.241; *Prosecutor v. Cesić*, Sentencing Judgment, IT-95-10/1-S, 1 March 2004, paras.13-14; *Prosecutor v. Todorovic*, Sentencing Judgment, IT-95-9/1-S, 31 July 2011, paras.38-40; *Prosecutor v. Simić et al.*, Trial Judgment, IT-95-9-T, 17 October 2003, para.728; *Situation in Kenya: Prosecutor v. Muthaura et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012).

Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18 *European Journal of International Law* 253; Sandesh Sivakumaran, 'Prosecuting Sexual Violence against Men and Boys' in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 79-100; Solange Mouthaan, 'Sexual Violence Against Men and International Law: Criminalising the Unmentionable' (2013) 13 *International Criminal Law Review* 665.

⁹ *Prosecutor v. Brima, Kamara, and Kanu*, Appeals Judgment, SCSL-04-16-A, 22 February 2008 (*AFRC Appeals Judgment*).

of such crimes at an international level. In addition, Article 42(9) of the ICC Statute established the office of the Special Advisor on Gender to the Chief Prosecutor of the ICC, whose role is to assist the court in developing its gender strategy and building its cases involving gender-based crimes.¹⁰ Despite these potential strengths, the strategy of the ICC towards prosecution of gender-based crimes and the actual cases handled by the Office of the Prosecutor (OTP) so far have failed to build on the many remarkable achievements of the ad hoc tribunals. However, the ICC will become even more critical once the terms of the ad hoc tribunals have come to an end. The ways in which the ICC can strengthen the effectiveness of prosecution of gender-based crimes, taking into account both substantive and procedural obstacles faced by this institution, will be addressed in Chapter 5.

1.1. Conflict-related sexual violence and gender-based crimes

The term sexual violence is gender-neutral. Sexual violence, including rape, has been defined by the ICTR in *Prosecutor v. Akayesu* 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”.¹¹

Those acts, which amount to crimes against humanity and war crimes, may take several forms, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence.¹² Both men and women can fall victim to sexual violence during armed conflict, as evidenced by the judgments of the ICTY.¹³ Equally, both men and women can be perpetrators of sexual violence.¹⁴ Therefore, the provisions prohibiting sexual violence in the statutes of international

¹⁰ The current Special Advisor on Gender to the ICC is Brigid Inder. Previously, this position was held by Professor Catharine MacKinnon (November 2008 – August 2012).

¹¹ *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para.688.

¹² Article 7(1)(g) ICC Statute, Article 8(2)(b)(xxii) ICC Statute.

¹³ See footnote 8 above.

¹⁴ *Prosecutor v. Nyiramasuhuko*, Trial Judgment, ICTR-98-42-T, 24 June 2011; *Prosecutor v. Simone Gbagbo*, Arrest Warrant, ICC-02/11-01/12, 29 February 2012; Nicole Hogg, ‘Women’s participation in the Rwandan genocide: mothers or monsters?’ (2010) Vol.92 No. 877 *International Review of the Red Cross* 69.

criminal courts and tribunals enable application of ICL to situations where either a woman or a man was a perpetrator or a victim.¹⁵ All provisions of the ICC statute relating to sexual violence crimes are also worded in gender-neutral terms.¹⁶

The term 'gender-based crimes' describes crimes committed against a person because of their gender.¹⁷ Gender-based violence may take the form of both sexual and non-sexual acts, but in the context of ICL, gender-based crimes mostly involve an element of sexual violence. However, some crimes of sexual violence can be committed only against women due to their reproductive capacity, such as forced pregnancy. Furthermore, the crime of forced marriage has also been committed principally against women and girls due to their gender and while the crime usually involves a sexual element (conjugal duties, exclusive forced sexual relationship with the 'husband'), it is not limited to it and may include forced labour, forced child upbringing as well as non-sexual abuse.¹⁸

As noted by Hagay-Frey a dichotomy has emerged in international law in relation to sexual offences, exemplified by the distinction between sexual crimes perpetrated in the context of inter-group conflicts based on group identities such as nationality, religion, race or ethnicity, and sexual crimes perpetrated on the basis of gender.¹⁹ Whilst sexual offences committed in the context of ethnic, religious, national or racial conflict have been successfully recognized and prosecuted by the international

¹⁵ Campbell notes that although the provisions of ICL relating to sexual violence may appear gender-neutral, they are in fact embedded in gendered bodies and actions. What is sexual (e.g. a particular act, body or body part) is determined by the notions of femininity and masculinity. As such, the 'sexual' element of crimes of sexual violence is always already gendered. Kirsten Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1 *International Journal of Transitional Justice* 411, 417-420.

¹⁶ That said, the ICC failed to recognize the sexual nature of some crimes committed against men. In *Situation in Kenya: Prosecutor v. Muthaura et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012), the Pre-Trial Chamber II failed to recognize the sexual nature of the acts of forcible circumcision and penile amputation committed against Luo men (paras.265-266).

¹⁷ Article 7(3) of the ICC Statute defines gender as 'the two sexes, male and female, within the context of society'. For criticism regarding the definition of gender in the ICC Statute see: Valerie Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55.

¹⁸ Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments' (2011) 44 *Cornell International Law Journal* 49, 64-68.

¹⁹ Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law. Past, present, future* (Martinus Nijhoff 2011), xiii.

criminal courts and tribunals, the work of these institutions so far has only partially conceptualised and prosecuted sexual violence as a gender crime.²⁰ In order to be effective, the prosecution of sexual violence must involve the recognition of it as both a gender crime and a crime committed due to any other characteristics described above.

Therefore, for purposes of the current discussion, the term gender-based crimes is used in this thesis to describe crimes committed against women during armed conflict because of their gender. However, it should be noted that some international crimes discussed in this thesis may be committed on the basis of the combination of the victim's gender and other factors, such as race, ethnicity, or political opinion.

1.2. Gender-based crimes committed in armed conflict and ICL: a historical perspective

Sexual violence has been used in the vast majority of armed conflicts worldwide for millennia and continues to be used in modern armed conflicts.²¹ As it was discussed in detail in Chapter 1, wartime sexual violence has gone unpunished and for centuries has been accepted by many as a common element of armed conflict, even part of the victor's spoils.²² Until the fourth Geneva Convention was adopted in 1949, no international law instrument explicitly prohibited rape and other forms of sexual

²⁰ For criticism of the approaches taken toward prosecution of rape in context of ethnic conflict see: Doris Buss, 'The curious visibility of wartime rape: gender and ethnicity in international criminal law' (2007) 25 Windsor Yearbook of Access to Justice 3.

²¹ See Chapter 2 for the detailed overview and discussion of sexual violence in war. Sexual violence continues to be used in modern conflicts. It was used during the Arab Spring uprisings as well as during conflict in Syria. Olga Jurasz, 'Women of the Revolution: the future of women's rights in post-Gaddafi Libya' in: Carlo Panara, Gary Wilson (eds), *The Arab Spring. New Patterns for Democracy and International Law* (Martinus Nijhoff 2013) 123, 133-134 (describing sexual violence during Libyan Revolution); Ian Black, 'Libyan woman is brutally silenced after accusing Gaddafi's forces of rape' (The Guardian, 26 March 2011) <<http://www.theguardian.com/world/2011/mar/26/libya-woman-silenced-accusing-gaddafi-forces-rape>> accessed 12 April 2012; Steven Sotloff, 'The Rape of Iman al-Obeidi: The Libyan Regime's Other Crisis' (The Time, 29 March 2011) <<http://www.time.com/time/world/article/0,8599,2062007,00.html>> accessed 12 April 2012.

However, it has also been shown that not all conflicts involve sexual violence: Elisabeth Wood, 'Variations in sexual violence during war' (2006) 34(3) *Politics & Society* 307.

²² Susan Brownmiller, *Against Our Will. Men, Women and Rape* (Fawcett Books 1975) 33.

violence against women in armed conflict.²³ Thus, as a result of the legal and social indifference towards prohibition of sexual violence, international law accountability mechanisms for committing gender-based crimes in armed conflict were virtually non-existent.²⁴ For many years, this *status quo* allowed the perpetrators to go unpunished, encouraging the climate of impunity for war crimes generally and sexual violence in particular.

The first significant change in that respect came only in the mid-20th century, when the IMTN and the IMTFE were established in the aftermath of World War II, enabling prosecution of the key military leaders, who orchestrated the events of that war and were responsible for committing war crimes, crimes against humanity and crimes against peace. The Charter of the IMTN (the Nuremberg Charter) established jurisdiction of the IMTN over war crimes, crimes against humanity and crimes against peace committed during World War II.²⁵ However, despite significant evidence of

²³ Article 27 GC IV 1949.

However, some attempts to systemize the laws of warfare were made by Grotius in the 17th century: "You may read in many places that the raping of women in time of war is permissible, and in many others that it is not permissible. Those who sanction rape have taken into account only injury done to the person of another, and have judged that it is not inconsistent with the law of war that everything that belongs to the enemy [including the women] should be at the disposition of the victor. A better conclusion has been reached by others... and consequently [rape] should not go unpunished in war any more than in peace." Cited in: Kelly Askin 'Treatment of Sexual Violence in Armed Conflict: A Historical Perspective and the Way Forward' in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 24.

For a detailed overview and discussion of the evolution of IHL framework regarding sexual violence, see Chapter 2.

²⁴ However, some commentators suggest that the first international military trial for wartime rape took place in 1474, against Sir Peter Hagenbach. Hagenbach was convicted of war crimes, including rape, committed under his command by the court of twenty-eight judges drawn from the confederate entities of the Holy Roman Empire. As noted by de Brouwer, the conviction was indeed obscure because Hagenbach was convicted of rapes due to the fact that he did not declare war first. Had he done so, the rapes would have been considered legal: Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 4.

Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff 1997) 29; Kelly Askin 'Treatment of Sexual Violence in Armed Conflict: A Historical Perspective and the Way Forward' in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 23-24.

²⁵ Charter of the International Military Tribunal for the Trial of the Major War Criminals, Appended to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, London.

Article 6 of the IMTN Charter states:

sexual violence crimes being committed in World War II (by both enemy and ally forces), the Nuremberg charter failed to explicitly include acts of sexual violence in any of the categories of crimes prosecuted at Nuremberg.²⁶ Neither rape nor any other forms of sexual violence were prosecuted at Nuremberg, although transcripts from Nuremberg Trial contain evidence of rape, sexual torture, forced prostitution, forced sterilization, forced abortion, pornography, sexual mutilation and forced nudity.²⁷

The prosecutorial inaction at Nuremberg in relation to the prosecution of sexual violence crimes resulted in a significant missed opportunity in addressing these crimes at an international level. Whilst the Nuremberg Charter did not explicitly include gender-based crimes in Article 6, Article 6(c) included the category of 'other inhumane acts' as crimes against humanity, which could arguably have been successfully utilised by the IMTN in the prosecution of gender-based crimes.

The Tribunal established by the Agreement referred to Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **crimes against peace:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **war crimes:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **crimes against humanity:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

²⁶ The official documents from the Nuremberg Trial are available in this 42 volume work: *Trial of the Major War Criminals Before the International Military Tribunal*, 14 November 1945- 1 October 1946 (42 Volumes, 1947), <http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html> accessed 28 October 2013 (IMT Trial Documents).

²⁷ IMT Trial Documents: Vol. VI, 178, 404-407 ; Vol. VII, 453-457, 467, 494 (rape); Vol. VI, 178; Vol. VII, 494, 505 (sexual torture); Vol. VI, 212 (forced prostitution, forced sterilization, forced abortion); Vol. II, 139, Vol. VII, 548 (pornography); Vol. VII, 505 (sexual mutilation); Vol. II, 139, Vol. VII, 548 (forced nudity).

As the Nuremberg Tribunal was preparing to pronounce judgments, the trial was opening at the IMTFE in Tokyo to prosecute and punish the Japanese war criminals.²⁸ Similarly to the Nuremberg Charter, the Charter of the IMTFE did not include explicit references to rape and other forms of sexual violence as a crime.

Crimes involving sexual violence were widespread on the Far East front. Starting with the 'Rape of Nanking' in 1937-1938, sexual violence was systematically used by the Japanese army as a deliberate tool in punishing, torturing and humiliating the civilian population.²⁹ It is estimated that during the first six weeks of the Japanese occupation of Nanking, Japanese soldiers raped more than 20 000 women and girls.³⁰ Furthermore, sexual slavery and enforced prostitution became a characteristic and tragic feature of the war in the Far East. Nearly 200 000 Asian women (most of them of Chinese, Filipino, Indonesian or Korean origin) were forced into sexual slavery by the Japanese government.³¹

Despite the fact that rape and other forms of sexual violence were not explicitly included in the IMTFE Charter, the visibility of sexual violence crimes was much greater at IMTFE than at Nuremberg. The prevalence of sexual violence crimes was reflected in the indictment and during the trial. Gender crimes were explicitly incorporated into the indictment and charged as a war crime under headings of 'inhumane treatment', 'ill-treatment of medical staff' and 'failure to respect family honour':

"1. Inhumane treatment, contrary in each case to Article 4 of the said Annex to the said Hague Convention and the whole of the said Geneva Convention and to the said assurances. In addition to the inhumane treatment alleged in Sections Two to Six hereof inclusive, which are incorporated in this Section,

²⁸ The trial at IMTFE began on 3 May 1946 in Tokyo. The IMTN pronounced its verdict on 1 October 1946 at the Palace of Justice. The documents of the Tokyo Trial are reproduced in Neil Boister, Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Cambridge University Press 2008) (hereinafter IMTFE Documents); Arnold C. Brackman, *The Other Nuremberg. The Untold Story of the Tokyo War Crimes Trials* (Fontana/ Collins 1989).

²⁹ See generally: Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (BasicBooks 1997).

³⁰ IMTFE Documents, The Majority Judgment 535-536; Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (BasicBooks 1997).

³¹ C. Sarah Soh, 'Japan's Responsibility Toward Comfort Women Survivors' (2001) Japan Policy Research Institute Working Paper No.77 (May 2001)

<<http://www.jpri.org/publications/workingpapers/wp77.html>> accessed 14 February 2015.

prisoners of war and civilian internees were murdered beaten, tortured and otherwise ill-treated, and female prisoners were raped by members of the Japanese forces.

5. Mistreatment of the sick and wounded, medical personnel and female nurses, contrary to Articles 3, 14, 15 and 25 of the said Geneva Convention and Articles 1, 9, 10 and 12 of the said Red Cross Convention, and to the said assurances: (...) (c) Female nurses were raped, murdered and ill-treated;

12. Failure to respect family honour and rights, individual life, private property and religious convictions and worship in occupied territories, and deportation and enslavement of the inhabitants thereof, contrary to Article 46 of the said Annex to the said Hague Convention and to the Laws and Customs of War: Large numbers of the inhabitants of such territories were murdered, tortured, raped and otherwise ill-treated, arrested and interned without justification, sent to forced labour, and their property destroyed or confiscated".³²

The IMTFE Judgment found three individuals (General Matsui, Commander Hata and Foreign Minister Hirota) guilty of war crimes, including crimes of sexual violence, committed under their authority. Furthermore, the earlier trial of General Yamashita at the US Military Commission at Manila, which preceded the commencement of the IMTN and the IMTFE trials, established the criminal command responsibility of the accused for failure to prevent war crimes committed under his command, including rape. Whilst Yamashita was not proven to have ordered the crimes, the US Military Commission took the view that he must have had general awareness or should have had knowledge of atrocities being committed, primarily due to the widespread nature of the atrocities as well as Yamashita's high position in the chain of command.³³

Unlike the IMTN, the public record of the Tokyo trial includes explicit references to crimes of sexual violence committed in the Far East, especially the Rape of Nanking. Furthermore, rape was expressly included in the indictment and prosecuted at IMTFE

³² IMTFE Documents, Indictment 59, 60, 62.

³³ The Commission held: "(...) it is absurd... to consider a commander a murderer or rapist because one of his soldiers commits a murder or rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is not effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them." Decision of the United States Military Commission at Manila, 7 December 1945" (The Yamashita Case), reproduced in: *Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission. Volume IV.* (London: HMSO, 1948) 35
<http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf> accessed 1 December 2013.

despite the lack of explicit reference to gender crimes in the IMTFE Charter. Nonetheless, not one of the female victims was called to give evidence at a trial. Furthermore, the IMTFE could have gone further in addressing the issue of sexual slavery and enforced prostitution and establishing legal responsibility of the Japanese government for the commission of these acts. As Chinkin rightly notes, sexual violence and slavery have been routinely discounted from peace settlements and therefore effectively erased from the official records.³⁴ It was not until several decades later that the magnitude of these crimes was revisited, resulting in bringing justice to the victims of these crimes at the unofficial Women's International Tribunal on Japanese Military Sex Slavery in 2000.³⁵

Both the IMTN and the IMTFE advanced ICL in relation to the international criminal liability of military leaders and governmental officials for war crimes, crimes against humanity and crimes against peace. However, their contribution to the development of jurisprudence on punishing gender crimes is rather limited. Despite the well-recognized and well-documented evidence confirming the prevalence of sexual violence crimes during WW II, the judgments of the IMTN and the IMTFE do not reflect the magnitude of these crimes nor the various types of gender crimes that took place. The relative invisibility of gender crimes in the Nuremberg and Tokyo judgments can be seen historically as a major missed opportunity to recognize and redress gender crimes at the international level, resulting in the postponement of such advances until the end of the 20th century.

³⁴ Christine Chinkin, 'Women's International Tribunal on Japanese Military Sex Slavery' (2001) 95(2) *American Journal of International Law* 335, 339.

³⁵ David Boling, 'Mass Rape, Enforced Prostitution, and the Japanese Imperial Army' (1995) 32 *Columbia Journal of Transnational Law* 533. Women's Tribunal was created as a result of work of many women's rights NGO across Asia in recognition of the fact that post-WWII trials have not adequately addressed the issue of legal responsibility of the Japanese government for sexual slavery, trafficking for sexual exploitation and enforced prostitution, which took place in the Far East during WW II.

2. Gender crimes in the Statutes of the ICTY, the ICTR, the SCSL and the ICC

Statutes of the international criminal courts and tribunals have played a significant role in enabling the international criminal justice system to pursue justice for gender crimes committed in armed conflict. Especially at the early stages of the development of international criminal liability for gender crimes, the statutes of the ad hoc tribunals created a strong and, at the time, precedential basis for prosecution of sexual violence as an international crime.

2.1. Statutes of the ad hoc tribunals: the ICTY and the ICTR

The most significant, albeit early, steps in developing the notion of gender justice in ICL started with the incorporation of crimes of sexual violence into the statutes of the two ad hoc international criminal tribunals, the ICTY and the ICTR. The ICTY and the ICTR Statutes explicitly list rape as a crime against humanity (CAH) in Article 5(g) and Article 3(g) (respectively):

“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (...)

(g) rape;”³⁶

and

“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (...)

(g) rape;”³⁷

Later jurisprudence of the ad hoc tribunals confirmed that gender crimes may constitute an element of other international crimes.³⁸ For instance, rape was

³⁶ Article 5(g) ICTY Statute.

³⁷ Article 3(g) ICTR Statute.

³⁸ Discussed in further detail in section 3 below.

prosecuted under the heading of genocide at the ICTR, when intentionally committed as a means of destruction of a certain national, ethnical, racial or religious group.³⁹ Although the relevant articles relating to genocide do not expressly include rape, it may nevertheless be genocidal when it has been carried out as a part of the policy of ethnic cleansing, carried out on a massive and systematic basis for the purposes of producing babies of the ethnic group of the rapist or destroying the family life of the victims.⁴⁰ As such, rape is seen as amounting to a measure ‘causing serious bodily or mental harm to members of the group’ or ‘preventing births within the group’.⁴¹ Furthermore, rape has been prosecuted as a war crime, a form and means of torture, an act linked to the crime of enslavement (sexual slavery) and persecution.⁴²

Acts of sexual violence also constitute grave breaches of the Geneva Conventions.⁴³ Although Common Article 3 of the Geneva Conventions does not explicitly mention rape or other forms of sexual violence, it prohibits “violence to life and person” (including cruel treatment and torture) and “outrages upon personal dignity”. It should be noted that both the ICTY and the ICTR have jurisdiction over grave breaches of the

³⁹ *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, paras.731-732.

⁴⁰ Christine Chinkin, ‘Rape and Sexual Abuse of Women in International Law’ (1994) 5 *European Journal of International Law* 326, 333; Catharine MacKinnon, ‘Defining Rape Internationally: A Comment on *Akayesu*’ (2005) 44 *Columbia Journal of Transnational Law* 940; See generally: Usta Kaitesi, *Genocidal Gender and Sexual Violence. The legacy of the ICTR, Rwanda’s ordinary courts and gacaca courts* (Intersentia 2014).

⁴¹ Article 4(2)(b) and Article 4(2)(d) ICTY Statute; Article 2(2)(b) and Article 2(2)(d) ICTR Statute.

⁴² *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, paras.687, 690; *Prosecutor v. Mucić et al. (Čelebići Case)*, Trial Judgment, IT-96-21-T, 16 November 1998, paras.480-496, 940-943; *Prosecutor v. Kunarac et al.*, Trial Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para.655-656; Witnessing acts of sexual violence may also amount to torture: *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1T, 10 December 1998, para.267. However, the ICC in *Bemba* failed to conceptualise forcing family members to watch their relatives being raped as torture. A single charge of rape was pursued instead of one rape, one torture charge: *Situation in the Central African Republic: Prosecutor v. Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009), paras.204-205. *Prosecutor v. Kunarac et al.*, Trial Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para.542 (sexual violence as enslavement); *Prosecutor v. Kvočka et al.*, Trial Judgment, IT-98-30/1-T, 2 November 2001, paras.181-183 (persecution).

⁴³ This norm has also customary law status: Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press/ ICRC 2005) (*CIHL Study*), Vol. I: Rules, Rule 93: Rape and Other Forms of Sexual Violence <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule93> accessed 2 December 2013, Vol. II: Practice, Practice relating to Rule 93: Rape and Other Forms of Sexual Violence <http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule93> accessed 2 December 2013.

Geneva Conventions; however it is exclusively the Statute of the ICTY that makes such a provision explicit.⁴⁴

2.2. Statute of the SCSL

The SCSL Statute was created as a result of the Agreement between the UN and the government of Sierra Leone, pursuant to UNSCR 1315 (2000), at the time when precedents in successful prosecution of gender crimes have already been set by the ICTY and the ICTR.⁴⁵ The SCSL differs from the ICTY and the ICTR in that it is a hybrid court and the first ad hoc tribunal based on a treaty between the UN and a UN Member State.⁴⁶ Consequently, the SCSL has mixed jurisdiction over breaches of IHL, war crimes, and crimes against humanity as well as over crimes punishable under Sierra Leonean law.⁴⁷ The composition of judges at the SCSL is also mixed between Sierra Leonean and international judges.⁴⁸

The SCSL Statute contains detailed provisions regarding gender crimes. Article 2, which establishes the court's jurisdiction over crimes against humanity, makes explicit references not only to rape, but includes other types of gender crimes, namely sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.⁴⁹ Article 3 of the Statute gives the SCSL jurisdiction over serious violation of Article 3 of the Geneva Conventions 1949 and the Additional Protocol II 1977, which includes "rape, enforced prostitution and any other form of indecent assault" in the category of outrages upon personal dignity.⁵⁰

⁴⁴ Article 2 ICTY Statute.

⁴⁵ UNSCR 1315 (14 August 2000) UN Doc. S/RES/1315.

⁴⁶ The UN Secretary- General refers to the SCSL as 'a treaty based organ... not anchored in any existing system (i.e. United Nations or the national law of the State of the seat).' in: UNSC, Report of the Secretary- General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, para.9; Alexander Zahar, Göran Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2008) 12-13; Micaela Frulli, 'The Special Court for Sierra Leone: Some Preliminary Comments' (2000) 11(4) *European Journal of International Law* 857-869.

⁴⁷ Article 5 SCSL Statute.

⁴⁸ Article 12 and Article 13 SCSL Statute.

⁴⁹ Article 2(g) SCSL Statute.

⁵⁰ Article 3(e) SCSL Statute.

Furthermore, Article 5 gives the SCSL powers to prosecute crimes committed against girls under the Sierra Leonean Prevention of Cruelty to Children Act 1926. It refers to the abuse of girls less than 14 years of age as well as to abduction of girls for immoral purposes.⁵¹ Interestingly, though alarmingly at the same time, such abuses committed against boys are not legislated for. The inclusion of a broader and more detailed range of gender crimes under Article 2(g) set the basis for prosecution of more specific gender crimes, and not only rape, as crimes against humanity. It was certainly a welcome development and a significant departure from the status of gender crimes in the statutes of ad hoc tribunals, which explicitly proscribe only rape. This can be seen as an evident and positive impact of the ICC Statute, which had been awaiting entry to force at the time when the provisions of the SCSL Statute were drafted.⁵²

2.3. The Rome Statute of the ICC

The ICC Statute, which entered into force on 1 July 2002, contains the most advanced and comprehensive listing of sexual and gender-based crimes in any treaty to date. The jurisdiction of the court is confined to genocide, crimes against humanity, war crimes, and aggression, with gender crimes being explicitly included in the ICC Statute as crimes against humanity and war crimes.⁵³

2.3.1. Crimes against humanity

Article 7(1)(g) of the ICC Statute explicitly recognises

“rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”

as crimes against humanity. This comprehensive list of acts of sexual violence marks a major step forward from equivalent crimes against humanity provisions in the statutes of the ad hoc tribunals. Whilst the ICTY and the ICTR Statutes included rape as a crime against humanity, they did not give explicit recognition to any other specific forms of

⁵¹ Article 5(a)(i) & (ii) and Article 5(a)(iii) SCSL Statute (respectively).

⁵² The ICC Statute was adopted on 17 July 1998 and entered into force on 1 July 2002.

⁵³ Article 5 ICC Statute.

sexual violence. Rather, acts of sexual violence other than rape were charged by the ad hoc tribunals and further prosecuted as crimes against humanity under a 'catch-all' category of inhumane acts.⁵⁴ This category was also used by the ad hoc tribunals to charge and prosecute acts of sexual violence committed against men in armed conflict as well as to successfully prosecute acts of forced nudity.⁵⁵

In addition to explicit mention of sexual slavery in Article 7(1)(g), Article 7(1)(c) codifies enslavement as a crime against humanity. As a part of this provision, the ICC Statute also gives explicit recognition to trafficking in human beings, especially women and children, as a form of modern day slavery.⁵⁶ This is particularly significant in the context of conflict situations, where women and girls are particularly exposed to the risk of being trafficked.

Furthermore, the ICC Statute broadened the scope of the crime of persecution by including gender as one of the possible grounds for persecution in Article 7(1)(h).⁵⁷ The provision is to be interpreted in light of Article 7(3), which defines gender for purposes of the ICC statute as "the two sexes, male and female, within the context of society". This is not only the first time that gender-based persecution is listed as a crime in an international treaty, but also the first time that the definition of gender is provided in a treaty.⁵⁸ Although the inclusion of explicit references to gender in the ICC Statute was a welcome development, the definition of gender adopted by the ICC Statute attracted a lot of justifiable criticism.⁵⁹ The linguistic construction of the definition is arguably the crux of the problem and was described as "the most puzzling and bizarre language

⁵⁴ Article 5(i) ICTY Statute and Article 3(i) ICTR Statute.

⁵⁵ *Prosecutor v. Tadić*, Opinion and Judgment, IT-94-1-T, 7 May 1997; Tadić was convicted on Count 11 (inhumane acts, crimes against humanity) for forcing two prisoners to commit oral sex on another prisoner and then being forced to bite off one of that prisoner's testicles. *Akayesu*, para.697.

⁵⁶ Article 7(2)(c) defines enslavement for purposes of paragraph (1) as: "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".

⁵⁷ See generally: Valerie Oosterveld, 'Prosecuting Gender-Based Persecution as an International Crime' in: Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013).

⁵⁸ Gender-based persecution is recognized in the context of IRL (see chapter 3), but it is not codified in the treaty form.

⁵⁹ Explicit references to gender are made nine times in the ICC Statute.

ever included in an international treaty”.⁶⁰ The definition strongly bases itself on the notion of two sexes, male and female, a biologically determined binary opposition. This phraseology conflicts with the generally accepted definition of gender, which departs from this distinction and instead focuses on the socially constructed notions of femininity and masculinity and the social relations between them, which are also culturally contingent.⁶¹ The approach of eliding ‘sex’ with ‘gender’ results in a confusing definition, which has arguably a limiting scope. The current ICC definition of gender puts in question the place of socio-cultural analysis in the context of gender-specific provisions of the Statute. If one accepts the wrongful premise that sex equals gender (as Article 7(3) may seem to suggest), then the socio-cultural analysis of gender and gender relations in the context of cases heard before the ICC would be grossly lacking. This in turn may have detrimental impact on cases decided by the ICC involving gender crimes, leading to omission of gender-sensitive analysis of the case. Oosterveld warns that by focusing solely on the sex of the victim or a witness only, the ICC could arrive at “insensitive decisions about the protection or participation of the victim or witness” or “will not be able to understand and evaluate adequately the effects of rape on a female victim who is deemed unmarriageable by her society, or on a man (whatever his sexual orientation) raped by another man in a homophobic society”.⁶²

On the other hand, some commentators remain optimistic in relation to the proposed definition and interpret the phrase “within the context of society” as inviting a social construction of gender in Article 7(3).⁶³ Accordingly, such interpretation would be based on ‘sex’ as a foundation for a socially constructed definition of ‘gender’- a model

⁶⁰ Words attributed to Theo van Bowen. Cited in: Dorean M. Koenig, Kelly D. Askin, ‘International Criminal Law and the International Criminal Court Statute: Crimes Against Women’, in Kelly D. Askin, Dorean M. Koenig (eds), *Women and International Human Rights Law* (Transnational Publishers 2000), Vol.2, 20.

⁶¹ For example, Charlesworth defines gender as “the social construction of differences between women and men and ideas of ‘femininity’ and ‘masculinity’- the excess cultural baggage associated with biological sex” in: Hilary Charlesworth, ‘The Feminist Methods in International Law’ (1999) 93(2) *American Journal of International Law* 379.

⁶² Valerie Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 *Harvard Human Rights Journal* 55, 72, 74.

⁶³ *Ibid.*, 72 (Arguing that sex can be seen as a biological *foundation* from which the ICC is to interpret the social construction of ‘gender, which is quite different from biological *determinism*, unless taken to an extreme). Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law’ (2000) 46 *McGill Law Journal* 217, 237.

that has often been adopted by the United Nations in defining gender. Nonetheless, the current definition of gender in the ICC Statute would certainly benefit from clearer focus on socio-cultural analysis. Furthermore, the current definition can be seen as restrictive and not encompassing 'sexual orientation' within the notion of gender or, in other words, does not equip the ICC with tools to interpret and understand the social construction of sexual identity.⁶⁴ This particular ambiguity of the definition reflects objections posed by the Arab States and the Holy See during the process of drafting of gender provisions of the ICC Statute. These states were against the inclusion of gender in the ICC Statute due to their concerns regarding the possible interpretation of term 'gender' to include homosexuality.⁶⁵ Undoubtedly, the ICC Statute is a result of political compromise, which is clearly exemplified in this case. Unfortunately, these limitations result in a narrow definition of gender, which is open to misinterpretation. Finally, the definition has "little transformative edge" in the context of otherwise (at least in theory) the most gender-sensitive modern international treaty and represents a missed opportunity by the drafters of the ICC Statute to remap the persisting (gender) boundaries in international law.⁶⁶

2.3.2. War crimes

Article 8 of the ICC Statute codifies war crimes in an extensive and detailed manner. The distinction is drawn between provisions applicable to international armed conflicts (Article 8(2)(a) and Article 8(2)(b)) and those applicable to non-international armed conflict (Article 8(2)(c) and Article 8(2)(e)).

Provisions of the ICC Statute relating to grave breaches of Geneva Conventions (committed in international armed conflict) and serious violations of Article 3 common to the four Geneva Conventions (committed in non-international armed conflict) reflect the crimes listed in the Geneva Conventions and the wording used in these instruments. As such, neither Article 8(2)(a) nor Article 8(2)(c) contain explicit

⁶⁴ Oosterveld, *supra* 62, 76.

⁶⁵ Hilary Charlesworth, 'The Gender of International Law. Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law' (1999) 93 ASIL Proceedings 206, 207.

⁶⁶ Christine Chinkin, Hilary Charlesworth, *The boundaries of international law. A feminist analysis* (2000 Manchester University Press) 335.

reference to sexual violence or other gender crimes. However, Article 8(2)(b)(xxii), relating to “other serious violations of laws and customs applicable in international armed conflict”, outlines a detailed list of acts of sexual violence, the commission of which may amount to war crimes:

“rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f) enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”.

In addition to providing a specific list of acts of sexual violence amounting to war crimes, Article 8(2)(b)(xxii) recognises that acts of sexual violence also constitute a grave breach of the Geneva Conventions. It is also worth noting that subsection (xxii) is kept distinct from subsection (xxi), prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment”, therefore providing a dedicated provision addressing acts of sexual violence as war crimes.⁶⁷

The provision is mirrored in Article 8(2)(e)(vi) in the context of “other serious violations of laws and customs applicable in non-international armed conflict”:

“rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f) enforced sterilization, or any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions”.⁶⁸

2.3.3. Genocide

Genocide is an international crime under Article 6 of the ICC Statute. Whilst this provision does not contain explicit reference to gender crimes, the jurisprudence of ad hoc tribunals supports the interpretation that acts of sexual violence, in particular rape, can have genocidal character:

⁶⁷ Under CIHL, the expressions “outrages upon personal dignity” and “any form of indecent assault” (stemming from the language of Additional Protocols I and II) are interpreted as referring to any form of sexual violence. (*CIHL Study*), Vol. I: Rules, Rule 93: Rape and Other Forms of Sexual Violence <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule93> accessed 2 December 2013, Vol. II: Practice, Practice relating to Rule 93: Rape and Other Forms of Sexual Violence <http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule93> accessed 2 December 2013.

⁶⁸ Prosecution of gender-based war crimes by the international courts and tribunals is discussed in greater detail in section 3.2. of this chapter.

“rape and sexual violence, (...) constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm.”⁶⁹

Accordingly, some crimes of sexual violence can constitute genocide (when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group) as acts

“(b) Causing serious bodily or mental harm to members of the group; (...) or
(d) Imposing measures intended to prevent births within the group;”⁷⁰

Interpretation of Article 6 as inclusive of crimes of sexual violence is supported by the ICC Elements of Crimes.⁷¹

3. Prosecution of gender crimes in International Criminal Law

Gender crimes have been successfully prosecuted in ICL under various subcategories of the three key international crimes: crimes against humanity, war crimes and genocide. This section explores how gender crimes have been classified, defined and prosecuted by the ICTY, the ICTR, the SCSL and the ICC.

3.1. Gender crimes as crimes against humanity

The category of crimes against humanity has been extensively used by modern international criminal courts and tribunals to prosecute gender crimes, in particular rape, which was the only crime of sexual violence that was explicitly referred to in the statutes of the ICTY and the ICTR. Whilst crimes against humanity were addressed at Nuremberg, the more substantive development of the law took place in the late 20th century, with the establishment of ad hoc tribunals and their progressive jurisprudence. The IMTN adopted a negative definition of crimes against humanity,

⁶⁹ *Akayesu*, paras.731-732.

⁷⁰ Article 6(b) and Article 6(d) ICC Statute.

⁷¹ Article 6(b)(1) (footnote 3) ICC Elements of Crimes.

merely distinguishing them from war crimes. However, the elements of crimes against humanity were not defined.⁷² It is also the category of international crimes, which has in the past 20 years most developed in terms of listing various crimes of sexual violence: Article 7(1)(g) of the ICC Statute explicitly refers to 5 different acts of sexual violence which may constitute a crime against humanity. Furthermore, the category of ‘other forms of sexual violence of comparable gravity’ is also added to the provision in order to facilitate possible prosecution of acts that have not been individually named in the process of drafting this Article.

In order for a criminal act to be prosecuted as a crime against humanity, a specific contextual threshold must be met. As noted by Cryer et al., it is the contextual threshold that makes crimes (such as murder, rape etc.) which otherwise may have fallen exclusively under the national jurisdiction of a state, international crimes, which are of concern to the international community as a whole.⁷³ According to the definition of crime against humanity in the ICC Statute, an act must form “a part of a widespread or systematic attack against any civilian population”. This is the common element of crimes against humanity, present in the statutory definitions in the statutes of the ICTR and the SCSL and, in case of the ICTY, in line with judicial interpretations of this category of crime. Article 5 of the ICTY Statute does not explicitly include the requirement of “a widespread or systematic attack” in defining crimes against humanity. Instead, the ICTY Statute sets the contextual threshold as “when committed in armed conflict, whether international or internal in character, and directed against any civilian population”. However, the provision has been interpreted to require an element of “a widespread or systematic attack”.⁷⁴ Equally, the ICTR Statute broadens

⁷² “The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes Against Humanity within the meaning of the Charter, but from the beginning of the War in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.” IMT Trial Documents, Vol.22, 498.

⁷³ Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, *The Introduction to International Criminal Law and Procedure* (2014 Cambridge University Press) 229 (Cryer, *The Introduction to ICL*).

⁷⁴ The ICTY in *Tadić* interpreted this provision to mean that “acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organisational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement imported by the Secretary-General and the members of the Security

the contextual threshold by setting the requirement that widespread or systematic attack is committed against any civilian population on “national, political, ethnic, racial or religious grounds”.⁷⁵

3.1.1. Rape as a crime against humanity

The first prosecution of rape as a crime against humanity by the ICTR in *Prosecutor v. Akayesu* set a milestone for the prosecution of gender crimes in international law. This decision marked not only the first successful prosecution of wartime rape by an international criminal tribunal, but also set a precedent for the still ongoing process of codification and prosecution of gender crimes in international law. Given the precedential nature of the judgment, the ICTR had to formulate the definition of rape because at that point in time “there was no commonly accepted definition of the term [rape] in international law”.⁷⁶

3.1.1.1. Definition of rape in international law

Defining rape in international law was one of the key challenges in the early years of the work of the ad hoc tribunals. The overwhelming evidence of wartime sexual violence being committed during conflicts in the Former Yugoslavia and in Rwanda directly clashed with the substantive absence of previous experience of prosecuting gender crimes in international law. Whilst the statutory provisions of the ICTY and the ICTR enabled charging the accused with rape and prosecuting it, it became essential that the tribunals’ judges conceptualize rape and coin a definition of this crime for purposes of international criminal law.

Rape was first defined by the ICTR in *Akayesu* as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.⁷⁷ The

Council that the actions be taken on discriminatory grounds”. *Prosecutor v. Tadić*, Trial Judgment, IT-94-1-T, 7 May 1997, para.644; *Prosecutor v. Tadić*, Appeal Judgment, IT-94-1-A, 15 July 1999, para.248.

⁷⁵ Article 3 ICTR Statute.

⁷⁶ *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para.686.

⁷⁷ *Ibid.*, para.688.

definition is conceptual in that it focuses on the nature of rape as a form of aggression, a violation of one's sexual integrity, rather than an extensive list of technical modalities, which is usually present in definitions adopted in national jurisdictions. For instance, the ICTR's definition of rape does not include a requirement of penile penetration, which is present in many national jurisdictions.⁷⁸ This approach of the ICTR towards rape mirrors the approach represented in the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984, which focuses on the concept of torture as a type of state-sanctioned violence rather than the list of specific torturous acts.⁷⁹ In line with the conceptual approach, the Tribunal also gave explicit recognition to the fact that rape can take various forms, including penetration by objects and/or use of bodily orifices, which are not generally considered as sexual, such as thrusting a piece of wood into a woman's sexual organs.⁸⁰ Furthermore, the adopted phraseology indicated a gender-neutral approach, which enables prosecution of rape committed against both women and men.

Soon after the decision in *Akayesu*, the contrasting definition of rape was articulated by the ICTY in *Furundžija*, a case concerning multiple rapes committed by a paramilitary leader against one woman during the Yugoslav conflict.⁸¹ Rape was one of the methods used during the interrogation of the victim by Furundžija, however he was not a physical perpetrator himself. The Trial Chamber prosecuted rape as a violation of the laws or customs of the war under the headings of torture (as inflicting severe physical and psychological suffering taking place within armed conflict) and

⁷⁸ For example, according to s.1(1)(a) Sexual Offences Act 2003, a person (A) commits an offence if he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis.

⁷⁹ *Akayesu*, para.687; Article 1(1) of The UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984 defines torture as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

⁸⁰ *Akayesu*, para.686: "The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual".

⁸¹ *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1T, 10 December 1998.

outrages upon personal dignity.⁸² The ICTY defined rape as:

- i) sexual penetration, however slight:
 - a) of the vagina or anus of the victim by penis of the perpetrator or any 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 a third person.⁸³

The characterization of rape in *Furundžija* distinctively departed from the conceptual approach of the ICTR in *Akayesu*, resulting in a narrower and mechanical definition. It mostly reflects the domestic approaches towards rape, which is generally viewed as non-consensual intercourse and is defined through a 'checklist' of various elements of the crime. The approach in *Furundžija* can be criticized for departing from the progressive approach established by the ICTR and therefore having limited transformative impact on the prosecution of rape as a gender crime. Arguably it sets a higher threshold for prosecution of rape, which is captured in the list of elements of the crime that need to be fulfilled. In particular, the requirement of "coercion or force or threat of force" is problematic. It suggests that the presence of force or threat thereof is a crucial element of rape, thereby departing from the concept of 'coercive circumstances' presented in *Akayesu*. Finally, the approach taken in *Furundžija* is even more surprising given that three weeks earlier, the ICTY adopted the *Akayesu* definition in *Čelebići*, which led to the first successful prosecution of rape as a crime against humanity by the Tribunal.⁸⁴

The co-existence of the two definitions resulted in the ad hoc tribunals following either the *Akayesu* or *Furundžija* definitions of rape in their decisions. At times, the Tribunals even tried to reconcile the differences between the definitions, with rather limited, if not more restrictive results. For instance, in *Prosecutor v. Gacumbitsi*, the ICTR arrived at an even narrower definition of actus reus of rape than one in *Furundžija*.⁸⁵ Whilst

⁸² Ibid., paras.264-269 (torture) and paras.270-275 (outrages upon personal dignity). Prosecution of sexual violence as a war crime is discussed in greater detail in 3.2. below.

⁸³ Ibid., para.185.

⁸⁴ *Čelebići Case*, Trial Judgement, IT-96-21-T, 16 November 1998.

⁸⁵ *Prosecutor v. Gacumbitsi*, Trial Judgement, ICTR-2001-64-T, 17 June 2004.

acknowledging the fact that rape may encompass other acts, the Trial Chamber in *Gacumbitsi* focused predominantly on female victims of rape, by setting the actus reus of the crime as:

“any penetration of the victim’s vagina by the rapist with his genitals or any object constitutes rape, although the definition of rape (...) is not limited to such acts alone”.⁸⁶

However, the ICTY was more successful in its attempts to reconcile the *Akayesu* and *Furundžija* dichotomy. In *Kunarac*, a case based exclusively on the charges of sexual violence against women, the ICTY took an opportunity to clarify the issue of victim’s consent, which was a challenging and not fully articulated aspect of the newly formulated definitions of rape in international law.⁸⁷ Whilst the actus reus of rape in the *Kunarac* definition was adopted verbatim from *Furundžija*, it was the problematic issue of consent that was clarified in *Kunarac*, resulting in the partial departure from the *Furundžija* legacy and much needed clarification of the definition of rape in the developing international jurisprudence on wartime rape.⁸⁸

The ICC Statute followed the *Furundžija - Kunarac* interpretation of the actus reus of rape in international law. In accordance with the ICC Elements of Crimes (ICC EOC) a person committed rape if:

“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”.⁸⁹

By including the phrase ‘or of the perpetrator’ the ICC broadened the definition of rape and engaged with a gender-neutral approach towards defining rape in international

⁸⁶ Ibid., para.321.

⁸⁷ For a more detailed discussion of *Kunarac*, see: Doris Buss, ‘Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic’ (2000) 10 Feminist Legal Studies 90; Patricia Sellers, ‘Individual(s’) Liability for Collective Sexual Violence’ in: Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004).

⁸⁸ *Kunarac*, Trial Judgment, para.460. The issue of consent in context of rape is discussed in detail in section 3.1.1.2. below.

⁸⁹ Article 7(1)(g)-1(1) ICC EOC.

law. In addition, the ICC EOC state that the concept of ‘invasion’ is intended to be broad enough to be gender-neutral.⁹⁰ This allows, Boon notes, the departure from the *Furundžija* approach, which may allow prosecution of rape involving a female perpetrator and a male victim.⁹¹

3.1.1.2. Consent and coercion

The ICTY’s decision in *Kunarac* marked the key development in (re)defining rape in international law. The judgment addressed the question of consent in rape, which was the crux of the dichotomy created between the consent-focused approach applied in *Furundžija* and the language of ‘coercive circumstances’ in *Akayesu*.

Non-voluntary nature of rape is the essence of that crime. This is reflected in penal codes of many national jurisdictions, which strongly emphasize the lack of consent of the victim as the crucial element of a crime. In *Kunarac*, the ICTY considered ‘violation of sexual autonomy’ as the common denominator of all definitions of rape, which “occurs whenever the person is subjected to the act has not freely agreed to it or is otherwise not a voluntary participant”.⁹² Thus, the Trial Chamber defined rape as:

“the 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; where such sexual penetration occurs without the consent of the victim. **Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.** The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim”.⁹³ (emphasis added)

The definition reflects the ICTY’s understanding of the requirement of ‘the use of force or threat of force’ as clear indicators of the lack of consent on the part of the victim,

⁹⁰ Ibid.

⁹¹ Nonetheless it ought to be noted that such gender-neutral constrictio is possible under *Akayesu* definition.

⁹² *Kunarac*, Trial Judgment, para.457.

⁹³ Ibid., para.460, confirmed on Appeal: *Prosecutor v. Kunarac et al.*, Appeal Judgment, IT-96-23-A & IT-96-23/1-A, 12 June 2002, para.125. (emphasis added).

but not as elements of the crime of rape *per se*.⁹⁴ Furthermore, it was held that the lack of consent may be inferred from the circumstances in which the crime was committed, resonating the language of ‘coercive circumstances’ from *Akayesu*. Referring to the example of detention facilities in Foča, where raped women were held captive, the ICTY held that these circumstances “were so coercive as to negate the possibility of consent”.⁹⁵

This statement, although very welcome, raised a broader question of relevance of the ‘consent’ in the definition of rape in international law as well as the way in which it is established, i.e. are ‘non-consent’ and knowledge thereof elements of a crime to be proven beyond reasonable doubt by the prosecution (as per *Kunarac*) or is consent an affirmative defence only and if so the non-consent can be inferred from coercive circumstances in which the crime was committed (as per *Akayesu*)?⁹⁶ Whilst consent is embedded in the vast majority of national definitions of rape, it is questionable if it is necessary to include it as an element of a crime for purposes of prosecuting rape in international law. Judge Cassese warned in *Prosecutor v. Erdemović* against such over-reliance on domestic definitions of crimes when defining crimes in international law and emphasized the need to consider the specificity of international criminal proceedings.⁹⁷ This precise argument was reiterated in *Kunarac* in relation to the formulation of the definition of torture, with the Trial Chamber concluding that it is impossible to transfer the elements of torture as found in human rights law into international humanitarian law without consideration of the particular differences that exist for these two distinct bodies of law.⁹⁸ By analogy, it should be impossible, if not at least questionable, to transfer the elements of rape found in national laws into international criminal law. What essentially distinguishes rape committed in peacetime

⁹⁴ *Prosecutor v. Kunarac et al.*, Appeal Judgment, IT-96-23-A & IT-96-23/1-A, 12 June 2002, para.129.

⁹⁵ *Ibid.*, para.132.

⁹⁶ *Gacumbitsi*, Appeal Judgment, para.153: “(...) *Kunarac* establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the Prosecution bears the burden of proving these elements beyond reasonable doubt. If the affirmative defence approach were taken, the accused would bear, at least, the burden of production, that is, the burden to introduce evidence providing prima facie support for the defence”.

⁹⁷ *Prosecutor v. Erdemović*, IT-96-22, Separate and Dissenting Opinion of Judge Antonio Cassese, 7 October 1997, paras.1-6.

⁹⁸ *Kunarac*, Trial Judgment, paras.468-471.

from wartime rape is the notion of surrounding circumstances associated with armed conflict or widespread violations of human rights. The contextual aspect of the crime cannot be ignored. Rape committed as a crime against humanity is not a one-off crime or an opportunistic crime. Quite to the contrary, when prosecuting such a crime in ICL, it needs to be established first that the act was committed within the very particular circumstantial context, i.e. ‘widespread and systematic attack against any civilian population’. Furthermore, as rightly noted by deBrouwer, the wording in both *Akayesu* and *Furundžija* potentially covers all circumstances in which rape is committed in the context of crimes against humanity, genocide and war crimes.⁹⁹ The circumstances in which these categories of crimes are committed are inherently coercive and imply, at the very least, the existence of a high level of violence and threat to one’s life as well as physical and mental integrity, which questions the capability of the victim to give genuine consent. Thus, the existence of these factors renders the victim’s true consent impossible (and, arguably, irrelevant), as articulated by the Appeals Chamber in *Kunarac*, which held that in most cases charged as either war crimes or crimes against humanity, circumstances will be “almost universally coercive”.¹⁰⁰ If that premise is accepted, then the inclusion of non-consent in the definition of rape in ICL becomes redundant.

Furthermore, even in the unlikely case of consent being sought by the perpetrator, it ought to be emphasized that such consent must be genuine and meaningful. As was shown above, the circumstances in which rapes are committed (as crimes against humanity) exclude the possibility of a real and meaningful consent on the part of the victim. Tribunal judges reached the same conclusion in leading cases before the ad hoc tribunals (e.g. *Kunarac*, *Furundžija*, *Gacumbitisi* and *Krnojelac*) holding that circumstances in which rapes were committed excluded the possibility of consent being given. This approach was also echoed by the Appeals Chamber in *Prosecutor v. Krnojelac*, which found that “it is impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any

⁹⁹ de Brouwer (2005), supra 24, 119.

¹⁰⁰ *Kunarac*, Appeal Judgment, para.130; confirmed in *Prosecutor v. Muhimana*, Trial Judgment, ICTR-95-1B-T, 28 April 2005, para.546.

value”.¹⁰¹

In addition, Rule 96 of the ICTY and the ICTR Rules of Procedure and Evidence (RPE) supports the argument for omitting consent as an element of the crime and instead inferring non-consent from the coercive circumstances.¹⁰² Under Rule 96 of the ICTY RPE, the victim’s consent is irrelevant under coercive circumstances, effectively disallowing consent as a defence. Using consent as an affirmative defence is still theoretically possible, although it would appear to be hardly possible given the circumstances in which rape is committed (i.e. war, genocide or situations where crimes against humanity are committed). In such a case, the burden of proof would be on the accused to establish on the balance of probabilities that the victim did consent. This approach is also reflected in Rule 70 of the ICC Rules of Procedure and Evidence (ICC RPE), which prohibits inferring consent from the words or conduct of the victim where force or threat of force was used or where circumstances were coercive, as well as where a victim did not resist or was silent about the act of sexual violence.¹⁰³

Moreover, inclusion of consent as an element of the definition of rape is likely to result in revictimisation by way of questioning the victim during the trial about the details of the committed crime. Where consent is an element of a crime, the burden of proof rests on the prosecution to show that the victim did not consent. Establishing non-consent involves an inquiry, whereby the victim would be questioned about her conduct and state of mind, especially whether she consented to the sexual act. This may be a particularly humiliating and degrading experience for the victims of sexual violence, especially if the circumstances in which rape took place can be described as coercive or where force or coercion was used. However, the ICTR in *Gacumbitsi* took a step forward in recognizing that the prosecution can prove non-consent beyond reasonable doubt by relying on the notion of coercive circumstances under which meaningful consent is not possible:

¹⁰¹ *Prosecutor v. Krnojelac*, Appeal Judgment, IT-97-25-A, 17 September 2003, para.229

¹⁰² It should be noted that the first version of the Rule 96 excluded consent as a defence in cases of sexual violence. The current version of the Rule 96 was revisited in order to balance the rights of the victims with the rights of the accused to a fair trial. See: Noëlle Quénivet, *Sexual Offences in Armed Conflict and International Law* (2005 Transnational Publishers) 25-27.

¹⁰³ Rule 70(a)-(d) ICC RPE.

“The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. (...) But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim’s relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim”.¹⁰⁴

This development does not nonetheless clarify the existing disparity between coercion and consent in international law. The assertion of the Trial Chamber in *Prosecutor v. Milutinović* (as it then was) that “the apparent disparity [between non-consent and coercion] is of formal nature only” is highly questionable.¹⁰⁵ Essentially, coercion and consent are separate concepts focusing on the broader notion of circumstances surrounding commission of a criminal act, on the one hand, and victim’s agency on the other. Whilst it is argued in this thesis that the coercive circumstances approach is more adequate for purposes of prosecution of rape in international law, some commentators support the approach prioritizing consent as an element of a crime. Engle in particular suggests that focusing on the notion of coercive circumstances dilutes the concept of consent within the ICTY jurisprudence and therefore has diminishing effect on women’s political and sexual agency during the Yugoslav conflict.¹⁰⁶ The argument in favour of prioritising non-consent is also advanced by Boon, who argues that such an approach would promote the victim’s individual perspective, free will and agency instead of focusing on the power exercised by the perpetrator.¹⁰⁷

It remains highly problematic that prosecution of crimes of sexual violence as crimes against humanity requires the additional proof of non-consent, whereas other criminal acts falling under the threshold of crimes against humanity do not need to satisfy this

¹⁰⁴ *Prosecutor v. Gacumbitsi*, Appeal Judgment, ICTR-2001-64-A, 7 July 2006, para.155.

¹⁰⁵ *Prosecutor v. Milutinović et al.*, Trial Judgment, IT-05-87, 26 February 2009, para.198; Following the acquittal of Milan Milutinović in 2009, the case became *Prosecutor v. Šainović et al.*

¹⁰⁶ Karen Engle, ‘Feminism and its (Dis)contents: Criminalising Wartime Rape in Bosnia and Herzegovina’ (2005) 99 *American Journal of International Law* 806, 810-811.

¹⁰⁷ Kristen Boon, ‘Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent’ (2001) 32 *Columbia Human Rights Law Review* 669-671.

criterion. It may even appear absurd to imply that one should prove consent to torture or enslavement when prosecuting these acts as crimes against humanity or war crimes. By extension, deBrouwer notes, if one accepts that rape may form a part of genocide, this would imply that a victim could consent to genocide.¹⁰⁸ Therefore, the long-established existence of consent as an integral element of the definition of rape in domestic jurisdictions is a hardly convincing reason for applying the same approach to prosecuting rape as a crime against humanity or war crime in ICL.¹⁰⁹ The fact that rape is a sexual violence crime should not be a factor in justifying implementation of an effectively higher threshold for prosecution of rape as a crime against humanity than the threshold applicable to other crimes against humanity; nor should, as O’Byrne notes, “the mere fact that [sexual assaults] are constituted by acts targeting sexual organs, sexuality or women”.¹¹⁰

Whilst nearly all cases currently pending before the ICC involve a charge of rape, the ICC has not yet successfully prosecuted rape under the Rome Statute.¹¹¹ Therefore, one can only speculate on the approach taken by the ICC judges towards interpretation of elements of rape as a crime against humanity. So far, the definition of rape in the ICC EOC appears to depart from the problematic notion of non-consent as an element of rape and this element is not included in the definition. However, the concepts of coercive circumstances as well as incapability of giving genuine consent are articulated in the definition as alternatives to ‘coercion, force or use of force’:

“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”.¹¹² (emphasis added)

On the whole, the test of coercive circumstances appears to be the most adequate tool

¹⁰⁸ de Brouwer (2005), *supra* 24, 121.

¹⁰⁹ *Ibid.*, 120-123.

¹¹⁰ Wolfgang Schomburg, Ines Peterson, ‘Genuine Consent to Sexual Violence under International Criminal Law’ (2007) 101 *American Journal of International Law* 121, 126; Katie O’Byrne, ‘Beyond Consent: Conceptualising Sexual Assault in International Criminal Law’ (2011) 11 *International Criminal Law Review* 495, 512

¹¹¹ Information correct as of 1 January 2016.

¹¹² Article 7(1)(g)-1 ICC EOC.

for determining the lack of consent in rape cases in international law. The concept of coercive circumstances reflects well the reality in which rape is committed as a crime against humanity, an aspect which cannot be ignored when prosecuting such crimes. This contention is supported by the leading case law (*Kunarac, Gacumbitsi*) where, despite the language of non-consent being used, the judges relied wholly on the concept of coercive circumstances in reaching their decisions. Furthermore, the application of the coercive circumstances test avoids the revictimization of victims during the trial, as they would not be subjected to a line of questioning regarding their conduct when the act was committed. Despite the criticism surrounding the application of the concept of coercion to rape cases in international law, the test of coercive circumstances does not diminish the fact that the victim is an autonomous person. To the contrary, it merely recognizes that the circumstances may impact on the ability or the opportunity of the victim to exercise her free will, resulting in the commission of a criminal act which violates the sexual autonomy of the victim.

3.1.1.3. The (in)visibility of rape as a gender crime

It is undisputable that in the past two decades rape became particularly 'visible' as a crime, both in international law and on the international scene more generally. Prosecutions of rape as an international crime, be it as crime against humanity, war crime or genocide, by the international criminal courts and tribunals, have been accompanied by campaigns aiming at prevention of rape and sexual violence as weapons of war.¹¹³ Nevertheless, it remains questionable whether rape has actually been conceptualized as a gender crime in international law in addition to establishing it as a crime committed on ethnic, racial, nationalist or religious grounds. It is argued that in order to show the real extent of rape as a crime against humanity, the

¹¹³ These campaigns were both UN-driven (e.g. Stop Rape Now) and also conducted on a governmental level, such as Prevention of Sexual Violence in Conflict Initiative launched in May 2012 by William Hague, the UK Foreign Secretary.

Foreign & Commonwealth Office, Stop Rape Now: UN Action on Prevention of Sexual Violence in Conflict <<http://www.stoprapenow.org/>> accessed 14 February 2014; Foreign & Commonwealth Office, Preventing Sexual Violence in Conflict Initiative <<https://www.gov.uk/government/policies/preventing-conflict-in-fragile-states--2/supporting-pages/preventing-sexual-violence-initiative>> accessed 14 February 2014.

international criminal courts and tribunals need to apply an intersectional analysis, inclusive of gender as well as other factors due to which rape has been committed.¹¹⁴

The gender aspect of rape particularly fades away during prosecutions of rape as a crime against humanity committed in the context of ethnic conflict, such as in Rwanda or in the Former Yugoslavia. The selected cases from international criminal courts and tribunals, in particular *Prosecutor v. Gacumbitsi* and *Prosecutor v. Krstić*, illustrate this flawed approach. The victim's ethnicity often becomes the predominant narrative in conceptualizing the crime, whilst gender is omitted from the analysis. To a great extent, the Statutes of the Tribunals limit the scope for prosecuting rape as a gender crime because gender is not included as a discriminatory ground in provisions on crimes against humanity. This understandably constrains the ability of the tribunal to explicitly charge and prosecute rape as a crime against humanity motivated by gender discrimination. Nonetheless, the Tribunals ought to incorporate gender into the broader analysis of the crime, showing that it is in fact one of the discriminatory grounds. Application of the intersectional approach and making gender an integral part of the inquiry would thus demonstrate that the victim's gender combined with the victim's ethnicity are the discriminatory grounds pursuant to which the crime had been committed. The intersectional approach which focuses on, Charlesworth notes, "the multiple fluid structures of domination which intersect to locate women differently at particular historical conjunctures" rather than "a notion of universal patriarchy operating in a transhistorical way to subordinate all women" is particularly useful in the context of those international crimes which involve a gender dimension.¹¹⁵ For example, Buss describes the mass rape of women in Yugoslavia as an example of a phenomenon where gender, sexual violence and nationalism were intertwined,

¹¹⁴ This argument is also supported by various academic commentators: Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 McGill Law Journal 217; Llezlie L. Green, 'Gender hate propaganda and sexual violence in the Rwandan genocide: an argument for interdisciplinarity in international law' (2002) 33 Columbia Human Rights Law Review 764; Doris Buss, 'The curious visibility of wartime rape: gender and ethnicity in international criminal law' (2007) 25 Windsor Yearbook of Access to Justice 3.

¹¹⁵ This section focuses on intersectionality between ethnicity and gender in relation to rape as a crime against humanity. Hilary Charlesworth, 'The Feminist Methods in International Law' (1999) 93(2) American Journal of International Law 379.

resulting in the commission of crimes against humanity.¹¹⁶

The shortcomings of the current approach to prosecution of rape as a crime against humanity are evidenced by the ICTR decision in *Gacumbitsi*, a case concerning the defendant's responsibility for inciting rapes of Tutsi women in his public speech as well as his individual responsibility for committing acts of murder and rape. One of the victims was a Hutu woman married to a Tutsi man (Witness TAS) who was raped by two Hutu men. The ICTR was faced with a dilemma of how to approach prosecution of this crime. In order to prosecute it as a crime against humanity, it needs to be shown (apart from producing evidence to confirm the act of rape itself) that the rape of Witness TAS formed a part of widespread or systematic attack against Tutsi population. The Hutu ethnicity of the victim posed a significant challenge as she did not belong to the population group under attack. However, the Tribunal approached the issue in a rather peculiar manner and held that

“(...) through the woman, it was her husband, a Tutsi civilian, who was the target. Thus, the rape was part of the widespread attacks against Tutsi civilians (...)”.¹¹⁷

This approach is problematic, although it demonstrates an attempt to interpret the rape of Witness TAS within the broader context of widespread and systematic attack during Rwandan genocide. Firstly, it views rape of Witness TAS as an offence committed against her husband, not her as an individual. Secondly, by viewing the rape as an act committed against a particular ethnic group (here represented by Witness TAS' husband), the Trial Chamber ignored the individual aspect of harm as well as its gender dimension. The crime is effectively portrayed only through a lens of ethnicity and is interpreted as a crime against a community. Such method demonstrates the limits of viewing rape through the lens of ethnicity only and reveals a narrow understanding of sexual violence against women, especially in the context of ethnic conflict. Rape in *Gacumbitsi* is undoubtedly visible as a crime, however the

¹¹⁶ Doris Buss, 'Women at the Borders: Rape and Nationalism in International Law' (1998) 6 Feminist Legal Studies 171.

¹¹⁷ *Gacumbitsi*, Trial Judgment, para.222.

understanding of the offence as well as its causes are under-explored and rather narrowly constructed. Whilst the ethnic dimension certainly cannot be ignored, it should not be the sole explanation of sexual violence in ethnic conflict, or the exclusive lens through which the rape of Witness TAS is analysed. Buss further notes that an approach that is overly focused on ethnicity instead of the intersection of ethnicity and gender largely ignores the pre-conflict patterns and practices of inequality, which enabled this particular form of abuse in the first place.¹¹⁸

The decision in *Gacumbitsi* stands in strong contrast to the decision of the ICTY in *Krstić*, a case concerning the execution of approximately seven to eight thousand Bosnian Muslim men in Srebrenica. The Trial Chamber engaged in intersectional analysis of gender and ethnicity in the context of the Srebrenica genocide and gave explicit recognition to the impact of the Srebrenica massacre on Bosnian Muslim women. By recognizing that Bosnian Muslims of Eastern Bosnia were a patriarchal society, the Tribunal held that:

“[f]or Bosnian Muslim women it is essential to have a clear marital status, whether widowed, divorced or married; a woman whose husband is missing does not fit any of these categories”.¹¹⁹

The application of an intersectional approach by the ICTY to the Srebrenica massacre showed the impact of mass murder of Bosnian Muslim men on Bosnian Muslim women although they were not direct victims of the crime. The ICTY referred to the pre-conflict societal and gender relations in the Bosnian Muslim community, which deepened the understanding of the real scope and impact of the atrocities committed in Srebrenica. The Tribunal also found that “Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men have on survival of a traditionally patriarchal society”.¹²⁰ However, the ICTY’s decision, whilst praised on the one hand, received criticism for portraying Bosnian Muslim society in a static, one-dimensional fashion. It was criticized for viewing Bosnian

¹¹⁸ Doris Buss, ‘The curious visibility of wartime rape: gender and ethnicity in international criminal law’ (2007) 25 Windsor Yearbook of Access to Justice 3, 10, 17.

¹¹⁹ *Prosecutor v. Krstić*, Trial Judgment, IT-98-33-T, 2 August 2001, para.93.

¹²⁰ *Prosecutor v. Krstić*, Trial Judgment, IT-98-33-T, 2 August 2001, para.595.

Muslim women in a pre-modern context, oppressed by their Muslim-ness and the patriarchal system and reduced to their reproductive role, thereby denying them their individual agency and identity.¹²¹

Despite existing criticisms, a comparison between *Gacumbitsi* and *Krstić* suggests that the intersectional approach to rape as an international crime may be the better one. This is especially the case when rape is committed in the context of ethnic or religious conflict, where gender and other factors such as race, ethnicity or religion intersect and produce a particular type of violence. However, as evidenced by *Krstić*, the intersectional approach needs to be informed by the inquiry-based approach of the courts rather than, (which has been the case so far) the preconceived and often stereotypical ideas about a particular society or group. Gender is not a static factor and it is capable of evolving together with the changes in society. Thus, the broader context of modern societal relations needs to be taken into account in order to avoid stereotypical framing of rape and its impact on the victims. Otherwise, the legal decisions that are produced “presume rather than interrogate the processes by which conflict is deemed to be ethnic, and violence becomes sexual”.¹²²

3.1.2. Enhancing the visibility of gender-based crimes as crimes against humanity

Gender-based crimes have also been prosecuted by international criminal tribunals as acts amounting to crimes listed under other headings of crimes against humanity. These include torture, enslavement, persecution and other inhumane acts. Successful prosecution of acts of sexual violence under these headings was a significant step in ensuring the visibility of gender-based crimes as constitutive acts of other crimes against humanity.

The scope of Article 7 of the ICC Statute is broader than the equivalent provisions of the statutes of the ICTY, the ICTR and the SCSL. It goes further than these instruments in defining with more precision various acts of a sexual and gender-based nature

¹²¹ Doris Buss, ‘The curious visibility of wartime rape: gender and ethnicity in international criminal law’ (2007) 25 Windsor Yearbook of Access to Justice 3, 19-20.

¹²² Doris Buss, ‘Sexual violence, ethnicity, and intersectionality in international criminal law’ in Emily Grabham, Davina Cooper, Jane Krishnadas, Didi Herman (eds) *Intersectionality and Beyond. Law, power and the politics of location* (Routledge 2009) 118.

which, under certain circumstances, may amount to a CAH. Article 7(1)(h) of the ICC Statute includes “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as acts potentially amounting to a CAH. As such, it allows the ICC to charge and prosecute gender crimes with greater precision as to the exact type of act committed, whereas in the past some of the acts listed in Article 7(1)(g) had to be prosecuted under a different heading of the CAH provision.¹²³

3.1.2.1. Enslavement and sexual slavery

Enslavement is categorized as a CAH in the statutes of the IMTN (Article 6(c)), the IMTFE Charter (Article 5(c)), the ICTY (Article 5(c)), the ICTR (Article 3(c)), the SCSL (Article 2(c)) and the ICC (Article 7(1)(c)). In addition, the SCSL Statute and the ICC Statute specify sexual slavery as a separate CAH in Article 2(g) and Article 7(1)(g) (respectively).

The ICTY was the first international criminal tribunal to successfully prosecute the acts of sexual and gender-based violence under the heading of enslavement. In *Kunarac*, the ICTY Trial Chamber defined the actus reus of enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person”.¹²⁴ The ICTY also specified the indicia for enslavement, which include:

“the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour”.¹²⁵

The Trial Chamber held that acts of rape committed by the accused amount to both rape and enslavement under Article 3 of the ICTY Statute. By recognizing that the

¹²³ This point was articulated by the ICTR Trial Chamber in *Prosecutor v. Semanza*, Trial Judgment, ICTR-97-20-T, 15 May 2003: “ (...) the Chamber recognises that other acts of sexual violence that do not satisfy this narrow definition may be prosecuted as other crimes against humanity within the jurisdiction of this Tribunal such as torture, persecution, enslavement, or other inhumane acts” (para.345).

¹²⁴ *Kunarac*, Trial Judgment, para.540.

¹²⁵ *Ibid.*, para.543.

accused “forced their captives to endure rape as an especially odious form of their domestic servitude”, the Appeals Chamber in *Kunarac* further upheld that rape and enslavement, although based (in the factual circumstances in *Kunarac*) on the same act, are two distinct offences.¹²⁶ Although the decision in *Kunarac* did not invoke the language of ‘sexual slavery’ per se, the ICTY conceptually recognized that acts of sexual violence may in certain circumstances amount to enslavement. As such, *Kunarac* marked a significant development in the jurisprudence of the international criminal tribunals in relation to the crime of sexual slavery. It also departed from the unfortunate legacy of the IMTN and IMTFE which, despite the evidence of sexual slavery being committed during WW II (e.g. evidenced by ‘comfort women’ in the Far East), did not prosecute sexual slavery in their judgments.

The SCSL considered sexual slavery in relation to the acts of forced marriage in *AFRC*, *RUF* and in *Taylor*.¹²⁷ Nonetheless, the SCSL Appeals Chamber in *AFRC* held that acts of forced marriage amount to a CAH of ‘other inhumane acts’ rather than sexual slavery (discussed in further detail in section 3.1.2.4. below). The first-ever convictions for sexual slavery as an international crime were handed down by the SCSL in *RUF*, where the Trial Chamber defined sexual slavery as comprising of the following elements:

- (i) The Accused exercised any or all the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
- (ii) The Accused caused such person or persons to engage in one or more acts of a sexual nature; and
- (iii) The Accused intended to exercise the act of sexual slavery or acted in the reasonable knowledge that this was likely to occur.¹²⁸

The SCSL adopted the list of indicia for enslavement from *Kunarac*. Furthermore, the SCSL confirmed in all three cases that for the purposes of sexual slavery the victims

¹²⁶ *Kunarac*, Appeals Judgment, para.186.

¹²⁷ For a discussion of the SCSL approach towards prosecution of sexual slavery see: Valerie Oosterveld, ‘Evaluating the Special Court for Sierra Leone’s Gender Jurisprudence’ in: Charles Chernor Jalloh, *The Sierra Leone Special Court and its Legacy. The Impact for Africa and International Criminal Law* (CUP 2014) 234, 239-244.

¹²⁸ *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T, 2 March 2009, para.158.

need not be physically confined - to the contrary, they may remain in the captor's control because they have nowhere else to go and fear for their lives.¹²⁹

So far, the ICC has not successfully prosecuted sexual slavery. Nonetheless, sexual slavery charges have been entered against Germain Katanga (acquitted following trial) and Bosco Ntaganda.¹³⁰

3.1.2.2. Torture

Torture figures as a crime against humanity in Article 5(f) of the ICTY Statute, Article 3(f) of the ICTR Statute, Article 2(f) of the SCSL Statute and Article 7(1)(f) of the ICC Statute. As torture is proscribed but not defined in IHL, the Tribunals needed to specify the meaning of torture committed in the context of armed conflict. The earlier cases before the ICTY and the ICTR (*Akayesu*, *Furundžija*, *Čelebići*) adopted the definition of torture enshrined in Article 1(1) of the UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984 (CAT 1984), which states:

“(...) the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.¹³¹

Nonetheless, the Trial Chamber was of the view that the human rights definition of torture needed to be adjusted to reflect the contextual circumstances in which torture

¹²⁹ *Prosecutor v. Brima et al.*, Trial Judgment, SCSL-04-16-T, 20 June 2007; *Prosecutor v. Brima et al.*, Appeal Judgment, SCSL-04-16-A, 22 February 2008, para.709; *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T, 2 March 2009, para.161; *Prosecutor v. Taylor*, Judgment, SCSL-03-01-T, 18 May 2012, para.420.

¹³⁰ *Situation in the Democratic Republic of the Congo: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) (30 September 2008), paras. 428-436 (Count 6); *Situation in the Democratic Republic of the Congo: Prosecutor v. Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06 (9 June 2014) paras.53-57.

¹³¹ Article 1(1) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85.

is committed during armed conflict. As such, the Trial Chamber eliminated the fourth requirement present in the CAT definition, namely the requirement that an act of torture is perpetrated by a person acting in official capacity.¹³² Therefore, the Trial Chamber held that the elements of torture under IHL, which reflect customary international law are:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- (ii) The act or omission must be intentional.
- (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.¹³³

Kunarac marked the first successful conviction by the international criminal tribunal for acts of sexual violence amounting to torture as a CAH. The accused Kunarac and Vukovic were found guilty of torture as a crime against humanity (and also as a war crime) for committing acts of sexualized torture on Muslim women and girls. The Trial Chamber viewed rapes as acts resulting in severe mental and physical pain and suffering for the victims and therefore amounting to torture.¹³⁴ The ICTY Trial Chamber held that women and girls were chosen to be raped because they were Muslim and female, which constituted a prohibited ground (discrimination) for purposes of the torture definition.¹³⁵ The accused intentionally committed rape as torture with this particular discriminatory intention in mind.

The ICTR followed *Kunarac* in *Prosecutor v. Semanza* by cumulatively charging and prosecuting rape under Articles 3(f) (torture) and 3(g) (rape) of the ICTR Statute.¹³⁶ The ICTR Trial Chamber found the accused guilty of inciting a crowd to rape Tutsi women before killing them.¹³⁷ The Trial Chamber was satisfied that rapes were committed intentionally on the basis of discrimination against Tutsi females and that they caused

¹³² *Kunarac*, Trial Judgment, para.496.

¹³³ *Ibid.*, para.497, confirmed on appeal: *Kunarac et al.*, Appeals Judgment, IT-96-23 & IT-96-23/1-A, 12 June 2002, para.156.

¹³⁴ *Kunarac*, Trial Judgment, para.669.

¹³⁵ *Ibid.*, para.654.

¹³⁶ *Prosecutor v. Semanza*, Trial Judgment, ICTR-97-20-T, 15 May 2003.

¹³⁷ *Ibid.*, paras.481-482.

severe mental suffering to the victims, therefore satisfying the material elements of torture as a crime against humanity.¹³⁸

Prosecution of sexual violence as a constitutive element of torture as a CAH marked an important step in enhancing the visibility of gender crimes in ICL. These developments emphasized that acts of sexual violence often form a part of other international crimes - an aspect which is often forgotten when gender crimes are involved. The practice of cumulative charging exemplified in *Kunarac* and *Semanza* was nonetheless rejected by the ICC in the decision on the confirmation of charges in *Prosecutor v. Bemba*.¹³⁹ In the amended Document Containing the Charges, the ICC Prosecutor charged Bemba with committing “crimes against humanity by inflicting severe physical or mental pain or suffering through acts of rape or other forms of sexual violence, upon civilian men, women and children in the Central African Republic, in violation of Articles 7(1)(f) and 25(3)(a) or 28(a) or 28(b) of the Rome Statute” in addition to the count of rape as a CAH.¹⁴⁰ The inclusion of two separate but related charges was supported by the fact that victims were raped in front of their family members.¹⁴¹ Therefore, the pain and suffering was experienced by those who were raped in front of family members but also by those who were forced to watch their family members being raped. However, the Pre-Trial Chamber II refused to confirm the separate count of torture as a CAH, arguing that the act of torture was “fully subsumed by the count of rape”.¹⁴²

The approach presented by the ICC in this decision is highly problematic. The reasoning of Pre-Trial Chamber II (or rather the lack of it) regarding the opinion that the act of torture is subsumed in the charge of rape is questionable. It remains unclear how the material elements of the crime of torture, which was inflicted on persons forced to watch their family members being raped, could be subsumed under a single charge of rape as a crime against humanity. Unfortunately, the decision of the Pre-Trial Chamber II did not offer further elaboration on this matter. Finally, the approach that the ICC

¹³⁸ Ibid., paras.483-485.

¹³⁹ *Situation in the Central African Republic: Prosecutor v. Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009).

¹⁴⁰ *Situation in the Central African Republic: Prosecutor v. Bemba* (The Amended Document Containing the Charges) ICC-01/05-01/08-395-Anx3 (30 March 2009) 35.

¹⁴¹ *Situation in the Central African Republic: Prosecutor v. Bemba*, supra 138, paras.165, 177.

¹⁴² Ibid., paras.204-205.

took in this case does not recognize the suffering of the persons witnessing rapes as well as the gender-based nature of the crime.

3.1.2.3. Persecution

Persecution is a CAH under the statutes of the ad hoc international criminal tribunals, the SCSL and the ICC.¹⁴³ The statutory provisions of the ICTY, ICTR and the SCSL list a basic number of prohibited grounds of persecution, which include political, racial, religious and, in the case of SCSL only, ethnic grounds. The ICC Statute offers by far the broadest list of persecutory grounds. Article 7(1)(h) defines persecution as an act committed

“against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”.

Accordingly, the ICC Statute is the first treaty to recognize gender as the basis for persecution and also the first international instrument which provides a definition of persecution.¹⁴⁴

The ICTY has particularly rich jurisprudence on the issue of persecution as a CAH.¹⁴⁵ The ICTY Appeals Chamber in *Prosecutor v. Krnojelac* defined persecution as

“an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus); and was carried out deliberately with the intention to

¹⁴³ Article 5(h) ICTY Statute, Article 3(h) ICTR Statute, Article 2(h) SCSL Statute, Article 7(1)(h) ICC Statute.

¹⁴⁴ The definition of persecution is enshrined in Article 7(1)(h) of the ICC EOC. These two issues are highly important and much debated in the context of International Refugee Law, as discussed in Chapter 3.

¹⁴⁵ See generally: Jonas Nilsson, ‘The Crime of Persecution in the ICTY Case-law’ in: Bert Swart, Alexander Zahar, Göran Sluiter, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 219-246.

discriminate on one of the listed grounds, specifically race, religion or politics (the mens rea)".¹⁴⁶

In the interpretation of the ad hoc tribunals, the acts or omissions which underlie the crime of persecution do not need to constitute a crime in international law, but nonetheless must be of the same level of gravity as the crimes listed in the ICTY or ICTR statutes. In contrast, the ICC Statute additionally requires a connection between persecution and either one of the acts listed in Article 7(1) or any crime within the jurisdiction of the Court. Cryer et al question the customary law status of this definition by pointing out that such requirement is absent in the Tribunals' jurisprudence.¹⁴⁷ Furthermore, as noted by the ICTY Trial Chamber in *Kupreškić*, "although the Statute of the ICC may be indicative of the *opinio juris* of many states, Article 7(1)(h) is not consonant with customary international law".¹⁴⁸ However, in practical terms, it is highly likely that acts of persecution will normally be linked to at least one of the acts recognized as criminal under the ICC Statute or otherwise forbidden in international law. Thus far, the international criminal tribunals recognized a range of acts as amounting to persecution, including murder, extermination, imprisonment, deportation, transfer of populations, torture, enslavement and attacks on property.¹⁴⁹

The ICTY and the ICTR have successfully prosecuted acts of sexual and gender-based violence committed against women as well as against men, as persecution.¹⁵⁰ In *Stakić* and *Brdanin*, the ICTY Trial Chamber held that rapes committed against women of Bosnian Muslim or Bosnian Croat origin were discriminatory in nature and therefore amounted to persecution.¹⁵¹ The ICTR also found rapes committed against Tutsi

¹⁴⁶ *Prosecutor v. Krnojelac*, Appeals Judgment, IT-97-25-A, 17 September 2003, para.185; confirmed in *Prosecutor v. Popović et al.*, Trial Judgment, IT-05-88-T, 10 June 2010, para.946.

¹⁴⁷ Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, *The Introduction to International Criminal Law and Procedure* (2014 Cambridge University Press) 257.

¹⁴⁸ *Prosecutor v. Kupreškić*, Trial Judgment, IT-95-16-T, 14 January 2000, para.580.

¹⁴⁹ *Prosecutor v. Tadić*, Trial Judgment, IT-94-1-T, 7 May 1997, paras.704-710; *Kupreškić* (Trial Judgment) para.594; *Prosecutor v. Kordić and Čerkez*, Trial Judgment, IT-95-14/2, 26 February 2001, para.205.

¹⁵⁰ In *Todorović*, the ICTY Trial Chamber held that ordering detained men to perform fellatio on each other amounted to persecution. *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgment, paras.9, 12, 38-40.

¹⁵¹ *Prosecutor v. Brdanin*, Trial Judgment, IT-99-36-T, 1 September 2003, paras.1010-1011; *Prosecutor v. Stakić*, Trial Judgment, IT-97-24-T, 31 July 2003, para.806.

women at Kigali roadblocks and in two religious buildings as amounting to persecution.¹⁵² However, rape is not the only act of sexual and gender-based violence to be recognized as persecutory in nature. In *Brdanin*, the ICTY recognized that acts of sexual nature might also amount to persecution, e.g. forcing detainees to have sex with each other or forcing a Bosnian Muslim woman to undress in front of cheering Bosnian Serb policemen.¹⁵³ Furthermore, the ICTR acknowledged that gendered language may also be a contributing factor to a criminal act of persecution. To that end, the ICTR in *Nahimana* considered that the media portrayal of Tutsi women as *femmes fatales* and as seductive agents of the enemy created a “framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them”.¹⁵⁴

More recently, the ICTY Appeals Chamber in *Prosecutor v. Šainović et al* and in *Prosecutor v. Dorđević* found (reversing the acquittals by the Trial Chamber) the members of the Serbian leadership guilty of acts of persecution by sexual assaults committed by their troops during the ethnic cleansing in Kosovo in 1999.¹⁵⁵ In both cases, the ICTY Appeals Chamber found the accused guilty on the basis of the doctrine of joint criminal enterprise. By finding that sexual assaults amounted to persecution, the ICTY Appeals Chamber in *Šainović* and in *Dorđević* considered sexual violence in the broader context of systematic campaign of terror and violence, similarly to the type of consideration normally given to any other violent acts.¹⁵⁶ As such, the ICTY accurately portrayed sexual assaults not as opportunistic crimes, but as a part of a campaign motivated by discrimination on the basis of ethnicity.¹⁵⁷

Thus far, the ICC has not prosecuted acts of gender-based persecution. However, the charges of persecution through acts of sexual and gender-based violence were included in the arrest warrants for Ahmad Muhammad Harun, Ali Muhammad Ali Abd-

¹⁵² *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Judgment and Sentence, 18 December 2008, para.2210.

¹⁵³ *Prosecutor v. Brdanin*, Trial Judgment, IT-99-36-T, 1 September 2003, paras.1012-1013.

¹⁵⁴ *Prosecutor v. Nahimana et al.*, ICTR-96-11-T, 3 December 2003, para.1079.

¹⁵⁵ *Prosecutor v. Šainović et al.*, Appeals Judgment, IT-05-87-A, 23 January 2014, para.1604; *Prosecutor v. Dorđević*, Appeals Judgment, IT-05-87/1-A, 27 January 2014.

¹⁵⁶ *Prosecutor v. Dorđević*, Appeals Judgment, IT-05-87/1-A, 27 January 2014, para.891.

¹⁵⁷ *Ibid.*, para.892.

Al-Rahman and Abdel Raheem Muhammad Hussein for acts of persecution committed in Darfur.¹⁵⁸ Therefore, one may only speculate about the future approach of the ICC towards the prosecution of acts of gender-based persecution as crimes against humanity. Whilst at present there is no further case law (other than the arrest warrants mentioned above) which would illustrate the ICC approach to gender-based persecution, other decisions of the ICC prompt concerns about the prospects of successful prosecution of this newly codified international crime. One of the key concerns is the demonstrative reluctance of the ICC to cumulatively charge offences of a sexual and gender-based nature.¹⁵⁹ The decision of the Pre-Trial Chamber II in *Prosecutor v. Bemba* (discussed in detail in section 3.1.2.6. below), where the Chamber held that the charges of rape, torture and outrages upon personal dignity based on the same conduct were not to be charged as separate offences but instead captured under a single charge of rape, illustrates this point. Oosterveld shares these concerns and rightly notes that “if not remedied, the associated harms resulting from the various gender-related charges will not be fully captured in the trial judgment”.¹⁶⁰ This point raises significant issues for the future prospects of achieving gender justice at the ICC. The diversity of harms suffered by the victims of crimes of sexual and gender-based violence should be adequately reflected in the charges placed before the court and then prosecuted at trial stage. The accuracy of charging and prosecuting sexual and gender violence crimes has a practical implication for the victims in that harms suffered by them are recognized and, if proven guilty, the accused is held accountable for committing gender crimes in the same way as for any other violent crimes. Finally, the successful prosecution of crimes of sexual and gender-based violence enables the victims to receive a remedy in form of reparations for these acts.¹⁶¹

¹⁵⁸ *Situation in Darfur, Sudan: Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (27 April 2007), counts 10 and 39; *Situation in Darfur, Sudan: The Prosecutor v. Abdel Raheem Muhammad Hussein*, ICC-02/05-01/12, Warrant of Arrest for Abdel Raheem Muhammad Hussein (1 March 2012), count 1.

¹⁵⁹ The issue of cumulative charging is discussed in greater detail in Chapter 5.

¹⁶⁰ Valerie Oosterveld ‘Prosecuting Gender-Based Persecution as an International Crime’ in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 75.

¹⁶¹ The topic of reparations for gender-based harms is discussed in detail in Chapter 6 of this thesis.

Another concern relates to the way in which the ICC will approach (if at all) gender as a recognized ground for persecution under Article 7(1)(g) of the ICC statute. As discussed in section 2.3.1. above, the mere definition of gender adopted by the ICC statute has its limitations caused primarily by a confused and limiting phraseology used in defining this term. Should the ICC prosecute acts of gender-based persecution, it will have to revisit and clarify the scope of the term under the ICC Statute. Given the difficulties surrounding the definition of gender at the ICC, it remains uncertain whether the ICC will successfully engage in the intersectional approach towards persecution. Persecutory acts are often committed on more than one ground. For instance, sexual violence may amount to a persecutory act equally based on gender and ethnicity (and possibly more grounds) at the same time. In order to recognize the true extent of the crime of persecution, it is crucial that the ICC Prosecutor and the ICC judges give recognition to all discriminatory grounds for persecution which were engaged in committing a particular act. The prevalence of acknowledging other grounds (such as race or ethnicity) over gender has been highlighted by Buss, who noted that such approach effectively maneuvers the complexity of sexual violence and inequality out of the decisions of international criminal tribunals.¹⁶² Therefore, in cases of persecution based on multiple grounds including gender, there exists a possibility that the Prosecutor might find it strategically easier to prioritize and plead more 'established' grounds (such as ethnicity, race or political views) at the cost of sidelining gender as a persecutory ground.

3.1.2.4. 'Other inhumane acts'

The category of 'other inhumane acts' is used as a residual category for prosecuting crimes which pertain to crimes against humanity but do not amount to other grounds listed in the provisions on crimes against humanity.¹⁶³ With regard to crimes of sexual

¹⁶² Doris Buss, 'The curious visibility of wartime rape: gender and ethnicity in international criminal law' (2007) 25 Windsor Yearbook of Access to Justice 3, 6.

¹⁶³ Article 5(i) ICTY Statute, Article 3(i) ICTR Statute, Article 7(1)(k) ICC Statute, Article 2(i) SCSL Statute. "[T]he crime of inhumane acts functions as residual category for serious charges which are not otherwise enumerated in Article 5": *Prosecutor v. Vasiljević*, Trial Judgment, IT-98-32-T, 29 November 2002, para.234.

violence, the category of 'other inhumane acts' has been used as a 'catch-all' category for acts that do not fulfill the threshold of rape as a crime against humanity. This is particularly the case in relation to acts of sexual violence which do not involve penetration or sexual contact, but are nonetheless considered as sexual in their nature, such as forced nudity or sexual mutilation.¹⁶⁴ The category of 'other inhumane acts' is also included in Article 7(1)(k) of the ICC Statute. However, the ICC Statute, which contains much more detailed provisions regarding sexual violence as a crime against humanity, additionally includes specific reference to 'any other form of sexual violence of comparable gravity' in Article 7(1)(g). As such, in contrast with the Tribunals, the ICC is capable of charging and prosecuting gender crimes under specific offences contained in Article 7(1)(g).

On a normative level, the category of 'other inhumane acts' remains largely open to judicial interpretation, with "each case being examined on its merits".¹⁶⁵ The broad construction of 'other inhumane acts' allows the courts to have flexibility in adjudication of crimes against humanity and gives recognition to the evolving nature of crimes against humanity. In particular, it enables the courts to punish various acts amounting to crimes against humanity, which were not envisaged at the time of drafting the provisions on crimes against humanity. In fact, the inclusion of 'open-ended' provisions in modern treaties is not unusual and can be observed for instance in Article 7(1)(g) of the ICC Statute ('any other form of sexual violence of comparable gravity') and in the definition of trafficking in human beings in Article 3(a) of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention on Transnational Organized Crime 2000. That said, the wide scope of the provision, whilst beneficial from the perspective of allowing a certain degree of flexibility with respect to charging and prosecuting crimes not thought of at the time of the drafting of a given treaty, causes concerns as to whether there is a sufficient level of specificity of the crime for

¹⁶⁴ The ICTR Trial Chamber in *Akayesu* recognized that acts of sexual violence do not need to involve penetration or sexual contact. *Akayesu*, Trial Judgment, paras. 598, 688; *Prosecutor v. Kvočka et al.*, Trial Judgment, IT-98-30/1-T, 2 November 2001, para.180.

¹⁶⁵ *Kupreškić*, Trial Judgment, para.623.

purposes of ICL.¹⁶⁶ In the search for a definition of ‘other inhumane acts’ which would not hinder its deliberately open-ended nature, the ICTY in *Kupreškić* adopted a human rights-based approach to defining ‘other inhumane acts’. The ICTY suggested that the parameters for identification of ‘other inhumane acts’ can be based on the basic set of human rights which are found in the key human rights instruments, such as the UDHR 1948, ICCPR 1966 and ICESCR 1966.¹⁶⁷ In the ICTY’s view, these rights, if violated in particular circumstances, may amount to a crime against humanity.

However, Bassiouni argues that unlike in cases of other categories of crimes “there is no crime labeled ‘other inhumane acts’ under any source of international or national law” and hence ‘other inhumane acts’ cannot be exhaustively set out and defined.¹⁶⁸ Therefore, a crime against humanity of ‘other inhumane acts’ needs to satisfy the threshold requirements for crimes against humanity, both in relation to the *actus reus* element (an act must form a part of a widespread or systematic attack against the civilian population) and the *mens rea* element (the perpetrator had the intention to commit the offence and had knowledge of its role as a part of an ongoing attack against civilian population) as well as being of equivalent seriousness as other acts explicitly listed in the crimes against humanity provisions. Furthermore, the broad interpretation of ‘other inhumane acts’ initially raised concerns regarding the violation of the *nullum crimen sine lege* principle in that ‘other inhumane acts’ have been defined in international law *ex post facto*. However, this issue has been resolved by the *ad hoc* tribunals, which held that ‘other inhumane acts’ provisions conform with the principle *nullum crimen sine lege* as they proscribe conduct prohibited under customary international law.¹⁶⁹ The courts support this view with the fact that ‘other inhumane acts’ were included as crimes against humanity in the Nuremberg Charter as well as in Article II of Law no.10 of the Control Council for Germany.

International criminal courts and tribunals have applied the category of ‘other

¹⁶⁶ *Ibid.*, para.563.

¹⁶⁷ *Ibid.*, para.566.

¹⁶⁸ M. Cherif Bassiouni, *Crimes against humanity: historical evolution and contemporary application* (CUP 2011) 405.

¹⁶⁹ *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.141. (*Tadić* (Jurisdiction)).

inhumane acts’ to a range of acts of sexual violence other than rape, which would otherwise fail to be prosecuted as crimes against humanity. The ICTR prosecuted forced nudity in *Akayesu*, where the accused was held criminally responsible for forcing several female victims to undress in front of the bureau communal, perform physical exercise naked and marching naked.¹⁷⁰ Furthermore the Trial Chamber reiterated that these acts amounted to sexual violence, although they did not involve penetration or sexual contact.¹⁷¹ In *Kupreškić*, the ICTY prosecuted forced prostitution as ‘other inhumane act’.¹⁷² Furthermore, the ICTR prosecuted castration of men and acts of sexual violence to dead women’s bodies, which included piercing of the sexual organs of a dead woman with a spear, cutting off a dead girl’s breast and licking it, as other inhumane acts.¹⁷³ Notably, the Tribunal also recognized that witnessing of these acts of sexual violence caused mental suffering to civilians who were present at the scene. As such, these acts amounted to a serious attack on the human dignity of the Tutsi population on the whole and therefore should be punished under the category of ‘other inhumane acts’ as crimes against humanity.¹⁷⁴

3.1.2.5. Forced marriage as a CAH of ‘other inhumane acts’

The question of forced marriage as an international crime was raised only before one of the international criminal courts, the SCSL. The SCSL considered forced marriage committed during the civil war in Sierra Leone in the *AFRC, RUF* and in *Taylor*.¹⁷⁵ The *AFRC* Appeals Judgment marked the first time in history where an international criminal court or tribunal held that forced marriage amounts to a crime against

¹⁷⁰ *Akayesu*, Trial Judgment, para.697. Forced nudity was also alleged as a crime against humanity of ‘other inhumane acts’ in *Prosecutor v. Nyiramasuhuko*. However, it was noted by the ICTR Trial Chamber that the Prosecution failed to include these charges in the indictment or produce sufficient evidence to support the alleged crime. *Prosecutor v. Nyiramasuhuko*, Trial Judgment, ICTR-98-42-T, 24 June 2011, paras.6134-6137.

¹⁷¹ *Akayesu*, Trial Judgment, para.688.

¹⁷² *Kupreškić*, Trial Judgment, para.566.

¹⁷³ *Prosecutor v. Niyitegeka*, Trial Judgment, ICTR-96-14-T, 16 May 2003, paras.462-465; *Prosecutor v. Kajelijeli*, Trial Judgment, ICTR-98-44A-T, 1 December 2003, paras.677-678.

¹⁷⁴ *Prosecutor v. Niyitegeka*, Trial Judgment, paras.465-467.

¹⁷⁵ *Prosecutor v. Brima et al.*, Trial Judgment, SCSL-04-16-T, 20 June 2007; *Prosecutor v. Brima et al.*, Appeal Judgment, SCSL-04-16-A, 22 February 2008; *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T, 2 March 2009; *Prosecutor v. Taylor*, Judgment, SCSL-03-01-T, 18 May 2012.

humanity.

Forced marriage became a recognized phenomenon in the context of the Sierra Leonean war. Forced marriage was not a feature of conflicts which were subject to the jurisdiction of the international criminal tribunals created in the 20th century, such as the IMTN, the IMTFE, the ICTY or the ICTR. During the conflict in Sierra Leone, many girls and women were abducted and forced to become 'bush wives' (or 'rebel wives'). They were forcefully 'married' to the rebels and forced to live with them as their 'wives'. Their duties as a 'wife' involved taking care of and carrying their husband's belongings, cooking, cleaning, doing laundry, taking care of the household as well as satisfying the husband's sexual needs on demand.¹⁷⁶ As a result of sexual relations with men, many women became pregnant and gave birth to children fathered by their 'husbands'. Some women also suffered physical injuries, miscarriages and long-term damage to their sexual health resulting from forced sexual intercourse. The impact of forced marriage on victims continued in the aftermath of war. Many women were forced to live with the continuing stigma of being 'bush wives', which not only caused mental trauma but also was the primary reason why some women faced real difficulties reintegrating into their communities or even families.¹⁷⁷

The treatment of forced marriage by the SCSL remains highly controversial, in particular in relation to the categorization of forced marriage under Article 2 of the SCSL Statute. The distinctiveness of forced marriage, which was exemplified both by the character of a crime and by its significant role in the context of the Sierra Leonean conflict, may partly explain why there existed no prohibition of such conduct within the ICL. The defence argued that forced marriage should not be categorized as 'other inhumane act' due to it falling short of satisfying the gravity threshold for the 'other inhumane acts' category. It was also of the view that forcing a woman to enter a marital type relationship is not of gravity similar to any other act referred to in Article 2(a) to (h) of the Statute. At the trial stage, Trial Chamber I of the SCSL held that forced

¹⁷⁶ *Prosecutor v. Brima et al.*, Trial Judgment, SCSL-04-16-T, 20 June 2007, para.711, 997, 1053, 1090-1091, 1105, 1122, 1129, 1154-1156; *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T, 2 March 2009, paras. 460, 1154-55, 1211-1213, 1293, 1295, 1413, 1460, 1472.

¹⁷⁷ *Prosecutor v. Brima et al.*, Appeal Judgment, SCSL-04-16-A, 22 February 2008, para.193.

marriage is subsumed under the category of sexual slavery as a crime against humanity, pursuant to Article 2(g) of the SCSL Statute.¹⁷⁸ Based on examination of the evidence submitted by the Prosecution, the majority of judges viewed the presented evidence of forced marriage as satisfying elements of the crime of sexual slavery. In the Trial Chamber's view, the nature of acts involved in forced marriage was primarily determined by the notion of ownership of the 'wife' by the rebel 'husband' and the exercise of control over her sexuality, movement and labour.¹⁷⁹

The approach of the Trial Chamber to forced marriage was rather disappointing in that it ignored the aspect of the forced conjugal relationship and its impact on the victims in favour of emphasizing only the sexual element of the crime. Such categorization of forced marriage does not reflect the complexity of this crime. Whilst witness evidence in the *AFRC* trial suggested that sexual violence more often than not formed a part of forced marriage, it also demonstrated other aspects of the crime. For instance, in addition to performing household duties, the 'wives' were expected to pledge loyalty to their 'husbands'. This suggested the relationship of exclusivity, which was confirmed by several witnesses in their testimonies.¹⁸⁰ A breach of this exclusive relationship could lead to severe consequences, including death.¹⁸¹ The Dissenting Opinion of Justice Doherty supported the more conceptual view of forced marriage and placed emphasis on the element of forced conjugal relationship, which may (but not necessarily has to) involve physical or sexual violence.¹⁸² Justice Doherty's definition of forced marriage acknowledged the long-lasting and diverse effect of the crime on its victims, especially in relation to the mental trauma suffered by the victims. Justice Doherty accurately argued that

“the conduct contemplated as “forced marriage” does not necessarily involve elements of physical violence such as abduction, enslavement or rape, although the presence of these elements may go to proof of the lack of consent of the victim. The crime is concerned primarily with the mental and moral suffering of

¹⁷⁸ *Prosecutor v. Brima et al.*, Trial Judgment, SCSL-04-16-T, 20 June 2007, para.713.

¹⁷⁹ *Ibid.*, para.711.

¹⁸⁰ *Ibid.*, para.1126, 1139.

¹⁸¹ *Ibid.*, paras.43-44, 1139, 1184.

¹⁸² *Prosecutor v. Brima et al.*, Trial Judgment, SCSL-04-16-T, 20 June 2007, Separate Dissenting Opinion of Justice Doherty, paras.31, 52.

the victim. (...) The crucial element of forced marriage is the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim".¹⁸³

On appeal, the SCSL Appeals Chamber reversed the majority finding presented in the trial judgment and aligned its verdict more closely with the opinion expressed by Justice Doherty. It held that forced marriage satisfies the threshold of 'other inhumane acts' as a crime against humanity. It defined forced marriage as an act involving

"a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim".¹⁸⁴

The decision of Appeals Chamber in *AFRC* confirmed that acts of forced marriage were of equivalent gravity to other acts listed in Article 2 of the SCSL Statute and that they satisfied chapeau requirements for crimes against humanity.¹⁸⁵ Nonetheless, the Appeals Chamber declined to enter fresh (and cumulative) convictions against the accused. It based its decision on the view that society's disapproval of the forceful abduction and use of women and girls as conjugal partners as a part of a widespread or systematic attack on civilian population is adequately reflected by recognizing that such conduct as criminal and that it constitutes an 'other inhumane act' capable of incurring individual criminal responsibility in international law.¹⁸⁶ The first convictions for forced marriage as a crime against humanity of 'other inhumane acts' were entered in the *RUF* trial judgment.¹⁸⁷

Furthermore, in an attempt to conceptualize the crime of forced marriage, the Appeals Chamber relied on a distinction between the practice of arranged marriages in peacetime and forced marriage during armed conflict, which was drawn by Justice

¹⁸³ *Ibid.*, paras.52-53.

¹⁸⁴ *Prosecutor v. Brima et al.*, Appeal Judgment, SCSL-04-16-A, 22 February 2008, para.195.

¹⁸⁵ *Ibid.*, para.200.

¹⁸⁶ *Ibid.*, para.202.

¹⁸⁷ *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T, 2 March 2009, paras.2306-2307.

Sebutinde and Justice Doherty.¹⁸⁸ Arranged marriages are a popular practice in customary law in Sierra Leone, which was confirmed by the testimony of the Expert Witness for the Prosecution, Mrs. Bangura and the Expert Witness for the Defence, Dr. Thorsen.¹⁸⁹ According to the evidence provided by the Expert Witness for the Prosecution, in arranged marriages, the consent of the bride's family (very often of the male representatives) is essential in order for marriage to be concluded. Furthermore, the marriage is preceded by a series of customs which must be performed and culminates in a formal ceremony. The Appeals Chamber upheld the interpretation that forced marriage as substantively different from arranged marriage due to the lack of these customary elements.

However, whilst it is true that forced marriage does not involve consent from the 'bride' or her family nor concludes in a formal ceremony, this reliance on such reasoning, and the largely linguistic distinction between 'arranged' and 'forced' marriage, is highly problematic. Arranged marriages in Sierra Leone (and elsewhere) are in violation of human rights obligations enshrined in the key international human rights treaties, in particular Article 16 CEDAW and Article 23 ICCPR.¹⁹⁰ Furthermore, in many jurisdictions, marrying a minor is also a criminal offence. Although certain differences exist between the two types of marriage, in both cases the consent of the intending spouse is missing, making 'peacetime arranged marriage' essentially a forced one due to the absence of consent. By creating and relying on the distinction between 'arranged' and 'forced' marriages, the Appeals Chamber appears to have neglected highly problematic aspects of peacetime forced marriages.

The SCSL returned to the question of characterization of forced marriage in *Taylor*. Although the crime was not charged in the indictment against Taylor, the witness evidence in relation to charges of sexual violence suggested the occurrence of forced

¹⁸⁸ *Prosecutor v. Brima et al.*, Trial Judgment, SCSL-04-16-T, 20 June 2007, Separate Dissenting Opinion of Justice Doherty, paras.26-28; Separate Concurring Opinion of the Hon. Justice Julia Sebutinde, paras.8-12.

¹⁸⁹ See generally: Henry M. Joko Smart, *Sierra Leone Customary Family Law* (Freetown: Atlantic Printers 1983); Barbara Harrell-Bond, *Family Law in Sierra Leone: A Research Report* (Afrikastudie-Centrum, Leiden: 1971), 13.

¹⁹⁰ Sierra Leone is a party to both of these treaties.

marriages.¹⁹¹ The Trial Chamber took the view that forced marriage should in fact be described as ‘conjugal slavery’, which in the Chamber’s view would encapsulate both the sexual aspect of the crime and the forced labour element. Accordingly, the Trial Chamber viewed forced marriage as two different forms of enslavement (sexual slavery and forced labour) imposed through conjugal association.¹⁹² The Trial Chamber in *Taylor* split these two elements of forced marriage and considered evidence under two separate categories of crimes, namely sexual slavery as CAH and enslavement as CAH.¹⁹³ Whilst this step certainly marks an attempt to reconcile the problem of appropriate characterization of forced marriage, it nonetheless fails to capture this unique phenomenon and consolidate it within the jurisprudence of the court. In a somewhat pragmatic step to divide the sexual and non-sexual elements of the crime, the SCSL reverted from the previous jurisprudence of the court which was attempting to define and conceptualise the crime of ‘forced marriage’ within ICL. As such, the SCSL in *Taylor* (the final case prosecuted before the SCSL) failed to build on previous decisions of the court with regard to forced marriage and to characterize it within a single category of international crimes.

Despite the wide praise of the SCSL for prosecuting forced marriage in the *AFRC* Appeal Judgment, some commentators have questioned the legality of the decision.¹⁹⁴ Goodfellow in particular maintains that the classification of forced marriage as ‘other inhumane act’ by the SCSL Appeals Chamber offended the principle of legality, non-retroactivity and the requirement of specificity in international criminal law.¹⁹⁵ The key error of the SCSL Appeals Chamber was, Goodfellow argues, the absence of identification of an existing international law norm criminalizing forced marriage.¹⁹⁶ However, the application of the *Kupreškić* definition of ‘other inhumane acts’ to acts of

¹⁹¹ *Taylor*, Trial Judgment, para.422.

¹⁹² *Ibid.*, paras.427-429.

¹⁹³ *Ibid.*, paras.1066, 1072-1075, 1094, 1098, 1108, 1144-1146, 1828, 1833.

¹⁹⁴ Nicholas Azadi Goodfellow, ‘The Miscategorization of ‘Forced Marriage’ as a Crime Against Humanity by the Special Court for Sierra Leone’ (2011) 11 *International Criminal Law Review* 831-867; Sidney Thompson ‘Forced Marriage at the Special Court for Sierra Leone: Questions of Jurisdiction, Legality, Specificity, and Consistency’ in Charles Chernor Jalloh, *The Sierra Leone Special Court and its Legacy. The Impact for Africa and International Criminal Law* (CUP 2014) 215-233.

¹⁹⁵ Goodfellow, *Ibid.*, 866.

¹⁹⁶ *Ibid.*, 853.

forced marriage in Sierra Leone supports the view that forced marriage fulfills the criteria of crimes against humanity of 'other inhumane acts'. The ICTY Trial Chamber in *Kupreškić* formulated a human rights-based definition of 'other inhumane acts' which, amongst other criteria, requires an act to be in breach of provisions of the key international human rights treaties (such as the UDHR 1948, the ICCPR 1966 or ICESCR 1966) in order to be classified as inhumane. At the time when the offences charged in the *AFRC* were committed, there existed no explicit provisions in international criminal law criminalizing forced marriage per se. Nonetheless, the prohibition of non-consensual marriage existed in international law at that time. Both the UDHR and the ICCPR explicitly proscribe non-consensual marriage in Articles 16(2) and Article 23(2) respectively. The equivalent provisions are also contained in the CEDAW and in African regional human rights instruments: the African Charter on Human and Peoples' Rights 1981 and the Maputo Protocol.¹⁹⁷ Furthermore, forced marriage could also be interpreted to amount to inhuman or degrading treatment or to servitude and is prohibited (albeit not in an armed conflict-related context) in many national jurisdictions.¹⁹⁸

Nonetheless, it can be argued that forced marriage could have been most adequately conceptualized as a form of enslavement, rather than other inhumane act or sexual slavery as charged by the Prosecution in the *AFRC* case. The vast majority of the commentary on the prosecution of forced marriage by the SCSL confines the debate to these two categories of crimes only, whereas a more thorough examination of the phenomenon of forced marriage as enslavement may appear to capture rather adequately the distinctive nature of this crime.¹⁹⁹ One of the key criticisms of the

¹⁹⁷ CEDAW 1979 (Article 16), African Charter on Human and Peoples' Rights 1981 (Banjul Charter) (Articles 2, 3, 18) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (Maputo Protocol) (Article 6).

¹⁹⁸ Forced Marriage (Civil Protection) Act 2007 (United Kingdom); The Commonwealth Criminal Code Act 1995 (Australia); The Council Of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) 2011, Article 32 (Civil consequences of forced marriages) and Article 37 (Forced marriage).

¹⁹⁹ Valerie Oosterveld, 'The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?' (2007) 45 *Canadian Yearbook of International Law* 131, 151-168; Neha Jain, 'Forced Marriage as a Crime Against Humanity. Problems of Definition and Prosecution' (2008) 6 *Journal of International Criminal Justice* 1013-1032; Micaela Frulli, 'Advancing International Criminal Law. The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New Crime' Against Humanity' (2008) 6

categorization of forced marriage as sexual slavery (as per the Trial Chamber's judgment in *AFRC*) is that it ignores the non-sexual aspects of the crime, such as forced domestic labour, transportation of household or military goods, abduction and the stigma associated with the victims.

The ICTY Trial Chamber in *Kunarac* provided a modern and broad interpretation of the crime of enslavement, which rests on the notion of the exercise of powers attaching to the rights of ownership over another person. According to the tribunal, enslavement may be encompassed in many forms, including "exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking".²⁰⁰ Furthermore, the Trial Chamber listed factors which should be taken into account when determining whether enslavement was committed, such as "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour".²⁰¹ A close examination of the nature of forced marriage allows one to conclude that all of the above factors are indeed enshrined in this criminal act. What is more, viewing forced marriage through the lens of the definition of enslavement from *Kunarac* allows to capture all factors and acts involved in commission of the crime of forced marriage, i.e. both its non-sexual and sexual components.

As rightly noted by Sellers, 'splintering the sexual manifestation of female enslavement

Journal of International Criminal Justice 1033-1042; Jennifer Gong-Gershowitz, 'Forced Marriage: a "New" Crime Against Humanity?' (2009) 8(1) Northwestern Journal of International Human Rights 53-76; Bridgette Toy-Cronin, 'What is forced marriage? Towards a definition of forced marriage as a crime against humanity' (2010) 19(2) Columbia Journal of Gender and Law 539-590; Nicholas Azadi Goodfellow, 'The Miscategorization of 'Forced Marriage' as a Crime Against Humanity by the Special Court for Sierra Leone' (2011) 11 International Criminal Law Review 831-867; Sidney Thompson 'Forced Marriage at the Special Court for Sierra Leone: Questions of Jurisdiction, Legality, Specificity, and Consistency' in: Charles Chernor Jalloh, *The Sierra Leone Special Court and its Legacy. The Impact for Africa and International Criminal Law* (CUP 2014) 215-233; Micheal P. Scharf 'Forced Marriage as a Separate Crime against Humanity' in: Charles Chernor Jalloh, *The Sierra Leone Special Court and its Legacy. The Impact for Africa and International Criminal Law* (CUP 2014) 193-214.

²⁰⁰ *Kunarac*, Trial Judgment, para.543.

²⁰¹ *Ibid.*

under different enumerated acts- forced marriage, other inhumane acts, sexual slavery, or outrages upon personal dignity while omitting the non-sexual acts of ownership, the circumstances of slave trading, and forgoing allegations of enslavement and slavery, is legally unsatisfactory”.²⁰² Therefore, categorization of forced marriage as enslavement would have enabled capturing the complexity and multifaceted nature of this crime and contributed to further conceptualization of the meaning of enslavement within modern international criminal law.

3.1.2.6. ‘Other inhumane acts’ at the ICC

In addition to the separate category of ‘other inhumane acts’ in Article 7(1)(k), the ICC Statute contains a list of specific offences of a sexual and gender-based nature in Article 7(1)(g). This is the broadest treaty provision listing sexual and gender-based crimes to date. Furthermore, Article 7(1)(g) in itself contains a residual category of ‘other forms of sexual violence’, which may be particularly utilized in charging and prosecuting acts otherwise not captured within the scope of this provision. In addition to the chapeau requirements for CAH, the ICC EOC requires that the crime against humanity of sexual violence consists of the following elements:

- 1) The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.
- 2) Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
- 3) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

²⁰² Patricia Viseur Sellers, ‘Wartime Female Slavery: Enslavement?’ (2011) 44(1) Cornell International Law Review 115, 138.

Given this unique aspect of the ICC Statute, it may be argued that the specificity of Article 7(1)(g) may in practical terms mean that gender-based crimes will rarely be charged and prosecuted under the residual category of 'other inhumane acts'. The inclusion of the open-ended category of 'any other acts of sexual violence' in Article 7(1)(g) effectively allows the ICC to prosecute acts of sexual violence which are not explicitly included in that Article without the need to resort to the more general category of 'other inhumane acts'. However, the decision of the Pre-Trial Chamber II in *Prosecutor v. Muthaura et al.* questions, however astoundingly, this hypothesis.²⁰³ In the decision on the confirmation of charges, the Pre-Trial Chamber II refused to consider acts of forcible circumcision and (in some cases) penile amputation inflicted on Luo men as 'other forms of sexual violence' pursuant to Article 7(1)(g) of the ICC Statute.²⁰⁴ Instead, the judges considered these acts to be 'other inhumane acts' under Article 7(1)(k). Surprisingly, the Pre-Trial Chamber II did not view forcible circumcision of men as an act of sexual nature, arguing that "not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence" and that "the determination of whether an act is of a sexual nature is inherently a question of fact".²⁰⁵ What is more, the judges viewed these acts as "motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other" and not as a crime of sexual and gender-based nature.²⁰⁶ In reaching this finding, the Pre-Trial Chamber II appeared to be ignorant of the argument advanced by the Prosecutor suggesting "that these weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities as men within their society and were designed to destroy their masculinity".²⁰⁷

The decision of Pre-Trial Chamber II puts in question the gender strategy of the ICC. The misconceptualisation of the sexual aspect of the crime of forcible circumcision and penile amputation as well as disregard for the gender dimension of the crime, prompts questions regarding the actual approach of the ICC towards gender-based crimes.

²⁰³ *Situation in Kenya: Prosecutor v. Muthaura et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012).

²⁰⁴ *Ibid.*, paras.260-263.

²⁰⁵ *Ibid.*, para.265.

²⁰⁶ *Ibid.*, para.266.

²⁰⁷ *Ibid.*, para.264.

Despite the highly praised advances made by the drafters of the ICC Statute in relation to listing diverse gender crimes, the decision in *Muthaura* displayed a rather limiting and alarming approach of the judges towards crimes of a sexual and gender-based nature, setting an unfortunate precedent for the future practice of charging and prosecuting gender crimes at the ICC. Finally, whilst *Muthaura* concerned acts of sexual violence directed against men, the bizarre finding of the Pre-Trial Chamber II begs the question of whether similar acts directed against women would also be interpreted by the ICC in the same manner. Theoretically, the reasoning of the Pre-Trial Chamber II, if followed, may lead to an erratic but analogous conclusion that acts of forcible female genital mutilation or excision of external female sexual organs should not be treated as acts of sexual violence. In light of its many troubling aspects, it is certainly hoped that the finding in *Muthaura* does not set a restrictive precedent for the ICC in the future charging and prosecution of gender crimes.

The decision on the Prosecutor's Application for a Warrant of Arrest in *Prosecutor v. Bemba* provides another illustration of the problematic approach of the ICC towards the category of 'other forms of sexual violence' under Article 7(1)(g) of the ICC Statute. The Pre-Trial Chamber III in *Bemba* refused to characterise the acts of forced public undressing of women as 'other forms of sexual violence' because, in the judges' view, these acts "do not constitute forms of sexual violence of comparable gravity to the other crimes set forth in article 7(1)(g) of the Statute".²⁰⁸ The approach of the Pre-Trial Chamber III stands in contradiction to the jurisprudence of the ad hoc tribunals, in particular the judgment of the ICTR in *Akayesu*. In 1998, the ICTR successfully prosecuted forced nudity as an international crime of sexual violence in *Akayesu*. The ICTR considered forced public nudity as sexual violence, defined by the Tribunal as "any act of a sexual nature which is committed on a person under circumstances which are coercive".²⁰⁹ Whilst the decisions of the ad hoc tribunals do not bind the ICC, it is nonetheless surprising that the Pre-Trial Chamber III departed from the approach

²⁰⁸ *Situation in the Central African Republic: Prosecutor v. Bemba* (Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (10 June 2008), para.40.

²⁰⁹ *Akayesu* (Trial Judgment), para.688.

presented by the ICTR in *Akayesu* and confirmed by further cases in such a radical manner.

3.2. Gender crimes as war crimes

Acts of sexual and gender-based violence have been successfully prosecuted at the international level as war crimes, primarily by the ICTY and the SCSL. To date, the ICC has returned only two convictions for war crimes (in *Lubanga* and in *Katanga*), but in neither of these cases did the charges explicitly include any gender crimes.

In order for an offence to constitute a war crime, it must be committed in armed conflict, either of international or non-international character. As noted by the ICTY in *Tadic*, this distinction is increasingly difficult to draw in the context of modern warfare, which in turn may have implications on the classification of the offence (e.g. as a grave breach of Geneva Convention or as a violation of Common Article 3) and its subsequent prosecution at an international criminal tribunal.²¹⁰ The Appeals Chamber also found that for purposes of applying IHL “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.²¹¹ Furthermore, for an offence to be a war crime, the criminal act must be closely related to hostilities.²¹² However, as emphasized by the ICTY Appeals Chamber in *Kunarac*, “(t)he armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed”.²¹³

The ICTY prosecuted acts of sexual violence as war crimes under two key categories: grave breaches of the Geneva Conventions 1949 under Article 2 of the ICTY Statute (applicable to offences committed in international armed conflict only) or as violations

²¹⁰ *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.97.

²¹¹ *Ibid.*, para.70.

²¹² *Prosecutor v. Tadić*, Trial Judgment, IT-94-1-T, 7 May 1997, para.573.

²¹³ *Kunarac et al.*, Appeals Judgment, para.58.

of laws or customs of war under Article 3 of the ICTY Statute (applicable to offences committed in both international and non-international armed conflict).²¹⁴ In relation to the latter category, the ICTY often relied on Common Article 3 to the Geneva Conventions 1949. In many cases, acts of sexual violence (in particular rape) committed against women were charged and prosecuted as torture under Article 2(b) of the ICTY Statute or under Common Article 3(1)(a) (“violence to life and person, in particular (...) torture”). In *Čelebići*, the ICTY recognized rape as a form of torture, as a grave breach of the GC 1949 and as a violation of the laws and customs of war.²¹⁵ The ICTY found one of the accused (Delić) guilty of committing acts of torture through multiple rapes of the victim, Ms. Ćećez, causing the victim severe mental pain and suffering.²¹⁶ The Trial Chamber observed that rapes were committed on Ms. Ćećez in order to obtain information about her husband’s whereabouts, but also because she was a woman. As such, these acts represented a form of discrimination, which is a prohibited purpose for the offence of torture under international law.²¹⁷ This approach was later confirmed in *Kvočka et al.*, where the Trial Chamber stated that “raping a person on the basis of sex or gender is a prohibited purpose for the offence of torture”, as well as in *Kunarac* and in *Brdanin*.²¹⁸ The ICTY also prosecuted under the heading of war crimes violent acts of a sexual nature, other than rape. For instance, in *Furundžija*, the ICTY viewed the interrogation of naked Witness A as torture amounting

²¹⁴ *Čelebići Case*, Trial Judgment, IT-96-21-T, 16 November 1998, para.560; *Prosecutor v. Rajić*, Trial Judgment, IT-95-12-T, 8 May 2006, paras.49, 53, 89; *Prosecutor v. Brdanin*, Trial Judgment, IT-99-36-T, 1 September 2003, paras.518, 523-524. Sexual violence against men was prosecuted in *Tadić* as a grave breach of the GC 1949 (‘inhumane treatment’ under Article 2(b) and ‘willfully causing great suffering or serious injury to body or health’ under Article 2(c) of the ICTY Statute).

Prosecutor v. Kunarac et al., Trial Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, paras.630-687, 782; *Čelebići Case*, Trial Judgment, IT-96-21-T, 16 November 1998, para.941-943; *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1T, 10 December 1998, paras.264-266, 275 (Furundžija was found guilty of torture (Count 13) and aiding and abetting outrages upon personal dignity, including rape (Count 14), as violations of laws or customs of war under Article 3 ICTY Statute); *Prosecutor v. Kvočka et al.*, Trial Judgment, IT-98-30/1-T, 2 November 2001, para.560; *Prosecutor v. Bralo*, Sentencing Judgment, IT-95-17-S, 7 December 2005, paras.5, 15, 33 (rape as an ‘outrage upon personal dignity’ within the scope of Common Article 3).

²¹⁵ *Čelebići Case*, Trial Judgment, IT-96-21-T, 16 November 1998, para.943.

²¹⁶ *Ibid.*, para.942.

²¹⁷ *Ibid.*, para.941.

²¹⁸ *Prosecutor v. Kvočka et al.*, Trial Judgment, IT-98-30/1-T, 2 November 2001, para.560; *Prosecutor v. Kunarac et al.*, Trial Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para.654; *Prosecutor v. Brdanin*, Trial Judgment, IT-99-36-T, 1 September 2003, paras.518, 523-524 (rapes of Muslim women prosecuted as war crimes (torture) under Article 2(b) of the ICTY Statute).

to a violation of the laws or customs of war.²¹⁹ Furthermore, in *Kunarac*, the tribunal convicted one of the accused men (Kovač) of committing outrages upon personal dignity within the meaning of Common Article 3(c) by sexually abusing and selling detained girls to another man.²²⁰

3.2.1. Gender crimes as acts of terrorism at the SCSL

The SCSL advanced the interpretation and international prosecution of gender-based war crimes in yet another aspect by successfully prosecuting sexual violence as an act of terrorism. The SCSL remains the first international criminal court to prosecute sexual violence under the heading of terrorism as a war crime. The SCSL viewed gender-based violence committed during the conflict in Sierra Leone as acts of terrorism punishable as a war crime under Article 3(d) of the SCSL Statute (violation of Common Article 3 and Article 13(2) Additional Protocol II to the GC 1949).²²¹ In making this precedential step, the SCSL focused strongly on the context in which acts of gender-based violence (including rapes, forced marriages and sexual slavery) were committed. The Trial Chamber in *RUF* confirmed that sexual violence is used “as a tactic of war to humiliate, dominate and instil fear in victims, their families and communities during armed conflict” and that in this case specifically, acts of sexual violence were committed “against the civilian population in an atmosphere in which violence, oppression and lawlessness prevailed”.²²² Whilst the ad hoc tribunals previously emphasized the deliberate use of sexual violence as a weapon of war, the SCSL made a clearer link between such characterization of conflict-related sexual violence and the crime of terrorism. Sexual violence was viewed by the court as an intrinsic element in the calculated and concerted pattern of terrorizing the civilian population, directly linked

²¹⁹ *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1T, 10 December 1998, para.264.

²²⁰ *Prosecutor v. Kunarac et al.*, Trial Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, paras.753-756, 759, 782.

²²¹ *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T, 2 March 2009, para.1352; confirmed on appeal: *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Appeals Judgment, SCSL-04-15-A, 26 October 2009, para.990.

For discussion of the prosecution of terrorism as a war crime by the SCSL see: Roberta Arnold ‘The Judicial Contribution of the Special Court for Sierra Leone to the Prosecution of Terrorism’ in: in Charles Chernor Jalloh, *The Sierra Leone Special Court and its Legacy. The Impact for Africa and International Criminal Law* (CUP 2014) 260-288; Kirsten M.F. Keith, ‘Deconstructing Terrorism as a War Crime. The Charles Taylor case’ (2013) 11(4) *Journal of International Criminal Justice* 813-833.

²²² *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T, 2 March 2009, paras.156, 1347.

to the combat strategy and ideology adopted by the RUF forces. Furthermore, the effects of the campaign involving sexual violence on the broader society were stressed, especially the destructive effects of these acts on the victim herself but also on her immediate family, as well as her prospects of family and community life. The acts of terrorism perpetrated through acts of sexual violence had an overarching goal of tearing apart communities not only by means of inflicting physical and mental pain on the civilian members of these communities, but also by undermining the cultural values held within these communities in order to subjugate these populations to the dominant control of the AFRC/RUF forces.²²³

The SCSL followed the same approach in *Taylor*, where the Trial Chamber held that sexual violence amounted to acts of terrorism and it was “deliberately aimed at destroying the traditional family nucleus, thus undermining the cultural values and relationships which held society together”.²²⁴ Furthermore the *Taylor* judgment echoes the view expressed by the Trial Chamber in *RUF* in that it found that sexual violence committed by the RUF/AFRC forces was not motivated merely by the sexual gratification of the perpetrator, but rather constituted a deliberate tactic of terrorizing civilian population, which is why the acts often took place in public.²²⁵

The approach adopted by the SCSL in *RUF* and in *Taylor* shows a progressive approach to prosecuting gender-based crimes at an international level, which advances the previous jurisprudence of the ad hoc tribunals on gender-based crimes. By prosecuting sexual violence as acts of terrorism, the SCSL showed that these violent acts of a gender-based nature are not merely ‘spoils of the war’ or incidental acts, but rather constitute an integral part of a strategy deliberately aimed at terrorizing the civilian population. Furthermore, when considering gender-based crimes as constitutive acts of terrorism, the court focused on various types of such crimes, including sexual slavery and forced marriage as well as rape, providing a more profound understanding of the role that sexual violence plays in conflict. Furthermore, this approach

²²³ *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T, 2 March 2009, para.1348-1349.

²²⁴ *Prosecutor v. Taylor*, Judgment, SCSL-03-01-T, 18 May 2012, para.2035.

²²⁵ *Prosecutor v. Taylor*, Judgment, SCSL-03-01-T, 18 May 2012, paras.2035-2038; *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T, 2 March 2009, para.1348.

underscores the importance of viewing gender crimes not only within their own categories but also as constituent elements of other international crimes.²²⁶ Nonetheless, the progressive approach demonstrated by the SCSL in *Taylor* and in *RUF* clashes with the view of the Trial Chamber in the *AFRC* case, which rather timidly observed that acts of sexual violence, for instance sexual slavery, were committed by the *AFRC* troops to take advantage of the spoils of war rather than as a mean of spreading terror amongst the civilian population.²²⁷

3.2.2. War crimes and gender at the ICC

The ICC Statute contains extensive provisions on war crimes committed in international and non-international armed conflicts. As a modern treaty, the ICC Statute explicitly recognises crimes of sexual violence as war crimes, which marks a change from the language originally used in the Geneva Conventions 1949 and in Additional Protocols I and II. Whilst the language used in the provisions on grave breaches of the GCs 1949 (Article 8(2)(a)) and on serious violations of Common Article 3 (Article 8(2)(c)) mirror the language used in the GCs 1949, various crimes of sexual violence are recognized as violations of the laws and customs applicable in armed conflicts. Both Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) incorporate an extensive list of acts of sexual violence, including rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7(2)(f) of the ICC Statute, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions or a serious violation of article 3 common to the four Geneva Conventions. Gender-based crimes have been charged as war crimes in many cases brought before the ICC.²²⁸ However, none of the cases concluded thus far has secured

²²⁶ This point is also argued by Oosterveld: Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments' (2011) 44 Cornell International Law Journal 49, 70.

²²⁷ *Prosecutor v. Brima et al.*, Trial Judgment, SCSL-04-16-T, 20 June 2007, para.1459.

²²⁸ *Situation in the Democratic Republic of the Congo: Prosecutor v. Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda), ICC-01/04-02/06 (9 June 2014) (Counts 5, 6, 8, 9); *Situation in the Democratic Republic of the Congo: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) (30 September 2008), para.354 (Count 7 and 9; acquitted following the trial); *Situation in the Central African Republic: Prosecutor v. Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June

convictions for war crimes which included acts of gender-based violence. In June 2014, charges of rape and sexual slavery as war crimes were confirmed by the Pre-Trial Chamber II in *Prosecutor v. Ntaganda*.²²⁹

3.2.2.1. *Prosecutor v. Lubanga*

The first judgment of the ICC in *Prosecutor v. Lubanga* resulted in a rather disappointing outcome in relation to prosecution of gender-based war crimes.²³⁰ Despite being based on a single count of the war crime of ‘conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities’, the Office of the Prosecutor (OTP) in *Lubanga* failed to include the charges of gender-based violence committed against child soldiers in the original indictment, and no amendment of the charges took place at a later stage. This was particularly astonishing given the overwhelming amount of evidence from international organizations and NGOs working in the DRC, which confirmed the common nature of sexual violence in general as well as directed against child soldiers, in particular girls.²³¹ Furthermore, during the trial, at least 15 of the first 25 prosecution witnesses (including two expert witnesses) provided testimony of gender-based crimes, in particular rape and sexual slavery.²³² The failure of the OTP to effectively investigate crimes of sexual violence and to prosecute them was pointed out by the Trial Chamber during the trial:

2009) (Count 2); *Situation in Uganda: Prosecutor v. Joseph Kony* (Warrant of Arrest for Joseph Kony) ICC-02/04-01/05 (27 September 2005) (Count 3); *Situation in Uganda: Prosecutor v. Vincent Otti* (Warrant of Arrest for Vincent Otti) ICC-02/04 (8 July 2005) (Count 3).

²²⁹ *Situation in the Democratic Republic of the Congo: Prosecutor v. Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda), ICC-01/04-02/06 (9 June 2014) paras.76-82 (rape and sexual slavery of child soldiers) and paras.53-57 (Count 8).

²³⁰ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Judgment), ICC-01/04-01/06 (14 March 2012).

²³¹ Amnesty International, *Democratic Republic of Congo: Children at War* (8 September 2003), 8-9 <<http://www.amnesty.org/en/library/info/AFR62/034/2003/en>> accessed 14 February 2015; Human Rights Watch, *Seeking Justice. The Prosecution of Sexual Violence in the Congo War* (8 March 2005), 19-20 <<http://www.hrw.org/reports/2005/03/07/seeking-justice>> accessed 14 February 2015; The Save the Children Fund, *Forgotten Casualties of War: Girls in armed conflict* (2005), 11-16 <<http://resourcecentre.savethechildren.se/library/forgotten-casualties-war-girls-armed-conflicts>> accessed 14 February 2015.

²³² Women’s Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2009*, 71-85 <http://www.iccwomen.org/news/docs/GRC09_web-2-10.pdf> accessed 14 February 2015.

“(i)t is to be noted that although the prosecution referred to sexual violence in its opening and closing submissions, it has not requested any relevant amendment to the charges. (...) Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step”.²³³

The flaw in investigating and charging acts of sexual violence committed against girl soldiers in *Lubanga* resulted in creating a rather limited picture of the real extent of the crime of the recruitment and use of child soldiers. Although the Trial Chamber briefly acknowledged the multiplicity of roles played by child soldiers in general, the gender-based aspect of child soldiering and the occurrence of gender-based crimes committed against girl soldiers is not reflected neither in the charges nor in the conviction returned against Lubanga. As such, these aspects of the crime are rendered invisible in the judgment. These concerns are reflected in the Separate and Dissenting Opinion of Judge Odio-Benito who emphasized that

“(s)exual violence and enslavement are in the main crimes committed against girls and their illegal recruitment is often intended for that purpose (...). It is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task give to young boys”.²³⁴

Furthermore, the judgment in *Lubanga* exposed two key critical issues related to girl soldiers. Firstly, the question arises as to what it means to ‘actively participate in hostilities’ for purposes of prosecuting acts under Article 8(2)(e)(vii). The phrase ‘to actively participate in hostilities’ is the essential element of the crime under Article 8(2)(e)(vii) of the ICC Statute. It draws on one of the key principles of IHL, namely the principles of distinction between civilians who are afforded protection and persons who directly participate in hostilities who no longer benefit from the same level of protection as civilians.²³⁵ Therefore, from the IHL perspective, the narrower the construction of ‘direct participation in hostilities’, the greater the level of protection

²³³ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Judgment), ICC-01/04-01/06 (14 March 2012), para.629.

²³⁴ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Judgment), ICC-01/04-01/06 (14 March 2012), Separate and Dissenting Opinion of Judge Odio-Benito, para.21.

²³⁵ There exists a difference between the legal terms used in this context. The IHL language uses the phrase of ‘direct participation in hostilities’ whilst the ICL utilizes the phrase of ‘active participation in hostilities’.

that can be afforded to the person (i.e. they cannot be construed as legitimate targets). The meaning of ‘active participation in hostilities’ is crucial in the context of addressing harms suffered by girl soldiers. For example, if ‘direct participation’ was to be understood as active participation in combat only, girl soldiers who did not perform combat roles could be viewed as civilians. However, from the ICL perspective, the meaning of ‘active participation in hostilities’ has been given a broader interpretation and has been shown to encompass a myriad of roles, by far not limited to active combat only. The ICC confirmed that

“The extent of the potential danger faced by a child soldier will often be unrelated to the precise nature of the role he or she is given. Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an “indirect” role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. (...) these combined factors – the child’s support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them”.²³⁶

The broader interpretation of ‘active participation in hostilities’ creates an opportunity to encompass the variety of roles performed by girl soldiers and to capture the complexity of their involvement in hostilities. Sexual violence committed against girl soldiers should be viewed as an inherent element of the concept of ‘using to participate in hostilities’ as in fact many girls are recruited to armed groups for the purpose of sexual exploitation, amongst performing other roles. Applying the formula articulated by the ICC Trial Chamber (child’s support and the level of consequential risk), sexual violence should fall under the threshold of ‘active participation in hostilities’, reflecting the constant risk of becoming victims to sexual violence to which girls are exposed by being associated with a particular armed group. Nonetheless, such categorisation means that within ICL, girl soldiers are perceived as participating in

²³⁶ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Judgment), ICC-01/04-01/06 (14 March 2012), para.628.

hostilities through their experience of sexual exploitation as well as other roles and therefore are excluded from the IHL protection afforded to civilians. This has implications for charging and prosecuting perpetrators of such acts, as illustrated in *Lubanga*.

The decision in *Lubanga* prompts an inquiry into the way in which (if at all) gender-based crimes committed against girl soldiers can be charged and prosecuted under the ICC Statute. Whilst the broad understanding of 'active participation in hostilities' provides a true reflection of the complexity of the crime and the variety of the roles involved, it also has implications for the prosecution of crimes committed against girl soldiers. Viewing girl soldiers as active participants in hostilities means that they are not eligible for protection attributed to civilians under the rules of IHL. Based on this distinction, gender-based crimes committed against girl soldiers could not be prosecuted as war crimes given that they were committed by the members of the same armed group that the girl soldiers were a part of. These clashing approaches between IHL and ICL put girl soldiers in a catch-22 situation: the IHL approach would result in maximising their protection as civilians, whilst ignoring the gender-based aspect of the crime of recruitment and use of children to actively participate in hostilities. In contrast, the ICL approach captures the true extent of the crime, including its gender dimension, at the price of compromising prosecution of these gender-based crimes as war crimes. If the overarching aim is to maximise protection given to girls recruited and used by armed groups, then the IHL approach of employing a restrictive, combat-focused definition of 'participating in hostilities' is favourable. It will therefore view girl soldiers who are subjected to sexual violence by members of the same armed group as civilians rather than as persons actively participating in hostilities. However, if the objective is to demonstrate that child soldiers, especially girls, fulfil a variety of roles (some of which do not involve active combat per se) which further the combat aims of the armed group, the ICL approach appears to be more adequate. This approach treats girl soldiers as 'actively participating in hostilities' even where they do not engage in direct combat, including being sexually exploited by the members of the armed group. Furthermore, it makes sexual violence visible as an integral part of an international crime of enlisting, conscripting and using children to

participate in hostilities, although sexual violence is not an element of the legal definition of this crime under the ICC Statute. Nonetheless, the ICC's interpretation of 'active participation in hostilities' restricts the prosecution of sexual violence against girl soldiers as a war crime due to the fact that i) girls are viewed as 'actively participating in hostilities' and therefore relinquish protection afforded to civilians under IHL; and ii) the perpetrators of sexual violence are members of the same armed group.

This legal problem is likely to be addressed by the ICC in *Ntaganda*, where the ICC Prosecutor charged Ntaganda with separate counts of rape and sexual slavery as war crimes committed against child soldiers (Counts 4 and 7), in addition to charges of rape (Count 5) and sexual slavery (Count 8) as war crimes under Article 8(2)(e)(vi) of the ICC Statute.²³⁷ Such categorisation of charges enables the court, at least in theory, to escape the *Lubanga* fallacy. Charging Ntaganda with rape and sexual slavery as CAH (in addition to charging these acts as war crimes) makes it possible to prosecute the accused for perpetrating these acts against child soldiers without obliging the court to consider whether the child was actively participating in hostilities or not (as it would need to do in cases involving war crimes).

3.3. Genocide as a gender crime

Genocide has been prosecuted as an international crime primarily by the ICTR.²³⁸ Since the precedential judgment in *Akayesu*, where the ICTR prosecuted rape as genocide, the tribunal has successfully prosecuted rape and sexual violence as constituent acts of genocide in *Gacumbitsi*, *Muhimana*, *Bagosora et al.*, *Karemera et al.*²³⁹ The ICC also has jurisdiction over the crime of genocide, but no person has been convicted of

²³⁷ *Situation in the Democratic Republic of the Congo: Prosecutor v. Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06 (9 June 2014).

²³⁸ See generally: Usta Kaitesi, *Genocidal Gender and Sexual Violence. The legacy of the ICTR, Rwanda's ordinary courts and gacaca courts* (Intersentia 2014). At the ICTY, the charges of genocide in *Karadzic* and *Mladic* are based (in part) on acts of sexual violence.

²³⁹ *Prosecutor v. Gacumbitsi*, Trial Judgment, ICTR-2001-64-T, 17 June 2004, paras.292-293; *Prosecutor v. Muhimana*, Judgment and Sentence, ICTR-95-1B, 28 April 2005, paras.513 and 517; *Prosecutor v. Bagosora et al.*, Judgment and Sentence, ICTR-98-41-T, 18 December 2008, paras.2124, 2132-2133; *Prosecutor v. Karemera et al.*, Trial Judgment, ICTR-98-44-T, para.1670.

genocide by the ICC. However, three charges of genocide, supported by the evidence of widespread rape, are included in the arrest warrant against Omar Al-Bashir, the president of Sudan.²⁴⁰

The ICTR's judgment in *Akayesu* was a setting stone for recognizing that acts of sexual and gender-based violence, in particular rape, may amount to genocide provided they satisfy the *dolus specialis* of genocide, i.e. that the acts are "committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such".²⁴¹ In approaching the issues of *dolus specialis* in *Akayesu*, the Trial Chamber recognized that "intent is a mental factor which is difficult, even impossible, to determine".²⁴² Therefore, the Trial Chamber held, it is

"possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group (...) such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups".²⁴³

In prosecuting acts of genocide involving sexual and gender-based violence, one of two categories is relied on: the acts are either interpreted as 'causing serious bodily or mental harm to the members of the group' or viewed as 'amounting to measures intended to prevent births within the group' such as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.²⁴⁴ The ICTR also confirmed that "rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, (...) one of the worst ways of inflicting harm on the victim as he or she suffers both bodily

²⁴⁰ Information correct as of 6 January 2016.

Situation in Darfur, Sudan: Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"), Second Warrant of Arrest for Omar Hassan Ahmed Al Bashir, ICC-02/05-01/09 (12 July 2010) 6-8; at p.6, the Pre-Trial Chamber I considered that "GoS forces subjected, throughout the Darfur region, (i) thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of rape; (...)".

²⁴¹ *Akayesu*, Trial Judgment, paras.731-732.

²⁴² *Ibid.*, para.523.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*, para.507.

and mental harm”.²⁴⁵ Both the ICTY and the ICTR stressed the strategic significance of rape or forced impregnation in the context of inter-ethnic conflict.²⁴⁶ The tribunals clarified that rape resulting in forced impregnation of a woman of ethnicity other than the perpetrator which results in birth of a child who will not belong to the same ethnic group as the mother constitutes a measure intended to prevent births within the group.²⁴⁷ This point was further illustrated in *Muhimana*, where the accused mistakenly raped Witness BJ (a Hutu girl) because he perceived her to be Tutsi.²⁴⁸

The recognition of the genocidal dimension of rape and other forms of sexual violence in *Akayesu* was particularly important given that rape is not included as a prohibited act in the Genocide Convention 1948, nor is gender viewed as a protected group under this international instrument. The Trial Chamber in *Akayesu* also framed sexual violence as an integral part of the deliberate process of targeting and destruction of the Tutsi group as a whole rather than as opportunistic crimes, which put sexual violence on a par with other potentially genocidal acts, such as murder.

Importantly, the jurisprudence of the ICTR contributed to the conceptualisation of sexual and gender-based violence as a mental harm under the scope of statutory provisions on genocide. The decision in *Akayesu* emphasized the destructive effect of genocidal rape on the victim. The Trial Chamber noted that in addition to physical harm, the experience of being raped constitutes a mental harm and may lead to the victim’s refusal to procreate in the future.²⁴⁹ Furthermore, when considering the genocidal killing of over 7000 Bosnian Muslim men in Srebrenica, the ICTY Trial Chamber in *Blagojević* focused not only on the lasting effects of the psychological trauma suffered by the male survivors of these executions but also on women and children who were separated from their families and forcibly transferred.²⁵⁰ The Trial

²⁴⁵ Ibid., paras.731-732.

²⁴⁶ Ibid., paras.507-508; *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-5-R61 & IT-95-18-R61, 11 July 1996, para.94.

²⁴⁷ *Akayesu*, Trial Judgment, para.507.

²⁴⁸ *Prosecutor v. Muhimana*, Judgment and Sentence, ICTR-95-1B, 28 April 2005, para.517.

²⁴⁹ *Akayesu*, Trial Judgment, para.508.

²⁵⁰ *Prosecutor v. Blagojević*, Trial Judgment, IT-02-60-T, 17 January 2005, para.652: “The Trial Chamber has no doubt that the suffering of the women, children and elderly people who were cruelly separated

Chamber viewed these experiences as satisfying the requisite threshold of Article 4(2)(b) of the ICTY Statute. Interestingly, the ICTR Trial Chamber in *Prosecutor v. Rukundo* focused exclusively on the mental harm caused to the victim of sexual assault. The Trial Chamber held that the sexual assault perpetrated by a clergy member on a young girl constituted genocide based only on the finding that she suffered mental harm as a result of the attack. Adopting the definition of sexual violence formulated in *Akayesu*, the Trial Chamber emphasized the contextual circumstances in which the sexual assault happened.²⁵¹ Nonetheless, the conviction of Rukundo was overturned on appeal as the ICTR Appeals Chamber reasoned that the finding regarding the requisite genocidal intent at the time of the sexual assault was not supported by the evidence.²⁵² However, the Appeals Chamber did not find erroneous the earlier finding of sexual assault as amounting to a serious mental harm. Judge Pocar (dissenting) criticised the approach of the majority in *Rukundo* for unreasonably viewing the single act of sexual assault as “‘qualitatively’ different from other killings or serious bodily injury for which the accused has been held responsible”.²⁵³

Judge Pocar’s point captures the problematic aspect of prosecuting acts of sexual violence as genocide, namely the often present judicial tendency to view these crimes as falling outside the scope of the particular category of prosecuted international crime (here: genocide). Despite the evident advances in international criminal

from their loved and forcibly transferred, and the terrible consequences that this had on their life, reaches the threshold of serious mental harm under Article 4(2)(b) of the Statute”.

²⁵¹ *The Prosecutor v. Rukundo*, ICTR-01-70, Judgment, 27 February 2009, para.388:

“The Chamber acknowledges that it has not had the benefit of any direct evidence on Witness CCH’s mental state, following the sexual assault, apart from her testimony that she could not tell anyone about the incident. The Chamber, however, recalls that it may draw inferences from the evidence presented. The Chamber finds it necessary to look beyond the sexual act in question and finds it particularly important to consider the highly charged, oppressive and other circumstances surrounding the sexual assault on Witness CCH. The Chamber notes in particular the following circumstances: 1) Members of her ethnic group were victims of mass killings; 2) She and her family, fearing death in this way, sought refuge in a religious institution; 3) Upon seeing a familiar and trusted person of authority and of the church, i.e. the Accused, she requested protection for herself; 4) When the Accused refused her the protection she had requested, he specifically threatened her – that her family was to be killed for its association with the “Inyenzi”; 5) Rukundo had a firearm; 6) Still hoping to be protected, Witness CCH sought to ingratiate herself to Rukundo by assisting him to carry his effects into a nearby room; 7) The Accused locked her in the room with him, put his firearm down nearby and proceeded to physically manhandle her in a sexual way; and 8) At the time of the incident, Witness CCH was sexually inexperienced”.

²⁵² *Rukundo v. The Prosecutor*, ICTR-2001-70-A, Judgment, 20 October 2010, para.236.

²⁵³ *Rukundo Appeal Judgment*, Partially Dissenting Opinion of Judge Pocar, para.4.

jurisprudence towards recognition of genocidal acts of sexual violence, such an approach (if maintained) may lead to taking a step back from the progressive character of the judgment in *Akayesu*. The chosen approach will also have significant ramifications for the prosecution of genocide by the ICC in *Al-Bashir* and will set a clear picture of the ICC's approach towards the acts of genocidal sexual violence.

4. Conclusion

International criminal prosecutions of gender-based crimes have come a long way since international criminal trials at IMTN and IMTFE. In less than 20 years since the landmark decisions in *Tadić*, *Akayesu*, *Furundžija* and *Kunarac*, the gender crimes jurisprudence of the ad hoc tribunals and the SCSL has developed at a fast pace, developing the normative scope of the ICL framework and establishing definitions of international crimes (e.g. rape in *Akayesu*).

The decisions of international criminal courts and tribunals also advanced the positioning of gender-based crimes within the ICL framework and in the discipline of international law in general. The decisions set legal landmarks by prosecuting various gender-based crimes (such as rape, forced nudity, sexual enslavement, forced marriage) for the very first time in international law. Furthermore, not only were these acts prosecuted as war crimes, crimes against humanity and genocide but it was also confirmed that acts of sexual and gender-based violence may play an integral role in the commission of other crimes which are not of a gender-based nature per se, such as terrorism or torture. That said, the courts have sometimes struggled with emphasizing the non-sexual aspect of certain gender-based crimes (as per SCSL Trial Chamber's decision in *AFRC*).

With the imminent closure of the ad hoc tribunals and the already completed term of the SCSL, the ICC is the only permanent international criminal court with jurisdiction over international gender-based crimes. The substantive provisions of the ICC Statute enable the ICC prosecutor to charge and prosecute individuals accused of various gender-based crimes, including a broad range of sexual violence offences (both as war

crimes and CAH) and gender-based persecution as a CAH. Despite that, the ICC Prosecutor has charged but not yet successfully prosecuted gender-based crimes. Furthermore, the ICC has demonstrated some alarming flaws in interpreting and prosecuting crimes of sexual violence (as illustrated in *Lubanga*, *Bemba* and *Muthaura et al.*), often disregarding the sexual as well as gender-based aspect of a crime. These shortcomings, if not corrected by future decisions, are likely to set back the promise of gender justice at an international level, which was clearly set out by the work of the ICTY, ICTR and the SCSL.

Chapter 5

Challenges to gender justice and the limits of International Criminal Law

1. Introduction

Prosecutions of sexual and gender-based violence by international criminal courts and tribunals are a significant step in pursuing international gender justice for conflict-related gender-based crimes. As discussed in chapter 4, gender-based crimes have been successfully prosecuted at the international level as war crimes, crimes against humanity and genocide. In this respect, prosecutions of gender-based crimes by ad hoc tribunals and the SCSL were instrumental in marking a significant shift from the Nuremberg legacy, where gender-based crimes committed during the Second World War were effectively left unaccounted for. In contrast, the modern framework of ICL takes account of gender-based crimes, which is primarily demonstrated in the provisions of the ICC Statute listing a broad array of gender-based crimes as well as a number of successful international prosecutions of such crimes.¹ However, the analysis of international case-law concerning gender-based crimes reveals some of the obstacles and challenges embedded in the international criminal process of seeking accountability for conflict-related gender-based crimes within the ICL framework. These challenges are primarily related to the procedural aspects of investigating, indicting and prosecuting persons responsible for committing gender-based crimes. The weaknesses exposed in relation to the investigation and documentation of gender-based crimes have proven to have an instrumental effect on the later stages of the process, including confirmation of charges, prosecution at the trial stage and sentencing. They have also had a significant impact on the decisions on award of reparations to victims.² Furthermore, whilst the overall amount of international prosecutions of gender-based crimes is on the rise, the enduring obstacles expose the

¹ Article 7(1)(g) ICC Statute; For a detailed discussion regarding prosecutions of gender-based crimes at international criminal courts and tribunals see Chapter 4.

² The issue of reparations is discussed in detail in Chapter 6 of this thesis.

need for deeper understanding of the complexity and nature of gender-based crimes at an international level.

This chapter will explore the procedural obstacles and challenges associated with the prosecution of conflict-related gender-based crimes by the international courts and tribunals. Drawing on the experience of prosecuting gender-based crimes by the ad hoc tribunals and the SCSL, the discussion will focus predominantly on the ICC and the ways in which the ICC can tackle the enduring challenges embedded in the process of prosecuting gender-based crimes. The discussion presented in this chapter also engages with two main modes of prosecuting, and establishing liability for, gender-based crimes, namely cumulative charging and joint criminal enterprise liability (JCE). Furthermore, the limitations of ICL as a branch of public international law will be explored with respect to the quest to achieve justice for conflict-related gender-based crimes.

2. The pursuit of post-conflict gender justice: obstacles and challenges

The early prosecutions of gender-based crimes before the ad hoc tribunals met obstacles related both to substantive and procedural law. As the tribunals were setting precedent in the prosecution of sexual and gender-based violence, they were faced with the challenge of defining some of the crimes for the first time in international law. Unlike the ICC Statute and the ICC Elements of Crimes, the statutes of the ICTY and the ICTR do not contain statutory definitions of gender-based crimes. Furthermore, although the ICTY and the ICTR prosecuted a number of acts of sexual violence, their statutes listed expressly only rape as a crime against humanity and, additionally, in the case of the ICTR, enforced prostitution as a violation of Common Article 3 to the Geneva Conventions 1949.³ This rather limited scope of the statutory provisions was remedied in the drafting of the ICC Statute, resulting in the inclusion of various crimes of sexual and gender-based violence in the Statute.

³ Article 5(g) ICTY Statute (rape), Article 3(g) (rape) and Article 4(e) (enforced prostitution) ICTR Statute.

Nearly two decades since the first prosecution of rape as an international crime by the ICTR in *Akayesu*, the picture looks quite different. The ICC remains the only permanent criminal court and is arguably much better equipped to prosecute gender-based crimes than the ad hoc tribunals. At the very least, the ICC Statute gives the ICC Prosecutor a solid basis for charging and prosecuting a variety of gender-based crimes. Although the ICC is not bound by the precedents set by other international courts and tribunals, it can nonetheless draw on the experience of prosecuting gender-based crimes by the ICTY, the ICTR and the SCSL. Furthermore, the ICC can benefit from the changes in political attitudes towards sexual and gender-based violence in conflict. Over the past two decades, the topic of conflict-related sexual violence has gained prominence not only in international law but also in international politics.

The positioning of sexual and gender-based crimes within the international context shifted from being a discrete, rarely mentioned topic to the forefront of international debates and political involvement in addressing this problem. For instance, in May 2012 the then UK Foreign Secretary, William Hague, launched the Preventing Sexual Violence in Conflict Initiative (PSVI), which aimed at addressing the problem of impunity for crimes of sexual violence committed in armed conflict.⁴ The efforts of the PSVI campaign resulted in the adoption of the Declaration of Commitment to End Sexual Violence in Conflict during the G8 Foreign Ministers Meeting, which was endorsed by over two thirds of the United Nations member states.⁵ Furthermore, in June 2014, the UK hosted a Global Summit to End Sexual Violence in Conflict, which was the largest meeting of state and non-state delegates thus far addressing the topic of fighting conflict-related sexual violence.⁶ These unprecedented events go to show that conflict-related sexual violence is no longer an isolated issue, but one that is becoming incorporated into international and foreign policy agendas. Whilst the

⁴ Foreign and Commonwealth Office, Preventing Sexual Violence in Conflict Initiative, <<https://www.gov.uk/government/policies/preventing-sexual-violence-in-conflict>> accessed 1 March 2015.

⁵ Foreign and Commonwealth Office, Declaration of Commitment to End Sexual Violence in Conflict, 23 September 2013, <<https://www.gov.uk/government/publications/a-declaration-of-commitment-to-end-sexual-violence-in-conflict>> accessed 1 March 2015.

⁶ It is estimated that 1700 delegates took part in the Global Summit, including 123 country delegations and 79 ministers. <<https://www.gov.uk/government/topical-events/sexual-violence-in-conflict>> accessed 1 March 2015

increased attention to this problem does not guarantee the immediate reduction of acts of sexual violence committed in modern conflicts nor an increase in their prosecutions, it may nonetheless be hoped that it may have a positive influence on domestic laws as well as strengthen states' cooperation with the ICC.

Despite the noticeable changes in political attitudes towards conflict-related sexual violence and the advances in ICL related to seeking accountability for gender-based crimes, obstacles to prosecuting gender-based crimes remain. Zawati perceives the "abstractness and lack of accurate description of gender-based crimes in the statutory laws of the international criminal tribunals and courts" as a major obstacle to the prosecution of gender-based crimes at an international level and suggests that "rape and other forms of sexual violence should be prosecuted separately as crimes in themselves, not as a subsection of war crimes or crimes against humanity".⁷ In this somewhat problematic premise, Zawati appears to ignore the practical and procedural aspects of such a proposal or the feasibility of introducing a separate category of international crimes within international criminal law, namely an individual category of gender-based crimes. The challenges related to reaching a consensus amongst the State parties regarding such amendment to the ICC Statute and the ICC EOC appear to be a major flaw to such proposal. Above all, it is doubtful that an introduction of the new category of international crimes (i.e. crimes of gender-based nature) or, as Zawati suggests, forging a new treaty under Chapter VII of the UN Charter, would make a substantive difference to the way in which such crimes are currently addressed by international criminal courts and tribunals. Undoubtedly, a new treaty addressing gender-based crimes only would be an interesting addition to the current international legal landscape. But at the same time, it remains unclear as to which body would enforce provisions of such a treaty and how, if at all, would they relate to the existing provisions on gender-based crimes in the ICC Statute. Finally, what measures would be introduced in such a treaty to overcome the procedural obstacles associated with international criminal trials?

⁷ Hilmi M. Zawati, *Fair Labeling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (OUP 2014) xiii, 6.

The key obstacle to securing successful prosecutions of conflict-related gender-based crimes lies not in the alleged statutory or definitional shortcomings (which to a large extent have been remedied by the ICC Statute and relevant ICL jurisprudence), but rather in the procedural aspect of this process.⁸ These particular enduring difficulties have been highlighted by a number of commentators, but also identified by the ICC Office of the Prosecutor in the Policy Paper on Sexual and Gender-Based Crimes.⁹ Furthermore, as rightly noted by Cryer et al, “the quality of the procedural law and the efficiency of the institutional structure in which it is to be interpreted and applied are key to the ability of the court or tribunals to fulfil its mandate and to meet the highest standard of fairness and due process”.¹⁰ In an attempt to close the impunity gap for gender-based crimes within the ICL framework, it is essential that cases involving gender-based crimes meet this threshold. Strengthening of the procedural law in relation to investigation and prosecution of gender-based crimes is therefore crucial in order to improve the process of bringing justice to victims of gender-based crimes through international courts and tribunals, especially the ICC as the only permanent international criminal court.

⁸ This point is also captured by Kai Ambos, who rightly notes that “In any case, the prosecution of sex crimes did not fail because of the absence of a legal definition but for procedural reasons. For example, it could not be proven that the crimes had happened in the first place, or that the accused was involved”. Kai Ambos, ‘Thematic Investigations and Prosecution of International Sex Crimes: Some Critical Comments from a Theoretical and Comparative Perspective’ in Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 292; ICTR, ‘Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions’ (30 January 2014) <<http://unictr.unmict.org/en/documents/best-practices-manuals-and-conference-reports>> accessed 17 March 2015, sections III and IV.

⁹ The procedural and evidentiary difficulties associated with prosecution of gender-based crimes are explored in sections 3 and 4 of this chapter.

ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), paras.50-51 <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 17 March 2015.

Niamh Hayes, ‘The Impact of Prosecutorial Strategy on Investigation and Prosecution of Sexual Violence at International Criminal Tribunals’ in: Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012); Niamh Hayes, ‘Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court’ in: William Schabas, Yvonne McDermott, Niamh Hayes (eds), *The Ashgate Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013); Susana SáCouto, Katherine Cleary, “The importance of effective investigation of sexual and gender-based crimes at the International Criminal Court” (2009) 17 *American University Journal of Gender, Social Policy and Law* 337- 359, Dianne Luping, “Investigation and prosecution of gender-based crimes before the International Criminal Court” (2009) 17 *American University Journal of Gender, Social Policy and Law* 431-496.

¹⁰ Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmschurst, *The Introduction to International Criminal Law and Procedure* (2014 Cambridge University Press) 423 (Cryer et al, *The Introduction to ICL*).

To that end, this chapter will focus on the procedural aspects of prosecuting sexual and gender-based crimes at the ICC. The analysis will draw on the experience of the ad hoc international criminal tribunals and the SCSL in this field as well as the ICC's practice to date in relation to prosecuting sexual and gender-based crimes. The challenges associated with this process form the starting point for the discussion, which also aims to provide proposals for improvement of the procedures employed by the ICC in relation to investigation, charging and prosecution of sexual and gender-based crimes. Nonetheless, it must be recognized that prosecution of sexual and gender-based crimes at international criminal courts and tribunals provides only one method of achieving post-conflict gender justice. Therefore, that latter part of this chapter explores the limits of ICL in relation to gender justice and aims to discuss the alternative modes of achieving justice for conflict-related gender-based crimes.

3. Investigation of gender-based crimes at the international level

Responsibility for criminal investigation lies with the Prosecutor at the ad hoc tribunals, the SCSL, and the ICC. In the case of the ICC, the duty of carrying out an effective investigation and prosecution of crimes is placed upon the Prosecutor.¹¹ Furthermore, Regulation 34 of the Regulations of the ICC Office of the Prosecutor states that when developing a case hypothesis, the joint investigation team should aim to select incidents which reflect the most serious crimes and the main types of victimization, including sexual and gender-based violence.¹² The key aim of the investigation is to collect evidence regarding particular international crimes which arise in relation to a specific situation or specific accused and to interpret it.¹³ The collected evidence is crucial in proving a case against the defendant and in securing a

¹¹ Article 54(1)(b) of the ICC Statute places an obligation on the ICC Prosecutor to ensure effective investigation and prosecution of crimes "in particular where it involves sexual violence, gender violence or violence against children".

¹² ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Regulation 34.

¹³ Fujiwara and Parmentier identify two basic features of criminal investigations (both in domestic and in international context), namely "1) collecting evidence and 2) legally interpreting the collected evidence. The first includes analyzing information pertaining to certain acts of individuals and putting the alleged crime into a historical and social context. The second pertains to the evaluation of the evidence against the elements required for chargeable offences and to its preservation and presentation in accordance with procedural requirements." Hiroto Fujiwara, Stephan Parmentier, 'Investigations' in Luc Reydam, Jan Wouters, Cedric Ryngaert, *International Prosecutors* (OUP 2012) 573.

conviction and sentence for the alleged criminal acts. In order to achieve this aim, the evidence needs to be interpreted and evaluated against the elements of a particular offence (e.g. rape) as well as against the common elements required for the particular category of international crime (e.g. CAH, war crime or genocide). As such, the investigation phase is of paramount importance in ensuring that the Prosecutor can proceed with the case and prove beyond reasonable doubt that the accused bears individual criminal liability for the alleged crimes.

3.1. Challenges of international criminal investigations

The investigation of international crimes comes with a plethora of challenges which equally apply to investigations of any domestic crimes, whether of sexual and gender-based nature or not. Firstly, there are significant differences between international criminal investigations and investigations carried out in a domestic setting. These two types of investigations differ in their focus, subject matter, and share considerably different experiences in relation to the accessibility of information.

International investigations are strongly focused on establishing the socio-political context in which particular criminal acts were committed. The contextual perspective is crucial in order to adequately categorize a specific criminal act within the ICL framework. For instance, depending on the circumstances in which it was committed, rape can be charged and prosecuted as a war crime and/or a crime against humanity and/or genocide. Furthermore, the scale on which international crimes have been committed means that the investigators are likely to face a multiplicity of perpetrators, victims and witnesses, whose numbers are incomparably higher than those arising in domestic investigations. As it is practically impossible to ascertain all of the perpetrators, victims and witnesses, the investigations often need to be focused either according to a geographic region where crimes were allegedly committed (e.g. genocidal campaign in the Butare province in Rwanda), the group of defendants or the nature of the crimes (e.g. focusing only on acts of sexual violence as the ICTY did in

Kunarac).¹⁴

The subject matter of the international investigation also stands in contrast with its domestic counterpart. Whilst domestic investigators may undoubtedly encounter examples of gruesome and violent crimes, including instances of violent organized crime, the subject matter of international crimes and the factual circumstances in which they have been committed vary from those attributable to domestic crimes. International crimes are usually committed in the context of mass atrocities motivated by political reasons. They are usually committed against a particular population or group that is targeted and these acts may be perpetrated by either State or non-state actors. In fact, the involvement of State agents in the commission of international crimes may significantly limit the political will to investigate and prosecute such crimes, making the investigation by the international team additionally difficult. Importantly, the absence of an international police force and the limited resources of the international prosecutors mean that the Prosecutor's progress in investigation is largely dependant upon the cooperation and financial support from States and other entities, such as international organizations and NGOs.¹⁵ Whilst domestic prosecutions are also entirely dependent on state funding, they additionally benefit from the availability of the police force and usually no international cooperation is required.

Finally, in the vast majority of cases, the investigations into violations of international criminal law take place shortly after an armed conflict or situation of alleged mass violation of human rights came to an end. The post-conflict context brings out some of the practical difficulties in carrying out such investigations, such as the security concerns in relation to the safety of the investigative team, witnesses and intermediaries, the infrastructural and logistical limitations and the inherent priority of other more critical needs (such as access to food, fresh water, shelter, medical care).

¹⁴ Hiroto Fujiwara, Stephan Parmentier, 'Investigations' in Luc Reydam, Jan Wouters, Cedric Ryngaert, *International Prosecutors* (OUP 2012) 574; Hayes (2012), *supra* 9, 420-421.

On the issue of thematic prosecutions of international sex crimes see generally: Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012).

¹⁵ On the role of human rights professionals in investigation: Morten Bergsmo, William H. Wiley, "Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes" in: Siri Skåre, Ingvild Burkey, Hege Mørk (eds) *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers* (Oslo: Norwegian Centre for Human Rights, 2008).

Furthermore, the polarisation of societies resulting from the conflict may impede effective investigations.

3.2. Challenges of investigating gender-based crimes

The investigation of gender-based crimes in a post-conflict context (or at times, in an ongoing conflict) faces some unique challenges.¹⁶ Generally, sexual and gender-based violence is underreported, especially when it happens in armed conflict.¹⁷ Moreover, conflict-related gender-based crimes are often committed together with other crimes, such as murder. The killing of the victim of sexual violence automatically eliminates the possibility of obtaining evidence on that matter directly from the victim. In many cases, the forensic or documentary evidence may be lacking or difficult to obtain due to the passage of time since the crimes were committed. As a result, the key evidence related to gender-based crimes committed in such situations is often based on hearsay and circumstantial evidence.¹⁸ In addition, crimes of sexual and gender-based violence, Marcus notes, appear to be often “approached with greater reluctance, analysed as if it were a separate category unto itself, and not assumed to be a component of every investigation into international criminal law violations”.¹⁹ This approach, which has been shown to exist at various stages of the process of prosecuting gender-based crimes, has a detrimental impact on the gathering of evidence related to gender-based crimes as well as on the quality of such evidence when placed before the international criminal courts during the trial.

¹⁶ ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), paras.50-51 <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 17 March 2015.

¹⁷ UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. S/2015/203, 23 March 2015, para.5, noting that “sexual violence during and in the wake of armed conflict continues to be dramatically underreported because of the risks, threats and trauma faced by those who come forward”.

¹⁸ Kai Ambos, ‘Thematic Investigations and Prosecution of International Sex Crimes: Some Critical Comments from a Theoretical and Comparative Perspective’ in: Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 297.

¹⁹ Maxine Marcus, ‘Investigation of crimes of sexual and gender-based violence under international criminal law’ in: Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 211.

It is therefore essential that investigative teams are adequately trained to approach and interview the victims of gender-based crimes and that evidence is competently collected and documented. The prosecutorial strategy also has a great impact on the way in which investigations into gender-based crimes are conducted. As argued by Nowrojee, “different prosecution strategies will require different evidentiary standards and investigative approaches. Without a unified prosecution strategy on the sexual violence charges, different teams will pursue different, and perhaps even contradictory, approaches”.²⁰ Therefore, it vital that the prosecutorial strategy takes account of gender-based crimes from the very outset, even before any decision is made to initiate investigation in any country.²¹ The question of the ability of a state to prosecute conflict-related sexual and gender-based violence should form a part of the initial inquiry carried out by the Prosecution into the particular situation (i.e. at the ‘situation stage’), in accordance with the obligation placed on the ICC Prosecutor under Article 54(1)(b) of the ICC Statute. The initial inquiry ought to examine whether national institutions are capable of carrying out the investigation and prosecution of gender-based crimes and, if so, whether they actually carry out proceedings against perpetrators of gender-based crimes, who otherwise might be subjected to the ICC jurisdiction. Whilst a State may be able and willing to prosecute perpetrators of other international crimes, there exists a danger that the significance of gender-based crimes might be minimised resulting in an omission of these crimes from this process.²² This may be due to the false perception of gender-based crimes as having less priority than other crimes such as murder or torture, or even the lack of political will to do so. Arguing in support of the gender inclusive perspective into the early stages of the preliminary investigation, SáCouto and Cleary emphasize the need for the Prosecutor

²⁰ Binaifer Nowrojee, “We Can Do Better: Investigating and Prosecuting International Crimes of Sexual Violence” (2004) <<http://ictr-archive09.library.cornell.edu/ENGLISH/colloquium04/nowrojee.html>> accessed 17 March 2015.

²¹ Luping, supra 9, 434.

²² According to the Amnesty International report from 2008, “(...) despite extensive documentation by women’s groups, non-governmental organisations and NATO of rape and other crimes of sexual violence committed on a large scale during the conflict in Kosovo (...) it appears that there had, up to April 2007 been only one indictment including a charge of rape or sexual violence as a war crime or crime against humanity”. Amnesty International, ‘Kosovo (Serbia): The challenge to fix a failed UN justice mission’ (2008) 63 <<https://www.amnesty.org/en/documents/document/?indexNumber=EUR70%2F001%2F2008&language=en>> accessed 17 March 2015.

to thoroughly examine “a state’s laws, procedures, and policies governing the investigation and prosecution of sexual violence and gender-based crimes, even where the State seems capable and willing to try other crimes”.²³

The commitment to the incorporation of a gender perspective into all stages of prosecuting gender-based crimes, including the early phase, is also reflected in the 2014 ICC Policy Paper on Sexual and Gender-Based Crimes, in which the ICC Prosecutor commits to examining the existence of genuine and relevant national proceedings in relation to sexual and gender-based crimes and assessing whether they relate to potential cases being examined by the OTP.²⁴ The Policy Paper also recognizes the existence of possible barriers to genuine criminal proceedings, which will be considered by the OTP during the complementarity assessment, including “discriminatory attitudes and gender stereotypes in substantive law, and/or procedural rules that limit access to justice for victims of such crimes, (...), the existence of amnesties or immunity laws and statutes of limitation, and the absence of protective measures for victims of sexual violence”.²⁵

3.3. Collection of evidence related to gender-based crimes

The collection of evidence related to gender-based crimes may be impeded by the reluctance of some victims to give an account of acts of sexual and gender-based violence committed against them.²⁶ This may be caused by a variety of factors

²³ Susana SáCouto, Katherine Cleary, “The importance of effective investigation of sexual and gender-based crimes at the International Criminal Court” (2009) 17 American University Journal of Gender, Social Policy and Law 337, 344-345.

²⁴ ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), para.40 < <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 17 March 2015.

²⁵ Ibid., para.41.

²⁶ For the discussion of best practices and methods of investigation and documentation of sexual and gender-based violence see: Foreign & Commonwealth Office, ‘The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict. Basic Standards of Best Practice in Documentation of Sexual Violence as a Crime under International Law’ (June 2014) <<https://www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict>> accessed 17 March 2015; Lynn Lawry, Kirsten Johnson, Jana Asher ‘Evidence-Based Documentation of Gender-Based Violence’ in: Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 243-274.

including the trauma suffered by the victim, the fear of being ostracised and the fear for their physical safety and security. Various societies, cultures and religions attach stigma to the victims of sexual and gender-based violence, which may result in exclusion of such persons from their immediate family and broader community, having a profound impact on the victim's future life.²⁷ As described by the ICTY, witnesses "face various social, psychological and sometimes even physical impediments to coming forward and testifying. Some of the potential witnesses feel that their security may be jeopardised should they come to testify. In addition, identifying oneself as a victim of sexual violence may lead to stigmatisation within one's society, making return to normal life even more difficult".²⁸ Whilst the apprehension associated with testifying applies to all victims of crime, testifying about gender-based crimes carries particular challenges not only due to the social stigma attached to these crimes but also because of the possible risk of revictimisation during testimony. It is therefore crucial to consistently ensure the physical and psychological safety and security of victims and witnesses who provide evidence of gender-based crimes in international trials. However, where witnesses are based in their own countries, this task is particularly challenging. The ICC Statute contains procedural measures aimed at protecting victims and witnesses which may include a hearing in closed session or proceedings in camera. Under Article 68(1), the Court "shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses", especially in cases involving sexual and gender-based violence.²⁹ Under ICC RPE, the Court may also order protective measures (Rule 87) and/or special measures in relation to the traumatised victim or witness or the victim of sexual violence (Rule 88). The ICC Victims and Witnesses Unit may also advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance.³⁰ Whilst the decisions and practice of the

²⁷ Nowrojee (2004), *supra* 20; ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), paras.50, 65
<<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 17 March 2015.

²⁸ ICTY, "Reliving the past: The challenges of testifying" <<http://www.icty.org/sid/10608>> accessed 17 March 2015.

²⁹ This obligation is also reflected in the ICC-OTP Policy Paper on Sexual and Gender-Based Crimes (June 2014), *supra* 29, paras.60-61.

³⁰ Article 68(4) ICC Statute.

ICC regarding protective tools are still developing, it is reported that within the first seven years of the work of the court none of the over 500 witnesses has suffered harm from the hands of the accused or their associates as a consequence of giving evidence before the court.³¹

Furthermore, the victim's reluctance to discuss their experience of sexual and gender-based violence may be caused by flaws in the interview technique or by the behaviour of the interviewer.³² Nowrojee stresses the need to incorporate gender-sensitive interviewing methodology when collecting evidence about gender-based crimes. Regarding the ICTR, Nowrojee points out major weaknesses in the investigation process, such as investigators' lack of skills on how to effectively pursue evidence relating to gender-based crimes, no training on interviewing methodology for rape victims, little or no experience of investigators in dealing with gender-based crimes or the belief that this is not a crime that deserves serious attention.³³

In culturally sensitive environments, the need for an investigator's 'informed preparation' is of paramount importance.³⁴ The investigator's knowledge of the nature of the conflict as well as understanding of the culture, customs and traditions within a particular country may contribute to establishing good practice of interviewing. Cultural awareness is crucial in order to facilitate interviews with victims. Hayes notes examples of some cultural differences which may be misinterpreted by an unskilled or unaware interviewer.³⁵ For instance, the lack of direct eye contact from the victim may not be an evasive technique but rather a show of respect, similarly to the greeting involving shaking hands being possibly perceived in some contexts as highly inappropriate. The understanding of customary views on sexuality as well as customary responses of communities to sexual and gender-based violence is also a

³¹ Markus Eikel, 'External Support and Internal Coordination - The ICC and the Protection of Witnesses' in: Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 1118.

³² See generally: Foreign & Commonwealth Office, 'The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict. Basic Standards of Best Practice in Documentation of Sexual Violence as a Crime under International Law' (June 2014) 50-60 <<https://www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict>> accessed 17 March 2015.

³³ Nowrojee (2004), *supra* 20.

³⁴ Marcus, *supra* 19, 213-218.

³⁵ Hayes (2012), *supra* 9, 422-423.

significant factor in interpreting the victim's testimony. This aspect may be particularly relevant in relation to the language used by the victim to describe her experiences. Some victims may not expressly refer to acts of sexual and gender-based violence using words such as 'rape' or 'sexual assault'. Instead, they may speak of experiencing these acts of violence using euphemistic phrases ("he lay with me" or "he disrespected me") or may choose to speak of these events in the third person, avoiding revealing their personal victimhood.³⁶ Additionally, an investigator needs to understand, Hayes notes, "that not everything they or the interviewee say will have direct word-for-word translation and that certain styles of questions (particularly rhetorical questions or long, barrister-style conditional questions) are particularly difficult to convey".³⁷

The investigators ought to also be mindful of the possibility that victims may speak of acts of sexual violence not directly, but in the context of other crimes being committed. In the *Akayesu* trial at the ICTR, the witness who was called to testify at the early stage of the trial about the murder of most members of her family spontaneously mentioned that her six year old daughter had been raped.³⁸ When further questioned by the members of the ICTR, including Judge Navanethem Pillay, Witness J testified that other girls had been raped in Akayesu's bureau communal. The example of the spontaneous testimony of Witness J in *Akayesu* revealed that the witness had not been questioned about occurrences of sexual violence crimes in the Taba commune during her interviews. It also stresses the need to pay close attention to the victim's testimony at the interview stage, especially in relation to identifying possible information about gender-based crimes.

³⁶ Ibid., 422; ICTR, 'Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions', supra 8, para.173.

The need for preparation of the interviewers towards the understanding of the culturally sensitive language used in interviews is also highlighted by the ICC OTP: "The interview team and interpreters will undertake specific preparation in relation to the interview process. This may include familiarisation with euphemisms and other verbal and non-verbal communication which may be used by witnesses to refer to acts of sexual violence within the specific context of the investigation. They will also receive briefings and glossaries in order to familiarise themselves with the appropriate and accurate terms to describe acts of sexual violence and parts of the body". ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), para.58 < <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 17 March 2015.

³⁷ Hayes, supra 35, 423.

³⁸ *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para.416.

Due to the nature of gender-based crimes, the victims may hesitate to speak about their experiences with a male investigator. However, this is not to say that men should not be involved in the investigation of gender-based crimes. Rather, the focus ought to be placed on the consistent and high standard of expertise in investigating gender-based crimes, regardless of the gender of the team member. As Sellers rightly notes, “investigations could field all male team members, or all female team members or mixed-gendered teams depending on what configuration would be more likely to obtain a witness’ evidence”.³⁹ In such circumstances, the choice of the interviewer’s gender ought to, wherever possible, be left to the victim, who is best placed to decide with whom they feel most comfortable sharing their experience of sexual violence.⁴⁰ Furthermore, Marcus highlights the importance of establishing rapport with the victim in relation to the information-sharing. The willingness of an international investigator to adapt to the local customary greetings, learning a few words of greeting in the language of the witness and therefore showing respect to the witness, their community, language and practices can encourage the witness to share sensitive information.⁴¹

4. Charging and prosecution of gender-based crimes

The decision to bring charges before an international court or tribunal lies at the discretion of the Prosecutor. It is up to the Prosecutor to determine and characterize the charges and to include the relevant ones in the indictment.⁴² Over the years, the Prosecutors of international criminal courts and tribunals have been criticised for their selectiveness and, at times, a demonstrable lack of political will in charging crimes of sexual and gender-based violence. Despite indisputable advances made by the

³⁹ Patricia Viseur Sellers, “Gender strategy is not a luxury for international courts” (2009) 17 *American University Journal of Gender, Social Policy and Law* 301, 311.

⁴⁰ Luping, *supra* 9, 493.

⁴¹ Marcus, *supra* 19, 224.

⁴² However, at the ICC, the Pre-Trial Chamber can recharacterize the charges under Regulation 55. However, the use of this principle has been criticized: Dov Jacobs, ‘A Shifting Scale of Power: who is in Charge of the Charges at the International Criminal Court and the uses of Regulation 55’ (2013) Grotius Centre Working Paper 2013/004-ICL

<<http://law.leiden.edu/organisation/publiclaw/publicinternationallaw/grotius-centre-workingpapers/working-paper-series.html>> accessed 17 March 2015; Kevin Jon Heller, ‘A Stick to Hit the Accused With’: The Legal Recharacterization of Facts under Regulation 55’ in: Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 981-1006.

international criminal court and tribunals in prosecuting conflict-related gender-based crimes, charges of gender-based crimes continue to be omitted from indictments even where evidence exists to support their inclusion. For example, Nowrojee criticised the unexpected drop in new indictments, including sexual violence charges, from 100 per cent of indictments in 1999–2000 to 35 per cent in 2001–02, since Carla Del Ponte assumed the office of the ICTR Prosecutor.⁴³ By Del Ponte’s final year, none of the new indictments contained rape charges. In addition, a number of cases (most notably the *Cyangugu* case) proceeded to trial without including charges of rape despite strong evidence supporting such charges being in the possession of the OTP.⁴⁴ The absence of sexual violence charges in the decision on the confirmation of charges against Thomas Lubanga Dyilo at the ICC illustrates a more recent prosecutorial omission.⁴⁵

A number of factors have a significant bearing on which charges are brought by the Prosecutor. Firstly, international criminal courts and tribunals are designed to focus their prosecutions on the most serious international crimes or on crimes committed by high-level defendants. In this context, the gravity of gender-based crimes has often been downplayed by an incorrect, although fairly common, view that sexual and gender-based violence is not of equal gravity to other international crimes. Moreover, the false perception that crimes of sexual and gender-based violence are more difficult to prosecute than other international crimes can be seen as an additional hurdle to including charges of such crimes in the indictment.⁴⁶ The institutional attitude towards charging gender-based crimes changed significantly at the ICC, where the vast majority of the defendants in cases brought before the Court have been charged with such offences. However, where charges of gender-based crimes proceed to trial, they are still subjected to what Hayes describes as “the most intractable problem facing the ICC, and the one which appears to affect prosecutions for sexual violence to an

⁴³ Binaifer Nowrojee, “‘Your Justice is Too Slow’ Will the ICTR Fail Rwanda’s Rape Victims?” (November 2005) United Nations Research Institute for Social Development, Occasional Paper No.10, 10 <<http://www.unrisd.org/publications/opgp10>> accessed 17 March 2015.

⁴⁴ *Ibid.*, 8-12, 14-17; Beth Van Schaack, ‘Obstacles on the road to gender justice: the International Criminal Tribunal for Rwanda as object lesson’ (2009) 17 *American University Journal of Gender, Social Policy and Law* 361, 372-375.

⁴⁵ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Decision on the confirmation of charges), ICC-01/04-01/06-806 (29 January 2007).

⁴⁶ Marcus, *supra* 19, 211.

inordinate extent”, namely the quality and sufficiency of prosecution evidence supporting these charges.⁴⁷

Secondly, in order to charge and prosecute high-level commanders and leaders for gender-based crimes, the link needs to be established between the acts of sexual violence and the accused. It needs to be shown that the accused either committed or instigated the acts themselves (individual criminal responsibility) or that the accused exercised superior responsibility over the direct perpetrator of the alleged offence (superior responsibility doctrine). In the context of the latter, it needs to be demonstrated that the perpetrator (i.e. subordinate) was under the effective control of the accused and that the accused knew, or should have known, that his subordinates were committing or were about to commit international crimes yet failed to take all necessary and reasonable measures to prevent or repress the commission of such crimes.⁴⁸ Given that the need for such a link applies equally to other international crimes, whenever the doctrine of superior responsibility is invoked as a mode of liability. To that end, at least in principle, gender-based crimes are equally affected by the scope of this principle as any other international crimes. The case of Charles Taylor, the former president of Liberia, is illustrative in this respect and demonstrates the possibility of holding high-level accused criminally responsible for gender-based crimes in ICL.

The SCSL Trial Chamber successfully established the link between Charles Taylor, the former president of Liberia, and gender-based crimes committed during the Sierra Leonean conflict.⁴⁹ The Trial Chamber concluded that Taylor was aware that AFRC and RUF forces were committing acts of sexual and gender-based violence in Sierra Leone. It emphasized that Taylor was in particular aware of the content of the ECOWAS report on the situation in Sierra Leone, which outlined the level of atrocities, including acts of

⁴⁷ Hayes (2013), *supra* 9, 27.

⁴⁸ Article 28 ICC Statute; ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), para.78 <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 17 March 2015.

⁴⁹ Valerie Oosterveld, ‘Gender and the Charles Taylor Case before the Special Court for Sierra Leone’ (2012) 19(1) *William & Mary Journal of Women and Law* 7-33; Valerie Oosterveld, ‘Evaluating the Special Court for Sierra Leone’s Gender Jurisprudence’ in Charles Chernor Jalloh, *The Sierra Leone Special Court and its Legacy. The Impact for Africa and International Criminal Law* (CUP 2014) 234-259.

sexual and gender-based violence and therefore “as early as August 1997, the Accused, as President of Liberia and a member of the ECOWAS Committee of Five, was informed in detail of the crimes committed by the AFRC/RUF members during the Junta period, including murder, abduction of civilians including children, rape, amputation and looting. He would therefore have been aware of the likelihood that the AFRC/RUF would commit similar crimes in the future”.⁵⁰ Given Taylor’s knowledge, providing and facilitating arms and ammunition to the RUF and AFRC constituted practical assistance in committing international crimes (including sexual slavery and rape), therefore amounting to aiding and abetting the commission of the crimes outlined in the indictment.⁵¹

In contrast, looking at the experience of the ICTR, Van Schaack comments on the difficulties encountered by the prosecution in *Akayesu*, where the prosecutor was initially unable to charge Akayesu with crimes of sexual violence committed in Taba commune (where Akayesu was a *bourgmestre*), despite the knowledge of such acts being perpetrated.⁵² This was due to the lack of evidence supporting the existence of the superior-subordinate relationship between Akayesu and the perpetrators of sexual violence. Coincidentally, the prosecution was able to amend the indictment and succeed in prosecuting Akayesu with regard to charges of sexual violence thanks to the spontaneous testimony of one of the witnesses during the trial. Another case before the ICTR, *Prosecutor v. Muvunyi*, also faced similar problems.⁵³ However, as the experience from the ICTY and the ICTR goes to show, prosecuting acts of sexual and gender-based violence based on the doctrine of joint criminal enterprise (JCE) may offer a practical solution to the problem outlined above.

⁵⁰ *Prosecutor v. Taylor*, Trial Chamber II Judgment, SCSL-03-01-T, 18 May 2012, para.6882.

⁵¹ *Prosecutor v. Taylor*, Trial Chamber II Judgment, SCSL-03-01-T, 18 May 2012, paras.6911-6912, 6953.

⁵² *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, paras.49-77 (outlining de facto and de jure powers of the town *bourgmestre*).

Beth Van Schaack, *supra* 44, 391-393.

⁵³ *Prosecutor v. Muvunyi*, Trial Judgment and Sentence, ICTR-2000-55A-T, 12 September 2006, paras.400-409; para.409: “The Chamber fully understands the unique circumstances of rape victims and sympathises with them. However, in light of the very specific nature of the rape charge contained in the Indictment, and the nature of the evidence adduced at trial, the Chamber is of the view that the Prosecution has not proved beyond reasonable doubt that the Accused can be held responsible for the crime of rape as charged in Count 4 of the Indictment”.

4.1. Joint criminal enterprise (JCE)

Joint criminal enterprise (JCE) is a mode of liability for international crimes. After World War II, the Charters of the IMTN and of the IMTFE provided that those who participated in “a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan”.⁵⁴ The doctrine of JCE has been further developed and applied by modern international criminal courts and tribunals and, according to Cassese et al., it is to be regarded as a norm of customary international criminal law.⁵⁵ The ICTY Appeals Chamber in *Tadić* confirmed that JCE is a part of customary ICL and outlined three forms of JCE:

- a) JCE I, where all participants in the common design possess the same criminal intent to commit a crime;
- b) JCE II (so called ‘concentration camp’ cases) is a variant of JCE I which requires that a criminal plan involves ill-treatment taking place in an institutionalised setting, e.g. detention camp;
- c) JCE III, where the criminal act falls outside the ‘common purpose’ but is nonetheless a foreseeable consequence of the common plan’s implementation.⁵⁶

The next section focuses on the analysis of JCE III as a mode of liability applied in prosecution of high-level defendants in cases involving sexual violence crimes.

4.1.1. JCE III and prosecution of sexual violence

JCE can be used in relation to any of the crimes under the ICTY Statute, and there is no reason to treat it any differently in cases involving sexual violence.⁵⁷ In order to prosecute any crime using JCE liability, it needs to be shown that there exists a link

⁵⁴ Article 6 IMTN Statute, Article 5(c) IMTFE Statute.

⁵⁵ Antonio Cassese, Mary De Ming Fan, Vanessa Thalmann, Salvatore Zappala, ‘Amicus curiae brief of Professor Antonio Cassese and members of the Journal of International Criminal Justice on the Joint Criminal Enterprise Doctrine’ (2009) 20 Criminal Law Forum 289, 294-295 (arguing that JCE has become a norm of customary ICL by 1975); However this contention was rejected by the Extraordinary Chambers in the Court of Cambodia in *Prosecutor v. Ieng Sary* (Decision on the Appeal against the Co-Investigative Judges Order on Joint Criminal Enterprise) 002/19-09-2007-ECCC/OCIJ (PTC 38), 20 May 2010, paras.75-88.

⁵⁶ *Prosecutor v. Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999, para.220.

⁵⁷ The same applies in relation to the ICTR and the SCSL Statutes.

between the high-level accused person and the committed crimes, even though the accused may have been physically removed from them. In that respect, the nature of the crime is irrelevant, allowing for the prosecution of sexual violence in the same way as other crimes. The ICTY has successfully relied on JCE in the prosecution of cases involving sexual violence.⁵⁸ The mode of liability applied in such cases was generally involving JCE III (i.e. where sexual violence was a natural and foreseeable consequence of the implementation of the common plan), but JCE I liability was nonetheless successfully invoked in *Stakić*.⁵⁹ *Stakić* was convicted of persecution (as a CAH) based on rapes and sexual assaults (amongst other criminal acts), which formed a part of a JCE to ethnically cleanse the Prijedor region by deporting and persecuting Bosnian Muslims and Bosnian Croats. The ICTY Trial Chamber considered that acts of sexual violence were committed with a discriminatory intent and formed an integral part of the ‘common purpose’ entrenched in deportations and forced transfers.⁶⁰

However, the majority of sexual violence cases before the ICTY in which JCE liability was invoked were based on JCE III and concerned situations of forcible transfers, mass expulsions and detention camps. The substantive difference between JCE I and JCE III is that the latter arises where the crime was foreseeable even if it did not form a part of a common plan (which is required for JCE I). In order to satisfy the mens rea elements of JCE III, the Prosecutor must prove that the accused, having “awareness that such crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise”.⁶¹ Therefore, the standard applicable to JCE III is one

⁵⁸ Michelle Jarvis, Elena Martin Salgado ‘Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice’ in: Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 111-117.

⁵⁹ *Prosecutor v. Stakić*, Trial Judgment, IT-97-24-T, 31 July 2003, paras.234-236, 240-241, 244, 757, 791-806, 826; *Prosecutor v. Stakić*, Appeal Judgment, IT-97-24-A, 22 March 2006, paras.73, 84-85, 92-98, 104; The ICTY Trial Chamber also used JCE I in *Prosecutor v. Krajišnik*, Trial Judgment, IT-00-39-T, 27 September 2006, convicting Krajišnik of persecution based on, amongst other things, sexual violence (paras.4, 1126, 1145, 1182). However, the ICTY Appeals Chamber overturned Trial Chamber’s finding due to insufficient detail. Therefore, the final decision in *Krajišnik* did not include sexual violence crimes.

⁶⁰ *Prosecutor v. Stakić*, Trial Judgment, IT-97-24-T, 31 July 2003, paras.234-236, 240-241, 244, 791-806, 826

⁶¹ *Prosecutor v. Karadžić*, IT-95-5/18-AR72.4, Decision on Prosecutor’s Motion Appealing Trial Chamber’s Decision on JCE III Foreseeability, 25 June 2009, para.15; see also: *Prosecutor v. Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999, para.228.

of possibility and not of probability. The actus reus of JCE III is common for all types of JCE and involves:

- i. A plurality of persons.
- ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.
- iii. Participation of the accused in the common design involving perpetration of one of the crimes provided for in the Statute.⁶²

In *Prosecutor v. Kvočka et al.*, the ICTY Trial Chamber convicted the accused of committing acts of persecution (involving rape and sexual assault) in the Omarska camp in Prijedor. Considering the question of foreseeability of acts of sexual violence in the detention camp in Omarska by the defendants, the Trial Chamber concluded that in light of circumstances and conditions imposed upon detainees in Omarska camp it was foreseeable that acts of sexual violence might be committed (even though they did not form a part of the common plan agreed by the accused):

“any crimes that were natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence, can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise. In Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence”.⁶³

Similarly, in *Krstić*, the ICTY Trial Chamber reasoned that sexual violence was not an agreed part of the defendants’ common purpose to forcibly transfer Bosnian Muslims from Srebrenica, but rather amounted to a natural and foreseeable consequence of such plan. The ICTY correctly noted that factors such as “the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient

⁶² *Prosecutor v. Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999, para.227.

⁶³ *Prosecutor v. Kvočka et al.*, Trial Judgment, IT-98-30/1-T, 2 November 2003, para.327.

members of the UN to provide protection” were indicative of the foreseeability of sexual violence.⁶⁴

In *Šainović et al.*, the ICTY Appeals Chamber reversed the first instance finding that while acts of murder and destruction or damage to religious property were sufficiently foreseeable consequences of the ethnic cleansing campaign in Kosovo in 1999, sexual assaults were not (amounting to a JCE).⁶⁵ The Appeals Chamber, similarly to *Krstić* and *Kvočka*, relied on various facts (such as reports of sexual violence taking place) as well as circumstantial factors suggesting that it was foreseeable to the accused that sexual violence might be committed in relation to Kosovar Albanian women. In addition, the Appeals Chamber provided an important clarification on the standard for JCE III liability, confirming that it is one of possibility, not probability. Therefore, it corrected the error of the Trial Chamber in applying the higher degree of foreseeability than required for crimes falling outside the scope of common purpose (i.e. JCE III).⁶⁶

The ICTR has successfully prosecuted sexual violence on the basis of JCE III only in one case, *Prosecutor v. Karemera et al.*⁶⁷ The ICTR Appeals Chamber found that rapes and sexual assaults of Tutsi women did not form a part of the common purpose to destroy the Tutsi population in Rwanda in 1994, but instead amounted to a natural and foreseeable consequence of the joint criminal enterprise of the accused in the form of a campaign to exterminate the Tutsis.⁶⁸ The accused were proven to have had sufficient knowledge about rapes and sexual assaults taking place as a part of the policy to destroy the Tutsi population, primarily because of their professional positions. Despite that, they decided to continue taking part in JCE and took the risk

⁶⁴ *Prosecutor v. Krstić*, Trial Judgment, IT-98-33-T, 2 August 2001, para.616; conviction of Krstić in relation to acts of sexual violence on the basis of JCE III was upheld on appeal: *Prosecutor v. Krstić*, Appeals Judgment, IT-98-33-A, 19 April 2004, paras.150-151.

⁶⁵ *Prosecutor v. Milutinović et al.*, Trial Judgment, IT-05-87-T, 26 February 2009, vol.III, paras.470-473 (finding, in respect of Šainović, that murder and destruction of damage to religious property was reasonably foreseeable but that sexual assault was not), paras.1134-1136 (finding, in respect of Lukić, that murder and destruction of damage to religious property was reasonably foreseeable but that sexual assault was not); overturned on appeal: *Prosecutor v. Šainović et al.*, Appeals Judgment, IT-05-87-A, 23 January 2014, paras.1581-1582 (re: Šainović), 1591-1592 (re: Lukić).

⁶⁶ *Prosecutor v. Šainović et al.*, Appeals Judgment, IT-05-87-A, 23 January 2014, para.1061.

⁶⁷ *Prosecutor v. Karemera et al.*, Appeals Judgment, ICTR-98-44-A, 29 September 2014; *Prosecutor v. Karemera et al.*, Trial Judgment, ICTR-98-44-T, 2 February 2012.

⁶⁸ *Prosecutor v. Karemera et al.*, Trial Judgment, ICTR-98-44-T, 2 February 2012, paras.1477, 1487, 1669.

that these crimes would continue to be committed.⁶⁹ Importantly, the ICTR also recognized the pervasive and integral part that sexual violence has played in the Rwandan genocide when stating that

“(...) during a campaign to destroy, in whole or in part, a national, ethnic, racial, or religious group, a natural and foreseeable consequence of that campaign will be that soldiers and militias who participate in the destruction will resort to rapes and sexual assaults unless restricted by their superiors”.⁷⁰

4.1.2. Critique and evaluation of JCE III

Although JCE III proved to be a useful mechanism for ensuring the culpability of a high level defendant for crimes involving sexual violence before ad hoc tribunals, the scope of the JCE III doctrine attracted significant criticism.⁷¹ The ICTY was criticised for “inventing JCE III out of a thin air in *Tadić*”, whilst the doctrine itself was said to “unfairly hold the participant liable for criminal conduct that he neither intended or participated in” as well as to rely on a notion of foreseeability which in itself renders criminal liability of the accused unforeseeable.⁷²

The critique was predominantly focused on the rights of defendants in criminal trials and procedural fairness, as per Ambos’ arguments. The issues of foreseeability of certain crimes arising from the implementation of the common plan has proved to be particularly controversial. However, it can be argued that, especially in cases involving high-level defendants (such as political or military leaders) it is *reasonably* foreseeable that persons in such positions would have foreknown that their actions may lead to other crimes being committed, especially acts of sexual violence. The application of an

⁶⁹ Ibid., para.1487.

⁷⁰ Ibid., para.1476.

⁷¹ Jens David Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ (2007) 5(1) *Journal of International Criminal Justice* 69-90; Kai Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (2007) 5(1) *Journal of International Criminal Justice* 159-183; Mohamed Elewa Badar, ‘“Just Convict Everyone!”- Joint Perpetration: From *Tadić* to *Stakić* and Back Again’ (2006) 6 *International Criminal Law Review* 292-302.

⁷² Kevin Jon Heller, ‘The ECCC Issues a Landmark Decision on JCE III’, *Opinio Juris* (23 May 2010) <<http://opiniojuris.org/2010/05/23/the-eccc-issues-a-landmark-decision-on-jce-iii/>> accessed 1 July 2015; Mohamed Elewa Badar, ‘“Just Convict Everyone!”- Joint Perpetration: From *Tadić* to *Stakić* and Back Again’ (2006) 6 *International Criminal Law Review* 292, 301; Kai Ambos, *Treatise on International Criminal Law*, Vol.1 (OUP 2013) 174.

objective standard of reasonableness to the issue of foreseeability in JCE would lead to a contention that the professional skills and knowledge of political and military leaders as well as their professional standing would suggest that the consequences of their actions were more readily foreseeable to them than to an ordinary person.

When it comes to acts of sexual violence, it is expected that such public figures, especially military strategists and leaders, would have been aware of the political as well as strategic dimensions of the use of sexual violence in conflicts as well as the historical record of such practices. In this context, it is worth noting the dissenting opinion of Judge Chowhan in *Milutinović et al.* who, in relation to the ethnic cleansing campaign in Kosovo, considered the nature of the conflict in question as well as the past history of conflicts in the region as factors contributing to “prudence and [a] common sense” conclusion that “sexual assaults, like murders, were certainly foreseeable realities”.⁷³ To suggest otherwise would be not only naïve, but would further perpetuate one of the key reasons why the high level leaders and senior officials have long managed to evade criminal accountability for conflict-related sexual violence. It is also difficult to ignore the importance of causation in the context of JCE III. After all, the ‘consequential crime’ is made possible by the existence and implementation of the ‘common plan’ of JCE. Under the JCE III doctrine, the accused need not directly commit the ‘consequential crime’; the requirement is that the accused willingly took the risk of the ‘additional offence’ foreseeably occurring as a result of the main crime.⁷⁴ As such, by continuing the involvement in JCE, the accused accepts the risk that operation of the common plan may result in additional crimes, for which the accused may consequently be held responsible.

The application of JCE III exposes the complex nature of the perpetration of international crimes. It forces the law to look beyond the direct perpetrators of international crimes and command responsibility. As such, it offers a more rounded

⁷³ *Prosecutor v. Milutinović et al.*, Trial Judgment, IT-05-87-T, 26 February 2009, vol.III, Dissenting Opinion of Judge Chowhan.

⁷⁴ According to the ICTY Appeals Chamber in *Tadić*, the standard required is to show that the accused took the risk willingly, “more than negligence is required” (IT-94-1-A, 15 July 1999, para.220); Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge’s Recollection* (OUP 2012) 222-223.

understanding of the character of international crimes, which usually requires the collective involvement of many actors, from high-level political and military figures to direct perpetrators on the ground. Despite the diversity of their roles, it is the united effort of all these actors that makes the commission of international crimes possible. This is particularly applicable to the high-level accused, many of whom are in fact in a position to stop or prevent international crimes from occurring, especially if they receive information about certain crimes taking place. For instance, in *Šainović et al.* the Appeals Chamber confirmed that despite receiving reports of sexual violence taking place, the accused continued their involvement in JCE.⁷⁵

JCE III recognizes this dynamic by extending the accountability for international crimes, including acts of sexual violence, arising 'as a consequence' of primary crimes, to those who facilitate the commission of these criminal acts by implementing a common criminal plan. As such, it conceptually tackles one of the key challenges in prosecuting high-level accused for acts of sexual violence: the shortage of sufficient evidence that would link the high-level accused to victim of sexual violence.⁷⁶ Van der Wilt calls for the recognition of this symbolic function of the JCE III doctrine with respect to putting an end to high-level culprits evading personal responsibility for international crimes.⁷⁷ In achieving this end, JCE III not only brings about the personal criminal responsibility of high-level accused for committing international crimes, but at the same time emphasizes the collective aspect of their commission.

Finally, the jurisprudence of the ad hoc tribunals on JCE III for crimes of sexual violence has further demonstrated the pervasive character of sexual violence in armed conflict. It further showed that sexual violence in conflict is not isolated but rather is

⁷⁵ *Prosecutor v. Šainović et al.*, Appeals Judgment, IT-05-87-A, 23 January 2014, paras.1578-1579.

⁷⁶ This issue has been raised in relation to prosecution of conflict-related sexual violence at the ICTY and at the ICTR: Linda Bianchi, 'The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR' in: Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 134-135; Michelle Jarvis, Elena Martin Salgado 'Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice' in: Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 106-110.

⁷⁷ Harmen van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations' (2007) 5(1) *Journal of International Criminal Justice* 91, 107-108.

perpetrated alongside other international crimes and may also act as a tool to ensuring the successful execution of other criminal acts, such as ethnic cleansing, forcible transfers or forced detention. From the perspective of seeking accountability for conflict-related sexual violence, JCE III can therefore be seen as an important development and valuable tool in ensuring that ‘consequential’ sexual violence is punished.

4.1.3. The ICC and ‘joint enterprise liability’

The JCE III doctrine is not incorporated into the ICC Statute and therefore does not fall under the ICC’s jurisdiction. However, a variation of JCE III features in Article 25(3)(d) of the ICC Statute, which provides for liability for the person who:

“contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime”.⁷⁸

There exist substantive differences between JCE III and liability under Article 25(3)(d).⁷⁹ The latter provision focuses on the intentional contributions, eliminating the element of recklessness which is central to JCE III. As clarified by the Pre-Trial Chamber I in *Mbarushimana*, contributions of the alleged perpetrator need to be ‘significant’ but not ‘essential’, with the major factor (amongst four others) being “the role the suspect played *vis-à-vis* the seriousness and scope of the crimes committed”.⁸⁰ However, in order for the accused to incur liability under Article 25(3)(d), they do not need to be a member of the group that acts with a common purpose.⁸¹

⁷⁸ Article 25(3)(d) ICC Statute 1998.

⁷⁹ Kai Ambos, *Treatise on International Criminal Law*, Vol.1 (OUP 2013) 172-176; Cryer et al, *The Introduction to ICL*, 362-363.

⁸⁰ *Situation in the Democratic Republic of the Congo: Prosecutor v. Callixte Mbarushimana* (Decision on the confirmation of charges), Pre-Trial Chamber I, ICC-01/04-01/1, 16 December 2011, paras.283-285.

⁸¹ *Ibid.*, paras.273-275.

The ICC Trial Chamber II considered the application of Article 25(3)(d) liability to acts of sexual violence in *Prosecutor v. Katanga*.⁸² Germain Katanga, a commander of a militia group, was charged under Article 25(3)(d) with a number of criminal acts, including rape and sexual slavery, allegedly committed in the context of the attack on Bogoro village in eastern DRC in February 2003.⁸³ In March 2014, Katanga was ultimately convicted of war crimes of attack on civilian population, pillage, destruction of property and murder on the basis of Article 25(3)(d), but acquitted on charges of rape and sexual slavery.⁸⁴

The treatment of charges of rape and sexual slavery by the Trial Chamber II illustrate a worrying approach towards viewing gender-based crimes in the context of Article 25(3)(d). The court did not view acts of rape and sexual slavery as constituting a part of the ‘common purpose’ of the attack on civilian population in Bogoro.⁸⁵ Given the ethnic background of the conflict, it is even more astounding that the Trial Chamber failed to make a connection with the large body of jurisprudence from ad hoc tribunals, which emphasizes the role of sexual violence in inter-ethnic conflict. Furthermore, this finding stands in sharp contrast with the approach demonstrated towards property-oriented crimes (destruction of property, pillage) and murder, which were held to constitute a part of the ‘common purpose’, therefore forming a ground for the conviction of Katanga.⁸⁶ In reaching this conclusion, the Trial Chamber differentiated between the ways in which the accused contributed to the commission of the alleged crimes. In particular, it was held that Katanga’s actions had a significant impact on carrying out the common purpose plan in the form of an attack on civilians in Bogoro. It was considered that transporting, storing and distributing weapons and ammunition demonstrated planning, intent and preparation for the attack and proved

⁸² *Situation in the Democratic Republic of the Congo: Prosecutor v. Germain Katanga* (Judgment pursuant to article 74 of the Statute), Trial Chamber II, ICC-01/04-01/7-3436, 7 March 2014.

⁸³ Bogoro village was inhabited predominantly by persons of Hema ethnicity. The militia group commanded by Katanga was in conflict with Hema militia group, which was based on the ethnic rivalry. *Situation in the Democratic Republic of the Congo: Prosecutor v. Germain Katanga* (Judgment pursuant to article 74 of the Statute), Trial Chamber II, ICC-01/04-01/7-3436, 7 March 2014, paras.433, 1463, 1688-1691.

⁸⁴ *Ibid.*, paras.1657-1664.

⁸⁵ *Ibid.*, paras.1663-1664.

⁸⁶ *Ibid.*, paras.1657-1662.

Katanga's contribution to the common purpose.⁸⁷ Nonetheless the judges failed to make the connection between the act of amassing large amounts of arms and the subsequent occurrence of sexual violence. This inconsistent interpretation begs the question of what would be considered an equivalent 'significant contribution' for rape or sexual slavery? In the absence of the ICC elaboration on this particular issue, it remains questionable why Trial Chamber II was not convinced beyond reasonable doubt that the supply of arms by Katanga facilitated the commission of acts of sexual and gender-based violence by the militia. Finally, the conclusion reached by Trial Chamber II is even more astounding given that the link between acts of sexual and gender-based violence and arms is explicitly recognized in Article 7(4) of the Arms Trade Treaty 2013 as well as by the UN Human Rights Council.⁸⁸

The apparent shortcomings of the *Katanga* decision illustrate that gender-based crimes continue to be treated differently to other crimes within the ICC jurisdiction. The reasoning of Trial Chamber II confirms that there exists the on-going double-standard in the approach of international courts towards the prosecution of gender-based crimes. Such practice is reflected in the alarmingly common practice whereby the courts appear to require a higher standard of proof to satisfy the threshold of reasonable doubt in cases involving sexual and gender-based violence, despite the lack of the substantive requirement that would justify the need for such an approach. Finally, the trial of gender-based crimes under Article 25(3)(d) in *Katanga* sets an alarming precedent for the future prosecution of such crimes before the ICC.⁸⁹ However, the ICC OTP Policy on Sexual and Gender-Based Crimes recognizes that, especially where there is no evidence of orders to commit sexual or gender-based

⁸⁷ Ibid., paras.1671-1673.

⁸⁸ The Arms Trade Treaty 2013 came into force on 24 December 2014. Article 7(4) states: "The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children". UN Human Rights Council, 'Impact of arms transfers on human rights in armed conflicts', 8 October 2013, A/HRC/RES/24/35, para.2.

⁸⁹ The ICC confirmed charges of gender-based crimes (rape and sexual slavery as CAH and as war crimes) against Bosco Ntaganda, including on the basis of Article 25(3)(d): *Situation in the Democratic Republic of the Congo: Prosecutor v. Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06 (9 June 2014) para.97.

crimes, “evidence such as pattern of prior or subsequent conduct or specific notice may be adduced to prove awareness on the part of the accused that such crimes would occur in ordinary course of events”.⁹⁰ Nonetheless, thus far the ICC appears to take a step back from the advances established by the JCE III, particularly when it comes to ensuring criminal accountability of high-level or senior figures with respect to conflict-related gender-based crimes.

4.2. Cumulative charges

Cumulative charging became a common practice in the ad hoc tribunals and at the SCSL, particularly when prosecuting gender-based crimes.⁹¹ It was also accepted by the IMTN and the IMTFE. The key principle behind cumulative charging is that it enables the prosecution of different crimes based on the same course of conduct of the accused. The rationale behind this principle is that, especially in the context of international crimes, crimes may overlap leading to the same act being possibly concurrently considered a war crime, crime against humanity and genocide. In such situations, the distinction between the categories of crimes under which the particular criminal act is charged depends on the circumstances and context in which it was committed.

The ad hoc tribunals have long accepted cumulative charging and many individuals have been successfully prosecuted and convicted of concurrent offences.⁹² The ICTY Appeals Chamber in *Čelebići* reasoned that:

⁹⁰ ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), supra 29, para.81.

⁹¹ With an exception of *Kayishema & Ruzindana* in which the ICTR ruled against cumulative charging: *Prosecutor v. Kayishema & Ruzindana*, Judgment and Sentence, ICTR-95-1, 21 May 1999, paras.625-650.

⁹² *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, paras.468-470; *Prosecutor v. Rutaganda*, Judgment and Sentence, ICTR-96-3-T, 6 December 1999, paras.115-119; *Prosecutor v. Musema*, Judgment and Sentence, ICTR-96-13-T, 27 January 2000, paras.269-299; *Čelebići*, Appeal Judgment, IT-96-21-A, 20 February 2001, paras.397-400; *Prosecutor v. Jelisić*, Appeal Judgment, IT-95-10-A, 5 July 2011, paras.82-83; *Prosecutor v. Krstić*, Appeal Judgment, IT-98-33-A, 19 April 2004, paras.219-227 (overturning Trial Chamber’s decision and allowing cumulative charging).

Atila Bogdan, ‘Cumulative charges, convictions and sentencing at the ad hoc international tribunals for the Former Yugoslavia and Rwanda’ (2002) 3(1) Melbourne Journal of International Law 1-32; ‘Cumulative Charging and Cumulative Convictions’ in: Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) 315-319.

“Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR”.⁹³

The tribunals also clarified the scope of cumulative charging and the principles governing the practice. In *Kunarac*, the ICTY Appeals Chamber held that the question of whether the same conduct violates two distinct statutory provisions is a question of law.⁹⁴ Cumulative charging also raised the question of cumulative convictions. To that end, and in the interest of fairness to the accused, the ICTY reasoned in *Čelebići* that cumulative convictions “entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other”.⁹⁵ Accordingly, if the particular offence does not meet the threshold, then the conviction should be entered only for the provision containing an additional materially distinct element. Therefore, the court needs to first determine that the evidence presented in the case established two separate offences based on the same conduct. It is only when this part of the test is satisfied, the court can consider whether the two offences differ in the material elements for the purposes of allowing a cumulative conviction.

4.2.1. Cumulative charging of gender-based crimes at the ICC

In the past, the ad hoc tribunals and the SCSL successfully convicted individuals accused of gender-based crimes based on cumulative charges. Cumulative charging not only enabled the full extent of these crimes to be captured and the true extent of the criminal conduct of the accused but also permitted the prosecution of these crimes according to their multifold nature.⁹⁶ It also shows that gender-based crimes rarely

⁹³ *Čelebići*, Appeal Judgment, IT-96-21-A, 20 February 2001, para.400.

⁹⁴ *Prosecutor v. Kunarac et al.*, Appeal Judgment, IT-96-23-A & IT-96-23/1-A, 12 June 2002, para.174.

⁹⁵ *Čelebići*, Appeal Judgment, IT-96-21-A, 20 February 2001, para.1033.

⁹⁶ *Prosecutor v. Jelisić*, Appeal Judgment, IT-95-10-A, 5 July 2011, Partially Dissenting Opinion of Judge Shahabudden, para.41.

occur in isolation, reflecting “that gender violence is regularly employed alongside and to exacerbate other forms of violence and repression”, particularly in conflict situations.⁹⁷ As confirmed by the case law of the ad hoc tribunals and the SCSL, acts of sexual and gender-based violence often satisfy the threshold of several categories of crimes, e.g. rape may be prosecuted under its distinct provision, but may at the same time also amount to torture or sexual slavery. For instance, the SCSL Trial Chamber in *Taylor* allowed cumulative convictions for crimes against humanity of both sexual slavery and rape, based on the same set of facts with regard to rape. Allowing cumulative conviction, the Trial Chamber rightly reasoned that “(w)hile both are forms of sexual violence, each offence contains a distinct element not required by the other. The offence of rape requires non-consensual sexual penetration. The definition of rape does not require that the perpetrator exercise ongoing control or ownership over the victim, as is required by the crime of sexual slavery”.⁹⁸

However, the approach towards cumulative charging of gender-based crimes presented by the ICTY, the ICTR and the SCSL appears to stand in contrast with the approach demonstrated thus far by the ICC.⁹⁹ Whilst the ICC Statute does not contain provisions which explicitly address cumulative charging, references to such practice are made in the ICC EOC as well as in the recent OTP Policy on Sexual and Gender-Based Crimes. The introduction to the ICC EOC states the principle that “a particular conduct may constitute one or more crimes”.¹⁰⁰ The ICC Prosecutor also confirmed that “the Office will bring charges for sexual and gender-based crimes explicitly as crimes per se, in addition to charging these acts as forms of other violence within the Court’s subject-matter jurisdiction, where the material elements are met, e.g. charging rape as torture, persecution, and genocide” and that “(t)he Office will seek to bring cumulative charges in order to reflect the severity and multi-faceted character of these

⁹⁷ Beth Van Schaack, *supra* 44, 376; This point is also emphasized by the ICC OTP in the 2014 Policy Paper on Sexual and Gender-Based Crimes (para.59).

⁹⁸ *Prosecutor v. Taylor*, Trial Chamber II Judgment, SCSL-03-01-T, 18 May 2012, para.6989.

⁹⁹ See generally: War Crimes Research Office, ‘The Practice of Cumulative Charging at the International Criminal Court’ (May 2010)

<https://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_May2010.pdf> accessed 1 July 2015.

¹⁰⁰ ICC EOC, para.9.

crimes fairly, and to enunciate their range supported by the evidence in each case”.¹⁰¹ Nonetheless, the practice of the ICC to date reveals some inconsistencies in the Court’s declared approach towards cumulative charging, particularly where gender-based crimes are involved.

The actual effectiveness of the strong commitment of the OTP to cumulatively charge gender-based crimes ultimately relies on the approach of the ICC Pre-Trial Chamber towards such practice. In *Bemba*, the Pre-Trial Chamber refused to confirm cumulative charges of rape, torture and outrages upon personal dignity. In rejecting charges of torture as a CAH and outrages upon personal dignity as a war crime, the Pre-Trial Chamber argued that these acts are fully subsumed under the count of rape as a CAH.¹⁰² The Pre-Trial Chamber also justified its decision on the basis that “prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence”.¹⁰³ Further grounding its decision, the Pre-Trial Chamber reasoned that “as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges,” and that this is “only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other”.¹⁰⁴ With regard to the latter criterion, originating from the *Čelebići* test, it can be argued that the Pre-Trial Chamber misapplied this test in *Bemba*. The material elements of each of the offences originally charged in the indictment are different. The elements of rape and torture are distinctive and do not overlap: a physical invasion of sexual nature is not required to prove torture, nor is a certain level of pain and

¹⁰¹ ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), supra 29, para.72.

¹⁰² *Situation in the Central African Republic: Prosecutor v. Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009), paras.204-205 (torture), 310 (outrages upon personal dignity); Laurie Green, ‘First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court’ (2011) 11 International Criminal Law Review 529-541, Kai Ambos, ‘Critical Issues in the Bemba Confirmation Decision’ (2009) 22(4) Leiden Journal of International Law 715-726. See also: Chapter 4, section 3.1.2.2..

¹⁰³ *Situation in the Central African Republic: Prosecutor v. Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009), para.202.

¹⁰⁴ *Ibid.*, para.202, n.272.

suffering required to prove rape.¹⁰⁵ Similarly, elements of the crime of outrages upon personal dignity (i.e. that “the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons”) are not required statutory elements of rape.¹⁰⁶

The decision of the ICC Pre-Trial Chamber in *Bemba* demonstrates, as noted by Sluiter et al., “a questionable application of the [Čelebići] test”.¹⁰⁷ In particular, the Bemba decision stands in contrast with the successful application of this test to cumulative charges in *Ruto* and in *Al-Bashir*.¹⁰⁸ Since the decision in *Bemba*, the ICC confirmed cumulative charges of rape and sexual slavery as war crimes and crimes against humanity against Bosco Ntaganda, whose trial will further clarify the approach of the ICC towards cumulative charging of gender-based crimes.¹⁰⁹

4.3. Evidence and procedural guarantees in prosecutions of gender-based crimes

Obtaining reliable evidence is crucial when prosecuting international crimes. The importance of this is especially prominent in the prosecution of gender-based crimes where victims and witnesses, due to a number of factors, may be particularly hesitant to testify about their experiences. Furthermore, an additional challenge is posed by the apparent tendency amongst international criminal courts to require higher evidentiary standards in cases involving gender-based crimes. Whilst this is not a legal or procedural requirement, the manner in which evidence is considered effectively

¹⁰⁵ ICC EOC, Article 7(1)(f) [torture] and Article 7(1)(g)-1(1) [rape]; This argument is also posed by Laurie Green, ‘First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court’ (2011) 11 International Criminal Law Review 529, 535-538.

¹⁰⁶ ICC EOC, Article 8(2)(c)(ii).

¹⁰⁷ Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 434.

¹⁰⁸ *Situation in the Republic of Kenya: Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11 (23 January 2012) paras.279-281; *Situation in Darfur, Sudan: Prosecutor v. Omar Hassan Ahmad Al Bashir* (“Omar Al Bashir”) (Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir), ICC-02/05-01/09-3 (4 March 2009) paras.95-96 (accepting counts of extermination and murder as crimes against humanity based on the same conduct).

¹⁰⁹ *Situation in the Democratic Republic of the Congo: Prosecutor v. Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda), ICC-01/04-02/06 (9 June 2014), paras.99-100 (counts 4 and 5: rape as a CAH and a war crime; counts 7 and 8: sexual slavery as a CAH and a war crime).

imposes a higher evidentiary threshold.¹¹⁰ This tendency has therefore practical implications in determining the ultimate success of the case and emphasizes the importance of not only collecting reliable evidence but also its persuasive presentation in court. Finally, the existing direct and indirect gender-based discrimination amongst investigators, prosecutors and judges often leads to an insufficient recognition of gender-related dimensions within the evidence and, as Inder notes, too few prosecutions of sexual and gender-based violence, both at an international and domestic level.¹¹¹

4.3.1. Evidence of gender-based crimes on trial

All international criminal courts and tribunals have adopted Rules of Procedure and Evidence which contain provisions relating to evidence in cases involving sexual violence. Rule 96 of the ICTY RPE is considered the key contribution to ensuring the effective prosecution of sexual violence at the ad hoc tribunals. Rule 96, which is reflected in the ICTR RPE, SCSL RPE and ICC RPE, established that in cases involving sexual violence no corroboration of the victim's testimony is required.¹¹² It therefore gives recognition to the contextual reality in which sexual violence takes place in conflict, where no witnesses are present or where the only witnesses were collaborating with the perpetrator. Most importantly, Rule 96(ii) restricts the circumstances in which consent may be used as a defence in cases involving sexual violence. It accepts that non-consent may be automatically inferred in circumstances where the victim "has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression" or where the victim "reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear".¹¹³ This principle has been further confirmed and applied by the ad hoc tribunals, most notably in *Akayesu*, *Kunarac* and *Gacumbitsi*, where the

¹¹⁰ Marcus, supra 19, 212; Susana SáCouto, Katherine Cleary, "The importance of effective investigation of sexual and gender-based crimes at the International Criminal Court" (2009) 17 American University Journal of Gender, Social Policy and Law 337, 353-358.

¹¹¹ Louise Chappell, Brigid Inder, 'Advocating for Gender Justice: A conversation with Brigid Inder' (2014) 16(4) International Feminist Journal of Politics 655, 658.

¹¹² Rule 96 ICTR RPE; Rule 96 SCSL RPE; Rule 63(4) ICC RPE.

¹¹³ Rule 96(ii)(a) and (b) ICTY RPE; Rule 96(ii)(a) and (b) ICTR RPE; Rule 96(i) SCSL RPE; Rule 70 ICC RPE.

ICTR and the ICTY Appeals Chambers confirmed the application of the test of ‘coercive circumstances’ in rape cases.¹¹⁴ Rule 96(iv) also requires that past sexual conduct of the victim shall not form a part of the evidence.¹¹⁵ Additional protection to witnesses was provided by Rule 96 (iii) which requires that “before evidence of the victim’s consent is admitted, the accused shall satisfy the Trial Chamber in camera (session closed to public) that the evidence is relevant and credible”.¹¹⁶ This regulation ensures that the cases involving sexual violence, especially rape, proceed only if there is a valid basis for it, thereby protecting the witness from being unnecessarily exposed to testifying about sensitive details of her experiences of sexual violence as well as to cross-examination by the defence.

Prosecution of gender-based crimes is no different from prosecution of other crimes in that it is dependent on the presentation of the obtained evidence in court. This requires adherence to the rules of procedure and evidence of a given court as well as a striking of the balance between the rights of the accused and protection of the victims and witnesses. In relation to the latter, Marcus outlines various strategies which can be utilised for presentation of evidence in court, including the use of expert witnesses who can provide the necessary contextual evidence in relation to crimes of sexual and gender-based violence and summary witnesses who can give evidence related to the pattern, scale and gravity of sexual violence (for instance, a doctor working in a clinic in the region where alleged acts of sexual violence took place).¹¹⁷ Likewise, Aranburu suggests that a greater use of pattern evidence and analysis for sexual violence cases, especially in relation to investigation of senior leaders, may be particularly effective.¹¹⁸

However, whilst testimonies of summary witnesses may be particularly useful in cases involving sexual violence, where witnesses are often killed or flee and are unavailable

¹¹⁴ *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para.688; *Prosecutor v. Kunarac et al.*, Appeals Judgment, IT-96-23 & IT-96-23/1-A, 12 June 2002, para.127; *Prosecutor v. Gacumbitsi*, Appeal Judgment, ICTR-2001-64-A, 7 July 2006, para.155.

¹¹⁵ Rule 96 (iv) ICTY RPE; Rule 96 (iv) ICTR RPE; Rule 96 (iv) SCSL RPE; Rule 70(d) and 71 ICC RPE.

¹¹⁶ Rule 96(iii) ICTY RPE; Rule 96(iii) ICTR RPE; 72(1) ICC RPE. There is no equivalent provision in the SCSL RPE.

¹¹⁷ Marcus, *supra* 19, 238-240.

¹¹⁸ Xabier Agirre Aranburu, ‘Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases’ (2010) 23(3) *Leiden Journal of International Law* 609, 610.

to investigators, the courts may not always be persuaded by the strength of the evidence adduced by summary witnesses. For instance, the ICC Pre-Trial Chamber I warned in *Gbagbo* that the Chamber may choose to decline to confirm allegations that are supported only by anonymous or summary witness statements.¹¹⁹ The Pre-Trial Chamber I also forewarned about the use of NGO reports and press articles as evidence of international crimes, stating that whilst such publications carry informational value about the context of the conflict, “they do not usually constitute a valid substitute for the type of evidence required to meet the evidentiary threshold for the confirmation of charges”.¹²⁰

4.3.2. Witness protection, victim support and procedural guarantees

The ICTY recognized the specific needs of victims and witnesses of rape and sexual assault in the first case heard before the tribunal. The Trial Chamber in *Tadić* captured some of the key challenges of testifying about sexual violence when it emphasized that “rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent detrimental impact on the victim. (...) testifying about the event is often difficult, particularly in public, and can result in rejection by the victim’s family and community. In addition, traditional court practice and procedure has been known to exacerbate a victim’s ordeal during the trial. Women who have been raped and have sought justice in the legal system commonly compare the experience to being raped a second time”.¹²¹

¹¹⁹ *Situation in the Republic of Côte d’Ivoire: Prosecutor v. Laurent Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute), ICC-02/11-01/11-432 (3 June 2013) para.34.

¹²⁰ *Ibid.*, para.35.

However, this stands in contrast with the approach of the SCSL in *Prosecutor v. Taylor*, where the Trial Chamber strongly relied on contemporary documentary evidence from the reports of international organisations and NGOs on crimes committed in Sierra Leone as well as media coverage of these crimes. On the basis of such evidence, the Trial Chamber found beyond reasonable doubt that Taylor was aware of the crimes committed in Sierra Leone by the RUF/AFRC forced against civilians, including gender-based crimes. *Prosecutor v. Taylor*, Trial Chamber II Judgment, SCSL-03-01-T, 18 May 2012, paras.6815-6886.

¹²¹ *Prosecutor v. Tadić*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, IT-94-1-T, para.46.

Due to the nature of international crimes, extraordinarily high reliance on evidence adduced by the victims and witnesses, as well as the public and global outreach of international criminal courts, the system of international criminal justice had to develop measures to protect victims and witnesses who decided to testify against the accused. The Rules of Procedure and Evidence of the ICC, the SCSL and the ad hoc tribunals list specific measures which are aimed at the protection of victims and witnesses. Special units dedicated to victim and witness issues have been established for each of these criminal courts.¹²²

In addition to the core provisions regarding the need to ensure the safety of the victims/ witnesses and to exercise care, key importance is attached to protecting the identity of the victim/ witness. This issue is particularly significant when the trial takes place during armed conflict or in its immediate aftermath, where victims/ witnesses and their families often find themselves facing real threats to their lives or being harassed, intimidated or threatened if it is found out that they will give evidence against the accused or their supporters.¹²³ At the same time, non-disclosure of witness identity is a key example of the tension between rights of the accused and the protection of the victim/ witness.¹²⁴

In *Tadić*, the ICTY allowed the use of anonymous witness (i.e. the witness whose identity is unknown to both parties), which attracted wide questioning, particularly from the due process perspective.¹²⁵ This conflict further highlights what Chinkin excellently described as, “the argument that human rights standards have been defined by men in accordance with male assertions of what constitutes the most

¹²² Rule 34 ICTY RPE; Rule 34 ICTR RPE; Article 16(4) SCSL Statute and Rule 34 SCSL RPE; Article 43(6) and 68(4) ICC Statute and Rules 16-19 ICC RPE.

¹²³ The impact of disclosure of victim’s identity on their safety is outlined by the ICTR: ICTR, ‘Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions’, supra 8, paras.179-180; ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), supra 29, para.65.

¹²⁴ Rule 69 ICTY RPE; Rule 69 ICTR RPE; Rule 69 SCSL RPE, Rule 81(4) ICC RPE.

¹²⁵ Monroe Leigh, ‘The Yugoslav Tribunal: Anonymity Is Inconsistent with Due Process’ (1996) 90 American Journal of International Law 235; Olivia Swaak-Goldman, ‘The ICTY and the Right to a Fair Trial: A Critique of the Critics’ (1997) 10 Leiden Journal of International Law 215; Natasha Affolder, ‘Tadić, the Anonymous Witness and the Sources of International Procedural Law’ (1998) 19 Michigan Journal of International Law 445.

fundamental guarantees required by individuals”.¹²⁶ However, the Tribunal did not afford blanket anonymity to all victims/ witnesses and indicated careful guidelines on the determination of anonymous status of the victim/ witness.¹²⁷ The Trial Chamber focused particularly on the security concerns of the victim and emphasized the fact that the Tribunal itself is not in a position to offer protection to witnesses following their testimony.¹²⁸ Arguably, by acting within these constraints the ICTY, contrary to the overwhelming criticism, managed to actually adhere to the commitments set out within its Statute and RPE to protect witnesses. Furthermore, the decision in *Tadić* represents a successful attempt to address the balance of fairness in the proceedings whilst taking into consideration the contextual nature of the conflict and the impact of sexual violence on the victims (most of whom are women).

The approach taken in *Tadić* is only partially reflected in Rule 81(4) of the ICC RPE, which allows for witness anonymity to be invoked (following a successful request), but only in the period leading up to the trial.¹²⁹ Nonetheless, ICC RPE built on the RPE of the ad hoc tribunals to provide a number of other rules aimed at the protection of victims and witnesses. In order to avoid retraumatisation of the victim/ witness, Rule 68 of the ICC RPE allows the presentation of a witness statement in the form of a previously recorded statement, in audio, video or transcript form.¹³⁰ Alternatively, as an exception to the principle of public hearings, Rule 67 of the ICC RPE allows the use of audio or video-link technology to provide live testimony without requiring the presence of the witness in the same courtroom as the accused. A range of other

¹²⁶ Christine Chinkin, ‘Due Process and Witness Anonymity’ (1997) 91 *American Journal of International Law* 75, 78.

¹²⁷ *Prosecutor v. Tadić*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, IT-94-1-T, para.77: “Initially, the Trial Chamber must consider the factors that apply to all witnesses. First, with respect to the objective aspect of the criterion that there must be real fear for the safety of the witness, it is generally sufficient for a court to find that the ruthless character of an alleged crime justifies such fear of the accused and his accomplices. The alleged crimes are, without doubt, of a nature that warrants such a finding. Secondly, the Prosecutor has sufficiently demonstrated the importance of the witnesses to prove the counts of the indictment to which they intend to testify. Thirdly, no evidence has been produced to indicate that any of the witnesses is untrustworthy. Fourthly, the International Tribunal is in no position to protect the witnesses and or members of their family after they have testified”.

¹²⁸ *Ibid*, para.77.

¹²⁹ The ICC OTP supports the use of rule 81(4) ICC RPE in relation to victims of sexual and gender-based violence if disclosure would expose victims and witnesses to physical or psychological harm: ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), *supra* 29, para.87.

¹³⁰ Rule 92 bis ICTY RPE; Rule 92 bis ICTR RPE; Rule 92 bis and 92 ter SCSL RPE.

practical measures may also be requested by the ICC Prosecutor to protect the victim/witness. These include, but are not limited to, the use of pseudonyms, redacting the name of a person and any identifying information from public records, image or voice alteration and use of electronic means to provide testimony of the victim/witness before the court.¹³¹ Finally, the Chamber is obliged to control the manner of questioning in order to avoid any harassment or intimidation of victims/witnesses.¹³²

Overall, building on the experience of the ad hoc tribunals, the ICC Statute and RPE take a strongly victim-focused approach, which is nonetheless balanced with protecting the rights of the accused. Given the heinous nature of the crimes prosecuted before the ICC as well as their contextual aspect, the victim-focused approach is particularly needed to support and protect victims and witnesses who decide to testify. From the perspective of victims of sexual and gender-based crimes, the existence of these measures is of paramount importance and may be a decisive factor in their decision whether to testify or not. Furthermore, it ought to be recognized that the interests of victims/witnesses as well as their needs may vary and a certain level of flexibility in providing adequate support and protection may be required. Nonetheless, the substantive and procedural rules merely set out the agreed standards. In order to provide meaningful protection to its intended beneficiaries, these rules need to be effectively implemented into the process of investigating and prosecuting gender-based crimes.

4.4. Institutional culture as an obstacle to gender justice

The achievement of international justice for conflict-related gender-based crimes depends not only on the existence of a set of adequate substantive and procedural laws, but also on the gender awareness and attitudes of those working within the international criminal justice system. The institutional culture within international criminal courts becomes a significant factor determining how cases involving sexual and gender-based violence are investigated and prosecuted. Over the years, it became

¹³¹ Rule 87(3) ICC RPE; Rule 75(B) ICTY RPE; Rule 75(B) ICTR RPE; Rule 75(B) SCSL RPE.

¹³² Rule 88(5) ICC RPE; Rule 75(D) ICTY RPE; Rule 75(D) ICTR RPE; Rule 75(C) SCSL RPE.

apparent that there exist significant gender biases amongst persons working at all structural levels of international criminal courts. Richard Goldstone, the first ICTY Prosecutor, recalls his astonishment with the level of gender bias within the office of the prosecutor, which prompted his conclusion that ‘if we did not have an appropriate gender policy in the Office of the Prosecutor, we would have little chance getting it right outside of the office’.¹³³

4.4.1. Gender biases in international criminal courts

Gender biases have been often reflected in the attitudes of staff towards the investigation and prosecution of gender-based crimes, e.g. ‘I’ve got ten dead bodies now, how do I have time for rape? That’s not as important’, ‘So a bunch of guys got riled up after a day of war, what’s the big deal? (ICTY investigators), ‘I have enough on my plate, I don’t need a bunch of hysterical women in my courtroom’ (ICTY senior Trial Attorney).¹³⁴ Sharratt also quotes a female judge from the ICTY who “had to struggle with male colleagues who often saw the victims as so frail that their testimony needed to be abbreviated” and who often found herself “tutoring [my] male colleagues of what it means to a woman to be raped (...) You have to be insistent that this was a serious crime and they could have not consented to it under the situation that they were in”.¹³⁵

Furthermore, gender insensitivity and stereotypical attitudes have been often revealed during trials of gender-based crimes, both by defence lawyers and the judges. As for the latter, judges may actively demonstrate their bias through their words or actions but also by omitting to intervene, for example to stop harassment of the victim. An

¹³³ Richard Goldstone, ‘Prosecuting Rape as a War Crime’ (2002) 34 Case Western Reserve Journal of International Law 277, 280, resulting in the successful appointment of Patricia Viseur-Sellers as a Gender Advisor to the ICTY.

¹³⁴ Peggy Kuo, ‘Prosecuting Crimes of Sexual Violence in an International Tribunal’ (2002) 34 Case Western Reserve Journal of International Law 305, 310-311; Hayes (2012), supra 9, 417.

¹³⁵ Sara Sharratt, ‘Voice of Court Members: A Phenomenological Journey- The Prosecution of Rape and Sexual Violence at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Bosnian War Crimes Court (BiH)’ in: Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 365, 368; See generally: Sara Sharratt, *Gender, Shame and Sexual Violence: The voices of witnesses and court members at War Crimes Tribunals* (Ashgate 2011).

(in)famous example of such attitudes includes the incident during the Butare trial before the ICTR, where a rape victim was asked 1194 questions by the defence with no intervention by the ICTR Trial Chamber.¹³⁶ Furthermore, in the very same trial, during the questioning, the defence lawyer suggested to the victim of rape that the accused could not have raped her because she had not taken a bath in a few days and she smelled. All three judges on the bench reacted to this with laughter.¹³⁷ Following this outrageous behaviour, no apology was ever issued to the victim. Other more recent examples of gender bias at the ICC include the deliberations of the Pre-Trial Chamber II regarding the (non)sexual nature of crimes alleged in *Muthaura*, the majority decision in *Lubanga* (failing to include sexual violence within the scope of the crime of enlistment, conscription and use of child soldiers) and the decision on the confirmation of charges in *Bemba* (failing to confirm separate charges for rape as torture).¹³⁸

The existence of demonstrable gender biases within the institutions of international criminal justice amounts to structural discrimination and constitutes a significant obstacle to the successful investigation and prosecution of gender-based crimes and putting an end to impunity for such crimes.¹³⁹ The institutional gender biases contradict the principle of non-discrimination, which is embedded in Article 21(3) of the ICC Statute and is also a key principle in International Human Rights Law (IHRL). Article 21(3) requires that the ICC applies and interprets the law in accordance with IHRL and without adverse distinction based on gender (amongst other grounds).¹⁴⁰ Hence, the application of the principle of non-discrimination in the pre-trial and trial stages of cases involving gender-based crimes is of paramount importance. Not only

¹³⁶ *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, Transcripts, 31 October 2001, p.60-63, 65, 89; Nowrojee (2005), supra 43, 23.

¹³⁷ Nowrojee (2005), *ibid.*, 24.

¹³⁸ *Situation in Kenya: Prosecutor v. Muthaura et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012), paras.265-266; *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Judgment), ICC-01/04-01/06 (14 March 2012), para.896; *Situation in the Central African Republic: Prosecutor v. Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009), paras.204-205.

¹³⁹ For a critique of the ICC from a feminist institutionalist framework perspective, see: Louise Chappell, 'Conflicting institutions and the search for gender justice at the International Criminal Court' (2014) 67(1) *Political Science Quarterly* 183.

¹⁴⁰ Rebecca Young, "'Internationally Recognized Human Rights" before the International Criminal Court' (2011) 60(1) *International and Comparative Law Quarterly* 189.

does it ensure that the applicable law is interpreted in a gender inclusive manner but also, on a normative level, it contributes to the development of gender inclusive international criminal jurisprudence. Furthermore, its application ensures that victims of gender-based crimes are not discriminated against during the proceedings, both in relation to the procedural rules and in matters concerning substantive law. For instance, regarding the latter, Judge Odio Benito noted in her Dissenting Opinion in *Lubanga* the discriminatory nature of excluding sexual violence from the scope of the crimes of enlistment, conscription and use of children under 15 to participate in hostilities.¹⁴¹

Despite the ICC taking important steps in relation to the pursuit of gender justice (such as incorporating a broad range of sexual violence offences into article 7(1)(g), development of gender-sensitive provisions within the ICC RPE and the appointment of a Gender Advisor to the ICC Prosecutor), the decisions of the court indicate a somewhat limited adherence to the application of the principle of non-discrimination. This unfortunate dynamic was particularly visible in the majority judgment in *Lubanga* as well as the pre-trial decisions in *Muthaura* and *Bemba*.¹⁴² Whilst the steps towards ensuring greater gender sensitivity at the ICC should be commended, the mere codification of gender-sensitive rules and regulations is not sufficient. In order to achieve meaningful gender justice at the ICC, a close monitoring and scrutiny is required both from inside the court and by external actors (such as NGOs, the academic community) to, as Chappell notes, “expose and challenge long-held assumptions about men and women’s experiences of war and conflict”.¹⁴³

4.4.2. Gender on the bench in international criminal courts

The examples explored in the previous section inherently lead to the question of whether gender parity on the bench (as well as in the key positions, such as the chief prosecutor) ultimately guarantees the realisation of a feminist project in international

¹⁴¹ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Judgment), ICC-01/04-01/06 (14 March 2012), Separate and Dissenting Opinion of Judge Odio-Benito, para.21.

¹⁴² Chappell, *supra* 139, 190-192 (criticising the *Lubanga* judgment using feminist institutionalist approach); Hayes (2013), *supra* 9, 10-25.

¹⁴³ Chappell, *supra* 139, 193.

criminal justice.¹⁴⁴ It would be unscrupulous to ignore the fact that in many cases involving gender-based crimes, especially in the early days of international criminal tribunals, the presence and expertise of female judges made a substantive difference. Female judges have been responsible for some key substantive and procedural developments in international criminal justice, particularly with reference to gender-based crimes.

The primary example of this is *Akayesu*, where Judge Navanethem Pillay requested amendment to the charges following a testimony about sexual violence by one of the victims. This intervention ultimately resulted in the first international criminal prosecution of rape as well as formulation of the definition of rape in international law which is now considered one of the key landmarks in gender-based crimes jurisprudence. Another example is Judge Elizabeth Odio-Benito, whose intervention in the early stages of the *Nikolić* case at the ICTY suggested (for the first time) that rape and other forms of sexual assault can be charged under the category of grave breaches of the Geneva Conventions or as a war crime, with a view to the Prosecutor amending the charges under Rule 50 of the ICTY RPE.¹⁴⁵ More recently, Judge Odio Benito's Dissenting Opinion in *Lubanga* marked an important development in the recognition of sexual violence as an element of the crime of enlistment, conscription and use of children under the age of 15 to actively participate in hostilities.¹⁴⁶ Furthermore, the strong involvement of Judge Odio-Benito and Judge Kirk-MacDonald in drafting Rule 96

¹⁴⁴ Feminist Judgments Projects proved that it is possible to achieve a feminist judgment whilst adhering to the laws at the time when the case was originally heard. Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010); Heather Douglas, Francesca Bartlett, Trish Luker, Rosemary Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart 2014).

Feminist International Judgments Project is currently organised in the UK by Dr Troy Lavers and Dr Loveday Hodson (forthcoming: 2016). The project includes feminist international judgments in cases involving gender-based crimes: *Prosecutor v. Lubanga* and the *AFRC* case.

On the topic of gender and judging in international criminal law context see: Nienke Grossman, 'Sex Representation on the Bench and the Legitimacy of International Criminal Courts' (2011) 11 *International Criminal Law Review* 643-653; Patricia M. Wald, 'Women on International Courts: Some Lessons Learned' (2011) 11 *International Criminal Law Review* 401-408. For a critical overview of women in judiciary see: Sally J. Kenney, *Gender and Justice. Why Women in the Judiciary Really Matter* (2013 Routledge).

¹⁴⁵ *Prosecutor v. Nikolić* (Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence), IT-94-R61, 20 October 1995, para.33.

¹⁴⁶ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Judgment), ICC-01/04-01/06 (14 March 2012), Separate and Dissenting Opinion of Judge Odio-Benito, paras.15-21; discussed in Chapter 4, section 3.2.2..

of the ICTY RPE made a landmark contribution to overcoming some of the key procedural obstacles embedded in the prosecution of sexual violence.

Whilst the presence of a female Prosecutor or a Judge might promote a proper and fair consideration of the gender dimension of crimes, it does not necessarily guarantee such outcome. Nowrojee notes the dramatic and consistent drop in the number of new indictments including charges of sexual violence since Carla Del Ponte assumed the office of the ICTR Prosecutor in September 1999. Concerns have also been expressed about the legacy of the current ICC Prosecutor, Fatou Bensouda. Whilst Bensouda expressed a strong commitment to bringing in new indictments and prosecuting sexual and gender-based crimes, most accurately articulated in the ICC OTP Policy on Sexual and Gender-Based Crimes (June 2014), no person has been yet prosecuted and convicted of gender-based crimes under the ICC statute.

5. Post-conflict gender justice and the limits of ICL

The emergence and operation of the ad hoc international criminal tribunals as well as the SCSL have enabled progressive steps in the international prosecution of gender-based crimes. These notable advances in international criminal law (which have been discussed at length in Chapter 4), whilst praised on the one hand, have also raised a fundamental question of the provision of gender justice for victims of sexual and gender-based violence, whose cases have not been heard before international tribunals. The limited capacity of the ICTY, the ICTR and the SCSL as well as the time limits for their operation meant that from the very time these organs were established, only selected cases could be investigated and tried before these international courts. The aim of the ad hoc tribunals and the SCSL was to hold accountable the individuals most responsible for committing international crimes and, as a result, the remaining cases were left subject to prosecution by the domestic courts. As such, the rules of international criminal courts and tribunals instantly limited the scale and extent to which institutions of international criminal justice could effectively investigate and prosecute gender-based crimes.

The normative and operational limitations of international criminal tribunals and the ICC reiterate the primary obligation of states to establish accountability for international crimes through national judicial systems. Although domestic prosecutions of conflict-related gender-based crimes in the aftermath of atrocities generally come with significant challenges, national courts have undertaken (with varied levels of success) prosecution of such crimes. The War Crimes Chamber of the Court of Bosnia and Herzegovina (WCC), a specialised branch of the Court of Bosnia and Herzegovina created in 2003, convicted 33 defendants on sexual violence charges between 2005 and 2013.¹⁴⁷ The WCC successfully prosecuted rape, sexual slavery and enslavement, gender-based persecution (as a CAH) and sexual violence as torture at the domestic level.¹⁴⁸ Likewise, acts of sexual violence committed during the Rwandan genocide were prosecuted in ordinary Rwandan national courts before being transferred to *gacaca* courts in 2008. However, Kaitesi notes the problematic aspects of these prosecutions, reflected in inconsistent categorisation of sexual violence (between first and third category offences, with the latter attracting only light prison sentences) as well as a large number of acquittals.¹⁴⁹ Prosecution of gender-based crimes is also a priority for the mobile gender courts in the Democratic Republic of the Congo (DRC).¹⁵⁰ The mobile gender courts are a response of the Congolese judicial system to the problem of enabling access by victims to courts across the country, which in some cases may require a week-long journey. Sexual violence has been widespread during the conflict in the Eastern DRC, which has one of the highest incidences of such acts in the world, and bringing justice to the victims, especially those located in remote areas, has proven a major challenge. Mobile gender courts have successfully prosecuted rape and other serious offences, convicting hundreds of

¹⁴⁷ OSCE, 'Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges. An analysis of criminal proceedings before the Court of Bosnia and Herzegovina between 2005 and 2013' (February 2014) 15 <<http://www.osce.org/node/117051>> accessed 5 July 2015; 12 defendants were acquitted.

¹⁴⁸ *Ibid.*, 41-43 (rape), 45-51 (enslavement and sexual slavery), 54-58 (sexual violence as torture), 60-62 (gender-based persecution).

¹⁴⁹ Usta Kaitesi, *Genocidal Gender and Sexual Violence. The legacy of the ICTR, Rwanda's ordinary courts and gacaca courts* (Intersentia 2014) 200.

¹⁵⁰ Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 73; 'The Fact Sheet: DRC Mobile Gender Courts' (The Open Society Justice Initiative, 2011) <<http://www.opensocietyfoundations.org/sites/default/files/mobile-court-20110725.pdf>> accessed 15 July 2015;

mostly direct perpetrators of sexual violence. Most notably, in February 2011 a mobile military court convicted four senior army officers and five lower rank soldiers of committing a mass rape attack in the village of Fizi, therefore showing that prosecution of higher level figures on charges of sexual violence is indeed achievable domestically.¹⁵¹

5.1. The ICC and positive complementarity

The ICC was founded on and operates on the principle of complementarity, which is enshrined in Article 17 of the ICC Statute.¹⁵² This means that the ICC will only investigate and prosecute international crimes where a state is unable or unwilling to carry out such proceedings within the domestic jurisdiction. Therefore, the ICC operates as the court of last resort, with the primary duty to investigate and prosecute international crimes under the ICC Statute resting on the state parties to the ICC Statute. In principle, this includes the investigation and prosecution of gender-based crimes in a domestic context. The obligation of states to prevent and punish acts of sexual and gender-based violence is also supported by UN Security Council Resolutions, which form a part of Women, Peace and Security Agenda (WPS Agenda). For instance, UN Security Council Resolution 1325

“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, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions”.¹⁵³

¹⁵¹ Alison Cole, ‘Making the perpetrators of mass sexual violence pay: International justice for gender-related crimes’ (*Openspace*, 6 March 2012) <<http://www.osisa.org/openspace/global/making-perpetrators-mass-sexual-violence-pay-alison-cole>> accessed 15 July 2015; Kelly D. Askin, ‘Fizi Diary: Mobile Court Tries Landmark Rape Case’ (*Open Society Foundation*, 17 February 2011) <<http://www.opensocietyfoundations.org/voices/fizi-diary-mobile-court-tries-landmark-rape-case>> accessed 15 July 2015.

¹⁵² See generally: Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2008).

¹⁵³ UN Security Council Resolution 1325 (31 October 2000) UN Doc. S/RES/1325, para.11.

Subsequent UN Security Council Resolutions which form a part of WPS Agenda continuously stress the primary responsibility of states to fight impunity for international gender-based crimes: UN Security Council Resolution 1820 (19 June 2008) UN Doc. S/RES/1820, para.4; UN Security Council Resolution 1888 (30 September 2009) UN Doc. S/RES/1888, para.6; UN Security Council Resolution 1889 (5 October

Nonetheless, it remains questionable whether the overall positive assessment of a state's general willingness and ability to prosecute international crimes is a guarantee that gender-based crimes will be adequately investigated and prosecuted domestically, particularly in the aftermath of conflict. The capacity of the domestic legal systems to prosecute gender-based crimes in line with the principle of complementarity heavily depends on the existence of adequate and gender-sensitive substantive laws as well as procedural rules. Ní Aoláin shows that whilst many parties to the Rome Statute have general criminal laws dealing with sexual offences, their level of sophistication and detail varies significantly.¹⁵⁴ Also, even where legislation addressing sexual and gender-based offences is well developed, states nonetheless often fail to prosecute sexual offences effectively and in a gender-sensitive manner.¹⁵⁵

Furthermore, whilst ratification of the ICC Statute acts as a catalyst for some states to introduce legislation regarding sexual and gender-based violence, domestic laws often do not fully reflect the scope of the gender-sensitive provisions of the ICC Statute, the ICC EOC and the ICC RPE.¹⁵⁶ This factor is likely to have implications for the treatment (or lack thereof) of conflict-related gender-based crimes before the domestic courts. Indeed, concerns have been expressed by various commentators with regard to the rights of the accused in the domestic proceedings, particularly over the due process rights and fairness of the proceedings.¹⁵⁷ Likewise, similar concerns exist with regard to the treatment of gender-based crimes and real prospects of their effective and fair prosecution. Unfortunately, the extensive and gender-sensitive provisions of the ICC statute related to gender-based crimes do not find reflection in complementarity

2009) UN Doc. S/RES/1889, para.3; UN Security Council Resolution 2106 (24 June 2013) UN Doc. S/RES/2106, para.2; UN Security Council Resolution 2122 (18 October 2013) UN Doc. S/RES/2122, para.12.

¹⁵⁴ Fionnuala Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law' (2014) 16(4) *International Feminist Journal of Politics* 622, Appendix I.

¹⁵⁵ Nicola Westmarland, Geetanjali Gangoli (eds), *International Approaches to Rape* (The Policy Press 2011) 8.

¹⁵⁶ Fionnuala Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law' (2014) 16(4) *International Feminist Journal of Politics* 622, 629-630; Generally on ICC Statute as an incentive for national legislation see: Cryer et al., 162-163; 'Complementarity as a catalyst to compliance' in Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2008) 309-340.

¹⁵⁷ Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum* 255; Enrique Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace Without Justice" to "No Peace with Victor's Justice"?' (2005) 18 *Leiden Journal of International Law* 829.

provisions, which would ensure the equivalent treatment of gender-based crimes at a domestic level.¹⁵⁸ This in turn creates a potential impunity gap whereby perpetrators of gender-based crimes may go unpunished despite the fact that complementarity assessment may indicate general willingness and ability of the state to prosecute other types of crimes, such as murder or torture.¹⁵⁹ Therefore, it is necessary that preliminary investigations carried out by the ICC Prosecutor include the assessment of factors, which may impede genuine investigation and prosecution of gender-based crimes by domestic courts. These factors may include (although are not limited to) gender stereotypes embedded in domestic substantive laws and procedural rules; inadequate domestic provisions addressing gender-based crimes under the ICC Statute; the existence of amnesties, immunity laws and statutes of limitation; and the absence of gender-sensitive protective measures for victims of sexual violence.¹⁶⁰

Equally, from a long-term perspective, efforts should be made by parties to the ICC Statute to amend their national laws and rules of procedure to reflect standards set out in the ICC Statute. Such steps would inherently lead to a strengthening of the domestic system and increasing its capacity to address gender-based crimes which, in turn, as Ní Aoláin suggests, supports effective complementarity.¹⁶¹

¹⁵⁸ This argument is also advanced by Chappell et al. with regard to ICC preliminary examinations of situation in Guinea and Colombia: Louise Chappell, Rosemary Grey, Emily Waller, 'The Gender Justice Shadow of Complementarity: Lessons From the International Criminal Court's Preliminary Examinations in Guinea and Colombia' (2013) 7(3) *International Journal of Transitional Justice* 455-475.

¹⁵⁹ According to the Amnesty International report from 2008, "(...) despite extensive documentation by women's groups, non-governmental organisations and NATO of rape and other crimes of sexual violence committed on a large scale during the conflict in Kosovo (...) it appears that there had, up to April 2007 been only one indictment including a charge of rape or sexual violence as a war crime or crime against humanity". Amnesty International, 'Kosovo (Serbia): The challenge to fix a failed UN justice mission' (2008) 63
<<https://www.amnesty.org/en/documents/document/?indexNumber=EUR70%2F001%2F2008&language=en>> accessed 17 March 2015.

¹⁶⁰ These factors have also been recognized by the Office of the Prosecutor at the ICC: ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), para.41 <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 17 March 2015.

¹⁶¹ Fionnuala Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law' (2014) 16(4) *International Feminist Journal of Politics* 622, 630.

6. Conclusion

The pursuit of justice for conflict-related gender-based crimes continues to face obstacles both at the international and domestic levels. The observation of the ICTY Trial Chamber in *Kupreskic* that “we have had to shoulder the heavy burden of establishing incredible facts by means of credible evidence” remains true.¹⁶² Although notable advances have been made since the creation of the ICTY in the mid-90’s in relation to developing gender jurisprudence as well as creating a gender-sensitive system of procedural rules, international prosecution of gender-based crimes is not to be taken for granted. Undoubtedly, the substantive law and jurisprudence applicable to gender-based crimes has grown and developed immensely over the course of the past 25 years, with the ICC statute codifying the substantive part of this practice. Nonetheless, there still exist some shortcomings in substantive and procedural laws that have the effect of preventing women’s voices and female experiences of conflict from being publically heard, particularly on a national level.

Over 20 years since the ICTY’s decision in *Tadić*, the challenges to obtaining direct evidence and testimonies related to gender-based crimes remain as a key challenge to closing the impunity gap for acts of sexual and gender-based violence. Therefore, it is crucial to develop international codes of good practice and procedures, which would increase the likelihood of obtaining ‘good and reliable’ evidence to support prosecution of conflict-related gender-based crimes, both in international and domestic context. The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, launched in June 2014 by the UK Foreign & Commonwealth Office, is a good example of an initiative that seeks to provide the means to realise such aim.¹⁶³ When considered from an international criminal justice perspective, the prospects of gender justice at the ICC (as the only permanent international criminal court in the world) depend not only on obtaining sufficient and

¹⁶² *Prosecutor v. Kupreškić*, Trial Judgment, IT-95-16-T, 14 January 2000, para.758.

¹⁶³ Foreign & Commonwealth Office, ‘The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict. Basic Standards of Best Practice in Documentation of Sexual Violence as a Crime under International Law’ (June 2014) <<https://www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict>> accessed 17 March 2015.

reliable evidence but also on prosecutorial strategy and commitment to gender justice. An effective and gender-sensitive prosecutorial strategy is central to securing successful convictions for conflict-related sexual and gender-based violence. After all, whilst ICL provides an opportunity to achieve gender justice, prosecutorial strategy provides the means of realising it.¹⁶⁴

¹⁶⁴ Hayes (2012), *supra* 9, 413.

Chapter 6

International law and reparations for conflict-related gendered harms

1. Introduction

The right of victims of international crimes and gross human rights violations to an effective remedy has been long recognized in international treaty law, international case-law and in soft law instruments.¹ More recently, the ICC Statute laid ground for the award of reparations in international criminal law. Although the right to reparations is recognized in international law, the gender dimension of reparations for conflict-related harms has only fairly recently emerged as a topic of academic inquiry in international law.² For instance, the issue of reparations for victims of sexual and gender-based violence suffered during the Second World War was not addressed at Nuremberg or at IMTFE.³

Reparations for harms suffered by individuals in armed conflict are an essential part of the process of transition from conflict to peace and securing post-conflict justice. Gender-sensitive reparations for women who are victims of international crimes and gross violations of human rights are an integral part of these processes and an important element in addressing the long-term impact of armed conflict on women. Thus far, international law's efforts to address the long-term impact of armed conflict on women focused predominantly on attempting to close the impunity gap for

¹ Discussed in detail in section 4 below.

² Ruth Rubio-Marín (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Sciences Research Council 2006); Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009); Liz Ford, 'Sexual violence in war: women must get reparations, says head of UN Women' (*The Guardian*, 11 June 2014)

<<http://www.theguardian.com/global-development/2014/jun/11/ending-sexual-violence-conflict-summit-reparations-un-women-mlambo-ngcuka>> accessed 17 July 2015; UN Office of High Commissioner on Human Rights, 'A Guidance Note of the Secretary General: Reparations for Conflict-Related Sexual Violence' (June 2014) <<http://www.unwomen.org/en/docs/2014/6/reparations-for-conflict-related-sexual-violence>> accessed 17 July 2015.

³ Yuma Totani, 'Legal Responses to World War II Sexual Violence: the Japanese Experience' in Elizabeth D. Heineman (ed), *Sexual Violence in the Conflict Zones. From the Ancient World to the Era of Human Rights* (University of Pennsylvania Press 2011) 223-226.

wartime sexual and gender-based violence through the jurisprudence of international criminal courts and tribunals. However, international criminal prosecutions of conflict-related gender-based crimes (discussed in chapters 4 and 5) have provided an important but somewhat limited avenue of redress for the victims. Whilst international criminal tribunals delivered symbolic justice by, in most cases, holding the key perpetrators of gender-based crimes to account, they did not have the powers or jurisdiction to award reparations for the victims.⁴ The jurisdictional and functional distinction between civil and criminal courts meant that in order to obtain further redress for harm suffered, the victims needed to resort to national courts to claim compensation.⁵ This process brought about inherent challenges illustrated by the shortcomings in domestic legislation, different rules on the recognition of victims under domestic laws and substantive delays in adjudication of such claims. In the meantime, women living in post-conflict societies had to face the challenges of day-to-day life with the consequences of physical, psychological and economic harms suffered as a result of international crimes and gross violations of human rights.

This chapter looks at the right to reparation in international law through a gender perspective and critically explores the concept of gender-sensitive reparations. The right to reparations is examined from the IHL, IHRL and ICL perspectives, including the system of reparations established under the Rome Statute and the decision of the ICC Appeals Chamber in *Prosecutor v. Lubanga*.⁶ With reference to examples of reparation practices in the aftermath of modern armed conflicts, the concept of gendered harms is considered and the issue of gender-sensitive reparations for victims of such harms is discussed. Finally, the chapter assesses the prospect of developing gender-sensitive reparations under existing principles of IHRL and the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of

⁴ With the exception of restitution of property: Rule 105 ICTY RPE, Rule 105 ICTR RPE.

⁵ Rule 106 ICTY RPE, Rule 106 ICTR RPE.

⁶ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the appeals against the “Decision establishing principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2), ICC-01/04-01/06-3129 (3 March 2015); *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Decision establishing principles and procedures to be applied to reparations), ICC-01/04-01/06-2904 (7 August 2012).

International Human Rights Law and Serious Violations of International Humanitarian Law (2005 Basic Principles).⁷

2. The concept of harm in public international law

There exists no comprehensive definition of harm in the context of public international law despite the term 'harm' being commonly used in both international and domestic law. There has been relatively little engagement with theorising harm in the legal context, exploring its elements and determining its scope. In the context of inter-state reparations, the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ILC Draft Articles) adopt a language of 'damage' and 'injury' to determine the extent of harm and to assess the state's responsibility for repairing that harm.⁸ Article 31(1) of the (ILC Draft Articles) places an obligation on all states to "make full reparation for the injury caused by the internationally wrongful act".⁹ The provision further states that "injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State". However, although injury may include damage, it does not necessarily consist of it. In other words, injury, which results from an infringement of rights or legally protected interest, does not have to result in the material or other damage in order to invoke the international responsibility of a state to repair that injury.¹⁰ As such, the obligation of a state to repair rests on the notion that a right or other interest protected in international law has been infringed.

When it comes to the issue of determining reparations in international law for harms suffered by individuals, two key issues arise. Firstly, there is a question of whether international law imposes an obligation on states to provide reparations to individuals

⁷ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, adopted by the General Assembly on 16 December 2005 (hereinafter: 2005 Basic Principles).

⁸ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission* (2001) vol. II, Part Two (hereinafter: ILC Draft Articles).

⁹ *Ibid.*, Article 31(1).

¹⁰ James Crawford, *State Responsibility. The General Part* (CUP 2013) 485-486.

and, secondly, what is perceived as ‘harm’ to individuals within the meaning of international law for the purposes of entitlement to reparations.

The system of public international law, which traditionally was restricted to governing relations exclusively between states, has been gradually evolving towards inclusion of individuals as subjects of international law. Although the positivist view of international law definitively excludes individuals as subjects of international law, post-1945 developments forced a gradual alteration of this traditional position. The adoption of the Nuremberg Charter, the creation of the IHRL framework as well as adoption of the four Geneva Conventions of 1949 confirmed that individuals can be beneficiaries of rights as well as bearers of some responsibilities, including individual criminal responsibility for international crimes under ICL. The latter principle was further reflected in UNSC Resolutions 827 (1993) and 955 (1994) establishing the ICTY and the ICTR (respectively) and in Article 25 of the Rome Statute of the ICC. Furthermore, the ICJ confirmed in the *LaGrand Case* that international law treaties may create individual rights, which may be invoked before international courts.¹¹ The ICJ therefore reversed the traditional position expressed by the PCIJ in its Advisory Opinion concerning Jurisdiction of the Courts of Danzig, which stated that a treaty between Germany and Poland, “being an international agreement, cannot as such create direct rights and obligations for private individuals”.¹² Individuals have become accepted as subjects of international law or rather, in Higgins’ view, participants in international law, whose interests may differ from those of states, but nonetheless give rise to claims under international law.¹³

In international law, the relationship between states and individuals is predominantly governed by human rights treaties, which determine the scope of individuals’ rights on the one hand and states’ obligations with respect to these rights on the other. The

¹¹ *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466, para.77.

¹² *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration)*, Advisory Opinion, (1928) PCIJ Series B No.15, 17.

¹³ Rosalyn Higgins, ‘Conceptual Thinking about the Individual in International Law’ (1978) 4 British Journal of International Studies 1, 5; Rosalyn Higgins, *Problems and Process. International Law and How We Use It* (OUP 1994) 48-55.

right to an effective remedy forms an integral part of the vast majority of human rights treaties, including the key regional human rights treaties such as the European Convention of Human Rights (ECHR) and American Charter of Human Rights.¹⁴ The UN Human Rights Committee considers the right to an effective remedy to be non-derogable, even in states of emergency, and has established a clear link between reparations and the obligation of states to provide an effective remedy.¹⁵ As such, under IHRL, there exists a right of individuals to obtain a remedy for human rights violations, which includes the right to receive reparations. States bear primary responsibility for provision of reparations as entities owing human rights obligations to individuals.

Nonetheless, there exists no clear body of rules (akin to the ILC Draft Articles) relating to the responsibility of states to provide reparation to individuals and which would define the elements of harm in that context. By analogy to the ILC Draft Articles, the international law understanding of harms suffered by individuals can be defined with reference to obligations of states vis-à-vis individuals which are enshrined in human rights treaties.

A human rights-based understanding of 'harm' should be twofold; within this approach harm can be viewed as comprising two elements: firstly, the breach of the state's obligations towards an individual established under international law and secondly, negative consequences / impact arising from that breach. The latter should include losses of both a pecuniary and non-pecuniary nature.

The above meaning of harm is construed somewhat differently in the context of the reparation mechanism established under the ICC Statute (discussed in detail in section 4.3. below). Although the ICC has not defined harm per se, the ICC Appeals Chamber in

¹⁴ African Charter on Human and Peoples' Rights 1981 (Banjul Charter) does not list specific provisions regarding the right to remedy or reparations for violations of rights enshrined in the Charter. Article 21(2) of the ACHPR explicitly mentions compensation only in cases involving spoliation of natural resources: "In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation".

¹⁵ UN Human Rights Committee, General Comment No.29: States of Emergency (Article 4) U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para.14; UN Human Rights Committee, General Comment No.31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.16.

Lubanga referred to victims as “natural persons who have suffered harm *as a result of* the commission of any crime within the jurisdiction of the court”.¹⁶ It therefore views harm as a result of a commission of an international crime, which is premised on the breach of ICL and subsequent invocation of individual criminal responsibility. Therefore it can be argued that both systems approach the issue of harms suffered by individuals with reference to international obligations (of states in case of IHRL and individuals under the ICC Statute).

3. Gendered harms in international law

The term ‘gendered harm’ relates to a harm which is inflicted upon an individual due to their gender. However, the term encompasses harms which can be experienced only by women, such as forced pregnancy or harms associated with the female reproductive system.¹⁷ Secondly, whilst some gendered harms may not be limited to women in a biological sense, but are more likely to be experienced by women than men or which affect women disproportionately. In addition, it ought to be noted that a particular violation may be differently experienced by a woman than by a man and imply different types of harm.¹⁸

Feminist legal scholars have long recognized that law, both at domestic and at international level, has demonstrated a limited engagement with fully addressing the needs and experiences of women.¹⁹ The shortcomings in legal responses to female experiences of harm are common, with domestic violence, sexual and gender-based violence, and regulation of property ownership being only a few examples illustrating this detrimental dynamic. International law is generally perceived to be universal and impartial, yet its creation and development was informed mainly by male experiences

¹⁶ *Lubanga* Reparations Judgment (3 March 2015), para.79.

¹⁷ Joanne Conaghan, ‘Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment’ (1996) 16(3) *Oxford Journal of Legal Studies* 407, 407-408.

¹⁸ Ruth Rubio-Marín, ‘The Gender of Reparations in Transitional Societies’ in: Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009) 97-99.

¹⁹ Joanne Conaghan, ‘Law, harm and redress: a feminist perspective’ (2002) 22(3) *Legal Studies* 319; Fionnuala Ní Aoláin, ‘Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies’ (2009-2010) 35 *Queen’s Law Journal* 219, 220-221; Christine Chinkin, Hilary Charlesworth, *The boundaries of international law. A feminist analysis* (Manchester University Press 2000) 4-14.

and male assumptions, which largely marginalised experiences of women and effectively excluded them from shaping the international legal framework.²⁰

Over the past three decades, international law has started to recognize the wide spectrum of the impact of armed conflict on women as well as the urgent need to address this matter.²¹ Generally, efforts to address this problem focused predominantly on strengthening protection from sexual and gender-based violence and, to a large extent, prosecution of gender-based crimes. However, the issue of remedying gender-specific violations through reparations has remained marginalised. Despite some notable advances in fighting impunity for wartime sexual and gender-based violence, international law only relatively recently started to engage with the notion of gendered harms sustained during armed conflict, doing so predominantly through the lens of international criminal law. Nonetheless, the understanding of gendered harms which arises from the jurisprudence of international criminal courts and tribunals demonstrates a somewhat narrow conceptualisation of such harms sustained by women during armed conflict, often reliant on essentialist notions of female victimhood.²² The treatment of forced marriage as a sex-only crime, to the exclusion of its non-sexual aspect, or the flawed approach towards prosecution of crimes committed against girl soldiers are illustrative in that respect.²³

The provision of gender-sensitive and adequate reparations for women in the aftermath of conflict relies heavily on a gender-inclusive understanding of the nature and wide spectrum of gendered harms. Therefore, a greater understanding of gendered harms is required in order to provide a basis for developing a comprehensive approach towards gender-sensitive reparations at an international level.²⁴ In

²⁰ Chinkin, Charlesworth, *Ibid.*, 14-18.

²¹ Cf. Chapters 1 and 2 of this thesis.

²² Several authors criticise the essentialist approach in international law: Christine Chinkin, Hilary Charlesworth, *The boundaries of international law. A feminist analysis* (Manchester University Press 2000) 52-56; Mark A. Drumbl, "'She makes me ashamed to be a woman': The Genocide Conviction of Pauline Nyiramasuhuko' (2012-2013) 34 Michigan Journal of International Law 559, 581-590.

²³ For a detailed discussion of these issues see: Chapter 4, sections 3.1.2.5. (forced marriage) and 3.2.2.1. (crimes committed against girl soldiers).

²⁴ Fionnuala Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009-2010) 35 Queen's Law Journal 219, 222-226 (noting the need for development of feminist theory of harm).

accordance with the definition of harm proposed in section 2 of this chapter, gendered harms should be viewed as composed of two elements:

- a) a violation of an existing international obligation owed vis-à-vis the victim; and
- b) detrimental effects arising from that violation, which are directed against women specifically or which affect women disproportionately.

3.1. The types of gendered harms

Gendered harms occur as a result of social relations. Therefore, they need to be assessed and understood in the broader social context and with a broad understanding of the possible types of harms.²⁵ Such an approach to gendered harms may avoid the risk of producing an essentialist picture of a female victim who suffers only sexual harms, leaving out a range of other egregious violations to which women are subjected during conflict.²⁶ Gendered harms are inherently interlinked with the gender-specific impact of armed conflict on women, which often involves, but is certainly not limited to, sexual violence. As discussed in chapter 2, acts of sexual and gender-based violence have profound long-term impacts on women's post-conflict lives as well as their physical and mental health. Although the severe impact of conflict-related sexual violence is generally recognized in international law, particularly through IHL and ICL, violations of women's reproductive rights (e.g. loss of reproductive capacity) are not typically included or conceptualised as distinct violations of human rights.²⁷ Instead, reparation programmes tend to focus on remedying harms arising from violation of the right to life, such as executions or disappearances, therefore creating a gender-biased hierarchy of harms.

²⁵ Joanne Conaghan, 'Law, harm and redress: a feminist perspective' (2002) 22(3) *Legal Studies* 319, 322.

²⁶ Ruth Rubio-Marín, 'The Gender of Reparations in Transitional Societies' in: Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009) 80; Fionnuala Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009-2010) 35 *Queen's Law Journal* 219, 233-234.

²⁷ Ruth Rubio-Marín, 'The Gender of Reparations in Transitional Societies' in: Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009) 81

Whilst international law (especially IHL and ICL) focuses largely on sexual violence, women's experiences of conflict include harms of a non-sexual nature, such as PTSD, forced labour, loss of housing, forced displacement and violations of economic, social and cultural rights.²⁸ Sankey further emphasizes a range of socio-economic forms of violence experienced by women which deprive them of the basic subsistence resulting in subsistence harms.²⁹ Despite their grave impact, subsistence harms in the form of forced displacement, attacks on homes, livelihoods and basic resources, have been largely marginalised in international law. The treatment of such harms in international law has been reduced to viewing them through the lens of their material impact, without focusing on the physical, psychological, social as well as the gendered aspect of the harms. Although some subsistence harms have been recognized by the ICTY and the SCSL, these courts focused exclusively on the material aspects of such harms.³⁰ Whilst the impact on the victims was to an extent acknowledged, the courts did so in general terms, without deepening the understanding of the specific and varied aspects of the impact of subsistence harms, especially its gendered character. Reparations for gendered harm should therefore employ the understanding of harms including those of a non-sexual nature. Otherwise, the full spectrum of the impact of the violations of human rights sustained by women during armed conflict remains curtailed, likely leading to incomplete and inadequate reparation awards for the victims.

3.2. The victims of gendered harms

As was demonstrated in Chapter 2, gendered harms sustained by women during armed conflict have significant implications primarily for the harmed individual but also for the broader community. This in turn creates what some scholars refer to as

²⁸ Examples of gendered harms of non-sexual nature are explored in chapter 2 as well as chapter 3 (gender dimension of forced displacement).

UN Human Rights Council, Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Rashida Manjoo, UN Doc. A/HRC/14/22, 23 April 2010, paras.44-45.

²⁹ Diana Sankey, 'Gendered Experiences of Subsistence Harms: A Possible Contribution to Feminist Discourse on Gendered Harm?' (2015) 24(1) *Social & Legal Studies* 25-45.

³⁰ *Prosecutor v. Kupreškić*, Trial Judgment, IT-95-16-T, 14 January 2000, para.631; *Prosecutor v. Brima, Kamara, and Kanu*, Trial Judgment, SCSL-04-16-T, 20 June 2007, para.670; *Prosecutor v. Stakić*, Appeal Judgment, IT-97-24-A, 22 March 2006, para.277.

‘communities of harm’, composed of persons emotionally tied to the victims or in a relationship of co-dependency with them.³¹

Generally, international law does not recognise such communities. It focuses exclusively on the injured individuals whose victimhood forms the basis for the right to receive reparations. More recent soft law developments, such as the 2005 Basic Principles and the 2014 UNSG’s Guidance Note depart from such understanding of victimhood and broaden the definitional scope of the term ‘victim’ to include “family members of the victim, persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” and, additionally, in cases of victims of conflict-related sexual violence, “children born as a result of pregnancy from rape and persons who depend on the victim of sexual violence”.³²

4. The right to reparation in international law

The key purpose of reparations, albeit often practically impossible, is to restore the order which was disturbed by the violation, to ‘undo’ the wrong and to remedy the breach. The right to reparation for sustained harms and wrongs has been long established in international law. In the 17th century, Hugo Grotius famously declared in *De Jure Belli Ac Pacis* the underlying principle that “every fault creates the obligation to make good the loss”.³³ The Permanent Court of International Justice (PCIJ) confirmed

³¹ Fionnuala Ní Aoláin, ‘Sex-based Violence during the Holocaust – A Reevaluation of Harms and Rights in International Law’ (2000) 12 *Yale Journal of Law and Feminism* 43-84; Ruth Rubio-Marín, Clara Sandoval, Catalina Díaz, ‘Repairing Family Members: Gross Human Rights Violations and Communities of Harm’ in Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009) 215-290.

³² UN Office of High Commissioner on Human Rights, ‘Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence’, June 2014, 3 <<http://www.unwomen.org/en/docs/2014/6/reparations-for-conflict-related-sexual-violence>> accessed 15 July 2015 (hereinafter: UNSG Guidance Note); UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, adopted by the General Assembly on 16 December 2005 (hereinafter: 2005 Basic Principles), Article 8; Ruth Rubio-Marín, Clara Sandoval, Catalina Díaz, ‘Repairing Family Members: Gross Human Rights Violations and Communities of Harm’ in Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009) 215-290.

³³ Hugo Grotius, edited by Stephen C. Neff, *Hugo Grotius on the Law of War and Peace* (CUP 2012) 252.

in the *Chorzów Factory Case* that “[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself”.³⁴ Furthermore, the PCIJ clarified the key principles which should determine the amount of compensation due for an act contrary to international law. The Court noted that

“reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear (...)”.³⁵

The approach demonstrated in the *Chorzów Factory Case* was further confirmed by the International Court of Justice (ICJ) in several cases, including *Gabčíkovo-Nagymaros Project Case*, *DRC v Uganda*, *The Genocide Case* and *Ahmadou Sadio Diallo Case*.³⁶ However, the ICJ (and, previously, the PCIJ) focuses predominantly on the traditional understanding of an obligation to make reparation as an interstate remedy for violations of international law and breaches of state responsibility. Therefore, traditionally, the beneficiaries of reparations in general international law are states, not individuals.³⁷ The obligation of states to make reparations for internationally wrongful acts is also articulated in Article 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ILC Articles).³⁸

³⁴ *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Jurisdiction, (1927) PCIJ Series A No.9, 21.

³⁵ *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Merits, (1928) PCIJ Series A No.17, 47.

³⁶ *Gabčíkovo-Nagymaros Project Case (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, paras.149-152; *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Reports 2005, 82, para.259; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007, 26 February 2007, p.232-233; *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Judgment, ICJ Reports 2010, 639, para.161.

³⁷ This approach is illustrated in the *Civilian War Claimants Association Ltd v. The King* [1932] AC 14. The case concerned a question whether Article 232 of the Versailles Treaty obliging Germany to “make compensation for all damage done to the civilian population of the Allied and Associated Powers and their property” conferred a right to compensation upon individual persons concerned. The House of Lords held that based upon the provision of the treaty, the funds for purposes of compensation were transferred to the Crown, but it nonetheless did not confer right to compensation to individuals persons who were allegedly injured during the First World War.

³⁸ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful

Nonetheless, there has been a gradual shift towards including natural and legal persons as direct beneficiaries of reparations. This shift was particularly due to the rise in recognition of the importance of human rights and its impact on the evolution of other branches of international law, especially with regard to recognition of rights of individuals in international law.³⁹ The official commentary to Article 33 of the ILC Articles views individuals as direct beneficiaries of reparations. It acknowledges that

“(…) a State’s responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights”.⁴⁰

The ICJ also explicitly recognized the right of individuals to receive reparations in the *Advisory Opinion on the Construction of the Wall* which affirmed an obligation of Israel to “compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction”, particularly to provide “compensation to individuals whose homes or agricultural holdings have been destroyed”.⁴¹

As evidenced by the decisions of the ICJ as well as other sources of international law, the types of reparations in general international law focus primarily on re-establishing the *status quo ante* through mechanisms of restitution and compensation. These two categories are also reflected in the 1985 General Assembly Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power and in the ILC Draft Articles which additionally include satisfaction (Article 37) amongst the types of

Acts, *Yearbook of the International Law Commission* (2001) vol. II, Part Two, 28 (hereinafter: ILC Draft Articles).

³⁹ For an overview of the evolution of the status of individuals under international law see: Kate Parlett, *The Individual in the International Legal System. Continuity and Change in International Law* (CUP 2011).

⁴⁰ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts. General Commentary, *Yearbook of the International Law Commission* (2001) vol. II, Part Two, 91 (Article 33, para.3) (hereinafter ILC Draft Articles, General Commentary).

⁴¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 paras.145, 152-153.

reparations for international wrongs.⁴² However, these two types of reparations have a limited effect in cases involving armed conflict, especially where gender-based crimes are concerned. The irreversible nature of gendered harms (particularly their reproductive aspect) as well as the level of both physical and mental pain and suffering experienced by the victims make it impossible to effectively apply the concept of *restitution in integrum* in such cases.⁴³

The principles of state responsibility to make reparations for breaches of international law developed without taking into account the gendered nature of certain violations or the need to incorporate gender-sensitive reparations into the existing legal framework. Some progress in this regard has been made at the UN level by the adoption of UNSCR 1888 and UNSCR 2106, which form a part of the UN Women, Peace and Security (WPS) Agenda. Both resolutions articulate the responsibility of states to make reparations for conflict-related gender-based violence: UNSCR 1888 emphasizes the need to address sexual violence in the context of justice and reparations; UNSCR 2106 stresses the importance of “supporting survivors in accessing justice and reparations”.⁴⁴ UNSCR 2122 further recalls the right to reparations for violations of individual harms, especially in relation to international crimes committed against women and girls.⁴⁵ Whilst these are welcome developments, the above resolutions were not adopted under Chapter VII of the UN Charter; accordingly they are not legally binding.

Nonetheless, they can be seen as important developments from the standard-setting perspective. The WPS resolutions brought the topic of reparations for gender-based violence into the realm of the UN Security Council and framed it in the context of international peace and security. As such, it not only emphasized the importance of

⁴² UNGA Resolution 40/34, Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, 29 November 1985, Annex, paras.8-13; Article 34 (restitution) and Article 36 (compensation) ILC Draft Articles.

⁴³ It is further argued in this thesis that restoring the system existing before the violations took place is an inadequate form of reparation for gender-based harms sustained in armed conflict as it likely to reinforce the system of inequality and structural discrimination existing before the conflict (for further discussion see section 5.1.1. below).

⁴⁴ UNSCR 1888, S/RES/1888, 30 September 2009, Preamble; UNSCR 2106, S/RES/2106, 24 June 2013, para.21.

⁴⁵ UNSCR 2122, S/RES/2122, 18 October 2013, para.13.

full and effective reparations for conflict-related sexual violence as an essential component of a durable peace, but also paved the way for other developments at the UN level, such as the UN Secretary-General's Guidance Note on Reparations for Conflict-Related Sexual Violence (June 2014).⁴⁶ Finally, the UNSCRs 1888 and 2106 reaffirm the developments with regard to reparations for conflict-related gender-based violence in other fields of international law, especially IHRL and ICL (discussed in detail below).

4.1. International Humanitarian Law

Any state responsible for violations of IHL is obliged to make full reparation in the form of compensation for the injury or loss caused. This principle is established in Article 3 of the 1907 IV Hague Convention and repeated in Article 91 of the Additional Protocol I to the Geneva Conventions, which states that:

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁴⁷

This legal principle is also reflected in customary IHL (CIHL), whereby “a State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused”.⁴⁸ Despite the absence of corresponding provisions in Additional Protocol II, this principle of CIHL is applicable to both international and non-international armed conflicts where violations are attributable to the state.

However, the IHL provisions regarding reparation for violations of IHL are not uncircumscribed. Firstly, Article 91 of AP I employs a narrow focus on remedies,

⁴⁶ UN Office of High Commissioner on Human Rights, ‘A Guidance Note of the Secretary General: Reparations for Conflict-Related Sexual Violence’ (June 2014) <<http://www.unwomen.org/en/docs/2014/6/reparations-for-conflict-related-sexual-violence>> accessed 17 July 2015 (UNSG, Guidance Note).

⁴⁷ Article 91 AP I 1977; Article 3 Hague Convention IV 1907.

⁴⁸ Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press/ ICRC 2005) (*CIHL Study*), Vol. I: Rules, Rule 150: Reparation <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150> accessed 17 July 2015.

limiting them to compensation only. Secondly, that provision reinforces the inter-state nature of compensation and hence does not directly refer to individuals as beneficiaries of such remedy. Accordingly, IHL does not foresee avenues of redress for individuals who have suffered violations of IHL. However, some commentators have argued in favour of reading of this provision as inclusive of individuals. Kalshoven justifies such an interpretation with reference to the records of the Second Hague Peace Conference 1907 during which the text of this provision was adopted.⁴⁹ Kalshoven's argument that the parties to the conference intended to lay down a rule establishing the state's liability to compensate the losses sustained by individual persons and not only vis-à-vis another state is further supported by Greenwood as well as Zegveld, who argues that "obligations of States and other warring parties under IHL could thus be construed as being mirrored by victims' rights for which IHL envisages a cause of action if they are violated".⁵⁰ This reading of Article 91 is also supported by the *ICRC Commentary on the Additional Protocols* and by the *ICJ Advisory Opinion on the Construction of the Wall*, where the ICJ viewed Israel as being under an obligation to compensate individuals for their losses suffered as a result of a construction of the wall "in accordance with the applicable rules of international law".⁵¹ However, there is fairly limited state practice to support such claims. Rather, as noted in the ICRC study on CIHL, there "is an increasing trend in favour" of allowing victims of violations of IHL to seek reparation from a responsible state, primarily supported by the commentary to Article 33 of the ILC Draft Articles.⁵²

Furthermore, the operation of the rules on compensation for violations of IHL is additionally challenged by the typology of modern armed conflicts, which are primarily

⁴⁹ Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 *International and Comparative Law Quarterly* 827, 830-832.

⁵⁰ Christopher Greenwood, 'International Humanitarian Law (Laws of War)' in: Frits Kalshoven (ed) *The Centennial of the First International Peace Conference* (Kluwer Law International 2000) 250; Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) Vol.85 No.851 *International Review of the Red Cross* 497, 506.

⁵¹ Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff 1987) 1056-1057, paras.3656-3657; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para.153.

⁵² Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press/ ICRC 2005) (*CIHL Study*), Vol. I: Rules, Rule 150: Reparation <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter42_rule150> accessed 17 July 2015.

non-international in nature and usually waged by non-state actors. Article 3 of the Hague Convention IV as well as Article 91 of AP I focus exclusively on obligations of states to pay. Whilst there exist a few examples of state practice and United Nations practice supporting the recognition of an obligation of armed opposition groups to provide reparations for violations of IHL, the extent of such obligations remains unclear.⁵³ Moreover, even if such an obligation was recognized, the determination of such claims remains questionable, particularly in the absence of a judicial body mandated with addressing violations of IHL.

Finally, the question arises in relation to the actual ability of individuals to enforce their rights to receive reparations for violations of IHL before domestic courts. Zegveld rightly notes that “primary rights in IHL do not necessarily translate into secondary rights as a consequence of their breach”, forcing victims to rely on CIHL or domestic laws in order to seek reparation for violations of IHL before international organs or domestic courts.⁵⁴ This dynamic is detrimental in the context of seeking reparations for gender-based crimes, especially those involving sexual violence. For instance, in 1998, the Tokyo district court rejected the claim for reparations to Filipino comfort women for harms resulting from a violation of the Article 3 of the Hague Convention 1907.⁵⁵ The Court reasoned that “throughout its close examination of texts and the drafting process of Article 3 of the Hague Convention, the Court has been unable to recognize the alleged rule of customary international law that provides individual residents in an occupied territory the right to claim compensation directly against the occupying state for damages resulting from a violation of the Hague Regulations committed by members of occupying forces”.⁵⁶

⁵³ Ibid.

⁵⁴ Liesbeth Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’ (2003) Vol.85 No.851 International Review of the Red Cross 497, 507.

⁵⁵ Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014) 168-169; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press/ ICRC 2005) (CIHL Study), Vol. II: Practice, Rule 150: Reparation (Japan) <https://www.icrc.org/customary-ihl/eng/docs/v2_cou_jp_rule150> accessed 17 July 2015.

⁵⁶ *Filipino ‘Comfort Women’ case*, Tokyo District Court (9 October 1998), cited in: Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014) 169.

Although women are afforded special protection under IHL, particularly with reference to sexual violence, IHL continues to offer very limited avenues of redress for such harms. The limitations imposed by the substantive IHL framework and the lack of enforcement and monitoring mechanisms for IHL have consequently prompted resort to other avenues of redress, particularly those available in IHRL.

4.2. International Human Rights Law

The key modern developments in relation to reparations in international law have been advanced through IHRL, both in hard law and soft law form. In 2005, the UN General Assembly adopted the most comprehensive set of guidelines on reparations to date.⁵⁷ Two years later, the Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation was developed by a coalition of civil society organizations in an attempt to promote a more gender-sensitive approach to reparations and to the 2005 Basic Principles.⁵⁸

4.2.1. The Basic Principles 2005

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (The Basic Principles) do not create legally binding international obligations, but rather set out international standards, although themselves not legally binding, in relation to reparations for violations of IHL and IHRL. They do so by "identifying 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".⁵⁹ According to the Basic Principles, victims, defined as "persons who

⁵⁷ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, adopted by the General Assembly on 16 December 2005 (hereinafter: 2005 Basic Principles).

⁵⁸ Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation (hereinafter the Nairobi Declaration) <https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf> accessed 17 July 2015.

⁵⁹ 2005 Basic Principles, Preamble.

individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law”, are entitled to five key types of reparation: compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁶⁰ The category of victims is also expanded to include “the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.⁶¹ The understanding of victims and reparations presented in the Basic Principles marks an important shift in two ways. Firstly, it expands the category of types of reparations established thus far in general international law and IHL, which focus only on restitution and/or compensation. Secondly, the broad understanding of the term ‘victim’ encapsulates the contextual reality of IHL and IHRL violations, which very often involve not only the suffering of the primary victim but also the victimization of their families and other persons.⁶²

Furthermore, the Basic Principles state that reparations, which “should be proportional to the gravity of the violations and the harm suffered”, must be provided by the state in relation to acts or omissions constituting violations of IHRL or IHL which can be attributed to it, but also by persons, legal persons or entities who may be found liable for reparations for violations of IHRL or IHL.⁶³ The inclusion of legal persons and entities as providers of reparations indicates further departure from the traditional approach to reparations in general international law, but also poses some normative challenges with regard to IHRL. Arguably, the order to provide reparations by legal

⁶⁰ Ibid., Article 8.

⁶¹ Ibid., Articles 8, 19-23.

⁶² This dynamic is illustrated in the case-law of international criminal tribunals as well as the ICC, primarily with regard to international crimes involving sexual and gender-based violence. On many occasions, family members were forced to witness the victim being raped or sexually assaulted, which in some cases heard before the tribunals was prosecuted as torture (*Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1T, 10 December 1998, para.267).

However, in contrast, the ICC in *Bemba* failed to conceptualise forcing family members to watch their relatives being raped as torture. A single charge of rape was pursued instead of one rape, one torture charge: *Situation in the Central African Republic: Prosecutor v. Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009), paras.204-205.

⁶³ 2005 Basic Principles, Articles 15 and 17.

persons would require a finding by a national court or a regional human rights court that the legal person in question is liable for serious violation of human rights. Thus far, the normative boundaries of IHRL, which attribute the primary responsibility for protecting human rights to states, have precluded human rights courts from breaking new ground with regard to establishing direct, horizontal liability of individuals under IHRL.⁶⁴ However, regional human rights courts have recognized and successfully adjudicated cases supporting the liability of states in human rights law for acts committed by non-state actors, including acts of violence against women.⁶⁵ In such cases, the ultimate responsibility for the violation (at a supranational level) is found to lie with the state for its failure in fulfilling due diligence obligations and not directly with the individual who committed acts leading to a violation of human rights. Therefore, it remains unclear which of the existing legal obligations based in IHRL are reflected in the second part of Article 15 of the Basic Principles, which states that “ in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if

⁶⁴ That said, the increased influence of human rights law on decisions of national courts in relation to cases involving both state and non-state actors can be observed. For instance, the UK Court of Appeal ruled in *Commissioner of Police of the Metropolis v. DSD and NBV* [2015] EWCA Civ 646 that the police have a positive duty under Article 3 ECHR to conduct investigations into alleged ill-treatment by private individuals.

The ECtHR also reaffirmed states' positive obligations towards victims of trafficking in human beings arising under Article 4 of the ECHR in *Rantsev: Rantsev v. Cyprus and Russia*, Application No.25965/04, Judgment, 7 January 2010; see also: Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24(2) *International Journal of Refugee Law* 181-201.

⁶⁵ *Velásquez Rodríguez v. Honduras*, IACtHR, Judgment (Merits), 29 July 1988, Ser.C, No.7, paras.172-177; *González et al. ("Cotton Field") v. Mexico*, IACtHR, Judgment (Preliminary Objection, Merits, Reparations and Costs), 16 November 2009, Ser.C, No.205, paras.280-286; *Opuz v. Turkey*, Application No.33401/02, Judgment, 9 June 2009; UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, on the Due Diligence Standard as a Tool for the Elimination of Violence Against Women, UN Doc. E/CN.4/2006/61, 20 January 2006; UN Human Rights Council, Report of the Special Rapporteur on Violence against Women, its causes and consequences, Rashida Manjoo, on state responsibility for eliminating violence against women, UN Doc. A/HRC/23/49, 14 May 2013; Christine Chinkin, 'Addressing violence against women in the Commonwealth within states' obligations under international law' (2014) 40(3) *Commonwealth Law Bulletin* 471, 479-480; Alice Edwards, *Violence Against Women under International Human Rights Law* (CUP 2011) 166-168; Andrew Byrnes, Eleanor Bath, 'Violence against Women, the Obligation of Due Diligence and the Optional Protocol to the Convention on Elimination of All Forms of Discrimination against Women - Recent Developments' (2008) 8(3) *Human Rights Law Review* 517-533; Ruth Rubio-Marín, Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment' (2011) 33 *Human Rights Quarterly* 1062-1091; Olga Jurasz, 'The Istanbul Convention: a New Chapter in Preventing and Combating Violence Against Women' (2015) Vol. 89/9 *Australian Law Journal* 619-627.

the State has already provided reparation to the victim". The instrument also remains silent on the practical application of the principle enshrined in Article 15.

4.2.2. International human rights treaty law

Similarly to general international law and IHL, the IHRL framework relevant to reparations developed largely without taking account of gender-based harms or violations suffered by women in particular. Generally, human rights treaty law establishes the right to an effective remedy, which was first articulated in Article 8 of the UDHR and is enshrined in key international and regional human rights treaties.⁶⁶ The right to reparations under IHRL can be interpreted to derive from these provisions. Arguably, the notion of an 'effective remedy', if it is to be genuinely effective, should not be limited to the court proceedings only, but additionally encompass a range of practical means of redress, including pecuniary remedies. The only UN human rights treaty which currently provides a comprehensive definition of reparations is the International Convention for Protection of All Persons from Enforced Disappearances 2006 (CED).⁶⁷ Articles 24(4) and (5) of the CED mirror the forms of reparations outlined in the 2005 Basic Principles and include compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁶⁸ As such, the CED is the first UN human rights treaty to formulate in a legally binding form the right of individuals to receive reparations. Nevertheless, none of the UN human rights treaties establishes the specific right to reparations for acts of violence against women. CEDAW, which is often referred to as the Women's Convention, contains provisions stipulating the rights of women to non-discrimination in multiple areas, including equality before the law, but it does not explicitly provide for women's rights to remedies, reparations or compensation.⁶⁹

⁶⁶ Article 8 UDHR, Article 2(3) ICCPR (effective remedy), Article 9(5) ICCPR (compensation for unlawful arrest or detention), Article 14(6) ICCPR (compensation for wrongful conviction); Article 14 CAT (right to receive compensation), Article 6 CERD (effective remedy); Article 13 ECHR (effective remedy), Article 41 ECHR (just satisfaction), Article 10 ACHR (right to compensation), Article 63 ACHR, Article 4(2)(f) Maputo Protocol (reparations for victims of violence against women), Article 25 Maputo Protocol (remedies).

⁶⁷ International Convention for the Protection of All Persons from Enforced Disappearance 2006, UNTS 2716, 3; Information correct as of July 2015.

⁶⁸ 2005 Basic Principles, Articles 19-23; Article 24(4) and 24(5) CED 2006.

⁶⁹ Article 2 CEDAW (general prohibition of discrimination); Article 15 CEDAW (equality before the law).

The right of women to receive reparations for acts of violence perpetrated against them has been recognised at a regional treaty level. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women 1994 (Belém do Pará Convention) requires states parties to ensure effective access to restitution, reparations or other effective remedies for women subjected to violence.⁷⁰ Parties must establish the necessary administrative and legislative mechanisms to give effect to this obligation, and must make women aware of their legal rights and existing remedies for violence against women.⁷¹ Equivalent provisions are included in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (the Maputo Protocol) and in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2011 (the Istanbul Convention), which additionally articulates the obligation of parties to provide reparations for acts of violence perpetrated by non-state actors.⁷²

4.2.3. The UN human rights treaty bodies

Most of the contemporary developments in the area of reparations for individuals who have suffered violations of human rights have been made by the UN treaty bodies and, to an extent, regional human rights courts. The treaty bodies have repeatedly reiterated the existence of the right to reparations in IHRL as well as both procedural and substantive obligations of states in this regard.⁷³ The Human Rights Committee has reaffirmed the obligation of parties to the ICCPR to provide reparations to persons whose rights under the Covenant have been violated, and has emphasized that “without reparation to individuals (...) the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged”.⁷⁴ Furthermore, focusing on VAW, the CEDAW Committee stated in General

⁷⁰ Article 7(g) Belém do Pará Convention.

⁷¹ Article 8(e) Belém do Pará Convention.

⁷² Article 4(2)(f) Maputo Protocol; Article 5(2) Istanbul Convention.

⁷³ UN Human Rights Committee, General Comment No.31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004; UN Committee Against Torture, General Comment No.3: Implementation of article 14 by State parties, UN Doc. CAT/C/GC/3, 19 November 2012; CEDAW, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013.

⁷⁴ UN Human Rights Committee, General Comment No.31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.16.

Recommendation No.19 that obligations under the Convention include the provision of effective complaints procedures and remedies, including compensation.⁷⁵ The Committee also clarified in General Recommendation No.28 that the scope of states' obligations under Article 2(b) of CEDAW includes provision of monetary and non-monetary reparations to women whose rights under the convention had been violated.⁷⁶

The CEDAW Committee also raised the issue of gender-sensitive reparations for acts of violence against women committed in armed conflict. Although the continued applicability of IHRL in situations of armed conflict is generally accepted, the CEDAW Committee is thus far the only UN treaty body to have commented on reparations for harms sustained by women during armed conflict.⁷⁷ It is also the only UN human rights treaty body to have given detailed consideration to gender-sensitive reparations for harms sustained both in armed conflict and in post-conflict situations. The CEDAW Committee has commented in General Recommendation No.30 on the right of women to prompt, adequate and effective reparations for violations of rights under the CEDAW suffered during armed conflict.⁷⁸ Importantly, the Committee stressed the obligation of parties to CEDAW not only to provide reparations which are gender-sensitive and responsive to women's needs but also emphasized the need for transformative reparation measures which would "seek to transform the structural inequalities which led to violations of women's rights".⁷⁹ By requiring state parties to take practical steps to combat structural inequalities, the Committee addressed the paramount issue regarding reparations for conflict-related gender-based harms, namely the necessity to design reparations which would also prevent the violations from recurring in the future. The necessity of transformative reparations in cases involving VAW was emphasized earlier by the Inter-American Court of Human Rights

⁷⁵ CEDAW, General Recommendation No.19 on Violence Against Women, UN Doc. A/47/38, 1992, para.24.

⁷⁶ CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/GR/28, 16 December 2010, para.32.

⁷⁷ CEDAW, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para.9.

⁷⁸ Ibid., paras.74-79.

⁷⁹ Ibid., para.79.

(IACtHR) in the *Cotton Field Case*, which concerned three victims of a systemic pattern of gender-based violence in Ciudad Juárez in Mexico. Considering the deficiencies in the police, judicial and public sector responses to the existing pattern of gender-based violence in Ciudad Juárez, the IACtHR held that

“bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State (...), the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable”.⁸⁰

Moreover, by emphasizing the applicability of state obligations under Article 5(a) CEDAW to post-conflict reparations, the Committee broke new ground in relation to promoting gender-sensitive reparations at an international level.

Firstly, it confirmed the applicability of state obligations under CEDAW in conflict and post-conflict situations. To that end, it also emphasized the importance of states fulfilling obligations under Article 5(a) with a view to providing gender-sensitive and adequate reparations.⁸¹ Secondly, the CEDAW Committee sought to remedy the existing pattern of looking at reparations through the lens of restitution, which in the case of violence against women merely reinstates the system of inequalities that enabled the gender-based violations in the first place. Furthermore, the Committee emphasized the need for reparations to be made with respect to not only gender-based violence but also violations of women’s economic, social and cultural rights.⁸² Finally, the Committee noted that women’s active participation is crucial to the process of designing gender-sensitive reparations, which indirectly echoes the principles underpinning the UN WPS Agenda.⁸³

⁸⁰ *González et al. (“Cotton Field”) v. Mexico*, IACtHR, Judgment (Preliminary Objection, Merits, Reparations and Costs), 16 November 2009, Ser.C, No.205, para.450.

⁸¹ CEDAW Committee also confirmed that states are required to make “changes to relevant laws and practices” as a part of an obligation to provide an appropriate remedy under Article 2(b) of CEDAW. CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/GR/28, 16 December 2010, para.32.

⁸² CEDAW, General Recommendation No.30, *supra* 77, para.81(g).

⁸³ *Ibid.*, para.81(e).

4.3. Reparations at the International Criminal Court

The ICC Statute established a unique mechanism which allows the victims of international crimes subject to ICC jurisdiction to submit claims to the court for reparations.⁸⁴ The ICC is the first international criminal court to provide such a system; as the international criminal courts and tribunals preceding it lacked jurisdiction with regard to reparations for harms arising as a consequence of the commission of international crimes.⁸⁵ The court has jurisdiction only in relation to individuals who have allegedly committed international crimes; not states. Accordingly, the ICC reparations system does not take account of state responsibility for international crimes or gross violations of human rights and humanitarian law, even in situations where crimes are perpetrated by the Head of State and state agents and/or institutions. However, state parties to the ICC Statute are required to assist the court with implementation of the orders for reparations, including assistance in tracing the defendant's assets as well as facilitation of searches and forfeiture proceedings.⁸⁶

The ICC reparations regime is laid out in Article 75 and Article 79 of the ICC Statute and further explained in Rules 94 to 99 of the ICC RPE. When ordering reparations, the ICC is required to carry out an assessment into the scope and extent of the damage, loss or injury suffered by the victim.⁸⁷ On the basis of this assessment, the Court can then award individual and/or collective reparations.⁸⁸ Articles 75(1) and 75(2) allow the

⁸⁴ For the overview of the system of reparations at the ICC see: Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15(3) *Leiden Journal of International Law* 667-686; Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP 2012).

⁸⁵ However, the Statutes and Rules of Procedure of the ICTY and the ICTR provided for the restitution of property or the proceeds thereof to victims.

The Extraordinary Chambers in the Courts of Cambodia allow victims to take part in the proceedings and to claim reparations. Although there exist no direct provisions regarding the right to reparations in the Statute of the ECCC, the Internal Rules of the ECCC (which are based on the Cambodian Criminal Code) provide for reparations for victims: Rules 23, 100(2), 110(3), 113(1) of the Internal Rules of Extraordinary Chambers for in the Courts of Cambodia (Rev.3), as revised on 6 March 2009.

⁸⁶ Articles 75(5), Article 93(1)(h) and (k), Article 109 ICC Statute; Rules 217, 218(3) and 219 ICC RPE. On the topic of domestic implementation of the provisions of the ICC Statute and the ICC orders with regard to reparations see: Carla Ferstman (2002), *supra* 84, 679-684; Edda Kristjándóttir 'Who is the most able and willing? Complementarity and victim reparations at the International Criminal Court' in: Cecilia M. Baillett, *Non-State Actors, Soft Law and Protective Regimes. From the Margins* (CUP 2012) 78-82.

⁸⁷ Article 75(a) ICC Statute; Rule 97 ICC RPE.

⁸⁸ Rule 97(1) ICC RPE.

Court to award reparations, including restitution, compensation and rehabilitation, to victims of international crimes.⁸⁹ Although the provisions refer to three types of reparations, the Court may award other remedies, as per Rule 91(1)(f) of the ICC RPE. The Court can order reparations either directly against the convicted person (Article 75(2)) or through the Trust Fund for Victims (TFV) (Article 79(2)). The TFV was established by the Assembly of the Parties for the benefit of the victims of international crimes and their families. The TFV, which is sponsored through voluntary donations from states, plays a dual role.

Firstly, the TFV is responsible for disbursement of the court-awarded reparations. As a part of this mandate, the TFV acts as a depository of assets seized through fines and forfeitures which form the basis for victims' reparations, especially where at the time of the reparations order it is impossible or impracticable to make individual awards directly to each victim.⁹⁰ Furthermore, where large numbers of victims are concerned and a collective reparations award is made, the TFV is tasked with implementation of the court order.⁹¹ Secondly, the TVF plays a humanitarian role as an agency providing physical, psychological and material support to the victims, their families and communities through assistance programmes. However, unlike with reparations, the 'assistance mandate' of the TFV is not linked to the conviction of the accused and should be viewed as separate from the TFV's role in assisting the court with the implementation of the reparation orders.⁹²

4.3.1. *Prosecutor v. Lubanga* (Reparations)

On 3 March 2015, the ICC Appeals Chamber, in its first judgment to award reparations, laid down certain principles regarding their award in *Prosecutor v. Lubanga*. The judgment, which gives effect to the court's obligation under Article 75(1) of the ICC

⁸⁹ Article 75(1) and 75(2) ICC Statute.

⁹⁰ Rule 98(2) ICC RPE.

⁹¹ Rule 98(3) ICC RPE.

⁹² This was confirmed by the ICC Appeals Chamber in *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the appeals against the "Decision establishing principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2), ICC-01/04-01/06-3129 (3 March 2015), para.182 (*Lubanga* Reparations Judgment (3 March 2015)).

Statute, reversed the earlier decision of the ICC Trial Chamber with regard to reparations and clarified several crucial concepts.

The Appeals Chamber emphasized that the obligation to repair is directly linked to individual criminal responsibility under the ICC Statute and, as such, lies with the convicted person.⁹³ In this context, destitution of the accused was rendered irrelevant and more emphasis was placed on the notion of the attribution of guilt and responsibility (both for the criminal acts and consequences of them) to the convicted person.⁹⁴ This approach reversed the position of the Trial Chamber which failed to make awards of reparations directly against Lubanga, based on his indigence. The Appeals Chamber reasoned that indigence is not an obstacle to award of reparations against the convicted person and that, based on the principle of accountability, the ICC needs to make a reparations order against the convicted person even if reparations are ordered through a TFV.⁹⁵ However, whilst the presented reasoning is correct in principle, its practical aspect is highly questionable. The alleged indigence of the individual will inherently have an impact on reparations for individuals who suffered harms as a result of international crimes committed by the convicted person. Whilst the TFV can supply some funds for reparations, the assets of the convicted person contribute towards the overall value of the reparation funds awarded by the ICC.

However, the award of reparations is subject to different tests than those pertinent to the determination of individual criminal responsibility under ICL. The 'liability to remedy harm' requires the establishment of a causal link between the criminal act and the harm based on 'but for' test and the 'proximate cause' standard.⁹⁶ Furthermore, in contrast to criminal proceedings, the causality does not have to be proven beyond reasonable doubt. Instead, a "sufficient causal link" between the crime and the sustained harm needs to be established.⁹⁷

⁹³ *Lubanga* Reparations Judgment (3 March 2015), para.99.

⁹⁴ *Ibid.* paras.102-105.

⁹⁵ *Ibid.*, para.69-70.

⁹⁶ *Ibid.*, paras.125-129.

⁹⁷ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations), ICC-01/04-01/06-3129-AnxA (3 March 2015), para.22.

Nonetheless, the Appeals Judgment also raises some concerns regarding the ICC's approach towards reparations. Stahn notes that the Order for Reparations issued in the *Lubanga* case appears to prioritise accountability over other societal concerns, such as security, well-being or deterrence measures preventing the violations from recurring in the future.⁹⁸ Whilst this approach is reflective of the general priorities of any criminal court, it raises the issue of suitability of such an approach in the post-conflict context. Arguably, the exclusive focus on criminal accountability of the high-level convicted person as a key determinative factor for award of reparations moves away from remedying other effects of armed conflict which must be addressed in the process of transition from conflict to peace. In particular, it may lead to prioritisation of victims of prosecuted and convicted crimes to the detriment (if not exclusion) of victimhood of other persons who have suffered harms resulting from international crimes which may have not been prosecuted at the ICC or, if prosecuted, no conviction was secured. For instance, victims of sexual and gender-based violence and victims of crimes committed by child soldiers illustrate groups of victims who were excluded from the award of reparations in *Lubanga*.

Furthermore, the focus of the court on remedying harms sustained by a select group of victims may lead to further societal divisions in a society recently emerging from conflict, and creation of a 'reparation gap'.⁹⁹ The ICC acknowledged the danger of such an approach, noting that the focus of the Reparations Order on victims from the Hema community may "give rise to a risk of resentment on the part of other victims and the re-stigmatisation of former child soldiers within their communities".¹⁰⁰ However, this shortcoming is also attributed to flaws in the earlier stages of the case, principally the type and number of charges in the indictment linking back to the weaknesses in prosecutorial strategy and investigations.¹⁰¹ Accordingly, the limited scope of charges

⁹⁸ Carsten Stahn, 'Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparations' (*EJIL: Talk!*, 7 April 2015) <<http://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/>> accessed 1 August 2015.

⁹⁹ Luke Moffett, 'Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court' (2013) 17(3) *The International Journal of Human Rights* 368, 375.

¹⁰⁰ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations), ICC-01/04-01/06-3129-AnxA (3 March 2015), footnote 44.

¹⁰¹ These shortcomings are discussed in Chapter 5 of this thesis.

brought against Lubanga automatically narrowed the number of eligible victims, hence limiting the opportunity to award reparations to other victims.

A similar difficulty arose in relation to reparations for victims of sexual and gender-based violence in *Lubanga*. Although the first decision on reparations included provision of reparation for such victims, the Appeals Chamber reversed that finding. It was held that harms arising from sexual and gender-based violence suffered by the victims were not linked to the crimes of which Lubanga was convicted (i.e. the enlistment, conscription and use of child soldiers under Article 8(2)(e)(vi) and (vii) of the ICC Statute). Therefore, in the Appeals Chamber's view, Lubanga could not be held liable for reparations in respect of these harms. The decision further illustrates the importance of adequate and detailed charging of gender-based crimes at the pre-trial stage, as well as their diligent prosecution during the trial. These two elements not only influence the future award of reparations to victims of gender-based crimes, but also have a real and practical impact on victims' lives in post-conflict reality.

The negative impact of the questionable finding of the Trial Chamber in *Lubanga* establishing that acts of sexual and gender-based violence are not a part of the crime of enlistment, conscription and use of child soldiers to participate actively in hostilities is particularly demonstrable in this context.¹⁰² Such interpretation effectively led to exclusion of victims, predominantly girls, who suffered harm resulting from sexual violence committed in the context, or as a result, of recruitment and/or use of child soldiers from benefitting from reparations ordered against Lubanga. Such a result is particularly worrying given the commitment of the ICC to the principle of equality and non-discrimination as well as the promise of special attention to the needs of child victims and victims of sexual and gender-based violence.¹⁰³

¹⁰² Decision of the ICC Trial Chamber in *Lubanga* regarding the issue of whether sexual and gender-based violence forms a part of 'active participation in hostilities' was discussed in detail in Chapter 5, section 3.2.2.1.

¹⁰³ Article 21(3) and Article 68 ICC Statute; Rule 86 ICC RPE.

4.3.2. Critique of the ICC reparations system

The system of reparations established in the ICC Statute is quite novel in modern ICL. It was aimed at reaching beyond the punitive function of the ICC, and ICL in general, to provide effective remedies for the victims whilst promoting a more inclusive and participatory approach.¹⁰⁴ Nonetheless, the early practice of the ICC with regard to reparations raises questions regarding the appropriateness and effectiveness of the established regime. Several commentators have also raised doubts regarding the actual substantive and procedural expertise of the ICC as a criminal court regarding adjudication of what essentially amounts to a civil claim.¹⁰⁵

The complementary nature of the ICC jurisdiction means that only selected cases will ever reach it. These are likely to involve high-level perpetrators, especially where there exists a lack of genuine domestic investigation and/or proceedings by the state with jurisdiction over the alleged crimes. In practice, this means that only a narrow group of victims is likely to be eligible for reparations, assuming that the alleged perpetrator is convicted by the ICC. Even then, the victims may receive reparations only in relation to harms sustained as a result of crimes successfully prosecuted by the court. In addition, as deBrouwer and Heikkilä point out, the lack of awareness amongst the victims of the possibility of seeking reparations, as well as the lack of understanding of practical details (such as the need to fill in the claim form), effectively prevents many victims from receiving reparations.¹⁰⁶

¹⁰⁴ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Decision establishing principles and procedures to be applied to reparations), ICC-01/04-01/06-2904 (7 August 2012), para.177.

¹⁰⁵ Carsten Stahn, 'Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparations' (*EJIL: Talk!*, 7 April 2015) <<http://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/>> accessed 1 August 2015; Liesbeth Zegveld, 'Victims' Reparation Claims and International Criminal Courts. Incompatible Values?' (2013) 8 *Journal of International Criminal Justice* 79, 100.

¹⁰⁶ Anne-Marie deBrouwer, Mikaela Heikkilä, 'Victim Issues: Participation, Protection, Reparations, and Assistance' in: Göran Sluiter, Häkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 1371.

Despite these limitations, the ICC faces potentially large numbers of victims seeking reparations.¹⁰⁷ This immediately raises a question about the effectiveness of such an approach. If the overarching aim of the post-conflict reparations is to remedy the harms suffered by individuals in armed conflict and to assist in the process of transformation from conflict to peace, then the ICC regime provides a rather limited scope for achieving these objectives. A large number of claimants raises questions about the financial aspects of awarding reparations. Thus far, the ICC has had to rely on the funds of the TFV to finance reparations for victims of crimes perpetrated by Lubanga, as he was found to be destitute, thereby precluding the TFV from seizing any assets. Furthermore, as Moffett notes, even where the defendant's assets are seized (as in *Bemba*), the final award to the victims is likely to be far less than reparations ordered by regional human rights courts, including rehabilitations and measures of satisfaction.¹⁰⁸ The strong reliance of the ICC reparations mechanism on the TFV is also questionable. Given that the TFV relies on voluntary donations from wealthier countries, the Trust Fund hardly offers a sustainable source of finance for future reparations. Schabas also doubts the utility of providing funds for the humanitarian activities of the TFV, which essentially amount to "expensive overseas development assistance" and are already carried out by specialised agencies such as Oxfam or the UN Development Programme.¹⁰⁹

Finally, the ICC practice with respect to gender-inclusive reparations is yet to be observed. In principle, the ICC reparations system recognizes the need for gender-sensitive reparations, which applies equally to cases involving gender-based crimes and those that do not. The reparations system is additionally supported by the general principles enshrined in the ICC Statute which prohibit gender discrimination and envisage special attention to the needs of victims of sexual and gender-based

¹⁰⁷ For instance, in the *Bemba* case, there are 4452 victims. *Prosecutor v. Bemba* (Public redacted version of the 'Decision on the Tenth and Seventeenth Transmissions of Applications by Victims to Participate in the Proceedings') ICC-01/05-01/08-2247-Red (19 July 2012).

¹⁰⁸ The value of defendant's assets seized by the ICC in *Bemba* case is estimated at €5.2 million. Given the number of victims (4452 in 2012), each victim would only receive €1168.

Luke Moffett, 'Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court' (2013) 17(3) *The International Journal of Human Rights* 368, 377.

¹⁰⁹ William A. Schabas, 'The International Criminal Court at Ten' (2001) 22 *Criminal Law Forum* 493, 501.

violence.¹¹⁰ However, flaws in the earlier procedural stages of a case may lead to gender-based crimes not being included in the conviction, therefore significantly limiting the eligibility of victims to claim reparations. Also, there is no clarification on what gender-inclusivity actually means when it comes to implementation of reparation orders. The Order for Reparations in *Lubanga* merely states that a “gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations” with a view to attaining gender parity in reparations, but does not elaborate further on practical means through which these goals are to be achieved.¹¹¹ Given the early practice of the ICC with regard to gender-inclusive reparations, the court has an opportunity to clarify this matter in its future decisions.

5. Reparations for conflict-related gendered harms

Although the right to reparations is established in international law, the flaws in many reparations programmes, or even the lack of such programmes in the aftermath of violent conflicts, effectively prevent women who have suffered violations of their rights during armed conflict from enforcing these rights and obtaining material reparations. This evident gap in relation to provision of effective remedies for women is illustrative of, as Ní Aoláin notes, “a consistent pattern of disjunctive responses by law to women’s needs”, which was also discussed in previous chapters of this thesis.¹¹² The early efforts to address reparations at an international level, particularly the 2005 Basic Guidelines, also failed to include a gender perspective. In 2014, the UN Secretary-General issued a Guidance Note on Reparations for Conflict-Related Sexual Violence, which (though not binding) provided “guidance for United Nations engagement in the area of reparations for victims of conflict-related sexual violence”.¹¹³ Although the need for gender-sensitive reparations had been voiced before in UNSCRs 1888, 2106, 2122 and in the Nairobi Declaration, the Guidance Note

¹¹⁰ Article 21(3), Article 68 ICC Statute; Rule 86 ICC RPE.

¹¹¹ *Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations), ICC-01/04-01/06-3129-AnxA (3 March 2015), para.18.

¹¹² Fionnuala Ní Aoláin, Catherine O’Rourke, Aisling Swaine, ‘Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice’ (2015) 28 *Harvard Human Rights Journal* 97, 102.

¹¹³ UNSG Guidance Note, 2.

demonstrates a more elaborate attempt to address the matter of reparations for conflict-related sexual violence in a more comprehensive manner, also recognizing the need to tailor the reparations to the specific needs of survivors of sexual and gender-based violence. Nonetheless, the Guidance Note focuses on one particular type of gendered harm, namely conflict-related sexual violence, rather than the wider spectrum of gendered harms sustained by women as a result of violations of their rights.

5.1. Reparations framework under the 2005 Basic Principles: a gender perspective

Reparations in international law come in many forms.¹¹⁴ The 2005 Basic Principles establishes a framework of five key types of reparations: restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.¹¹⁵ This instrument remains the most comprehensive to date which, whilst lacking a clear gender perspective, provides the most coherent set of rules governing reparations for violations of IHRL and IHL. The following sections explore the issue of reparations for gendered harms by applying a gender perspective to the framework for reparations established by the Basic Principles.

5.1.1. Restitution

Restitution, next to compensation, is one of the traditional categories of reparations in international law, as outlined in the *Chorzów Factory Case*.¹¹⁶ Although restitution in international law developed as an inter-state remedy, it is now accepted as a form of reparation benefiting individuals who are victims of violations of IHRL and IHL and includes restoration of liberty; enjoyment of human rights, identity, family life, and citizenship; return to one's place of residence; restoration of employment; and return

¹¹⁴ For an overview of various reparation principles, types of reparations and extensive case-studies see: Pablo de Greiff (ed), *The Handbook of Reparations* (OUP 2006).

¹¹⁵ The term 'guarantees of non-repetition' is commonly used in international instruments addressing reparations. However, the term is somewhat problematic, as one can never really guarantee non-repetition of violations.

¹¹⁶ Restitution is a common remedy in many domestic legal systems. It is also established as a form of inter-state reparation for internationally wrongful acts (Article 35 ILC Draft Articles).

of property.¹¹⁷ Based on the long-established principle of *restitutio in integrum*, the goal of restitution is to restore the position of the injured party (here, an individual) to the state they were in before the violation (here, of IHRL and/or IHL) occurred.

However, the application of restitution as a remedy for gendered harms resulting from conflict-related violations is highly problematic and in some cases quite unrealistic. The nature of certain gendered harms, particularly those of a sexual nature, means that it is impossible to reverse the physical and psychological injuries suffered by the victim, such as reproductive harms or trauma resulting from sexual violence. Furthermore, the substantial reliance of general international law (and, to an extent, IHRL) on restitution, which focuses on re-establishing the *status quo ante*, is not always an adequate remedy. It is submitted that whilst restitution is important in the context of remedying some gendered harms (e.g. focused on land and property ownership), the return to the exact legal *status quo ante* is an inadequate form of redress in situations where the pre-existing system of structural discrimination warranted the violation of women's rights resulting in gendered harms. Application of restitution in the post-conflict context would merely reinstate the very same system of structural discrimination of women, which was the root cause of the violations. A return to pre-conflict conditions and the legal *status quo*, if it discriminates against women, does not constitute a remedy, but merely reinstates conditions which allow the perpetuation of structural gender discrimination and inequality. Therefore, a more transformative focus of restitution may be needed in order for it to provide a meaningful and longer-term remedy.

Although restitution has a limited facility for remedying sexual harms, it may nonetheless be used to counteract some of the harms suffered as a result of sexual violence. Ní Aoláin et al. note that in many societies culture plays a crucial role in determining the true extent of gendered harms; for instance the loss of 'social position' within the community due to being ostracised as a victim of sexual violence. A gender-sensitive approach to restitution in such cases requires not only a culturally-sensitive approach but also involves drawing the connection between sexual harms

¹¹⁷ 2005 Basic Principles, Article 19.

suffered by the victim and the loss of social status of the victim. In such instances, gender-sensitive forms of restitution would entail taking proactive yet complex steps to reinstate the social position of the victim *status quo ante*. This comes nonetheless with significant practical challenges, which would require long-term efforts aimed at promoting social and attitudinal change towards victims of gendered harms. However, such efforts fall outside the normative and operational scope of international legal framework.

Restitution can be effectively applied as a mode of reparation for other, non-sexual harms sustained by women in armed conflict, such as the loss of land and/or property. For this purpose, a broad understanding of property should be employed, including housing, land, tangible property, livestock and any other forms of property on which women's livelihoods are dependent. The return of property plays a key role in women's rebuilding of their everyday lives in the aftermath of conflict. It is directly linked to women's economic and social rights, in particular the right to adequate housing and adequate food.¹¹⁸ Furthermore, women's property rights are interconnected with their security (including food security), health and livelihoods, all of which are likely to be in a particularly fragile condition as a result of conflict.¹¹⁹ Limited employment options and general economic hardship resulting from violent conflict contribute to an increase in economic vulnerability of women, especially those who lack family or community support or are single heads of households.¹²⁰ Therefore, the strategic importance as well as the transformative potential of ensuring the prompt and complete restitution of property to women should not be underestimated. For instance, the return of land and tools or livestock to rural women gives them practical means to survival and to become, however minimally, economically independent.

¹¹⁸ Article 14(2)(h) CEDAW, Article 11 ICESCR.

¹¹⁹ UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/19/53, 26 December 2011, para.2; Diana Sankey, 'Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice' (2014) 8 International Journal of Transitional Justice 121, 128-129.

¹²⁰ CEDAW, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para.51.

However, property restitution may prove challenging in countries where gender discrimination in property ownership exists. The limited or non-existent rights of women to hold property in some systems may be an obstacle to effective restitution of property, particularly in cases where the female victim survives her male partner or other male family members on whom she was economically dependent.¹²¹ This may be further hindered by the operation of customary laws which not only prevent women from having property rights but also deny them inheritance rights.¹²²

Furthermore, gender discrimination in property law puts female refugees and IDPs in a particularly precarious position. Reclaiming the property, often after a significant period of absence caused by the events of armed conflict is not only paved with practical challenges (e.g. proving ownership in the likely absence of documents, getting access to the property or evicting the illegal tenants) but also, as illustrated by *Blečić v. Croatia*, may not result in securing the ownership and occupancy rights.¹²³ The 2005 Pinheiro Principles recognised that giving effect to the rights of refugees and displaced women and girls requires positive action from states, including restitution of property.¹²⁴ The Principles also emphasized the principle of equality between men and women (as well as between boys and girls) and the need for its effective application in the context of property restitution for refugees and IDPs, especially through gender-sensitive reparation programmes, policies and practices.¹²⁵ The significance of land and property rights in the post-conflict context was further stressed by the CEDAW Committee, which recommended that states should adopt gender-sensitive legislation

¹²¹ The equal rights of spouses in respect of property are enshrined in Article 16(1)(h) CEDAW.

¹²² Leslie Kurshan, 'Rethinking property rights as human rights: acquiring equal property rights for women using international human rights treaties' (2000) 8(2) American University Journal of Gender, Social Policy and the Law 353, 361; Sharanya Sai Mohan, 'The Battle After the War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution' (2011) 36 Yale Journal of International Law 461, 464, 480-483 (describing customary law in Rwanda).

¹²³ *Blečić v. Croatia*, Application No. 59532/00, Judgment, 8 March 2006.

The national civil proceedings against Ms Blečić started in February 1992 regarding her alleged termination of tenancy due to absence of more than 6 months (caused by events of armed conflict). The Constitutional Court of Croatia dismissed the applicant's appeal in November 1999. However, the ECtHR was unable to decide on merits of the case due to the lack of temporal jurisdiction (Croatia ratified the ECHR only in November 1997).

¹²⁴ UN Sub-Commission on the Promotion and Protection of Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc. E/CN.4/Sub.2/2005/17, 28 June 2005 (The 2005 Pinheiro Principles), Preamble and Principle 4.

¹²⁵ The 2005 Pinheiro Principles, paras.4.1. -4.3.

and policies addressing the disadvantages faced by many women in relation to claiming their inheritance rights or rights to land in the aftermath of conflict.¹²⁶ Finally, the reform of land and property laws with a view of eradicating gender-bias and gender discrimination entrenched in existing laws may in itself constitute a form of transformative reparation, which not only ensures the effective remedy to the individual victim but also contributes to long-term change in gender power structures.¹²⁷

5.1.2. Compensation

Compensation is the key form of reparation for any economically assessable damage arising from violations of states' obligations under IHRL and/or IHL.¹²⁸ Compensation can be provided in respect of various harms, including moral and material aspects of sustained harms, loss of opportunities, loss of earnings or costs of required legal and medical assistance. According to the 2005 Basic Principles, compensation provided should be "proportional to the gravity of the violation and the circumstances of each case".¹²⁹

The key difficulty arises in relation to quantification of the harm with regard to which compensation is awarded. In order to be effective, compensation should take account of pecuniary and non-pecuniary losses already inflicted on the victim but also include consequential losses, e.g. the loss of reproductive capacity, loss of support, loss of pecuniary opportunity or loss of economic capacity. This is particularly important in the context of awarding compensation for gendered harms, the effects of which severely impact on the future of the victims both in the short- and longer term. As discussed in section 3.1., gendered harms have a wide spectrum of impact which

¹²⁶ CEDAW, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para.65(b).

¹²⁷ The transformative potential of such reforms is also noted by Ní Aoláin et al.: Fionnuala Ní Aoláin, Catherine O'Rourke, Aisling Swaine, 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 28 Harvard Human Rights Journal 97, 120; UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/19/53, 26 December 2011, paras.3 and 4.

¹²⁸ 2005 Basic Principles, Article 20.

¹²⁹ Ibid.

makes it challenging to quantify the 'value' of harms incurred, especially where sexual violence is involved. However, whilst the difficulty of quantifying harms arising from sexual violence is acknowledged (for instance, the value of adequate compensation for pain and suffering caused by rape or sexualised torture), it is important to emphasize the economic aspect of these types of violations.

Although it is difficult to put an exact compensatory value on physical and mental injuries suffered as a result of sexual violence, it is nonetheless possible to be more precise when quantifying the value of economic impact of harms arising from these violations. A broad understanding of economic loss in this context should include the costs of medical and psychological care required as the result of injuries sustained, the cost of legal services but also expenses associated with unwanted pregnancy or raising children conceived as a result of rape.¹³⁰ Furthermore, the cultural dimension of economic harms should not be ignored. In societies where the social status of a woman is adversely affected as a result of her being a victim of sexual violence, the compensation award should take account of this. For instance, where a female victim is ostracised or deemed to be of 'unmarriageable status', the economically assessable damages consequential to this type of harm, such as the loss of support, should be taken into account. Regional human rights courts have recognized the loss of support as a ground for award of reparations in situations where typically the death of a victim resulted in such loss (financial or otherwise) to the victim's family or dependants.¹³¹ Whilst in some circumstances the loss of support may be attributed to the death of a spouse or another family member upon whom the woman is economically dependent (e.g. forced single motherhood due to spouse/ partner having disappeared or died during armed conflict), it is argued that a broader understanding of the category of 'loss of support' is needed. It ought to be recognized that in context of gendered

¹³⁰ Sara L. Zeigler, Gregory Gilbert Gunderson, 'The Gendered Dimension of Conflict's Aftermath: A Victim-Centered Approach to Compensation' (2006) 20(2) *Ethics & International Affairs* 171, 184; Ruth Rubio-Marín, 'The Gender of Reparations in Transitional Societies' in: Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009) 108.

¹³¹ *Aktaş v. Turkey*, Application No.24351/94, Judgment, 24 April 2003, para.359-361; *Çakici v. Turkey*, Application No.23657/94, Judgment, 8 July 1999, paras.127, 130; *Gül v. Turkey*, Application No. 22676/93, Judgment, 14 December 2000, paras.107, 110; *Rochela Massacre v. Colombia*, IACtHR, Judgment (Merits, Reparations, and Costs), 11 May 2007, Ser.C No.163, paras.235, 238.

violations, the loss of support is linked to a human rights violation, but not dependant on the death of a victim. To the contrary, the victim herself suffers the loss of support (which normally would be provided by family, spouse or community) due to being ostracised as a victim of sexual violence.

Similarly, a gender-sensitive approach to compensation for the loss of income should take account of the generally disadvantageous economic position of women as a group, which becomes particularly aggravated during armed conflict and in its aftermath.¹³² Many women work in low-paid jobs or do not receive payment for their work, e.g. they work at home or on family land.¹³³ The quantification of the loss of income which ignores women's non-monetary contributions is therefore likely to lead to a low compensatory award (if at all), deepening the already disadvantageous position of the victims. Furthermore, the impact of gendered harms may also affect the victim's access to the same opportunities she would have had if the violation had not occurred, which, where applicable, should be reflected in the compensation award.¹³⁴ In Rubio-Marín's words, in order to avoid reproducing sexual hierarchies, women should be compensated "not for what they lost but what they would have lost under a non-discriminatory system".¹³⁵

Compensation awards are an important part of the reparations for gendered harms as they give the victims practical and financial means to rebuild their lives. Rubio-Marín also emphasizes the potential of compensatory reparations in redressing the economic

¹³² Ruth Rubio-Marín, 'The Gender of Reparations in Transitional Societies' in: Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009) 103.

¹³³ UNSG Guidance Note, 17.

¹³⁴ UNSG Guidance Note (page 17) makes a reference to the impact of sexual violence on the future income of the victim, e.g. limited opportunities due to being stigmatized as a victim of sexual violence. In *Loayza Tamayo v. Peru*, the IACtHR invented a concept of *proyecto de vida* (life plan), which seeks to compensate for damages to victim's professional and personal development, "her calling in life, her particular circumstances, her potentialities and her ambitions, [which would have permitted] her to set for herself, in a reasonable manner, specific goals and to attain those goals" (para.147). However, the IACtHR did not award compensation with regard to *proyecto de vida* as it found that "neither case law nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms" (*Loayza Tamayo v. Peru*, IACtHR, Judgment (Reparations), 27 November 1998, Ser.C, No.42, para.153).

¹³⁵ Ruth Rubio-Marín, 'The Gender of Reparations in Transitional Societies' in: Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009) 101.

subordination of women by enhancing their autonomy in the economic sphere.¹³⁶ On the other hand, the amount of individual compensation awarded is linked to the fiscal capabilities of the state and the total amount of resources available for reparations.¹³⁷ In situations where scarce resources are contrasted with a large number of victims claiming compensation, the individual awards may be very limited. Likewise, McCarthy points towards the potential tension between quantum of compensation available to victims seeking reparations through regional human rights courts or through the ICC and to those who have suffered violations in the same armed conflict but are left to seek redress within the domestic legal systems.¹³⁸

Finally, the issues of access to monetary reparations as well as modes of distribution need to be addressed. In order for compensation to be effective, it needs to be ensured that victims of gendered harms are aware of how to access this form of reparation as well as have means to benefit from it. Matters of illiteracy, lack of documentation, mobility or the lack of a personal bank account may stand in the way of many women receiving reparations for sustained gendered harms. Therefore, the design of reparation programmes should address these obstacles with a view to enhancing women's access to reparations and, as such, secure fulfilment of their human right to an effective remedy.¹³⁹

5.1.3. Rehabilitation

The 2005 Basic Principles define rehabilitation, rather briefly, as a form of reparation inclusive of "medical and psychological care as well as legal and social services".¹⁴⁰ As such, it is envisaged that a gender-sensitive approach to rehabilitation would involve

¹³⁶ *Ibid.*, 104.

¹³⁷ Richard Falk, 'Reparations, International Law and Global Justice: A New Frontier' in: Pablo de Greiff (ed), *The Handbook of Reparations* (OUP 2006) 492.

¹³⁸ Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP 2012) 163-164.

¹³⁹ UNSG Guidance Note suggests that "compensation could, for example, take the form of benefits/pensions to be paid directly to the victim of conflict-related sexual violence, under strict confidentiality" (page 17).

¹⁴⁰ 2005 Basic Principles, Article 21; Clara Sandoval Villalba, 'Rehabilitation as a form of reparation under international law' (REDRESS, 2009)

<<http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf>> accessed 1 October 2015.

provision of adequate care and services which focus specifically on women's health, including reproductive health, rather than on the general provision of healthcare. The timing of rehabilitation measures focussing on medical and psychological assistance is also of the essence, especially in the aftermath of armed conflict, where the extent of injuries to both physical and mental health may require immediate attention. However, the timely and adequate provision of such services is often overlooked. For instance, three years after the Rwandan genocide, which was characterised by prevalent sexual violence, the Special Rapporteur on Violence Against Women found that amongst 170 doctors in Rwanda there were only 5 gynaecologists to deal with the physical impact of genocide.¹⁴¹

In addition, the UN Secretary-General notes that rehabilitation in cases involving victims of conflict-related sexual violence should not be limited to medical services only and should also be extended to other persons (such as family members) with a view of maximising the probability of all victims' recovery.¹⁴² Ní Aoláin et al. further suggest that rehabilitation measures may also include broader victim-empowerment strategies, such as formal and informal education.¹⁴³ Arguably, rehabilitation measures should be inclusive of vocational rehabilitation, especially where the impact of gendered harms forces the victim to change profession or precludes her continuing the work she did prior to the violation occurring. Vocational rehabilitation may include provision of free information about employment opportunities but also free training programmes aimed at development of new skills, which allow women to undertake employment and to become financially independent.

¹⁴¹ UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, Radhika Coomaraswamy, Report of the mission to Rwanda on the issues of violence against women in situations of armed conflict, Addendum, UN Doc. E/CN.4/1998/54/Add.1, 4 February 1998, para.36.

¹⁴² UNSG Guidance Note, 18.

Shelton adopts a broader definition of rehabilitation as "the process of restoring the individual's full health and reputation after the trauma of a serious attack on one's physical or mental integrity [...] It aims to restore what has been lost. Rehabilitation seeks to achieve maximum physical and psychological fitness by addressing the individual, the family, local community and even the society as a whole". Dinah Shelton, *Remedies in International Human Rights*, 2nd ed., (OUP 2005) 275.

¹⁴³ Fionnuala Ní Aoláin, Catherine O'Rourke, Aisling Swaine, 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 28 Harvard Human Rights Journal 97, 121.

5.1.4. Satisfaction

Measures of satisfaction focus primarily on due recognition of the victims and are achieved mostly through a range of symbolic reparations.¹⁴⁴ These may include public apologies, commemorations and tributes to victims, official and/or judicial declarations restoring the reputation and dignity of victims and truth seeking.¹⁴⁵

The public recognition of gendered harms is one of the essential features of gender-sensitive measures of satisfaction. It is important that in the aftermath of conflict, the complete range of harms suffered by individuals is declared, therefore acknowledging the victims of gendered harms and types of violations that they suffered. However, where the state is responsible for the violations, such recognition should be accompanied by public apology and public admission of state responsibility for gendered harms suffered as a result of state failure in protecting human rights of the victims. The example of comfort women illustrates well the importance of public apologies and admission of state responsibility to the victims of gendered harms. After many decades since the violations were committed, the surviving former comfort women have not yet received a public apology from Japan for violations which they suffered at the hands of Japanese military.¹⁴⁶ Although in December 2015 Japan officially apologised to South Korea for the exploitation of Korean comfort women

¹⁴⁴ Satisfaction is also recognized as an inter-state reparation for internationally wrongful acts: Article 37 ILC Draft Articles.

¹⁴⁵ 2005 Basic Principles, Article 22 (a)-(h).

¹⁴⁶ The persistent failure of the Japanese Government to address the issue of comfort women was also highlighted by the UN Human Rights Committee, CEDAW Committee, and by the UN High Commissioner on Human Rights: UNHRC, Concluding observations on the sixth periodic report of Japan (20 August 2014) UN Doc. CCPR/C/JPN/CO/6, para.14 (considering that the situation reflects ongoing violations of the victims' human rights as well as a lack of effective remedies available to them as victims of past human rights violations); CEDAW, Concluding Observations: Japan (7 August 2009) UN Doc. CEDAW/C/JPN/CO/6, paras.37-38 (Recommending that the State party urgently endeavour to find a lasting solution for the situation of "comfort women" which would include the compensation of victims, the prosecution of perpetrators and the education of the public about these crimes.); UN Office of the High Commissioner on Human Rights, 'Japan's approach to the issue of "comfort women" causing further violations of victims' human rights - Pillay' (6 August 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14920&LangID=E>> accessed 9 July 2015; Sabrina Siddiqui, 'Japan's PM apologises for US war dead- but fails to mention "comfort women"' *The Guardian* (London, 29 April 2015) <<http://www.theguardian.com/world/2015/apr/29/japans-pm-shinzo-abe-apologises-us-war-dead-congress-comfort-women>> accessed 9 July 2015; Justin McCurry, 'Japan rejects US calls for apology over "comfort women"' *The Guardian* (31 July 2007) <<http://www.theguardian.com/world/2007/jul/31/usa.japan>> accessed 9 July 2015.

during the Second World War and committed to payment of £5.6 million in reparations, similar steps have not been taken by Japan with respect to comfort women originating from other countries, such as the Philippines, Taiwan, China and Indonesia.¹⁴⁷ In contrast, the Truth and Reconciliation Commission in Sierra Leone demonstrated good practice in relation to awarding gender-sensitive satisfaction measures. The Truth and Reconciliation Commission recommended that as a part of symbolic reparations, the president of Sierra Leone publicly acknowledge the harm suffered by women and girls during the Sierra Leonean civil war and that he offer unequivocal public apology to the victims on behalf of preceding governments of Sierra Leone.¹⁴⁸

However, processes of memorialisation of victims of gendered harms are still susceptible to denial. For instance, a proposal to install a plaque commemorating rape victims in Foča on the facade of a building where women were raped and tortured was rejected.¹⁴⁹ Furthermore, gender-sensitive measures of satisfaction require efforts to avoid reinforcement of stereotypes in favour of essentialist visions of female victimhood. Processes of memorialisation often focus on male victims of conflict or on commemoration of male combatants, ignoring the active role of many women in waging armed conflict. In such processes, women are usually portrayed (if at all) as victims of crimes against their 'honour' or 'chastity', therefore reinforcing the essentialist portrait of female victims and limiting the scope of acknowledgement of gendered harms.

¹⁴⁷ BBC News, 'Comfort women': Japan and South Korea hail agreement' (28 December 2015) <<http://www.bbc.co.uk/news/world-asia-35190464>> accessed 31 December 2015.

¹⁴⁸ Jamesina King, 'Gender and Reparations in Sierra Leone: The Wounds of War Remain Open' in: Ruth Rubio-Marín (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Sciences Research Council 2006) 268-269; Sierra Leone Truth and Reconciliation Commission, 'Witness to Truth: report of the Sierra Leone Truth and Reconciliation Commission' (Graphic Packaging Limited GCL 2004) vol.2, paras.317-318.

¹⁴⁹ BBC News, 'Bosnian Serbs reject the rape plaque' (1 October 2004) <<http://news.bbc.co.uk/1/hi/world/europe/3706554.stm>> accessed 1 October 2015.

5.1.5. Guarantees of non-repetition

Guarantees of non-repetition encompass a variety of measures, including effective civilian control over military and security forces, human rights and IHL education, strengthening of the rule of law and judiciary, review and reform of laws contributing to violations of IHRL and IHL.¹⁵⁰ The key aim of these measures is to prevent future violations of human rights or IHL. However, mere assurances by the State promising non-repetition of human rights violations resulting in harms of gendered nature are not sufficient. Rather, positive steps are required to ensure the elimination of the structural discrimination which enabled these violations. For instance, a part of the measures outlined in paragraph 23(h) of the 2005 Basic Principles can be aimed at repealing discriminatory domestic laws and introducing legal reforms based on the principle of equality and non-discrimination. Furthermore, steps should be taken to include more women in the decision-making processes regarding the design and implementation of reparations but also in proposed institutional and legal reforms, as directed by the UNSCR 1325. Another core element of guarantees of non-repetition is ensuring that violence against women does not continue in the aftermath of conflict. To that end, it is crucial that adequate laws and mechanisms are in place not only to prevent violence against women but also to enable women to report such acts and to benefit from professional support should such violations occur. Furthermore, a part of reparation funds for fulfilment of guarantees of non-repetition can be dedicated to programmes implementing human rights and IHL education of both girls and boys, including topics of gender equality, non-stereotyped gender roles, non-violent conflict resolution and gender-based violence.¹⁵¹

5.2. The essential features of reparations for gendered harms

Whilst each type of reparations has its own form and method of delivery, some overarching principles and issues, which are relevant to reparations for gendered harms in general, can be identified.

¹⁵⁰ 2005 Basic Principles, Article 23 (a)-(h).

¹⁵¹ Such educational measures are also outlined in Article 14 of the Istanbul Convention 2011.

Many of the debates about post-conflict reparations raise the distinction between individual and collective reparations as well as the appropriateness of these modes of reparations in relation to gendered harms arising from gross violations of IHRL and/or IHL. Whilst there is no fixed definition of collective reparations in international law, they can be understood with reference to reparations provided to a group of victims who suffered violations of IHRL/IHL or to the community where victims were from or where they reside.¹⁵² Gendered harms are suffered by primary victims but also have a detrimental impact on their families and communities. In that context, collective reparations, which aim at supporting not exclusively the primary victim but also the broader community, may appear as an appropriate mode of reparations. Arguably, the collective nature of these reparations makes them better tailored to remedy the social effects of gendered harms, for instance by supporting community programmes, ensuring provision of education and/or vocational courses or reintegration of the former child soldiers into their native communities. It is also argued that collective reparations may work better in cases of sexual violence as they allow victims to benefit from reparation without the need for naming individual victims and the types of violations suffered by them.¹⁵³ However, whilst avoidance of stigmatisation and revictimization is an important element in the design and distribution of reparations, it remains equally significant to ensure that individual victims directly benefit from reparations and that any such reparations are adequately tailored to remedy/ repair gendered harms suffered by the individual.

Whilst collective reparations certainly further the aims of repairing some of the harms suffered, they are not designed to address the individual needs of the victim; nor do they constitute full and adequate reparation. In support of that view, the UN Human Rights Committee ruled that 'symbolic' or less than full reparations is inadequate and ineffective as a remedy, whilst the UN OHCHR study on reparations in the DRC revealed that victims of conflict-related sexual violence expressed a clear preference for the tangible benefits of individual reparations which address the more concrete

¹⁵² International Center for Transitional Justice, 'The Rabat Report: Concept and Challenges of Collective Reparations' (1 February 2009) 10 <<https://www.ictj.org/publication/rabat-report-concept-and-challenges-collective-reparations>> accessed 1 October 2015.

¹⁵³ UNSG Guidance Note, 7.

needs of the victims, rather than symbolic reparations.¹⁵⁴ Furthermore, addressing the remedies for gendered harms only through a collective reparations system carries a potential danger of viewing the female victim of gendered harms only through the lens of the impact of these violations on the broader community, rather than viewing her as an independent individual whose human rights have been violated by the State.

That said, individual and collective reparations are not mutually exclusive and should not be approached as substitutive for one another.¹⁵⁵ Therefore, this thesis argues that only the combination of the two perspectives shows the complete picture of victimhood arising in relation to gendered harms. Such an approach enables treatment of the female victim as an equal rights holder but also emphasizes the extent to which gendered harms affect the broader community, creating what Ní Aoláin refers to as 'communities of harm'. Accordingly, a mixed approach, combining individual and collective reparations, is recommended as the best way to achieve comprehensive reparations for conflict-related gendered harms.

Another key issue relates to the manner in which reparations and reparation programmes for gendered harms are designed and implemented. When considering the harmful effect of gendered harms arising from violations of IHRL and/or IHL, it is essential to take account of the wide-ranging impact and diverse nature of these harms. In cases involving conflict-related sexual violence in particular, it remains crucial that, as a part of reparations, the existing taboos surrounding victims of sexual harms are challenged. Collective reparations have the potential to address such stereotypes with a view to transforming attitudes towards victims of sexual harms, e.g. through community reintegration programmes as well as gender equality education. Similarly, the awards of individual reparations ought to take account of the situation of

¹⁵⁴ *Albert Wilson v. The Philippines*, Communication No.868/1999, UN Doc. CCPR/C/79/D/868/1999 (2003), para.5.14.; UN Office of High Commissioner for Human Rights, 'Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights', March 2011, para.150
<http://www.ohchr.org/Documents/Countries/CD/DRC_Reparations_Report_en.pdf> accessed 1 October 2015.

¹⁵⁵ UN Committee Against Torture, General Comment No.3: Implementation of article 14 by State parties, UN Doc. CAT/C/GC/3, 19 November 2012, para.32 ("Culturally sensitive collective reparation measures (...) do not exclude the individual right to redress").

the victim, with particular attention to how gender and the system of structural discrimination may have positioned her within social and economic structures. Gender-sensitive reparations must take account of structural inequalities and structural discrimination and attempt to subvert these patterns.¹⁵⁶

Furthermore, it is important to ensure that reparations are accessible and inclusive and that they actually reach the intended beneficiary. To that end, practical obstacles faced by many female victims of gendered harms (such as the lack of a personal bank account or mobility) should be addressed. In addition, the importance of urgent interim reparations was identified by the UN Secretary-General as a means of “responding to the most urgent and immediate harm affecting victims of conflict-related sexual violence”.¹⁵⁷

Finally, the link between peace agreements and reparations for gendered harms needs to be strengthened. Reparation programmes for victims of gendered harms, including conflict-related sexual violence, should be meaningfully incorporated into the peace processes and into peace agreements. For instance, the Lomé Peace Accord, where women or women’s groups took no part in the peace negotiations process, established a blanket amnesty for crimes committed during the civil war, including crimes involving sexual violence or reproductive harms.¹⁵⁸ Active participation of women in the design of reparation programmes should form an integral part of women’s participation in the peace processes and peace agreements, which are the goals of the WPS Agenda and UNSCR 1325.¹⁵⁹ Ultimately, the full participation of women in the design of reparation programmes is also a way of implementing the principle of equal participation of women and men in public and political life enshrined in IHRL in Article 7 of the CEDAW and Article 25 of the ICCPR.

¹⁵⁶ Article 3 Nairobi Declaration.

¹⁵⁷ UNSG Guidance Note, 12-13.

¹⁵⁸ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, para.9 <<http://www.sierra-leone.org/lomeaccord.html>> accessed 7 October 2015.

¹⁵⁹ UNSCR 1325, S/RES/1325, 31 October 2000; CEDAW, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013.

5.3. Extraterritorial human rights obligations and reparations for gendered harms

As a general principle of human rights law, a state owes human rights obligations to its nationals and persons who are present within its territory. This also applies to reparations: a state is under an obligation to provide an effective remedy (including reparations) to individuals who have suffered harms as a result of the state's breach of its human rights obligations.

However, we can go further: the Human Rights Committee, the CEDAW Committee, and the ICJ have confirmed that states also bear responsibility in international law for human rights violations committed by their state agents, including armed forces, acting outside the state's territory.¹⁶⁰ According to the Human Rights Committee,

“State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. (...) This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation”.¹⁶¹

The extraterritorial application of human rights obligations has also been recognised by the ECtHR, especially in the context of overseas military action or military occupation by a party to the ECHR. The ECtHR confirmed in *Al-Skeini and others v. United Kingdom* that the UK's human rights obligations arising from Article 1 of the ECHR (obligation to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”) applied to its acts committed in

¹⁶⁰ UN Human Rights Committee, General Comment No.31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.10; CEDAW Committee, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations (2013), para.9.; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 paras.106-114.

See generally: Françoise Hampson, 'The scope of the extra-territorial applicability of international human rights' in: Geoff Gilbert, Françoise Hampson, Clara Sandoval (eds), *The Delivery of Human Rights. Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011) 157-182.

¹⁶¹ UN Human Rights Committee, General Comment No.31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.10.

Iraq.¹⁶² Accordingly, extra-territorial human rights obligations impose a responsibility on states under international law for acts committed by the state (through its agents) when acting outside its own territory.

This scenario commonly applies in armed conflicts as well as situations of military intervention where human rights violations are committed by the intervening state, for instance when acts of violence against women are committed in State B by armed forces of a state A or on territory which is under the effective control of state A. The CEDAW Committee aptly noted (in relation to CEDAW) that

“in conflict and post-conflict situations, States parties are bound to apply the Convention and other international human rights and humanitarian law when they exercise territorial or extraterritorial jurisdiction, whether individually, for example in unilateral military action, or as members of international or intergovernmental organizations and coalitions, for example as part of an international peacekeeping force”.¹⁶³

The extra-territorial application of human rights has potential practical implications for victims of conflict-related gendered harms suffered as a result of violations of IHRL and IHL. By relying on the extraterritoriality principle, victims may in theory seek reparations for breaches of IHRL from a state which exercised effective control over the territory where violations were committed. Furthermore, reparations can be sought for gendered harms occurring as a result of acts committed by the agents of a state when acting abroad, e.g. by armed forces, which often take place during armed conflicts and in situations of foreign military intervention. Finally, such an approach to international human rights obligations, whilst broadening the scope of state’s human rights obligations on one hand, presents an opportunity for the victims to seek a remedy beyond the constraints of the territorial jurisdiction of the state of which they are nationals.

¹⁶² *Al-Skeini and others v. United Kingdom*, Application No.55721/07, Judgment, 7 July 2011.

¹⁶³ CEDAW, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para.9.

6. Conclusion

Reparations for gendered harms arising from violations of IHRL and IHL form an integral part of transitional justice processes in which international law plays a significant role. With the exception of the ICC reparations mechanism, international law's engagement with reparations to individuals is limited to establishing the right to a remedy (including reparations), as well as the corresponding duty of states under IHRL to provide reparations for victims of human rights violations and violations of IHL. However, in the absence of an international human rights court to adjudicate such reparation claims the task of awarding reparations for conflict-related violations of human rights lies primarily with the domestic courts or, when domestic measures are exhausted, regional human rights courts.

The more precise principles governing reparations for individuals who have suffered violations of IHRL/IHL remain confined to soft law instruments such as the 2005 Basic Principles, the Nairobi Declaration and 2014 UNSG Guidance Note. As discussions in this chapter demonstrate, it is possible to apply the gender perspective to the reparations framework outlined in the 2005 Basic Principles to create and implement transformative and gender-sensitive reparations. In order for reparations to be meaningful, the decision-making process leading to the design and award of reparations needs to incorporate a thorough understanding of women's experiences of armed conflicts and take into account the multifaceted short-, medium-, and long-term consequences of gendered harms suffered by them.¹⁶⁴ The meaningful involvement of women in the design of reparations should form an integral part of that process. This includes women's participation in peace talks, where reparations are frequently being discussed but rarely (if at all) involve reparations for gendered harms.

The recognition of victims of gendered harms as well as the attribution of the responsibility of the state for violations of IHRL and IHL which resulted in those harms remains the crucial feature of reparations. This also applies to actions of states (and state agents) outside their territorial borders. It recognizes women as equal rights

¹⁶⁴ Fionnuala Ní Aoláin, Catherine O'Rourke, Aisling Swaine, 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 28 Harvard Human Rights Journal 97, 99.

holders but also places gendered harms on a par with other harms arising from breaches of the state's human rights obligations. Furthermore, gender-sensitive reparations must address structural inequalities and take into account the particular ways in which women and girls experience harm. The transformative nature of reparations, especially those that are collective in nature, should promote the weakening of the system of structural inequality and discrimination, which enabled the violations in first place.

Despite significant normative developments in international law, there remain many practical challenges in relation to effective provision of reparations for individuals who have suffered gendered harms. Access to information about the availability of reparations, the ability of some women to receive individual reparation awards, distribution of reparations and monitoring of implementation of reparation programmes are just a few of the practical yet problematic aspects. Furthermore, a strong connection between legal reparation and the means to enforce it means that many states emerging from armed conflict may face real challenges in the implementation of reparations, even if the will to do so is there. Therefore, a stronger rule of law is needed in post-conflict situations in order to ensure the timely and effective delivery of remedies to individuals who have suffered gendered harms during armed conflict. Finally, it is essential that reparations are viewed as an integral tool in the maintenance of peace and security, alongside other criminal justice and transitional justice mechanisms.

Chapter 7

Conclusions

International legal responses to the impact of armed conflict on women have developed considerably since the last decade of the 20th century. Until then, international law's engagement with issues surrounding women and armed conflict was largely confined to the realm of IHL, with its provisions granting special protection to women during war, especially in relation to protection from sexual violence. Little attention, if any, was paid to fostering a greater understanding of the gendered dimension of conflicts and to challenging the idea that women experience conflicts in a uniform manner, manifested predominantly through their experiences of conflict-related sexual violence. Furthermore, the merely prohibitive nature of IHL provisions and their limited application (i.e. in situations of armed conflict and occupation) stands in contrast to the growing recognition, advanced mainly by feminist legal scholars, of the continuing and gendered impact of armed conflict on women which lasts for many years after the conflict has come to an end.

The two humanitarian catastrophes of the late 20th century, namely the conflict in the Former Yugoslavia and in Rwanda, demonstrated the gross disregard for the rules of IHL and IHRL and were illustrative of the gendered consequences of armed conflict and their long-term impact. In this context, the limits of IHL became even more apparent, making this body of law of limited utility in addressing the gender-specific consequences of armed conflict in the aftermath. Whilst IHL was not designed to deal with the issues arising in the aftermath of conflicts, the continuing effects of the gross violations of IHL and IHRL prompted inquiries into how (if at all) other branches of international law may address these pressing issues.

1. Gender, armed conflict and international law: the past 30 years

The past three decades have witnessed a gradual shift from the rather constricted approach of viewing gender and armed conflict exclusively through the lens of IHL. This

this thesis assessed the key changes which occurred within international law in addressing the situation of women in the aftermath of conflicts. These changes were marked by the 'expansion' of issues concerning gender, armed conflict and post-conflict situations into other specialised branches of international law, such as IRL, ICL and IHRL. Legal developments took place in the context of, and have been partially influenced by, other changes within the discipline, including the increased fragmentation and specialisation of branches of international law, greater attention to the role of gender within international law, and, more recently, the emergence of the idea of *jus post bellum* as a legal framework addressing post-conflict situations. Whilst these developments are rarely (if at all) considered together, this thesis views them as closely linked and influential in shaping international legal responses to the situation of women in the aftermath of conflicts.

The increased fragmentation of international law, manifested by a specialisation of the individual branches of the discipline, such as IRL, ICL and IHRL, facilitated developments that address some of the challenges faced by women in the aftermath of conflicts. However, whilst progressing international law on one hand, the responses to the situation of women in the aftermath of conflict within these individual specialised branches of international law have been largely disjointed. The less desirable results of this disjointed growth are evident in the divergent understandings of the gendered impact of armed conflicts within individual branches of international law. They are also reflected in rapid changes in some fields (such as international criminal accountability) contrasting with slow progress in others (such as reparations for gender-based harms or protection of economic, social and cultural rights of women in the aftermath). Furthermore, some of the developments at an international level frequently resulted in a lack of continuity and absence of follow-up procedures.¹ In addition, the continuing and gender-specific impact of armed conflict on women, as well as gender analysis in general, have been reflected to varying degrees in the development of the law.

¹ For instance, since the adoption of the UNSCR 1325 in 2000, the next UNSCR on Women, Peace and Security was adopted only in 2008 (UNSCR 1820).

As examined in Chapters 4 and 5, ICL has been at the forefront of these advances, with its strong focus on establishing and strengthening individual accountability for gender-based crimes. The jurisprudence of the ad hoc tribunals marked some key landmarks in international prosecution of gender-based crimes such as rape, sexual enslavement, sexualised torture and forced nudity. The ICC Statute further contributed, albeit more on a normative level, towards the building of a comprehensive legal framework addressing further examples of gender based-crimes, including forced sterilization, forced pregnancy and gender-based persecution. Nonetheless, despite the inclusion of provisions enabling the prosecution of sexual and gender-based violence in the ICC Statute, thus far there has been no successful prosecution of gender-based crimes at the ICC.

Shortcomings in the investigation of international gender-based crimes, combined with procedural and evidentiary obstacles, remain the key barriers to successful prosecutions of such crimes at the ICC. Furthermore, the conceptual limitations of the ICL framework allow prosecution of only a selected few (and usually high-profile) cases arising from a particular conflict. The ICC in particular operates on the basis of the principle of complementarity, placing the key responsibility for the prosecution of war crimes, crimes against humanity and genocide (all of which include examples of gender-based crimes) on individual states. However, the increase in criminal accountability for gender-based crimes at the international level rarely translates into the prosecutions of these crimes in the domestic context, leaving many perpetrators of gender-based crimes unpunished and effectively denying the victims the opportunity to achieve justice.

As discussed in the introduction, feminist engagements with international law in general, and women and armed conflict in particular, have brought issues of the gendered impact of conflicts on women to the forefront of international law, both in terms of legal developments and political agendas, such as the Women, Peace and Security agenda at the UNSC. However, the predominant focus on conflict-related sexual violence has somewhat obscured other types of harms sustained by women during armed conflict, such as forced displacement, violations of economic, social and

cultural rights or the deficiencies and inadequacies in awarding reparations for conflict-related gendered harms in the aftermath of conflicts. Chapter 3 demonstrated the gender bias of IRL, especially in the context of its application to the situation of asylum seeking women. The precarious position of women seeking asylum as a result of conflict (or due to gender-related persecution experienced in that context) denote a significant gap in the protection of women in the aftermath of war and the effective legal response to the gender dimension of conflict-related displacement.

Likewise, international law has only recently engaged with the issue of reparations for gender-based harms sustained during armed conflict. Even so, these developments are confined to a soft law form and, as demonstrated by the UNSG's Note, focus exclusively on harms arising as a result of conflict-related sexual violence.² Chapter 6 highlighted the need for transformative and gender-sensitive reparations, which address not only the immediate consequences of conflict-related gendered harms but also address the structural discrimination and inequality which enabled the violations in the first place. Aside from some treaty provisions establishing the general right of individuals to a remedy for violation of their human rights, the international legal *status quo* in relation to reparations for gendered harms remains confined to a few soft law instruments, such as the 2005 Basic Principles, the Nairobi Declaration and the UNSG Guidance Note. Furthermore, whilst the right of individuals to an effective remedy is firmly embedded in IHRL, the actual consideration and award of reparations for conflict-related violations (including gendered harms) relies almost exclusively on the decisions of domestic courts as well as the readiness of the state to make reparations for violating its human rights obligations. Nonetheless, reparations for gendered harms arising from violations of IHRL and IHL form an integral part of transitional justice processes and contribute towards the maintenance of peace and security. Therefore, further conceptualisation of a normative framework for post-conflict reparations and implementation of the system of reparations for conflict-

² UN Office of High Commissioner on Human Rights, 'Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence', June 2014, 3
<<http://www.unwomen.org/en/docs/2014/6/reparations-for-conflict-related-sexual-violence>> accessed 15 July 2015 (UNSG Guidance Note).

related gendered harms within international law is certainly needed. Chapter 6 attempted to contribute to the (at least partial) closing of this conceptual gap.

Whilst developments within individual branches of international law continue to face challenges with regard to synchronization, implementation and enforcement, the overall framework addressing women, armed conflict and post-conflict situations has evolved immensely in the course of the past three decades. The major shift could be observed in relation to the amount of legal and conceptual arenas where the issue of the gendered impact of armed conflict on women is being addressed. From the narrowly focused area of IHL protection, the framework relating to women and armed conflict has expanded and is now looked at through the lens of human rights, further protective regimes, security, accountability as well as international criminal law. A significant change is also noticeable in the increased institutional and multi-agency engagement with these issues at an international level. This institutional change is evidenced, at the very least, by the Women, Peace and Security agenda at the UNSC, which recognized that sexual violence is a threat to international peace and security.

2. International law, gender and post-conflict settings: ongoing challenges

Despite significant progress in addressing some of the gendered consequences of armed conflicts on women, there exist some shortcomings in the international legal framework relevant to women in post-conflict settings which are yet to be addressed. International criminal accountability for conflict-related gender-based crimes has progressed most remarkably within the ICL framework, both on a normative and practical level. However, other forms of redress, in particular transformative and gender-sensitive reparations, are still sidelined (if not lacking) in many post-conflict settings and have not fully formed, in a way that ICL instruments did, within the international legal framework.³ Likewise, international legal responses to non-sexual harms sustained by women during conflicts, such as forced migration or violations of

³ For instance, the first compensation order for Bosnian women who suffered sexual violence during the Yugoslav war was issued only in 2015, 20 years after the armed conflict officially came to an end following Dayton Peace Agreement. 'Bosnian court grants wartime victim compensation in landmark ruling' (*The Guardian*, 24 June 2015) <<http://www.theguardian.com/world/2015/jun/24/bosnian-court-grants-wartime-victim-compensation-landmark-ruling>> accessed 10 December 2015.

economic, social and cultural rights, require further analysis and coherent development.

Despite rare exceptions, international law and international institutions largely continue to view the gendered impact of armed conflict on women predominantly through the lens of sexual violence. Accordingly, significantly less attention is paid to other types of conflict-related violations experienced by women, which is reflected in substantial gaps in the international legal regulation of these issues. However, in order for international law to provide an adequate legal response to the situation of women in the aftermath of conflicts, a greater understanding of the gendered nature of conflict as well as its underlying causes is needed. This is particularly relevant to any efforts to prevent gendered violations, including (but not limited to) conflict-related sexual violence. Better understanding of the underlying causes of conflict-related sexual violence can contribute towards the development and improvement of any efforts aimed at preventing sexual violence at a domestic and international level, which remains crucial yet most difficult to achieve.

Finally, the key shortcoming of the current legal framework lies in enforcement and accountability. As discussed in detail in the preceding chapters of this thesis, the vast majority of legal developments, especially in IHRL and IRL, relevant to the situation of women in the aftermath of conflicts are not legally binding. This includes UNSCR 1325 and subsequent WPS resolutions, which, although progressive in some aspects, remain confined to the realm of soft law and non-enforcement. Nonetheless, these developments constitute important markers of attitudinal change and can indeed become drivers for meaningful change in the international legal framework applicable to challenges faced by women in post-conflict settings if political declarations and commitments are implemented domestically. However, in order to be effective and enforceable, these political declarations need to be translated into the language of positive obligations, duties, and paired with a strong accountability mechanism, which is absent from the current legal framework.

3. International law, gender and post-conflict settings: opportunities and limits

Whilst this thesis focuses exclusively on the analysis of international legal responses to the gendered impact of armed conflict on women and their situation in the aftermath, it recognizes that international law cannot stand alone in addressing these issues.

International law is merely one of the tools, and certainly an important one, capable of addressing the situation of women in the aftermath of conflicts. However, legal developments need to be accompanied by attitudinal, political, social and economic changes, especially at a national level. In order to be effective, international law needs to build further on the existing developments to produce a gender-sensitive, meaningful, coherent and enforceable international legal framework applicable to the situation of women in post-conflict situations. In this context, the emerging conceptual framework of *jus post bellum* can be seen as a possible avenue for synchronizing the existing and future international legal responses addressing women's needs and women's rights. However, it is crucial that a gender analysis is effectively incorporated into the *jus post bellum* framework and into any future legal developments addressing the socio-political, economic and legal position of women in the aftermath of conflict, avoiding the 'add women and stir' approach.

Secondly, in order to have any real impact, these legal advances need to be implemented by states. The effectiveness of international law and any of its future developments strongly relies on the willingness of states to be bound by international legal obligations and on the domestic implementation of these obligations. An observation made by Chinkin in 1997 that "feminist interventions into international law can only have lasting impact if they are brought into domestic law and policy-making" is equally applicable in the context of contemporary international relations and international law.⁴ It is therefore of paramount importance that soft law developments, as well as political commitments, are translated into legally binding obligations of states under international law. Moreover, states' compliance with these

⁴ Christine Chinkin, 'Feminist Interventions into International Law' (1997) 19 *Adelaide Law Review* 13, 24.

legally binding obligations ought to be monitored and, ultimately, accountability should be enforced in cases of non-compliance.

There is potential scope for the existing UN human rights treaty bodies and the Human Rights Council (through the Universal Periodic Review mechanism) to fulfil, at least to an extent, such monitoring function. Although treaty bodies are concerned with monitoring states' obligations with respect to a particular UN human rights treaty, it is conceivable, if not encouraged, that they incorporate a gender perspective into the process of reviewing states' compliance with human rights obligations under a given treaty. Receptiveness of the treaty bodies to assessing a state's compliance with its human rights obligations in post-conflict situations and in response to the gendered impact of armed conflict on women is particularly encouraged. The practice of the CEDAW Committee has demonstrated that a treaty body can meaningfully engage with the issues of human rights protection in post-conflict settings whilst addressing the gendered and complex nature of the aftermath of conflicts. General Recommendations 30 and 32 demonstrated how a treaty body could substantively address areas of particular concern in post-conflict situations whilst incorporating a gender perspective into the analysis.⁵ By additionally focusing on issues beyond sexual violence, such as gender-biased application of asylum laws, transformative reparations and socio-economic dimension of the impact of armed conflict on women, the CEDAW Committee gave recognition to many areas of international law which are yet to be strengthened in order to better respond to the situation of women in the aftermath of conflicts and durable protection of their rights.

4. Final remarks

15 years since the adoption of UNSCR 1325 and the launch of the WPS Agenda at the UNSC, the gendered impact of armed conflict on women is no longer a silenced issue, but it is yet to be fully incorporated within mainstream international law. There has

⁵ CEDAW, General Recommendation No.30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013; CEDAW, General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, UN Doc. CEDAW/C/GC/32, 5 November 2014.

emerged, both in soft and hard law form, an international legal framework which addresses some of the aspects of gendered impact of armed conflict on women. With certain gaps to be filled and shortcomings to be addressed, the current framework could benefit from further developments and improvements, especially in relation to enforcement measures. A greater 'synchronization' of efforts and legal developments across various branches of international law could contribute towards the development of a more coherent, adequate and gender-sensitive legal framework addressing the situation of women in the aftermath of conflicts. Whilst the fragmentation of international law has enabled the proliferation of legal developments relevant to the gendered impact of armed conflict, the emerging framework of *jus post bellum* (if developed with a gender perspective in mind) can potentially create a means to bring these efforts together, at least on a normative level. Therefore, a trend of compartmentalising conflict-related sexual violence and other gendered harms as 'a women's only' issue in international law needs to be challenged. After all, the development, implementation and enforcement of a meaningful and coherent international legal framework addressing the gendered impact of conflicts on women needs to be seen as an important matter for contemporary international law and addressed as an essential element in maintaining international peace and security.

BIBLIOGRAPHY

BOOKS AND JOURNALS

- Affolder, N., 'Tadić, the Anonymous Witness and the Sources of International Procedural Law' (1998) 19 *Michigan Journal of International Law* 445
- Agger, I., *The Blue Room. Trauma and Testimony among Refugee Women. A psycho-social exploration* (Zed Books 1994)
- Ajevski, M., 'Fragmentation of International Human Rights Law- beyond conflict of laws' (2014) 32(2) *Nordic Journal of Human Rights* 87
- Allain, J., 'The *jus cogens* nature of *non-refoulement*' (2001) 13(4) *International Journal of Refugee Law* 533
- Ambos, K., 'Joint Criminal Enterprise and Command Responsibility' (2007) 5(1) *Journal of International Criminal Justice* 159
- Ambos, K., 'Critical Issues in the Bemba Confirmation Decision' (2009) 22(4) *Leiden Journal of International Law* 715
- Ambos, K., *Treatise on International Criminal Law, Vol.1* (OUP 2013)
- Andenas, M., Bjorge, E. (eds), *A Farewell to Fragmentation. Reassertion and Convergence in International Law* (CUP 2015)
- Anker, D., 'Refugee Status and Violence Against Women in the "Domestic" Sphere: the Non-State Actor Question' (2000) 15 *Georgetown Immigration Law Journal* 391
- Anker, D., 'Refugee Law, Gender and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133
- Arbour, L., 'The responsibility to protect as a duty of care in international law and practice' (2008) 34 *Review of International Studies* 445
- Aranburu, X. A., 'Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases' (2010) 23(3) *Leiden Journal of International Law* 609
- Askin, K. D., *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff 1997)
- Askin, K. D., Koenig, D. M. (eds), *Women and International Human Rights Law* (Transnational Publishers 2000), Vol.2
- Badar, M. E., 'Just Convict Everyone!'- Joint Perpetration: From *Tadić* to *Stakić* and Back Again' (2006) 6 *International Criminal Law Review* 292

- Baillett, C. M., *Non-State Actors, Soft Law and Protective Regimes. From the Margins* (CUP 2012)
- Barbour, B., Gorlick, B., 'Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims' (2008) 20(4) *International Journal of Refugee Law* 533
- Bassiouni, M. C., *Crimes against humanity: historical evolution and contemporary application* (CUP 2011)
- Battjes, H., *European Asylum Law and International Law* (2006 Martinus Nijhoff)
- Bell, C., *On the Law of Peace. Peace Agreements and the Lex Pacificatoria* (OUP 2008)
- Bell, C., O'Rourke, C., 'Peace agreements or pieces of paper? The impact of UNSC resolution 1325 on peace processes and their agreements' (2010) 59 *International and Comparative Law Quarterly* 941
- Bellamy, A. J., 'The Responsibilities of Victory: Jus Post Bellum and the Just War' (2008) 34(4) *Review of International Studies* 601
- Bellamy, A. J., *Global Politics and the Responsibility to Protect. From words to deeds* (2011 Routledge)
- Bergsmo, M. (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012)
- Bogdan, A., 'Cumulative charges, convictions and sentencing at the ad hoc international tribunals for the Former Yugoslavia and Rwanda' (2002) 3(1) *Melbourne Journal of International Law* 1
- Boister, N., Cryer, R., *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Cambridge University Press 2008)
- Boling, D., 'Mass Rape, Enforced Prostitution, and the Japanese Imperial Army' (1995) 32 *Columbia Journal of Transnational Law* 533
- Boon, K., 'Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent' (2001) 32 *Columbia Human Rights Law Review* 669
- Bowden, B., Charlesworth, H., Farrall, J. (eds), *The Role of International Law in Rebuilding Societies after Conflict. Great Expectations* (CUP 2012)
- Brackman, A. C., *The Other Nuremberg. The Untold Story of the Tokyo War Crimes Trials* (Fontana/ Collins 1989)
- Brownmiller, S., *Against Our Will. Men, Women and Rape* (Fawcett Books 1975)
- Buss, D., 'Women at the Borders: Rape and Nationalism in International Law' (1998) 6 *Feminist Legal Studies* 171

- Buss, D., 'Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic' (2000) 10 *Feminist Legal Studies* 90
- Buss, D., 'The curious visibility of wartime rape: gender and ethnicity in international criminal law' (2007) 25 *Windsor Yearbook of Access to Justice* 3
- Buss, D., 'Knowing Women: Translating Patriarchy in International Criminal Law' (2014) 23(1) *Social & Legal Studies* 73
- Byrnes, A., Bath, E., 'Violence against Women, the Obligation of Due Diligence and the Optional Protocol to the Convention on Elimination of All Forms of Discrimination against Women - Recent Developments' (2008) 8(3) *Human Rights Law Review* 517
- Campbell, K., 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1 *International Journal of Transitional Justice* 411
- Cassese, A., 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2002) 25(2) *Leiden Journal of International Law* 491
- Cassese, A., *International Criminal Law* (OUP 2008)
- Cassese, A., Fan, M., Thalmann, V., Zappala, S., 'Amicus curiae brief of Professor Antonio Cassese and members of the Journal of International Criminal Justice on the Joint Criminal Enterprise Doctrine' (2009) 20 *Criminal Law Forum* 289
- Chang, I., *The Rape of Nanking: The Forgotten Holocaust of World War II* (BasicBooks 1997)
- Chappell, L., 'Conflicting institutions and the search for gender justice at the International Criminal Court' (2014) 67(1) *Political Science Quarterly* 183
- Chappell, L., Inder, B., 'Advocating for Gender Justice: A conversation with Brigid Inder' (2014) 16(4) *International Feminist Journal of Politics* 655
- Chappell, L., Grey, R., Waller, E., 'The Gender Justice Shadow of Complementarity: Lessons From the International Criminal Court's Preliminary Examinations in Guinea and Colombia' (2013) 7(3) *International Journal of Transitional Justice* 455
- Charlesworth, H., 'The public/ private distinction and the right to development in international law' (1988-1989) 12 *Australian Year Book of International Law* 190
- Charlesworth, H., 'The Feminist Methods in International Law' (1999) 93(2) *American Journal of International Law* 379
- Charlesworth, H., 'The Gender of International Law. Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law' (1999) 93 *ASIL Proceedings* 206

- Charlesworth, H., 'The Hidden Gender of International Law' (2002) 16 *Temple International and Comparative Law Journal* 93
- Charlesworth, H., 'Feminist Ambivalence about International Law' (2005) 11 *International Legal Theory* 1
- Charlesworth, H., 'Not Waving but Drowning: Gender Mainstreaming and Human Rights at the United Nations' (2005) 18 *Harvard Human Rights Journal* 1
- Charlesworth, H., 'Feminist Reflections on Responsibility to Protect' (2010) 2 *Global Responsibility to Protect* 232
- Charlesworth, H., Chinkin, C., 'The Gender of Jus Cogens' (1993) 15 *Human Rights Quarterly* 63
- Charlesworth, H., Chinkin, C., *The boundaries of international law. A feminist analysis* (Manchester University Press 2000)
- Charlesworth, H., Chinkin, C., Wright, S., 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613
- Charlesworth, H., Chinkin, C., 'The New United Nations "Gender Architecture": A Room with a View?' (2013) 17 *Max Planck Yearbook of United Nations Law* 1
- Charlesworth, H., Gardam, J., 'Protection of women in armed conflict' (2000) 22 *Human Rights Quarterly* 148
- Chesterman, S., *Just war or just peace? Humanitarian intervention and international law* (OUP 2001)
- Chetail, V. (ed), *Post-Conflict Peacebuilding. A Lexicon* (OUP 2009)
- Chinkin, C., 'A gendered perspective to the international use of force' (1988-1989) 12 *Australian Year Book of International Law* 279
- Chinkin, C., Wright, S., 'The hunger trap: women, food and self-determination' (1992) 14 *Michigan Journal of International Law* 262
- Chinkin, C., 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *European Journal of International Law* 326
- Chinkin, C., 'Feminist Interventions into International Law' (1997) 19 *Adelaide Law Review* 13
- Chinkin, C., 'Due Process and Witness Anonymity' (1997) 91 *American Journal of International Law* 75
- Chinkin, C., 'A Critique of the Public/ Private Dimension' (1999) 10(2) *European Journal of International Law* 387

- Chinkin, C., 'Women's International Tribunal on Japanese Military Sex Slavery' (2001) 95(2) *American Journal of International Law* 335
- Chinkin, C., 'Addressing violence against women in the Commonwealth within states' obligations under international law' (2014) 40(3) *Commonwealth Law Bulletin* 471
- Clapham, A., 'Human rights obligations of non-state actors in conflict situations' (2006) 863 *International Review of the Red Cross* 491
- Clapham, A., Gaeta, P. (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014)
- Cohen, D. K., 'Female combatants and the perpetration of violence: wartime rape in the Sierra Leone Civil War' (2013) 65(3) *World Politics* 383
- Cohen, R., Deng, F. M., *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution Press 1998)
- Conaghan, J., 'Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment' (1996) 16(3) *Oxford Journal of Legal Studies* 407
- Conaghan, J., 'Law, harm and redress: a feminist perspective' (2002) 22(3) *Legal Studies* 319
- Copelon, R., 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217
- Crawford, J., *State Responsibility. The General Part* (CUP 2013)
- Crawley, H., *Refugees and Gender. Law and Process* (Jordans 2003)
- Crettol, M., La Rosa, A. – M., 'The missing and transitional justice: the right to know and fight against impunity' (2006) Vol.88, no. 862 *International Review of Red Cross* 356
- Cryer, R., Friman, H., Robinson, D., Wilmshurst, E., *The Introduction to International Criminal Law and Procedure* (2014 Cambridge University Press)
- de Brouwer, A. – M., *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005)
- de Brouwer, A. – M., Ku, C., Römken, R., van den Herik, L. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013)
- de Greiff, P. (ed), *The Handbook of Reparations* (OUP 2006)
- de Preux, J., 'Special protection of women and children' (1985) 248 *International Review of the Red Cross* 292

- de Wet, E., 'The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law' (2004) 15(1) *European Journal of International Law* 97
- Deng, F. M., Kimaro, S., Lyons, T., Rothchild, D., Zartman, I. W., *Sovereignty as responsibility: conflict management in Africa* (Brookings Institution Press 1996)
- Dixon, R., 'Rape as a crime in International Humanitarian Law: Where to from Here?' (2002) 13(3) *European Journal of International Law* 697
- Douglas, H., Bartlett, F., Luker, T., Hunter, R. (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart 2014)
- Drumbl, M. A., "'She makes me ashamed to be a woman": The Genocide Conviction of Pauline Nyiramasuhuko' (2012-2013) 34 *Michigan Journal of International Law* 559
- Durham, H., Gurd, T. (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff 2005)
- Durham, H., O'Byrne, K., 'The dialogue of difference: gender perspectives on international humanitarian law' (2010) Vol.92 No.877 *International Review of the Red Cross* 31
- Durieux, J.- F., 'Of Wars, Flows, Laws and Flaws: A Reply to Hugo Storey' (2012) 31(3) *Refugee Survey Quarterly* 161
- Easterday, J., 'What is Jus Post Bellum?' (2012) 106 *American Society of International Law Proceedings* 335
- Edwards, A., 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010', (2010) 29 (2) *Refugee Survey Quarterly* 21
- Edwards, A., *Violence against Women under International Human Rights Law* (CUP 2011)
- Edwards, A., Hurwitz, A., 'Introductory Note to the Arusha Conclusions on Complementarities between International Refugee Law, International Criminal Law, and International Human Rights Law' (2011) 23 (4) *International Journal of Refugee Law* 856
- Engle, K., 'Feminism and its (Dis)contents: Criminalising Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 806
- Feller, E., Türk, V., Nicholson, F. (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003)
- Ferstman, C., 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15(3) *Leiden Journal of International Law* 667

- Fisher, S. K., 'Occupation of the womb: forced impregnation as genocide' (1996) 46(1) *Duke Law Journal* 91
- FitzGerald, S. A. (ed), *Regulating the International Movement of Women. From Protection to Control* (Routledge 2011)
- Frulli, M., 'The Special Court for Sierra Leone: Some Preliminary Comments' (2000) 11(4) *European Journal of International Law* 857
- Frulli, M., 'Advancing International Criminal Law. The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New Crime' Against Humanity' (2008) 6 *Journal of International Criminal Justice* 1033
- Gardam, J., 'A feminist analysis of certain aspects of international humanitarian law' (1988-1989) 12 *Australian Year Book of International Law* 265
- Gardam, J., 'Gender and Non-Combatant Immunity' (1993) 3 *Transnational Law & Contemporary Problems* 345
- Gardam, J., 'Women and the law of armed conflict- why the silence?' (1997) 46 *International and Comparative Law Quarterly* 55
- Gardam, J., Charlesworth, H., 'Protection of Women in Armed Conflict' (2000) 22(1) *Human Rights Quarterly* 148
- Gardam, J., 'The neglected aspect of women and armed conflict- progressive development of the law' (2005) 52(2) *Netherlands International Law Review* 197
- Gardam, J., Jarvis, M., 'Women and armed conflict: the international response to the Beijing Platform for Action (2000-2001) 32 *Columbia Human Rights Law Review* 1
- Gardam, J., Jarvis, M., *Women, Armed Conflict and International Law* (Kluwer International 2001)
- Gilbert, G., Hampson, F., Sandoval, C. (eds), *The Delivery of Human Rights. Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011)
- Gizelis, T. – I., Olsson, L. (eds), *Gender, Peace and Security. Implementing UN Security Council Resolution 1325* (Routledge 2015)
- Goldin, C. D., 'The Role of World War II in the Rise of Women's Employment' (1991) 81(4) *The American Economic Review* 741
- Goldstein, J. S., *War and Gender: how gender shapes war system and vice versa* (CUP 2001)
- Goldstone, R., 'Prosecuting Rape as a War Crime' (2002) 34 *Case Western Reserve Journal of International Law* 277

- Gong-Gershowitz, J., 'Forced Marriage: a "New" Crime Against Humanity?' (2009) 8(1) *Northwestern Journal of International Human Rights* 53
- Goodfellow, N. A., 'The Miscategorization of 'Forced Marriage' as a Crime Against Humanity by the Special Court for Sierra Leone' (2011) 11 *International Criminal Law Review* 831
- Goodwin-Gill, G., McAdam, J., *The Refugee in International Law*, 3rd ed. (OUP 2007)
- Grabham, E., Cooper, D., Krishnadas, J., Herman, D. (eds) *Intersectionality and Beyond. Law, power and the politics of location* (Routledge 2009)
- Greatbatch, J., 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1(4) *International Journal of Refugee Law* 518
- Green, L., 'First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court' (2011) 11 *International Criminal Law Review* 529
- Green, L. L., 'Gender hate propaganda and sexual violence in the Rwandan genocide: an argument for interdisciplinarity in international law' (2002) 33 *Columbia Human Rights Law Review* 764
- Greenwood, C., 'International Humanitarian Law and the Tadić Case' (1996) 7 *European Journal of International Law* 265
- Grossman, N., 'Sex Representation on the Bench and the Legitimacy of International Criminal Courts' (2011) 11 *International Criminal Law Review* 643
- Groth, L., 'Engendering Protection: an Analysis of the 2009 Kampala Convention and its Provisions for Internally Displaced Women' (2011) 23(2) *International Journal of Refugee Law* 221
- Grotius, H. (edited by Stephen C. Neff), *Hugo Grotius on the Law of War and Peace* (CUP 2012)
- Haer, R., Hecker, T., Maedl, A., 'Former Combatants on Sexual Violence During Warfare. A Comparative Study of the Perspectives of Perpetrators, Victims, and Witnesses' (2015) 37(3) *Human Rights Quarterly* 609
- Hafner, G., 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25(4) *Michigan Journal of International Law* 849
- Hagay - Frey, A., *Sex and Gender Crimes in the New International Law. Past, present, future* (Martinus Nijhoff 2011)
- Hailbronner, K. (ed), *European Immigration and Asylum Law. A Commentary* (Hart Publishing 2010)

- Halley, J., *Split Decisions – how and why take a break from feminism* (Princeton University Press 2006)
- Harrell-Bond, B., *Family Law in Sierra Leone: A Research Report* (Afrikastudie-Centrum, Leiden: 1971)
- Harris Rimmer, S., 'Refugees, Internally Displaced Persons and Responsibility to Protect', UNHCR New Issues in Refugee Research, Research Paper no.185 (March 2010)
- Hathaway, J. C., *The Law of Refugee Status* (Butterworths 1991)
- Hathaway, J., Foster, M., 'Membership of a Particular Social Group. Discussion Paper No.4, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2000' (2003) 15 *International Journal of Refugee Law* 477
- Hathaway, J., *The Rights of Refugees under International Law* (CUP 2005)
- Heathcote, G., *The Law on the Use of Force. A Feminist Analysis* (Routledge 2011)
- Heineman, E. D. (ed), *Sexual Violence in the Conflict Zones. From the Ancient World to the Era of Human Rights* (University of Pennsylvania Press 2011)
- Heller, K. J., 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum* 255
- Heller, K. J., *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011)
- Henckaerts, J. – M., Doswald-Beck, L., *Customary International Humanitarian Law* (Cambridge University Press/ ICRC 2005) (*CIHL Study*), Vol. I: Rules
- Henckaerts, J. – M., Doswald-Beck, L., *Customary International Humanitarian Law* (Cambridge University Press/ ICRC 2005) (*CIHL Study*), Vol. II: Practice
- Herrmann, I., Palmieri, D., 'Between Amazons and Sabines: a historical approach to women and war' (2010) Vol.92 No.877 *International Review of the Red Cross* 19
- Higgins, R., 'Conceptual Thinking about the Individual in International Law' (1978) 4 *British Journal of International Studies* 1
- Higgins, R., *Problems and Process. International Law and How We Use It* (OUP 1994)
- Hogg, N., 'Women's participation in the Rwandan genocide: mothers or monsters?' (2010) Vol.92 No.877 *International Review of the Red Cross* 69
- Hunter, R., McGlynn, C., Rackley, E. (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010)

- Indra, D., 'Gender: A Key Dimension of Refugee Experience' (1987) 6 *Refugee* 3
- Jacobs, D., 'A Shifting Scale of Power: who is in Charge of the Charges at the International Criminal Court and the uses of Regulation 55' (2013) Grotius Centre Working Paper 2013/004-ICL
<<http://law.leiden.edu/organisation/publiclaw/publicinternationallaw/grotius-centre-workingpapers/working-paper-series.html>> accessed 17 March 2015
- Jain, N., 'Forced Marriage as a Crime Against Humanity. Problems of Definition and Prosecution' (2008) 6 *Journal of International Criminal Justice* 1013
- Jalloh, C. C., *The Sierra Leone Special Court and its Legacy. The Impact for Africa and International Criminal Law* (CUP 2014)
- Jessup, P., 'Should International Law Recognize an Intermediate Status Between Peace and War' (1954) 48 *American Journal of International Law* 98
- Johansson-Nogués, E., 'Gendering of the Arab Spring? Rights and (in)security of Tunisian, Egyptian and Libyan women' (2013) 44 (5-6) *Security Dialogue* 393
- Joko Smart, H. M., *Sierra Leone Customary Family Law* (Freetown: Atlantic Printers 1983)
- Jurasz, O., 'The Istanbul Convention: a New Chapter in Preventing and Combating Violence Against Women' (2015) Vol. 89/9 *Australian Law Journal* 619
- Kaitesi, U., *Genocidal Gender and Sexual Violence. The legacy of the ICTR, Rwanda's ordinary courts and gacaca courts* (Intersentia 2014)
- Kaldor, M., *New and Old Wars*, 3rd ed. (Polity Press 2012)
- Kalshoven, F., *Constraints on the waging of war* (ICRC 1987)
- Kalshoven, F., 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 *International and Comparative Law Quarterly* 827
- Kalshoven, F. (ed) *The Centennial of the First International Peace Conference* (Kluwer Law International 2000)
- Kälin, W., 'Refugees and Civil Wars: Only a Matter of Interpretation?' (1991) 3(3) *International Journal of Refugee Law* 435
- Kälin, W., 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15(3) *Georgetown Immigration Law Review* 415
- Kälin, W., 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool' (2005) 24 (3) *Refugee Survey Quarterly* 27
- Keith, K. M. F., 'Deconstructing Terrorism as a War Crime. The *Charles Taylor* case' (2013) 11(4) *Journal of International Criminal Justice* 813

- Kenney, S. J., *Gender and Justice. Why Women in the Judiciary Really Matter* (2013 Routledge).
- Kleffner, J. K., *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2008)
- Knop, K. (ed), *Gender and Human Rights* (Oxford University Press 2004)
- Koskenniemi, M., Leino, P., 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553
- Kouvo, S., Pearson, Z. (eds), *Feminist Perspectives on contemporary International Law. Between Resistance and Compliance?* (Hart Publishing 2011)
- Kuo, P., 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34 *Case Western Reserve Journal of International Law* 305
- Kurshan, L., 'Rethinking property rights as human rights: acquiring equal property rights for women using international human rights treaties' (2000) 8(2) *American University Journal of Gender, Social Policy and the Law* 353
- Laber, J., 'Bosnia: Questions About Rape' (25 March 1993) 40(6) *The New York Review of Books* 3
- Lambert, H., 'The Conceptualisation of 'Persecution' by the House of Lords: *Horvath v. Secretary of State for the Home Department*' (2001) 13 (1&2) *International Journal of Refugee Law* 16
- Lambert, H., 'The EU Asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and International Law' (2006) 55 *International and Comparative Law Quarterly* 161
- Lambert, H., Farrell, T., 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence' (2010) 22(2) *International Journal of Refugee Law* 237
- Leigh, M., 'The Yugoslav Tribunal: Anonymity Is Inconsistent with Due Process' (1996) 90 *American Journal of International Law* 235
- Lindsey, C., *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women* (ICRC 2001)
- Lopez, H., Wodon, Q., 'The Economic Impact of Armed Conflict in Rwanda' (2005) 14(1) *Journal of African Economies* 586
- Luping, D., "Investigation and prosecution of gender-based crimes before the International Criminal Court" (2009) 17 *American University Journal of Gender, Social Policy and Law* 431

- Macdonald, I., Toal, R., *Macdonald's Immigration Law & Practice*, 7th ed., (Butterworths 2008)
- MacKinnon, C., 'Defining Rape Internationally: A Comment on *Akayesu*' (2005) 44 *Columbia Journal of Transnational Law* 940
- MacKinnon, C., 'Creating International Law: Gender as Leading Edge' (2013) 36 *Harvard Journal of Law and Gender* 105
- Manjoo, R., McRaith, C., 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas' (2011) 44 *Cornell International Law Journal* 11
- Martin, E. A., Law, J., *Oxford Dictionary of Law*, 6th ed. (OUP 2006)
- May, L., *After War Ends: a Philosophical Perspective* (CUP 2012)
- May, L., Forcehimes, A. T. (eds), *Morality, Jus Post Bellum, and International Law* (CUP 2012)
- Mazurana, D., Raven-Roberts, A., Parpart, J. (eds), *Gender, Conflict and Peacekeeping* (Rowman and Littlefield Publishers 2005)
- McAdam, J., *Forced Migration, Human Rights and Security* (2008 Hart Publishing)
- McCarthy, C., *Reparations and Victim Support in the International Criminal Court* (CUP 2012)
- McClellan, E., 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13(1) *Journal of Conflict & Security Law* 123
- Meintjes, S., Pillay, A., Turshen, M. (eds), *The Aftermath. Women in post-conflict reconstruction* (Zed Books 2001)
- Mettraux, G., *International Crimes and the Ad Hoc Tribunals* (OUP 2005)
- Moffett, L., 'Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court' (2013) 17(3) *The International Journal of Human Rights* 368
- Mohan, S. S., 'The Battle After the War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution' (2011) 36 *Yale Journal of International Law* 461
- Mooney, E. D., 'Something Old, Something New, Something Borrowed...Something Blue? The Protection Potential of a Marriage of Concepts between R2P and IDP Protection' (2010) 2 *Global Responsibility to Protect* 60
- Mouthaan, S., 'Sexual Violence Against Men and International Law: Criminalising the Unmentionable' (2013) 13 *International Criminal Law Review* 665

Munro, V., Davies, M. (eds), *Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2012)

Murray, J., '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' (2002-2003) 34 *Columbia Human Rights Law Review* 475

Naffine, N., Owens, R. J., *Sexing the subject of law* (Sweet & Maxwell 1997)

Ní Aoláin, F., 'Rethinking the Concept of Harm and Legal Categorization of Sexual Violence During War' (2000) 1 *Theoretical Inquiries in Law* 307

Ní Aoláin, F., 'Sex-based Violence during the Holocaust – A Reevaluation of Harms and Rights in International Law' (2000) 12 *Yale Journal of Law and Feminism* 43

Ní Aoláin, F., 'Political violence and gender during times of transition' (2006) 15(3) *Columbia Journal of Gender and Law* 829

Ní Aoláin, F., 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009-2010) 35 *Queen's Law Journal* 219

Ní Aoláin, F., Haynes, D. F., Cahn, N., *On the Frontlines. Gender, War and the Post-Conflict Process* (OUP 2011)

Ní Aoláin, F., 'Gendered Harms and their Interface with International Criminal Law' (2014) 16(4) *International Feminist Journal of Politics* 622

Ní Aoláin, F., O'Rourke, C., Swaine, A., 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 28 *Harvard Human Rights Journal* 97

Nordstrom, C., 'Women, economy, war' (2010) Vol.92 No.877 *International Review of the Red Cross* 161

Nykänen, E., *Fragmented State Power and Forced Migration: A Study of Non-State Actors in Refugee Law* (Martinus Nijhoff 2012)

O'Byrne, K., 'Beyond Consent: Conceptualising Sexual Assault in International Criminal Law' (2011) 11 *International Criminal Law Review* 495

O'Meara, R. M., 'Jus Post bellum: Reflections on the Right Way to End the War' (2011) 6 *Journal on Terrorism and Security Analysis* 35

Ohlin, J. D., 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5(1) *Journal of International Criminal Justice* 69

Oosterveld, V., 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55

Oosterveld, V., 'Gender, Persecution and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution' (2006) 17 *Duke Journal of Comparative and International Law* 49

Oosterveld, V., 'The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?' (2007) 45 *Canadian Yearbook of International Law* 131

Oosterveld, V., 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments' (2011) 44 *Cornell International Law Journal* 49

Oosterveld, V., 'Gender and the Charles Taylor Case before the Special Court for Sierra Leone' (2012) 19(1) *William & Mary Journal of Women and Law* 7

O'Rourke, C., *Gender Politics in Transitional Justice* (Routledge 2013)

O'Sullivan, M. 'Acting the Part: Can Non-State Entities Provide Protection under International Refugee Law?' (2012) 24(1) *International Journal of Refugee Law* 85

Orend, B., 'Jus Post Bellum: The Perspective of a Just War Theorist' (2007) 20 *Leiden Journal of International Law* 573

Otto, D., "'Gender Comment": Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?' (2002) 14 *Canadian Journal of Women and Law* 1

Otto, D., 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10(1) *Melbourne Journal of International Law* 11

Otto, D., 'Power and Danger: Feminist Engagement with International Law through the UN Security Council' (2010) 32(1) *Australian Feminist Law Journal* 97

Österdahl, I., van Zadel, E., 'What Will Jus Post Bellum Mean? Of New Wine in Old Bottles' (2009) 14(2) *Journal of Conflict and Security Law* 175

Quéniwet, N., *Sexual Offences in Armed Conflict and International Law* (2005 Transnational Publishers)

Panara, C., Wilson, G. (eds), *The Arab Spring. New Patterns for Democracy and International Law* (Martinus Nijhoff 2013)

Parlett, K., *The Individual in the International Legal System. Continuity and Change in International Law* (CUP 2011)

Pauwelyn, J., 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25(4) *Michigan Journal of International Law* 903

Petman, J., Klabbers, J., (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff 2003)

Phuong, C., 'Internally Displaced Persons and Refugees: Conceptual Differences and Similarities' (2000) 18(2) *Netherland Quarterly of Human Rights* 215

Phuong, C., *The International Protection of Internally Displaced Persons* (CUP 2005)

Pictet, J., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987)

Piotrowicz, R., 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24(2) *International Journal of Refugee Law* 181

Piotrowicz, R., 'Asylum Seekers, Good Faith and the State' (2013) 20 *International Journal on Minority and Group Rights* 263

Randall, M., 'Refugee Law and State Accountability for Violence Against Women: a Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution' (2000) 25 *Harvard Women's Law Journal* 281

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

Reydams, L., Wouters, J., Ryngaert, C., *International Prosecutors* (OUP 2012)

Rojo, E., 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace Without Justice" to "No Peace with Victor's Justice"?' (2005) 18 *Leiden Journal of International Law* 829

Rubio-Marín, R. (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Sciences Research Council 2006)

Rubio-Marín, R. (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP 2009)

Rubio-Marín, R., Sandoval, C., 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment' (2011) 33 *Human Rights Quarterly* 1062-1091

Sadat, L. N., 'Avoiding Creation of a Gender Ghetto in International Criminal Law' (2011) 11 *International Criminal Law Review* 655

Sandoz, Y., Swiniarski, C., Zimmermann, B. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff 1987)

Sankey, D., 'Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice' (2014) 8 *International Journal of Transitional Justice* 121

- Sankey, D., 'Gendered Experiences of Subsistence Harms: A Possible Contribution to Feminist Discourse on Gendered Harm?' (2015) 24(1) *Social & Legal Studies* 25
- SáCouto, S., Cleary, K., "The importance of effective investigation of sexual and gender-based crimes at the International Criminal Court" (2009) 17 *American University Journal of Gender, Social Policy and Law* 337
- Schabas, W. A., 'The International Criminal Court at Ten' (2001) 22 *Criminal Law Forum* 493
- Schabas, W. A., *The UN international criminal tribunals: the former Yugoslavia, Rwanda, Sierra Leone* (CUP 2006)
- Schabas, W., McDermott, Y., Hayes, N. (eds) *The Ashgate Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013)
- Schomburg, W., Peterson, I., 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 *American Journal of International Law* 121
- Schwarzenberger, G., 'Jus Pacis, Ac Belli?' (1943) 37 *American Journal of International Law* 460
- Sellers, P. V., "Gender strategy is not a luxury for international courts" (2009) 17 *American University Journal of Gender, Social Policy and Law* 301
- Sellers, P. V., 'Wartime Female Slavery: Enslavement?' (2011) 44(1) *Cornell International Law Review* 115
- Shahabuddeen, M., *International Criminal Justice at the Yugoslav Tribunal: A Judge's Reflection* (OUP 2012)
- Sharratt, S., *Gender, Shame and Sexual Violence: The voices of witnesses and court members at War Crimes Tribunals* (Ashgate 2011)
- Shelton, D., *Remedies in International Human Rights*, 2nd ed., (OUP 2005)
- Simma, B., 'Universality of International Law from the Perspective of a Practitioner' (2009) 20(2) *European Journal of International Law* 265
- Sivakumaran, S., 'Sexual Violence Against Men in Armed Conflict' (2007) 18 *European Journal of International Law* 253
- Skåre, S., Burkey, I., Mørk, H. (eds), *Manual on Human Rights Monitoring. An Introduction for Human Rights Field Officers* (Oslo: Norwegian Centre for Human Rights, 2008)
- Sluiter, G., Friman, H., Linton, S., Vasiliev, S., Zappalà, S. (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013)

- Smeulers, A. (ed), *Collective Violence and International Criminal Justice. An Interdisciplinary Approach* (Intersentia 2010)
- Smeulers, A., 'Female Perpetrators: Ordinary or Extra-Ordinary Women' (2015) 15 *International Criminal Law Review* 207
- Stahn, C., "'Jus ad Bellum", "Jus in Bello", "Jus post Bellum"? – Rethinking the conception of the Law of Armed Force' (2006) 17(5) *European Journal of International Law* 921
- Stahn, C., 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) *American Journal of International Law* 99
- Stahn, C., Kleffner, J. K. (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008)
- Stahn, C., van der Herik, L., (eds), *The Diversification and fragmentation of international law* (Martinus Nijhoff 2012)
- Stahn, C., Easterday, J. S., Iverson, J., (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014)
- Stahn, C. (ed), *The Law and Practice of the International Criminal Court* (OUP 2015)
- Stigmayer, A. (ed), *Mass Rape. The War against Women in Bosnia-Herzegovina* (University of Nebraska Press 1994)
- Storey, H., 'EU Refugee Qualification Directive: a Brave New World?' (2008) 20(1) *International Journal of Refugee Law* 1
- Storey, H., 'Armed Conflict in Asylum Law: the "War-Flaw"' (2012) 31(2) *Refugee Survey Quarterly* 1
- Storey, H., Wallace, R., 'War and Peace in Refugee Law Jurisprudence' (2001) 95(2) *American Journal of International Law* 349
- Swaak-Goldman, O., 'The ICTY and the Right to a Fair Trial: A Critique of the Critics' (1997) 10 *Leiden Journal of International Law* 215
- Swart, B., Zahar, A., Sluiter, G., *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011)
- Toy-Cronin, B., 'What is forced marriage? Towards a definition of forced marriage as a crimes against humanity' (2010) 19(2) *Columbia Journal of Gender and Law* 539
- Turshen, M., Twagiramariya, C. (ed), *What do women do in wartime. Gender and conflict in Africa* (Zed Books 1998)
- van der Wilt, H., 'Joint Criminal Enterprise: Possibilities and Limitations' (2007) 5(1) *Journal of International Criminal Justice* 91

- Van Schaack, B., 'Obstacles on the road to gender justice: the International Criminal Tribunal for Rwanda as object lesson' (2009) 17 *American University Journal of Gender, Social Policy and Law* 361, 372-375.
- Wald, P. M., 'Women on International Courts: Some Lessons Learned' (2011) 11 *International Criminal Law Review* 401
- Warbrick, C., Rowe, P., 'The International Criminal Tribunal: the Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadić Case' (1996) 45 *International and Comparative Law Quarterly* 691
- Webb, P., *International Judicial Integration and Fragmentation* (OUP 2013)
- Weill, S., *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014)
- Weller, M. (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015)
- Westmarland, N., Gangoli, G. (eds), *International Approaches to Rape* (The Policy Press 2011)
- White, N. D., Henderson, C. (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar Publishing 2013)
- White, N. D., *Advanced Introduction to International Conflict and Security Law* (Edward Elgar Publishing 2014)
- Wilmshurst, E., Breau, S. (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007)
- Wilsher, D., 'Non-State Actors and the Definition of the Refugee in the United Kingdom: Protection, Accountability, Culpability?' (2003) 15(1) *International Journal of Refugee Law* 68
- Wood, E. J., 'Variations in sexual violence during war' (2006) 34(3) *Politics & Society* 307
- Wood, E. J., 'Armed groups and sexual violence: when is rape rare?' (2009) 37(1) *Politics & Society* 131
- Wood, E. J., 'Conflict-related sexual violence and the policy implications of recent research' (2014) Vol.96 No. 894 *International Review of the Red Cross* 457
- Young, M. A., *Regime Interaction in International Law. Facing Fragmentation* (CUP 2012)
- Young, R., "'Internationally Recognized Human Rights" before the International Criminal Court' (2011) 60(1) *International and Comparative Law Quarterly* 189

Zahar, A., Sluiter, G., *International Criminal Law: A Critical Introduction* (OUP 2008)

Zawati, H. M., *Fair Labeling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (OUP 2014)

Zegveld, L., 'Remedies for Victims of Violations of International Humanitarian Law' (2003) Vol.85 No.851 *International Review of the Red Cross* 497

Zegveld, L., 'Victims' Reparation Claims and International Criminal Courts. Incompatible Values?' (2013) 8 *Journal of International Criminal Justice* 79

Zeigler, S. L., Gunderson, G. G., 'The Gendered Dimension of Conflict's Aftermath: A Victim-Centered Approach to Compensation' (2006) 20(2) *Ethics & International Affairs* 171

Zimmermann, A., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (OUP 2011)

TREATIES AND CONVENTIONS

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009 (Kampala Convention) <<http://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>> accessed 17 October 2015

African Charter on Human and Peoples' Rights (Banjul Charter) (27 June 1981) 1520 UNTS 217

American Convention on Human Rights (22 November 1969) 1144 UNTS 144

Arms Trade Treaty 2013, adopted on 2 April 2013 by UNGA Resolution 67/234B

Convention on the Elimination of all Forms of Discrimination against Women (18 December 1979) 1249 UNTS 13

Convention on the Elimination of all forms of Racial Discrimination (7 March 1966) 660 UNTS 195

Convention on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85

Convention on the Rights of Persons with Disabilities, UN Doc. A/61/611, 13 December 2006

Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3

Council of Europe Convention on preventing and combating violence against women and domestic violence 2011, CETS No: 210

European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS No. 005, 213 UNTS 221

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85

Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135

Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287

Geneva Convention Relating to the Status of Refugees 1951 (28 July 1951) 189 UNTS 150

International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3

Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (9 June 1994) 33 ILM 1534

Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), of 8 June 1977, 1125 UNTS 3

Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), of 8 June 1977, 1125 UNTS 609

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (11 July 2003) Adopted by the 2nd Ordinary Session of the Assembly of the Union

Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3

Vienna Convention on the Law of Treaties 1969 (23 May 1969) 1155 UNTS 331

INTERNATIONAL DOCUMENTS

CEDAW, Concluding Observations: Japan (7 August 2009) UN Doc. CEDAW/C/JPN/CO/6

CEDAW, General Recommendation No.19 on Violence Against Women, UN Doc. A/47/38, 1992

CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/GR/28, 16 December 2010

CEDAW, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013

CEDAW, General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, UN Doc. CEDAW/C/GC/32, 5 November 2014

CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), UN Doc. E/C.12/2005/4, 11 August 2005

Charter of the International Military Tribunal for the Trial of the Major War Criminals, Appended to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, London.

COE, Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. Explanatory Report, 11 May 2011, CETS no.210 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a> > accessed 29 July 2013

Directive 2011/95/EU of The European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Official Journal of the European Union 2011 L337/9 (20 December 2011)

ExCom, General Conclusion on International Protection, ExCom Conclusion No. 77 (XLVI), 20 October 1995

ICC-OTP, Policy Paper on Sexual and Gender-Based Crimes (June 2014), paras.50-51 <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> accessed 17 March 2015

ICJ, The Proliferation of international judicial bodies: The outlook for the international legal order. Speech by His Excellency Judge Gilbert Guillaume, President of the

International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000,
<<http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>> accessed 17 October 2015

Internal Rules of Extraordinary Chambers for in the Courts of Cambodia (Rev.3), as revised on 6 March 2009

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission* (2001) vol. II, Part Two

International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”, Report of the Study Group of International Law Commission finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006

ILO, *ILO Action Plan for Gender Equality 2010-2015* (2012)
<http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_179106.pdf> accessed 17 November 2015

International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’ (Ottawa: International Development Research Centre for ICISS, December 2001) <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 15 May 2013 (The ICISS Report)

International Criminal Court, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009

International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1, adopted 29 June 1995

International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, UN Doc. IT/32/Rev.50, 8 July 2015 (as amended)

Joint general recommendation No.31 of the Committee on Elimination of All Forms of Discrimination Against Women / general comment No.18 of the Committee on the Rights of the Child on harmful practices, UN Doc. CEDAW/C/GC/31- CRC/C/GC/18, 14 November 2014

Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission. Volume IV. (London: HMSO, 1948) 35
<http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf> accessed 1 December 2013

Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone <<http://www.sierra-leone.org/lomeaccord.html>> accessed 7 October 2015

United Nations, Report of the Fourth World Conference on Women, UN Doc. A/CONF. 177/20; 17 October 1995

United Nations Preparatory Commission for the International Criminal Court, Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, 2 November 2000

United Nations, 'Women, peace and security. Study submitted by the Secretary-General Pursuant to Security Council Resolution 1325 (2000)' (2002) <<http://www.un.org/womenwatch/daw/public/eWPS.pdf>> accessed 10 March 2010

United Nations, 'Secretary General's Remarks at Meeting with Permanent Representatives of Troop and Police Contributing Countries on Sexual Exploitation and Abuse' (17 September 2015) <<http://www.un.org/sg/statements/index.asp?nid=8982>> accessed 1 December 2015

UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, adopted by the General Assembly on 16 December 2005

UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, Radhika Coomaraswamy, Report of the mission to Rwanda on the issues of violence against women in situations of armed conflict, Addendum, UN Doc. E/CN.4/1998/54/Add.1, 4 February 1998

UN Commission on Human Rights, Internally Displaced Persons. Report of the Representative of Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998

UN Commission on Human Rights, Report on contemporary forms of slavery. Systematic rape, sexual slavery and slavery-like practices during armed conflict. Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998

UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, on the Due Diligence Standard as a Tool for the Elimination of Violence Against Women, UN Doc. E/CN.4/2006/61, 20 January 2006

UN Committee Against Torture, General Comment No.2: Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008

UN Committee Against Torture, General Comment No.3: Implementation of article 14 by State parties, UN Doc. CAT/C/GC/3, 19 November 2012

UNGA Resolution 217 A (III), Universal Declaration of Human Rights, UN Doc. A/RES/217A, 10 December 1948

UNGA Resolution 40/34, Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, 29 November 1985, Annex

UNGA, 'Report of the Economic and Social Council for 1997', UN Doc. A/52/3, 18 September 1997, Chapter 4, Agreed conclusions

UNGA, 'Resolution adopted by the General Assembly: United Nations Millennium Declaration', UN Doc. A/RES/55/2, 18 September 2000

UNGA, Report of the United Nations High Commissioner for Human Rights, UN Doc. E/2015/59, 19 May 2015

UNGA, UNSC, Report of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), UN Doc. A/65/592-S/2010/604, 24 November 2010

UNGA, UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. A/66/657* - S/2012/33*, 13 January 2012

UNGA, UNSC, Sexual violence in conflict. Report of the Secretary-General, UN Doc. A/67/792 - S/2013/149, 14 March 2013

UNHCR, 'Guidelines on Protection of Refugee Women', July 1991,
<<http://www.refworld.org/docid/3ae6b3310.html>> accessed 9 May 2012

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng./REV.1, Geneva, 2nd ed., (1992)

UNHCR, Agents of Persecution – UNHCR Position, 14 March 1995
<<http://www.unhcr.org/refworld/docid/3ae6b31da3.html>> accessed 14 December 2012

UNHCR, 'Position Paper Gender- Related Persecution', 1 January 2000
<<http://www.refworld.org/docid/3bd3f2b04.html>> accessed 9 May 2012

UNHCR, 'Guidelines on International Protection No.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', HCR/GIP/02/01, 7 May 2002
<<http://www.refworld.org/docid/3d36f1c64.html>> accessed 9 May 2012

UNHCR, Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02 <<http://www.unhcr.org/refworld/docid/3d36f23f4.html>> accessed 25 June 2012

UNHCR, Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response, May 2003, <<http://www.refworld.org/docid/3edcd0661.html>> accessed 15 May 2013

UNHCR, Asylum in the European Union. A study of the implementation of the Qualification Directive, November 2007, <<http://www.refworld.org/docid/473050632.html>> accessed 26 July 2012

UNHCR, UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM (2009) 551, 21 October 2009), 29 July 2010 <<http://www.unhcr.org/4c5037f99.pdf>> accessed 3 July 2012

UNHCR, Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions, April 2011 <<http://www.refworld.org/docid/4e1729d52.html>> accessed 15 June 2012

UNHCR, Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence, 27 July 2011 <<http://www.unhcr.org/refworld/docid/4e2ee0022.html>> accessed 30 July 2011

UNHCR, The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group', April 2012, PPLA/2012/02 <<http://www.unhcr.org/refworld/docid/4f7d94722.html>> accessed 10 June 2012

UNHCR, *2014 Global Trends. World at War*, 18 June 2015 <<http://unhcr.org/556725e69.html>> accessed 9 November 2015

UN Human Rights Committee, General Comment No.28: Article 3 (equality of rights between men and women), UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000

UN Human Rights Committee, General Comment No.29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001

UN Human Rights Committee, General Comment No.31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004

UN Human Rights Committee, Concluding observations on the sixth periodic report of Japan (20 August 2014) UN Doc. CCPR/C/JPN/CO/6

UN Human Rights Council, Resolution 6/30: Integrating human rights of women throughout the UN system, UN Doc. A/HRC/RES/6/30, 14 December 2007

UN Human Rights Council, Report of the Special Rapporteur on Violence Against women, its causes and consequences, Rashida Manjoo, UN Doc. A/HRC/14/22, 23 April 2010

UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/19/53, 26 December 2011

UN Human Rights Council, Human rights of internally displaced persons, A/HRC/RES/20/9, 17 July 2012

UN Human Rights Council, Report submitted by the Special Rapporteur on the right to food, Olivier De Schutter. Women's rights and the right to food., UN Doc. A/HR/22/50, 24 December 2012

UN Human Rights Council, Report of the Special Rapporteur on Violence against Women, its causes and consequences, Rashida Manjoo, on state responsibility for eliminating violence against women, UN Doc. A/HRC/23/49, 14 May 2013

UN Human Rights Council, 'Impact of arms transfers on human rights in armed conflicts', 8 October 2013, A/HRC/RES/24/35

UNICEF, The Gender Dimensions of Internal Displacement: Concept Paper and Annotated Bibliography, (November 1998)

<http://www.forcedmigration.org/sphere/pdf/watsan/WCRWC/unicef_idpgender_1998.pdf> accessed 25 July 2011

UN OHCHR, 'Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights', March 2011

<http://www.ohchr.org/Documents/Countries/CD/DRC_Reparations_Report_en.pdf> accessed 1 October 2015

UN OHCHR, 'Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence', June 2014 <<http://www.unwomen.org/en/docs/2014/6/reparations-for-conflict-related-sexual-violence>> accessed 15 July 2015

UNSC, Report of the Secretary - General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000

UNSC, Sexual violence in conflict. Report of the Secretary-General, UN Doc. S/2014/181, 13 March 2014

UNSC, Conflict-related sexual violence. Report of the Secretary-General, UN Doc. S/2015/203, 23 March 2015

UNSCR 820 (17 April 1993) UN Doc. S/RES/820

UNSCR 827 (25 May 1993) UN Doc. S/RES/827

UNSCR 955 (8 November 1994) UN Doc. S/RES/955

UNSCR 1325 (31 October 2000) UN Doc. S/RES/1325

UNSCR 1820 (19 June 2008) UN Doc. S/RES/1820

UNSCR 1983 (7 June 2011) UN Doc. S/RES/1983

UNSCR 1888 (30 September 2009) UN Doc. S/RES/1888

UNSCR 1889 (5 October 2009) UN Doc. S/RES/1889

UNSCR 1960 (16 December 2010) UN Doc. S/RES/1960

UNSCR 2106 (24 June 2013) UN Doc. S/RES/2106

UNSCR 2122 (18 October 2013) UN Doc. S/RES/2122

UNSCR 2242 (13 October 2015) UN Doc. S/RES/2242

UN Sub-Commission on the Promotion and Protection of Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc. E/CN.4/Sub.2/2005/17, 28 June 2005

UN Women, 'Women's Participation in Peace Negotiations: Connections between Presence and Influence' (October 2012)

<<http://reliefweb.int/sites/reliefweb.int/files/resources/03AWomenPeaceNeg.pdf>> accessed 1 December 2015

WHO, *WHO Gender Policy: Integrating Gender Perspectives in the Work of WHO* (WHO Report, 2002)

<<http://whqlibdoc.who.int/hq/2002/a78322.pdf>> accessed 17 November 2015

World Bank, *Engendering Development: Through Gender Equality in Rights, Resources and Voice* (World Bank Policy Research Report 2001)

<<http://documents.worldbank.org/curated/en/2001/01/891686/engendering-development-through-gender-equality-rights-resources-voice>> accessed 17 November

2015

NATIONAL LEGISLATION

United Kingdom

Sexual Offences Act 2003
Forced Marriage (Civil Protection) Act 2007

Australia

The Commonwealth Criminal Code Act 1995

OTHER SOURCES

Amnesty International, 'Democratic Republic of Congo: Children at War' (8 September 2003) <<http://www.amnesty.org/en/library/info/AFR62/034/2003/en>> accessed 14 February 2015

Amnesty International, 'Kosovo (Serbia): The challenge to fix a failed UN justice mission' (2008)
<<https://www.amnesty.org/en/documents/document/?indexNumber=EUR70%2F001%2F2008&language=en>> accessed 17 March 2015

Amnesty International, 'Iraq: Yazidi women and girls face harrowing sexual violence' (23 December 2014) <<https://www.amnesty.org/en/latest/news/2014/12/iraq-yezidi-women-and-girls-face-harrowing-sexual-violence/>> accessed 1 December 2015

Amnesty International, 'Escape from hell: torture and sexual slavery in Islamic State captivity in Iraq' (December 2014)
<https://www.amnesty.org.uk/sites/default/files/escape_from_hell_-_torture_and_sexual_slavery_in_islamic_state_captivity_in_iraq_-_english_2.pdf> accessed 1 December 2015

Askin, K. D., 'Fizi Diary: Mobile Court Tries Landmark Rape Case' (*Open Society Foundation*, 17 February 2011) <<http://www.opensocietyfoundations.org/voices/fizi-diary-mobile-court-tries-landmark-rape-case>> accessed 15 July 2015

Asylum Aid, 'Unsustainable: the quality of initial decision-making in women's asylum claims', January 2011, <<http://www.asylumaid.org.uk/unsustainable/>> accessed 19 March 2012

Asylum Aid, 'Gender-related asylum claims in Europe. A comparative analysis of law, policies and practice focusing on women in nine EU Member States', May 2012 <http://www.asylumaid.org.uk/pages/campaign_for_gender_guidance_across_europe.html> accessed 23 January 2013

Asylum Aid & European Women's Lobby, 'Asylum is Not Gender Neutral: A practical advocacy guide for protecting women seeking asylum', November 2007, <<http://www.asylumaid.org.uk/publications.php?id=70>> accessed 19 March 2012
Bayoumy, Y., 'Analysis: Arab Spring nations backtrack on women's rights, poll says' (*Reuters* 11 November 2013) <<http://www.reuters.com/article/us-arab-women-spring-analysis-idUSBRE9AB00O20131112>> accessed 1 December 2015

BBC News, 'Bosnian Serbs reject the rape plaque' (1 October 2004) <<http://news.bbc.co.uk/1/hi/world/europe/3706554.stm>> accessed 1 October 2015

BBC News, 'Comfort women': Japan and South Korea hail agreement' (28 December 2015) <<http://www.bbc.co.uk/news/world-asia-35190464>> accessed 31 December 2015

Black, I., 'Libyan woman is brutally silenced after accusing Gaddafi's forces of rape' (*The Guardian*, 26 March 2011) <<http://www.theguardian.com/world/2011/mar/26/libya-woman-silenced-accusing-gaddafi-forces-rape>> accessed 12 April 2012

Chinkin, C., 'The Protection of Economic, Social and Cultural Rights Post-Conflict', paper series commissioned by the Office of the High Commissioner for Human Rights (2009) <http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf> accessed 12 May 2010

Chinkin, C., 'Feminism; Approach to International Law', Max Planck Encyclopedia of Public International Law <<http://opil.ouplaw.com/home/EPIL>> accessed 17 November 2015

Cole, A., 'Making the perpetrators of mass sexual violence pay: International justice for gender-related crimes' (*Openspace*, 6 March 2012) <<http://www.osisa.org/openspace/global/making-perpetrators-mass-sexual-violence-pay-alison-cole>> accessed 15 July 2015

Council of Europe, *Safe from Fear, Safe from Violence* (information leaflet on the Convention) <<https://edoc.coe.int/en/violence-against-women/6138-leaflet-safe-from-fear-istanbul-convention.html>> accessed 5 November 2015

Deschamps, M., Jallow, H. B., Sooka, Y., 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers. Report of an Independent Review on Sexual Exploitation and Abuse by Peacekeepers in the Central African Republic' (17 December 2015)

<http://www.un.org/News/dh/infocus/cenafricrepub/Independent-Review-Report.pdf>> accessed 2 January 2016

Des Forges, A., 'Leave None to Tell the Story. Genocide in Rwanda' (Human Rights Watch 1999) <<https://www.hrw.org/reports/pdfs/r/rwanda/rwanda993.pdf>> accessed 10 March 2010

El-Jack, A., *Gender and Armed Conflict. Overview report*, Institute of Development Studies, August 2003, <<http://www.bridge.ids.ac.uk/reports/cep-conflict-report.pdf>> accessed 1 December 2010

Foreign & Commonwealth Office, Preventing Sexual Violence in Conflict Initiative <<https://www.gov.uk/government/policies/preventing-conflict-in-fragile-states--2/supporting-pages/preventing-sexual-violence-initiative>> accessed 14 February 2014

Foreign and Commonwealth Office, Declaration of Commitment to End Sexual Violence in Conflict, 23 September 2013, <<https://www.gov.uk/government/publications/a-declaration-of-commitment-to-end-sexual-violence-in-conflict>> accessed 1 March 2015

Foreign & Commonwealth Office, 'The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict. Basic Standards of Best Practice in Documentation of Sexual Violence as a Crime under International Law' (June 2014) <<https://www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict>> accessed 17 March 2015

Ford, L., 'Sexual violence in war: women must get reparations, says head of UN Women' (*The Guardian*, 11 June 2014) <<http://www.theguardian.com/global-development/2014/jun/11/ending-sexual-violence-conflict-summit-reparations-un-women-mlambo-ngcuka>> accessed 17 July 2015

Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region (18 June 2008)

'Bosnian court grants wartime victim compensation in landmark ruling' (*The Guardian*, 24 June 2015) <<http://www.theguardian.com/world/2015/jun/24/bosnian-court-grants-wartime-victim-compensation-landmark-ruling>> accessed 10 December 2015

Heller, K. J., 'The ECCC Issues a Landmark Decision on JCE III', *Opinio Juris* (23 May 2010) <<http://opiniojuris.org/2010/05/23/the-eccc-issues-a-landmark-decision-on-jce-iii/>> accessed 1 July 2015

Human Rights Watch, 'Kosovo: rape as a weapon of 'ethnic cleansing'' (1 March 2000) <<https://www.hrw.org/report/2000/03/01/kosovo-rape-weapon-ethnic-cleansing>> accessed 12 March 2010

Human Rights Watch, 'We'll Kill You If You Cry. Sexual Violence in the Sierra Leone Conflict' (Human Rights Watch 2003) <<http://www.hrw.org/reports/2003/01/16/well-kill-you-if-you-cry>> accessed 1 October 2013

Human Rights Watch, 'Sexual Violence and Its Consequences among Displaced Persons in Darfur and Chad', 12 April 2005 <<http://www.hrw.org/reports/2005/04/12/sexual-violence-and-its-consequences-among-displaced-persons-darfur-and-chad>> accessed 15 May 2013

Human Rights Watch, 'Seeking Justice. The Prosecution of Sexual Violence in the Congo War' (8 March 2005) <<http://www.hrw.org/reports/2005/03/07/seeking-justice>> accessed 14 February 2015

ICTR, 'Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions' (30 January 2014) <<http://unictr.unmict.org/en/documents/best-practices-manuals-and-conference-reports>> accessed 17 March 2015

ICTY, 'Reliving the past: The challenges of testifying' <<http://www.icty.org/sid/10608>> accessed 17 March 2015

International Center for Transitional Justice, 'The Rabat Report: Concept and Challenges of Collective Reparations' (1 February 2009) <<https://www.ictj.org/publication/rabat-report-concept-and-challenges-collective-reparations>> accessed 1 October 2015

International Centre for Transitional Justice, 'The Disappeared and Invisible. Revealing the Enduring Impact of Enforced Disappearances on Women' (March 2015) <<https://www.ictj.org/sites/default/files/ICTJ-Global-Gender-Disappearances-2015.pdf>> accessed 1 December 2015

ICRC, *International Humanitarian Law and Gender. Report Summary*, International Expert Meeting: 'Gender Perspectives on International Humanitarian Law', 4-5 October 2007 Stockholm, Sweden <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/ihl-women-report-051008/\\$File/ihl%20and%20gender.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/ihl-women-report-051008/$File/ihl%20and%20gender.pdf)> accessed 12 March 2010

International Committee of the Red Cross (ICRC) Opinion Paper, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', March 2008 <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 20 March 2013

IDMC, *Global Overview 2015: People internally displaced by conflict and violence*, May 2015 <<http://www.internal-displacement.org/publications/2015/global-overview-2015-people-internally-displaced-by-conflict-and-violence>> accessed 8 November 2015

McCurry, J., 'Japan rejects US calls for apology over "comfort women"' *The Guardian* (31 July 2007) <<http://www.theguardian.com/world/2007/jul/31/usa.japan>> accessed 9 July 2015

Mooney, E., Internal Displacement and Gender, Notes for Presentation by Erin Mooney, OHCHR to Humanitarian Principles Workshop: Focus on a Child Rights Approach to Complex Emergencies and Internal Displacement, 1 October 1998 <http://reliefweb.int/sites/reliefweb.int/files/resources/46D644B62064FFEDC1256C28002AB8DA-Internal_Displcmt_Gender.html> accessed 25th July 2011

Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation (hereinafter the Nairobi Declaration) <https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf> accessed 17 July 2015

Ní Aoláin, F., 'The UN Security Council's New Resolution on Women, Peace and Security' (*Just Security*, 15 October 2015) <<https://www.justsecurity.org/26720/unscr-2242/>> accessed 17 October 2015

Nordås, R., 'Sexual Violence in African Conflicts', Peace Research Institute Oslo (PRIO) Policy Brief No. 1, 2011 <<http://www.usip.org/sites/default/files/missing-peace/Ragnhild-Nordas.pdf>> accessed 1 December 2015

Nowrojee, B., *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (Human Rights Watch 1996)

Nowrojee, B., "We Can Do Better: Investigating and Prosecuting International Crimes of Sexual Violence" (2004) <<http://ict-rarchive09.library.cornell.edu/ENGLISH/colloquium04/nowrojee.html>> accessed 17 March 2015

Nowrojee, B., "Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims? (November 2005) United Nations Research Institute for Social Development, Occasional Paper No.10, 10 <<http://www.unrisd.org/publications/opgp10>> accessed 17 March 2015

Oosterveld, V., Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention, PPLA/06/2012, September 2012 <<http://www.unhcr.org/504dd7649.html>> accessed 9th May 2013

Open Society Justice Initiative, 'The Fact Sheet: DRC Mobile Gender Courts' (2011) <<http://www.opensocietyfoundations.org/sites/default/files/mobile-court-20110725.pdf>> accessed 15 July 2015

OSCE, 'Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges. An analysis of criminal proceedings before the Court of Bosnia and Herzegovina between 2005 and 2013' (February 2014) <<http://www.osce.org/node/117051>> accessed 5 July 2015

Querton, C. / Asylum Aid, “‘I feel like as a woman I am not welcome’”: A gender analysis of UK asylum law, policy and practice’, January 2012

<http://www.asylumaid.org.uk/wp-content/uploads/2013/02/ifeelasawoman_report_web_.pdf> accessed 19 March 2012

Sandoval Villalba, C., ‘Rehabilitation as a form of reparation under international law’ (REDRESS, 2009)

<<http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf>> accessed 1 October 2015

Save the Children, ‘Too young to wed. The growing problem of child marriage among Syrian girls in Jordan’ (2014)

<https://www.savethechildren.org.uk/sites/default/files/images/Too_Young_to_Wed.pdf> accessed 1 December 2015

Siddiqui, S. ‘Japan’s PM apologises for US war dead- but fails to mention “comfort women”’ *The Guardian* (London, 29 April 2015)

<<http://www.theguardian.com/world/2015/apr/29/japans-pm-shinzo-abe-apologises-us-war-dead-congress-comfort-women>> accessed 9 July 2015

Sierra Leone Truth and Reconciliation Commission, ‘Witness to Truth: report of the Sierra Leone Truth and Reconciliation Commission’ (Graphic Packaging Limited GCL 2004) vol.2

Soh, C. S., ‘Japan’s Responsibility Toward Comfort Women Survivors’ (2001) Japan Policy Research Institute Working Paper No.77 (May 2001)

<<http://www.jpri.org/publications/workingpapers/wp77.html>> accessed 14 February 2015

Sotloff, S., ‘The Rape of Iman al-Obeidi: The Libyan Regime’s Other Crisis’ (The Time, 29 March 2011) <<http://www.time.com/time/world/article/0,8599,2062007,00.html>> accessed 12 April 2012

Stahn, C., ‘Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparations’ (*EJIL: Talk!*, 7 April 2015)

<<http://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/>> accessed 1 August 2015

Stop Rape Now: UN Action on Prevention of Sexual Violence in Conflict <<http://www.stopraperow.org/>> accessed 14 February 2014

The Save the Children Fund, *Forgotten Casualties of War: Girls in armed conflict* (2005) <<http://resourcecentre.savethechildren.se/library/forgotten-casualties-war-girls-armed-conflicts>> accessed 14 February 2015

UN OHCHR, ‘Women and the Arab Spring: an ongoing struggle for equal rights’ (22 March 2013)

<http://www.ohchr.org/EN/NewsEvents/Pages/WomenandtheArabspringanongoingstruggleforequalrights.aspx>> accessed 1 December 2015

UN OHCHR, 'Japan's approach to the issue of "comfort women" causing further violations of victims' human rights - Pillay' (6 August 2014)

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14920&LangID=E>> accessed 9 July 2015

UKBA Asylum Instruction on *Gender Issues in the Asylum Claim* (September 2010)

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/gender-issue-in-the-asylum.pdf?view=Binary>> accessed 3 July 2012

War Crimes Research Office, 'The Practice of Cumulative Charging at the International Criminal Court' (May 2010)

https://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_May2010.pdf> accessed 1 July 2015

Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2009* http://www.iccwomen.org/news/docs/GRC09_web-2-10.pdf> accessed 14 February 2015

TABLE OF CASES

Court of Justice of the European Union

Elgafaji v. Staatssecretaris van Justitie, CJEU, C-465/07 (17 February 2009)

Salahadin Abdulla and Others v. Bundesrepublik Deutschland, CJEU, C-175/08; C-176/08; C-178/08 & C-179/08, 2 March 2010

European Court of Human Rights

Aktaş v. Turkey, Application No.24351/94, Judgment, 24 April 2003

Al-Skeini and others v. United Kingdom, Application No.55721/07, Judgment, 7 July 2011

Aydin v. Turkey, Application No.23178/94, 27 September 1997

Blečić v. Croatia, Application No. 59532/00, Judgment, 8 March 2006

Çakici v. Turkey, Application No.23657/94, Judgment, 8 July 1999

Chahal v. UK, Application No. 70/1995/576/662, 11 November 1996

Gül v. Turkey, Application No. 22676/93, Judgment, 14 December 2000

M.S.S. v Belgium and Greece, Application No. 30696/09, 21 January 2011

Opuz v. Turkey, Application No.33401/02, Judgment, 9 June 2009

Rantsev v. Cyprus and Russia, Application No.25965/04, Judgment, 7 January 2010

Saadi v. Italy, Application No. 37201/06, 28 February 2008

Extraordinary Chambers in the Courts of Cambodia

Prosecutor v. Ieng Sary (Decision on the Appeal against the Co-Investigative Judges Order on Joint Criminal Enterprise) 002/19-09-2007-ECCC/OCIJ (PTC 38), 20 May 2010

Human Rights Committee

Albert Wilson v. The Philippines, Communication No.868/1999, UN Doc. CCPR/C/79/D/868/1999 (2003)

Inter-American Commission on Human Rights

Raquel Martí de Mejía v. Peru, Inter-American Commission on Human Rights, Case 10.970, Report No. 5/96, 1 March 1996

Inter-American Court of Human Rights

Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03, IACtHR, 17 September 2003

González et al. ("Cotton Field") v. Mexico, IACtHR, Judgment (Preliminary Objection, Merits, Reparations and Costs), 16 November 2009, Ser.C, No.205

Loayza Tamayo v. Peru, IACtHR, Judgment (Reparations), 27 November 1998, Ser.C, No.42

Rochela Massacre v. Colombia, IACtHR, Judgment (Merits, Reparations, and Costs), 11 May 2007, Ser.C No.163

Velásquez Rodríguez v. Honduras, IACtHR, Judgment (Merits), 29 July 1988, Ser.C, No.7

International Court of Justice

Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment, ICJ Reports 2005, 168

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) ICJ Reports 2007, 26 February 2007

Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Judgment, ICJ Reports 2010, 639

Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), ICJ Reports 2005, 82

Gabčíkovo-Nagymaros Project Case (Hungary v. Slovakia), Judgment, ICJ Reports 1997, 7

LaGrand Case (Germany v. United States of America), Judgment, ICJ Reports 2001, 466

Legality of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 36

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, 66

International Criminal Court

Prosecutor v. Bemba (Public redacted version of the ‘Decision on the Tenth and Seventeenth Transmissions of Applications by Victims to Participate in the Proceedings’) ICC-01/05-01/08-2247-Red (19 July 2012)

Prosecutor v. Simone Gbagbo, Arrest Warrant, ICC-02/11-01/12, 29 February 2012

Situation in Darfur, Sudan: Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”) (Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir), ICC-02/05-01/09-3 (4 March 2009)

Situation in Kenya: Prosecutor v. Muthaura et al (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012)

Situation in the Republic of Kenya: Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11 (23 January 2012)

Situation in the Central African Republic: Prosecutor v. Bemba (Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (10 June 2008)

Situation in the Central African Republic: Prosecutor v. Bemba (The Amended Document Containing the Charges) ICC-01/05-01/08-395-Anx3 (30 March 2009)

Situation in the Central African Republic: Prosecutor v. Bemba (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009)

Situation in Darfur, Sudan: Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and *Ali Muhammad Ali Abd-Al-Rahman* (“Ali Kushayb”), ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (27 April 2007)

Situation in Darfur, Sudan: The Prosecutor v. Abdel Raheem Muhammad Hussein, ICC-02/05-01/12, Warrant of Arrest for Abdel Raheem Muhammad Hussein (1 March 2012)

Situation in Darfur, Sudan: Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”), Second Warrant of Arrest for Omar Hassan Ahmed Al Bashir, ICC-02/05-01/09 (12 July 2010) 6-8

Situation in the Democratic Republic of the Congo: Prosecutor v. Bosco Ntaganda (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06 (9 June 2014)

Situation in the Democratic Republic of the Congo: Prosecutor v. Callixte Mbarushimana (Decision on the confirmation of charges), Pre-Trial Chamber I, ICC-01/04-01/1, 16 December 2011

Situation in the Democratic Republic of the Congo: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Decision on the confirmation of charges) (30 September 2008)

Situation in the Democratic Republic of the Congo: Prosecutor v. Germain Katanga (Judgment pursuant to article 74 of the Statute), Trial Chamber II, ICC-01/04-01/7-3436, 7 March 2014

Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo (Decision on the confirmation of charges), ICC-01/04-01/06-806 (29 January 2007)

Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo (Judgment), ICC-01/04-01/06 (14 March 2012)

Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo (Decision establishing principles and procedures to be applied to reparations), ICC-01/04-01/06-2904 (7 August 2012)

Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo (Judgment on the appeals against the “Decision establishing principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2), ICC-01/04-01/06-3129 (3 March 2015)

Situation in the Democratic Republic of the Congo: Prosecutor v. Thomas Lubanga Dyilo (Order for Reparations), ICC-01/04-01/06-3129-AnxA (3 March 2015)

Situation in the Republic of Côte d’Ivoire: Prosecutor v. Laurent Gbagbo (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute), ICC-02/11-01/11-432 (3 June 2013)

Situation in Uganda: Prosecutor v. Vincent Otti (Warrant of Arrest for Vincent Otti) ICC-02/04 (8 July 2005)

Situation in Uganda: Prosecutor v. Joseph Kony (Warrant of Arrest for Joseph Kony) ICC-02/04-01/05 (27 September 2005)

The Case of the Prosecutor v. Thomas Lubanga Dyilo, Opening Statement, ICC-01/04-01/06 (26 January 2009)

International Criminal Tribunal for Rwanda

Prosecutor v. Akayesu, Judgment, ICTR-96-4-T, 2 September 1998

Prosecutor v. Bagosora et al., Judgment and Sentence, ICTR-98-41-T, 18 December 2008

Prosecutor v. Gacumbitsi, Trial Judgment, ICTR-2001-64-T, 17 June 2004

Prosecutor v. Kajelijeli, Trial Judgment, ICTR-98-44A-T, 1 December 2003

Prosecutor v. Karemera et al., Trial Judgment, ICTR-98-44-T

Prosecutor v. Karemera et al., Appeals Judgment, ICTR-98-44-A, 29 September 2014

Prosecutor v. Kayishema & Ruzindana, Judgment and Sentence, ICTR-95-1, 21 May 1999

Prosecutor v. Muhimana, Judgment and Sentence, ICTR-95-1B, 28 April 2005

Prosecutor v. Musema, Judgment and Sentence, ICTR-96-13-T, 27 January 2000

Prosecutor v. Muvunyi, Trial Judgment and Sentence, ICTR-2000-55A-T, 12 September 2006

Prosecutor v. Nahimana et al., ICTR-96-11-T, 3 December 2003

Prosecutor v. Niyitegeka, Trial Judgment, ICTR-96-14-T, 16 May 2003

Prosecutor v. Nyiramasuhuko, Trial Judgment, ICTR-98-42-T, 24 June 2011

Prosecutor v. Rutaganda, Judgment and Sentence, ICTR-96-3-T, 6 December 1999

Prosecutor v. Rukundo, ICTR-01-70, Judgment, 27 February 2009

Prosecutor v. Semanza, Trial Judgment, ICTR-97-20-T, 15 May 2003

Rukundo v. The Prosecutor, ICTR-2001-70-A, Judgment, 20 October 2010

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Blaškić, Appeals Judgment, IT-95-14-A, 29 July 2001

Prosecutor v. Blagojević, Trial Judgment, IT-02-60-T, 17 January 2005

Prosecutor v. Bralo, Sentencing Judgment, IT-95-17-S, 7 December 2005

Prosecutor v. Brdanin, Trial Judgment, IT-99-36-T, 1 September 2003

Prosecutor v. Cesić, Sentencing Judgment, IT-95-10/1-S, 1 March 2004

Prosecutor v. Dordević, Appeals Judgment, IT-05-87/1-A, 27 January 2014

Prosecutor v. Erdemović, IT-96-22, Separate and Dissenting Opinion of Judge Antonio Cassese, 7 October 1997

Prosecutor v. Furundžija, Judgment, IT-95-17/1T, 10 December 1998

Prosecutor v. Jelisić, Appeal Judgment, IT-95-10-A, 5 July 2011

Prosecutor v. Karadžić et al., IT-95-18-R61, IT-95-5-R61, Transcript of Hearing, 2 July 1996

Prosecutor v. Radovan Karadžić and Ratko Mladić, Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-5-R61 & IT-95-18-R61, 11 July 1996

Prosecutor v. Karadžić, IT-95-5/18-AR72.4, Decision on Prosecutor's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009

Prosecutor v. Kordić and Čerkez, Trial Judgment, IT-95-14/2, 26 February 2001

Prosecutor v. Krajišnik, Trial Judgment, IT-00-39-T, 27 September 2006

Prosecutor v. Krnojelac, Appeals Judgment, IT-97-25-A, 17 September 2003

Prosecutor v. Krstić, Trial Judgment, IT-98-33-T, 2 August 2001

Prosecutor v. Krstić, Appeals Judgment, IT-98-33-A, 19 April 2004

Prosecutor v. Kunarac et al., Trial Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001

Prosecutor v. Kunarac, Appeals Judgment, IT-96-23/IT-96-23/1-A, 12 June 2002

Prosecutor v. Kupreškić et al., Judgment, IT-95-16, 14 January 2000

Prosecutor v. Kvočka et al., Trial Judgment, IT-98-30/1-T, 2 November 2001

Prosecutor v. Limaj, Trial Judgment, IT-03-66-T, 30 November 2005

Prosecutor v. Milutinović et al., Trial Judgment, IT-05-87-T, 26 February 2009

Prosecutor v. Mucić et al. (Čelebići Case), Trial Judgment, IT-96-21-T, 16 November 1998

Prosecutor v. Mucić et al., Appeal Judgment, IT-96-21-A, 20 February 2001

Prosecutor v. Nikolić (Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence), IT-94-R61, 20 October 1995

Prosecutor v. Popović et al., Trial Judgment, IT-05-88-T, 10 June 2010

Prosecutor v. Rajić, Trial Judgment, IT-95-12-T, 8 May 2006

Prosecutor v. Simić et al., Trial Judgment, IT-95-9-T, 17 October 2003

Prosecutor v. Stakić, Trial Judgment, IT-97-24-T, 31 July 2003

Prosecutor v. Stakić, Appeal Judgment, IT-97-24-A, 22 March 2006

Prosecutor v. Šainović et al., Appeals Judgment, IT-05-87-A, 23 January 2014

Prosecutor v. Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, IT-94-1-T

Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995

Prosecutor v. Tadić, Trial Judgment, IT-94-1-T, 7 May 1997

Prosecutor v. Tadić, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999

Prosecutor v. Todorović, IT-95-9/1-S, Sentencing Judgment, IT-95-9/1-S, 31 July 2011

Prosecutor v. Vasiljević, Trial Judgment, IT-98-32-T, 29 November 2002

International Military Tribunal at Nuremberg

Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945- 1 October 1946 (42 Volumes, 1947),
<http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html> accessed 28 October 2013

Permanent Court of International Justice

Case Concerning the Factory at Chorzów (Germany v. Poland), Jurisdiction, (1927) PCIJ Series A No.9, 21

Case Concerning the Factory at Chorzów (Germany v. Poland), Merits, (1928) PCIJ Series A No.17, 47

Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration), Advisory Opinion, (1928) PCIJ Series B No.15, 17

Special Court for Sierra Leone

Prosecutor v. Brima et al., Trial Judgment, SCSL-04-16-T, 20 June 2007

Prosecutor v. Brima et al., Appeal Judgment, SCSL-04-16-A, 22 February 2008

Prosecutor v. Sesay, Kallon, Gbao (RUF), Judgment, SCSL-04-15-T, 2 March 2009

Prosecutor v. Sesay, Kallon, Gbao (RUF), Appeals Judgment, SCSL-04-15-A, 26 October 2009

Prosecutor v. Taylor, Judgment, SCSL-03-01-T, 18 May 2012

Domestic cases

Australia

Applicant A v. MIEA [1997] HCA 4

Applicant S v. Minister for Immigration and Multicultural Affairs (2004) 217 CLR 387

Minister for Immigration and Multicultural Affairs v. Abdi [1999] 87 FCR 280

Minister for Immigration and Multicultural Affairs v. Ibrahim [2000] HCA 55

Minister for Immigration and Multicultural Affairs v. Khawar [2002] HCA 14

Canada

Canada v. Ward [1993] 2 SCR 689

Mugesera v. Minister of Citizenship and Immigration [2005] 2 SCR 100

United Kingdom

Adan v. Secretary of State for the Home Department [1998] 2 All ER 453

AZ (Trafficked women) Thailand CG [2010] UKUT 118

Civilian War Claimants Association Ltd v. The King [1932] AC 14

Commissioner of Police of the Metropolis v. DSD and NBV [2015] EWCA Civ 646

FM (FGM) Sudan CG [2007] UKAIT00060

Horvath v. Secretary of State for the Home Department, Appeal No. 17338, AIT/IAA, 28 September 1998

Horvath v. Secretary of State for the Home Department [2001] 1 AC 489

Islam v. Secretary of State for the Home Department and R v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah [1999] 2 AC 629

KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023

QD& AH (Iraq) v Secretary of State for the Home Department [2009] EWCA CIV 620

MK (Lesbians) Albania CG [2009] UKAIT00036

SB (PSG-Protection Regulations- Reg 6) Moldova CG [2008] UKAIT 00002

Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant), Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) [2006] UKHL 46

Wilson Herman Lopez Montoya v. Secretary of State for the Home Department [2002] EWCA Civ 620

United States of America

Re Acosta, 19 I. & N. Decisions 211, US Board of Immigration Appeals, 1 March 1985