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Women in Post-Conflict Reconstruction: Dilemmas and Directions

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WOMEN IN POST-CONFLICT RECONSTRUCTION: DILEMMAS AND DIRECTIONS

NAOMI R. CAHN*

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INTRODUCTION

Armed conflicts affect both men and women, but women face additional issues during wars that men do not, including sexual violence,¹ forced impregnation, and forced abortion.² Women are also differentially affected because of their role as the primary caretaker of the household and family, as well as their second class status in most conflict zones.³ Once the conflict ends, women continue to experience the consequences of these actions.⁴

In discussing women and war, this article addresses gender and post conflict reconstruction. Scholars, human rights organizations, and other local, national, and international actors have considered the importance of integrating women's wartime experiences in the post conflict context.⁵ These scholars and organizations have developed useful programs, such as gender mainstreaming,⁶ to ensure the inclusion of women's experiences and

1. Some sexual violence during conflicts is committed against boys and men, but the overwhelming majority of this violence is committed against women and girls. See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 297 (2003) (indicating that "outside a domestic prison context, targets of sex crimes are overwhelmingly female").

2. See, e.g., Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 385 (1999). Apart from sexualized violence, women also suffer greater injuries and death from landmines in conflict as they tend to constitute the majority of internally displaced persons (IDPs). See Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 COLUM. HUM. RTS. L. REV. 1, 12 (2000). ("The presence of landmines, also hinders the return of refugees, a factor that is most likely to affect women and children, who constitute the majority of the world's refugee population.").

3. See *id.*

4. See, e.g., *id.*

5. See, e.g., DONNA PANKHURST, CTR. FOR CONFLICT RESOLUTION, DEP'T OF PEACE STUDIES, UNIV. OF BRADFORD, WOMEN, GENDER AND PEACEBUILDING 9 (2000), available at <http://www.brad.ac.uk/acad/confres/assets/CCR5.pdf> (describing "a need for peacebuilding to incorporate policies which address women's specific health and economic needs"); UNITED NATIONS DEV. PROGRAMME, GENDER APPROACHES IN CONFLICT AND POST-CONFLICT SITUATIONS 11 (2003) (acknowledging that the post-conflict phase presents "an opportunity to promote reconstruction efforts with a gender perspective").

6. The United Nations Economic and Social Council (ECOSOC) has defined the concept of gender mainstreaming as follows:

In any area and at all levels, a gender mainstreaming perspective is the process of assessing the implications for women and men in any planned action, including legislation, policies or programmes. It is a strategy for making the concerns and experiences of women as well as of men an integral part of design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres, so that women and men benefit equally and inequality is not perpetuated. The

voices. Although gender mainstreaming is one useful program, this article argues for reform of the post-conflict context so that neglected experiences become central, not merely mainstreamed.

Women are most likely to experience conflict as civilians, although they may be combatants as well.⁷ Women fight alongside men, both willingly and unwillingly,⁸ and as many as forty percent of all child soldiers are girls.⁹ In addition to combat roles, women and girls may act as health professionals, provide domestic labor and sexual services, or assist in the essential task of collecting information.¹⁰ Although such service may be voluntary,¹¹ most women are coerced into joining armed groups.¹² Even those women who are allowed to remain in their communities during conflict may become victims of economic pillaging and sexual violence.¹³ The impact of conflict on women ranges from their mental and physical, including reproductive, health, to economic survival, to the breakdown of their families and communities.¹⁴

Nonetheless, women may also benefit from war, not just through economic profiteering as businesspeople, but also through the “gender dividend,” which allows them to function in roles

ultimate goal of mainstreaming is to achieve gender equality.
U.N. Econ. & Soc. Council [ECOSOC], *Coordination of Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System Related to the Following Theme: Mainstreaming the Gender Perspective into All Policies and Programmes in the United Nations System*, ¶ 4, U.N. Doc. E/1997/L.30 (July 14, 1997).

7. See Gardam & Jarvis, *supra* note 2, at 39-42 (describing the increased presence of female combatants). In some intra-state conflicts, female combatants are actually considered more effective than their male counterparts. See, e.g., *Liberia's Women Killers*, BBC NEWS, Aug. 26, 2003, <http://news.bbc.co.uk/2/hi/africa/3181529.stm> (quoting Peter Coleman, Liberia's Health Minister, who argues that women “are prized by their senior commanders as ‘[t]hey don't get drunk and they take their mission very seriously’”).

8. See, e.g., George Bardue, ‘We Were Forced to Fight’ Female Ex-Combatants Explain, ALLAFRICA.COM, Feb. 23, 2004, available at <http://www.peacewomen.org/news/Liberia/Feb04/excombatants.html>.

9. VANESSA FARR, BONN INT'L CTR. FOR CONVERSION, GENDERING DEMILITARIZATION AS A PEACEBUILDING TOOL 6 (2002); MATT HOBSON, SAVE THE CHILDREN, FORGOTTEN CASUALTIES OF WAR: GIRLS IN ARMED CONFLICT 1 (2005), available at http://www.savechildren.org.uk/temp/scuk/cache/cmsattach/2698_GAAF%20report.pdf.

10. HOBSON, *supra* note 9, at 4.

11. Some women may choose to follow a male relative who is fighting. Other women may “voluntarily” participate in conflict out of sheer survival, as doing so is “the best chance they will have to get food and other material goods.” *Id.* at 11.

12. *Id.* at 4.

13. *Id.* at 6 (quoting Furaa, a Congolese girl who fought with an unarmed group in the DRC as explaining, “when the men [in the interhamwe] were pillaging people's villages, they would rape women”).

14. See, e.g., Gardam & Jarvis, *supra* note 2, at 29-38.

traditionally occupied by men.¹⁵ Women may perform non-traditional roles both within their communities and in the conflict itself, acquiring new skills and status as a result.¹⁶

Following the conflict, the country, civil actors, international donors, and multilateral institutions must address the myriad of roles that women have experienced during the conflict. The involvement of women in post conflict reconstruction is, of course, an enormous topic, that ranges from the demilitarization process to the institution of a new government.¹⁷ Yet, integrating gender in the post conflict process specifically includes: (1) proceeding upon the recognition that sustainable development requires gender equity;¹⁸ (2) recognizing women's rights to participate in all aspects of the transition; (3) developing laws that respect and foster gender equity; and (4) implementing a justice component which ends impunity and ensures accountability for crimes committed during the conflict against women and girls.

Reconstruction includes many forms of development-related assistance, however, it must include a justice component. As warring groups reconcile, questions of responsibility remain. The relationship between transitional justice¹⁹ and reconstruction is complex; when ex-combatants seek to return to their communities, they must also confront issues of culpability for crimes committed during war.²⁰ Moreover, as victims attempt to continue with their

15. *Id.* at 42-43 (indicating that war can be a time of empowerment for women as they are often required to perform traditionally male roles and in so doing, develop new skills). For an account of the role of women in the labor force during World War II, see PENNY COLMAN, *ROSIE THE RIVETER: WOMEN WORKING ON THE HOME FRONT IN WORLD WAR II* (1995); SHERNA BERGER GLUCK, *ROSIE THE RIVETER REVISITED: WOMAN, THE WAR, AND SOCIAL CHANGE* (1987).

16. See, e.g., TSJEARD BOUTA ET AL., *THE WORLD BANK, GENDER, CONFLICT, AND DEVELOPMENT* xx (2005) (noting that among women who voluntarily choose to serve as soldiers, a key motivation is to obtain rights and gender equality).

17. See, e.g., Elaine Zuckerman & Marcia Greenberg, *The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework for Policymakers*, 12 *GENDER & DEV.* 1 (2004), available at <http://www.genderaction.org/images/ez-mg%20oxfam%20g&d%20gender-pcr.pdf>.

18. See MARTHA HIRPA, HEIFER INT'L, *GENDER EQUITY: EMPHASIZING FULL PARTICIPATION*, available at <http://www.heifer.org/site/c.edJRKQNiFiG/b.485979/> (last visited Dec. 30, 2005) ("Addressing gender issues is crucial to sustainable development. Development — improving people's livelihoods — isn't sustainable unless both men and women participate, unless both take responsibility for their futures.").

19. Professor Ruti Teitel has defined transitional justice as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes." Ruti G. Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69, 69 (2003).

20. See generally ROGER DUTHIE, *STOCKHOLM INITIATIVE ON DISARMAMENT DEMOBILISATION REINTEGRATION (SIDDR), TRANSITIONAL JUSTICE AND SOCIAL*

lives, they too must confront the impact of the conflict-based violence. To encompass the complexity of this situation, this article suggests that there are three distinct concepts of justice in this context: criminal/civil justice, restorative justice, and social services justice.²¹ Each of these is implicated in post conflict reconstruction.

Transitional justice, which focuses on responding to past human rights violations, can hold violators accountable for their acts.²² But a critical issue for post conflict reconstruction is moving beyond criminal prosecutions that ensure accountability of perpetrators toward a system that also serves the needs of victims. When reconstruction includes disarmament, demobilization, and reintegration (DDR)²³ and “development” services, these programs cannot be separated from perpetrator responsibility. The traditional criminal justice is perpetrator-centric. Indeed, under the criminal justice system, the victim is not a party to the proceedings but is merely called as a witness by the prosecution, who represents the public interest.²⁴ Alternative forms of justice have broadened this focus, recognizing that the legal system must respond to both victims and perpetrators.²⁵

REINTEGRATION (2005), available at <http://www.sweden.gov.se/content/1/c6/04/39/68/77a5e773.pdf>.

21. “Social services justice” provides another dimension to concepts of justice by focusing on the social, economic, medical, and psychological components of providing justice to victims. See Naomi Cahn, *Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence*, 1 STAN. J. C.R. & C.L. 217, 247-49 (2005).

22. Ruti Teitel, *Respondent: The Future of Human Rights Discourse*, 46 ST. LOUIS U. L.J. 449, 449 (2002).

23. For an explanation of DDR, see *infra* note 62, and accompanying text.

24. This shows the perpetrator that the crime was committed against society, thereby relieving pressure on the victim. See C. Quince Hopkins et al., *Responding: Two New Solutions: Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 290 (2004) (“[A]s witnesses rather than parties in criminal cases, victims’ control over prosecution is limited; in fact, the traditional criminal justice system, at the urging of battered women’s advocates, affirmatively displaces battered women . . . in a noble effort to take on the primary responsibility of confronting batterers about their violence.”); see also Nancy Rosenblum, *Justice and the Experience of Injustice*, in *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* 88 (Nancy Rosenblum, ed. 2002) (“As important as they are, legal proceedings in response to human rights violations have as their goal justice and not assistance to the aggrieved.”).

25. Truth commissions are one tool for accomplishing this goal. In a thoughtful article on transitional justice, Judy Meltzer delineates five ways in which truth commissions, as distinct from formal prosecutions, contribute to reconciliation:

They create a public space for victims to be heard and acknowledged; They allow for collective and institutional responsibility, unlike formal legal processes that are restricted to the individual; They can contribute directly to legal judicial procedures or make prosecution more likely in the future; They offer an opportunity to make recommendations regarding the reconciliation processes including reparations and institutional reforms, as

In addition to criminal and civil accountability (rights-based justice), perhaps the most significant form of justice for women is assistance traditionally associated with development, as it provides critical social services and facilitates all aspects of post conflict reconstruction.²⁶ This article seeks to expand conceptions of international justice in the post conflict setting to include social, economic, and development-based rights.²⁷ It does not cover all aspects of social services justice in post conflict countries. Rather, it examines two aspects of gender that are integral to post conflict reconstruction and involve women's differing roles during conflict: the significance of integrating gender into the process of DDR and the necessity of domestic responses to the crimes of sexual violence. Although this article uses the war in the Democratic Republic of Congo (DRC) as the primary paradigm for examining these aspects, the lessons are applicable to many other post conflict countries.²⁸

At the most basic level, DDR must be integrated with democracy promotion, gender equality, and economic and social development. Indeed, a linkage between disarmament and development has long been acknowledged.²⁹ This recognition must inform ongoing DDR efforts. By focusing on violence against women, the article demonstrates how domestic reforms in the post conflict context can have a triple impact of ensuring justice for past crimes,

well as putting in place funding structures required. . . .; [and t]hey establish a shared understanding of the past, which is important for reconciliation.

Judy Meltzer, *Transitional Justice and Reconciliation in Post-Conflict Colombia: Some Considerations for Future Canadian Engagement* 1, 7 (Focal, Policy Paper No. FPP-04-3 (2004), available at <http://www.focal.ca/pdf/colombia04.pdf>).

26. See Cahn, *supra* note 21, at 247-49.

27. For example, the International Covenant on Economic, Social, and Cultural Rights "recognize[s] the right of everyone to an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions." International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), ¶ 11(1), U.N. Doc. A/6316 (Jan. 3, 1976).

28. The war in the DRC is immensely complex and has been called Africa's First World War. See *From Combatant to Civilian*, THE WORLD BANK, Aug. 29, 2005, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/CONGO-DEMOCRATICEXTN/0,,contentMDK:20629793~menuPK:349472~pagePK:141137~piPK:141127~theSitePK:349466,00.html>.

29. See, e.g., G.A. Res. 40/155 (Dec. 16, 1985); G.A. Res. 39/160 (Dec. 17, 1984); G.A. Res. 38/71 (Dec. 15, 1983); BETHÉLEMY JEAN-CLAUDE, ET AL., OECD DEV. CTR., *THE DISARMAMENT DIVIDEND: CHALLENGES F DEVELOPMENT POLICY* (2004), available at <http://www.oecd.org/dataoecd/23/29/1918844.pdf>; David A. Koplow & Philip G. Schrag, *Carrying a Big Carrot: Linking Multilateral Disarmament and Development Assistance*, 91 COLUM. L. REV. 993 (1991); Herbert Wulf, *Disarmament as a Chance for Human Development — Is There a Peace Dividend?* (UNDP, Occasional Paper No. 5, 1992), available at http://hdr.undp.org/docs/publications/ocational_papers/oc5.htm.

providing penalties for future crimes, and promoting gender equality.

I. OVERVIEW OF POST CONFLICT TRANSITION

The official end of many contemporary conflicts is marked by a peace agreement which creates the context for establishing the legal structure of the post conflict society.³⁰ Nonetheless, violence may continue long after the peace accords have been signed.³¹ Parts of the population may still be in refugee camps or otherwise displaced from their communities.³² Foreign armies often remain in the country, armed groups may still have weapons, and there may be a transitional government in place with little control. Moreover, international humanitarian law (IHL), traditionally has not extended to the post conflict context.³³ International law scholars and activists have developed various theories on how to construct the post conflict context, developing different models of transitional justice.³⁴ These models grapple with the difficult theoretical issues of balancing reconciliation and punishment. Most scholars believe that criminal trials serve as the best method for administering justice and developing the rule of law in the post conflict context.³⁵

30. See, e.g., Christine Chinkin, *Gender, Human Rights, and Peace Agreements*, 18 OHIO ST. J. DISP. RESOL. 867, 867 (2003). (“The notion of a peace agreement or settlement as a pivotal moment for determining the future constitutional and legal framework of a post-conflict zone has become dominant.”).

31. See, e.g., HUMAN RIGHTS WATCH, *SEEKING JUSTICE: THE PROSECUTION OF SEXUAL VIOLENCE IN THE CONGO WAR 9-20* (2005), available at <http://hrw.org/reports/2005/drc0305> (documenting sexual violence following the establishment of a transitional government intended to unify the formerly warring factions pursuant to a peace agreement) [hereinafter *SEEKING JUSTICE*].

32. Over two million internally displaced persons (IDPs) in the Darfur region of Sudan “continue to live in a climate of fear, intimidation and violence, restricted to displaced persons camps because of continuing attacks and intimidation, unable to return to their homes.” See HUMAN RIGHTS WATCH, *SUBMISSION TO THE 38TH ORDINARY SESSION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS (2005)*, available at <http://hrw.org/english/docs/2005/11/19/africa12060.htm#Democratic%20Republic%20of%20the%20Congo>.

33. JUDITH G. GARDAM & MICHELLE J. JARVIS, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW* 252 (2001) (arguing that even when IHL does apply, “it is the ‘male’ civilian that is taken as the norm and its provisions are construed around their needs”).

34. See, e.g., RUTI TEITEL, *TRANSITIONAL JUSTICE* (2000); Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002).

35. See, e.g., JACKSON NYAMUYA MAOGOTO, *WAR CRIMES AND REALPOLITIK* 8 (2004) (“International tribunals . . . have become the international community’s primary response to humanitarian crises. . . .”); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 25 (1998) (“To respond to mass atrocities with legal prosecutions is to

Practically, however, prosecutions are very expensive and countries may have inadequate resources for trial costs.³⁶ In Rwanda, for example, only a fraction of perpetrators have been prosecuted, many of the trials have lacked various procedural protections, and thousands of people remain in detention with no evidence against them.³⁷

Moreover, a further critique suggests that the norms and justifications for international criminal law are drawn from domestic criminal law, which may not provide an appropriate analogy or basis for prosecuting crimes of mass atrocity.³⁸ For example, Miriam Aukerman advances several arguments as to why

embrace the rule of law.”). See also Aukerman, *supra* note 34, at 40 (“While participants in this debate disagree as to when trials are possible in practice, they generally share a basic assumption: Prosecuting perpetrators of injustice is the optimal method for dealing with past atrocities.”); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT’L L. REV. 321, 393 (2000) (“Law must come first and enforcement of law is a prerequisite to respect for the law.”).

36. Some countries emerging from conflict have attempted to institute cost-effective alternatives to criminal tribunals. In Rwanda, for example, *gacaca*, a traditional African conflict resolution system is being used to heal the wounds of the 1994 genocide. Library of Congress, Examples of Reconciliation, <http://www.loc.gov/loc/lcib/0504/africa.html> (last visited Jan. 16, 2006). *Gacaca* “works on the principle of reconciling the parties and promoting social harmony rather than penalizing the guilty party.” *Id.* While innovative, *gacaca* presents its own challenges. As Amnesty International notes:

Amnesty International is principally concerned with the extrajudicial nature of the *gacaca* tribunals. The *gacaca* legislation does not incorporate international standards of fair trial. Defendants appearing before the tribunals are not afforded applicable judicial guarantees so as to ensure that the proceedings are fair, even though some could face maximum sentences of life imprisonment.

Implementing *gacaca* also entails huge logistical problems. Tens of thousands of detainees will have to be transferred from central prisons to their home communities for the *gacaca* hearings. The Rwand[an] government has not clarified how and in what conditions the detainees will be transported, accommodated, fed and treated at the local level. The government’s failure to address these issues could deepen the cruel and inhumane conditions faced by Rwanda’s prison population.

Press Release, Amnesty International, Rwanda: Gacaca — Gambling with Justice (June 19, 2002), available at <http://web.amnesty.org/library/index/engAFR470032002?Open>.

37. See, e.g., AMNESTY INT’L, THE TROUBLED COURSE OF JUSTICE (2000), available at <http://web.amnesty.org/library/Index/ENGAFR470102000?open&of=ENG-RWA> (“However, the [Rwandan] government has still not fulfilled its pledges to release all those against whom there is no evidence, the very young, the old and the sick. Instead, it has repeatedly extended the period of pre-trial detention in clear breach of international law.”).

38. Mark A. Drumbl, *Collective Violence and Individual Punishment: the Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 545 (2005) (“In the end, the architecture of the special field of mass violence is little more than an expropriation of domestic methodologies . . . already assailed for their suitability to ordinary individual crime and all the more ill-fitting for cases of extraordinary international crime.”).

prosecution is not the appropriate method to achieve retribution (on a theoretical level).³⁹ Similarly, she suggests that when it comes to deterrence, which is often cited as an important justification to prosecution, it is impossible to determine whether prosecution will prevent future mass violence or genocide.⁴⁰ The focus on criminal trials, truth commissions, lustrations,⁴¹ or reparations should therefore vary, depending on the country's potential for implementing these mechanisms, as well as the desired outcome. Nonetheless, focusing on these methods of accountability still centers on perpetrator's guilt rather than victim's needs.⁴² What is needed in the post conflict context is a more general response to the totality of victim's needs, including both accountability *and* development.

A. Problems in Establishing the Post Conflict Framework

Following the cessation of hostilities, peace agreements set the basis for transitioning a country from war to peace. Contemporary peace accords take a holistic approach to post conflict reconstruction and seek to establish procedures for DDR, security, justice, and transitional government.⁴³ International organizations and scholars of international law have emphasized the need to include a meaningful gender perspective in negotiating and implementing

39. Aukerman, *supra* note 34, at 51-52, 57-58, 60.

40. *Id.* at 66-67.

41. The term lustration derives from the Latin and means "purification." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 695 (10th ed. 1993). Lustration laws had their heyday in Central and Eastern Europe following the 1989 democratic revolutions. As Roman David explains, "[l]ustration law is a special public employment law that regulates the process of examining whether a person holding certain higher public positions worked or collaborated with the repressive apparatus of the communist regime." Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)*, 28 LAW & SOC. INQUIRY 387, 388 (2003).

42. MINOW, *supra* note 35, at 117 ("Reparations, restitution, and apologies present distinct promises and problems as response to mass atrocity . . . Yet nothing in this discussion should imply that money payments, returned property, restored religious sites, or apologies seal the wounds, make victims whole, or clean the slate.")

43. An example is the Lomé Accord, signed July 7, 1999, ending the Civil War between the government of Sierra Leone and the RUF/SL. See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-R.U.F./S.L., July 7, 1999, available at <http://www.sierra-leone.org/lomeaccord.html> [hereinafter Lomé Accord]. Among its provisions, the Lomé Accord provides for cessation of hostilities (Part One); provides for the establishment of a transitional government (Part Two); provides for the establishment of a peacekeeping operation (Part Four); and makes provisions for human rights and humanitarian relief (Part Five). *Id.*

peace agreements.⁴⁴ There are three primary reasons to include women in a peace process. First, human rights norms demand women's equal participation in public life;⁴⁵ second, women at the peace table can help emphasize the potentially different experiences of women during conflict;⁴⁶ and third, if women are involved in negotiating peace, they become active agents in rebuilding, rather than passive victims of conflict.⁴⁷

The general structure for rebuilding a country focuses on guaranteeing rights. Yet, a rights-based approach presents various problems for women based upon the ability of the government to provide for the rights and the ability of women to exercise them. Establishing rights in a country which has no legal structure for enforcing those rights is admirable rhetoric, but does not provide concrete benefits to those unable to exercise those rights.⁴⁸ Many countries emerging from conflict have traditions of highly corrupt governments, low participatory rights in government, and little to no experience with a vigorous civil society.⁴⁹ Even those post conflict nations which have been the benefactors of a great deal of international support (such as Kosovo) continue to lack basic institutions necessary to establish the prerequisites for fundamental human rights.⁵⁰ These nations lack a reliable legal system, governmental

44. See, e.g. Chinkin, *supra* note 30, at 873. Professor Chinkin argues:

An effective peace process should be built on the widest base of experience and therefore must take account of local women's lived experiences during the conflict and their enormous responsibilities post-conflict. Gender balance does not mean the insertion of a few highly placed international women into the process but rather listening and responding to the diverse experiences of women who have lived through the conflict.

Id. at 873.

45. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

46. Chinkin, *supra* note 30, at 873.

47. *Id.* at 872-73.

48. See Julie Mertus, *Improving the Status of Women in the Wake of War: Overcoming Structural Obstacles*, 41 COLUM. J. TRANSNAT'L L. 541, 546 (2003) ("On a pragmatic level, the rights-based approach does not work unless the state has the capacity to recognize and respond appropriately to the rights claim.")

49. See generally THE WORLD BANK, GROWING ON THE ASHES OF CONFLICT (2005).

50. See Mertus, *supra* note 48, at 546. Professor Chinkin recounts a conversation with an American serving as a local prosecutor in Kosovo:

Michael Hartmann . . . confirms that despite all of the law reform efforts in Kosovo, local police still do not have the ability to fairly and effectively investigate a domestic violence dispute. 'It's not necessarily about not respecting women's rights,' Hartmann says, 'They just don't know how to do it. I'm talking the basics, how to get a fresh complaint, how to preserve evidence.'

Id. at 546.

transparency, and a legislature capable of enacting legal guarantees.⁵¹ In many of these countries as well, the written law and the law as enforced may differ dramatically.⁵²

Even if a post conflict government has the ability to provide for rights, women are often unable to exercise those rights because they lack legal literacy or cannot access them because of longstanding cultural barriers that reinforce women's subordinate status.⁵³ Consequently, guaranteeing legal rights does not address the underlying structural barriers to women's participation as citizens.⁵⁴

Finally, the nature of legal rights does not respond to many of women's needs in a post conflict society. Women have economic needs, and a guaranteed income generally is not a legal right,⁵⁵ nor is the right to a market for selling products one grows, nor is the right to a road for getting to the market. In many post conflict nations, the conflict disrupted women's formal education, and it is not abnormal for half of the female population to be unable to read and write as a result.⁵⁶

B. Problems with Post Conflict Donor Aid and Special Needs of Women

51. Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 849 (2001) (noting that "[t]hese countries need honest judges and regulators, good disclosure rules, and the beginnings of a culture of honesty before it makes sense to worry" about other corporate governance issues, such as the number of independent directors).

52. See, e.g., Stuart Cohn, *Teaching in a Developing Country: Mistakes Made and Lessons Learned in Uganda*, 48 J. LEG. EDUC. 101, 104 (1998). In preparing to teach a course on securities markets in Uganda, Professor Cohn discovered that "[n]othing existed except the laws, a Capital Markets Authority that had no capital markets to regulate, and a stock exchange devoid of stock. . . . I had assumed that the statutes, regulations, and organizational structure reflected market realities and developments — an assumption based on U.S. experience. . . ." *Id.* at 104. His advice to other teachers developing similar courses is not to assume that their students know the law. In Ugandan law schools, for example, copies of relevant statutes and cases were unavailable in the numbers necessary for teaching in the classroom and "even when . . . provided with the materials . . . [students'] lack of training and experience led to many elementary discussions on meanings and interpretations." *Id.* at 108.

53. Mertus, *supra* note 48, at 546 ("Much to their dismay, human rights education specialists have found that even the women who are well-educated in their rights may be prevented by social and cultural forces from asserting them.").

54. *Id.*

55. See GARDAM & JARVIS, *supra* note 33, at 229.

56. In 2003 the female adult illiteracy rate (over age fifteen) in the Congo was 44.9%. GLOBAL HEALTH ATLAS, CONGO, DRC: ADULT ILLITERACY, FEMALES, http://atlas.globalhealth.org/indicator_detail.cfm?IndicatorID=126&Country=CD (last visited Jan. 16, 2006).

Another major problem in post conflict reconstruction is donor coordination, both with respect to shared priorities and lack of information.⁵⁷ Given the paucity of civil society actors in many post conflict countries, donors are often forced to make their own determinations as to what aid a country needs. This often results in the over-funding of certain sectors and the under-funding of others.⁵⁸ Alongside such information problems and conflicting needs determinations, there is an almost inherent conflict between providing for humanitarian needs and long-term development projects in post conflict societies.⁵⁹

II. DDR PROGRAMS

Peace accords generally provide for DDR programs to former warring factions.⁶⁰ In the post Cold War world, DDR has become a staple of most contemporary peace operations.⁶¹ DDR is one of the first steps a society must take in the difficult transition from war to peace. Each phase is interconnected to the other and success of one depends upon the success of the other two. The United Nations offers the following definitions for each component:

Disarmament is the collection of small arms and light and heavy weapons within a conflict zone. It frequently entails the assembly and cantonment of combatants; it should also comprise the development of arms management programmes, including their safe storage and their final disposition, which may entail their destruction. Demining may also be part of this process.

Demobilization refers to the process by which parties to a conflict begin to disband their military structures and combatants begin the transformation into civilian life. It generally

57. See Maija Halonen-Akatwijuka, *Coordination Failure in Foreign Aid 2* (The World Bank Policy Research, Working Paper No. 3223, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=531082 (follow "Social Science Research Network" hyperlink; then select "Open") ("Donors allocate their funds between regions, sectors and activities in a recipient country. When there is incomplete information about the other donors' aid, coordination failure can occur.").

58. *Id.* at 3 ("There are often genuine differences between the donors and the recipients about how to allocate public funds in the recipient developing country. This leads to the well-known aid fungibility problem.").

59. *Id.* at 2 ("Donors tend to favor social sectors (health and education) over other public expenditure programs (e.g., transportation).").

60. See, e.g., Lomé Accord, *supra* note 43, at art. VI(2)(vi).

61. See, e.g., Statement by the President of the Security Council, U.N. Doc S/PRST/2000/10 (Mar. 23, 2000) ("The Security Council recognizes that the mandates of peacekeeping missions increasingly include oversight of disarmament, demobilization and reintegration as one of their functions.").

entails registration of former combatants; some kind of assistance to enable them to meet their immediate basic needs; discharge, and transportation to their home communities. It may be followed by recruitment into a new, unified military force.

Reintegration refers to the process which allows ex-combatants and their families to adapt, economically and socially, to productive civilian life. It generally entails the provision of a package of cash or in-kind compensation, training, and job- and income-generating projects. These measures frequently depend for their effectiveness upon other, broader undertakings, such as assistance to returning refugees and internally displaced persons; economic development at the community and national level; infrastructure rehabilitation; truth and reconciliation efforts; and institutional reform. Enhancement of local capacity is often crucial for the long-term success of reintegration.⁶²

These programs are typically administered by a multilateral organization or the United Nations.⁶³ This section discusses problems with how DDR programs have been implemented in the past and their limitations with respect to gender issues.⁶⁴

A. *Deconstructing DDR Programs*

On the most basic level, DDR programs are flawed with respect to the groups targeted for services. DDR programs are typically evaluated based upon the numbers of combatants demilitarized or the number of weapons collected.⁶⁵ As a result, female soldiers, who generally play a combat support role and have no weapon to turn in, are often overlooked and unable to benefit from resettlement allowances or training programs.⁶⁶ Many DDR plans implement

62. The Secretary-General, *Report of the Secretary-General, The Role of United Nations Peacekeeping in Disarmament, Demobilization and Reintegration*, ¶ 6, U.N. Doc. S/2002/101 (Feb. 11, 2000).

63. See, e.g., United Nations, Peace and Security Through Disarmament, <http://disarmament.un.org/> (last visited Jan. 22, 2006).

64. Women and girls, both ex-combatants and civilians, have specific needs that the DDR process fails to adequately address. UN DEP'T FOR DISARMAMENT AFFAIRS (DDA), GENDER PERSPECTIVES ON DISARMAMENT, DEMOBILIZATION AND REINTEGRATION (DDR) 1 (2001) [hereinafter GENDER PERSPECTIVES ON DDR].

65. *Id.* Even if females have played a direct combatant role, there is no assurance that they will be targeted in a DDR program. See, e.g., *id.* (quoting SALLY BADEN, INT'L LABOUR ORG., POST-CONFLICT MOZAMBIQUE: WOMEN'S SPECIAL SITUATION: POPULATION ISSUES AND GENDER PERSPECTIVES TO BE INTEGRATED INTO SKILLS TRAINING AND EMPLOYMENT (1997).

66. See HOBSON, *supra* note 9, at 19-20.

“cash for weapons” programs that specifically exclude certain groups from the demobilization process.⁶⁷ In the Congo, for example, one of the four criteria for DDR eligibility includes “possession of a weapon.”⁶⁸

Even when child soldiers are specifically targeted, boy child soldiers receive far greater attention in the DDR process than girl child soldiers. For example, demobilization camps usually lack sanitary supplies, bathing facilities, reproductive health care, child care, psychological support centers, and proper security to protect women from sexual violence. *See generally* DYAN MAZURANA & SUSAN MCKAY, CANADIAN INT’L DEV. AGENCY, WHERE ARE THE GIRLS?: GIRLS IN FIGHTING FORCES IN NORTHERN UGANDA, SIERRA LEONE AND MOZAMBIQUE: THEIR LIVES DURING AND AFTER WAR (2004).

67. In such programs, participants receive some form of personal benefit for turning over weapons. For example, “In El Salvador, successful personal incentives included in-kind vouchers for consumer goods, while in Mozambique farm implements or other tools to assist with productive opportunities worked well.” FORUM ON THE POLICIES AND PRACTICES OF SMALL ARMS AND LIGHT WEAPONS DISARMAMENT IN POST-CONFLICT TRANSITIONS, SWORDS FOR PLOUGHSHARES MICRODISARMAMENT IN TRANSITIONS FROM CONFLICT 16 (2000), available at <http://www.fafno.org/pub/rapp/332/332.pdf>.

In many DDR programs, ex-combatants receive significant amounts of cash, particularly when one considers the per capita income of the targeted nation. In Sierra Leone, for example, where the per capita annual income is less than \$200, ex-combatants were paid \$300. *See* Jeffrey Isima, *Cash Payments in Disarmament, Demobilization and Rehabilitation Programmes in Africa*, 2 J. SEC. SECTOR MGMT. 3 (2000), available at http://www.jofssm.org/issues/jofssm_0203_isima.pdf. *See also* U.S. DEP’T OF STATE, BUREAU OF AFRICAN AFFAIRS, BACKGROUND NOTE: SIERRA LEONE, a <http://www.state.gov/r/pa/ei/bgn/5475.htm> (last visited Jan. 16, 2006). In Sierra Leone’s southern neighbor, Liberia, the price for surrendering a weapon is \$300. *Id.* In the DRC, the total amount of the Transitional Subsistence Allowance, given in three slices, is approximately \$350. THE WORLD BANK, TECHNICAL ANNEX FOR A PROPOSED GRANT OF SDR 68.1 MILLION (US\$100 MILLION EQUIVALENT) TO THE DEMOCRATIC REPUBLIC OF CONGO FOR AN EMERGENCY DEMOBILIZATION AND REINTEGRATION PROJECT 16 (2004) [hereinafter WORLD BANK TECHNICAL ANNEX]. The first disbursement of \$30-\$50 would be received after ex-combatants are released from orientation centers and would also include a basic household items kit, *see infra* note 86; the second disbursement of \$150 would be paid when the ex-combatant registers in his chosen area of reintegration; and, several months later, if the ex-combatant is still participating in the DDR process, he will receive an additional \$150. *Id.* at 15-16. In January 2006, the State Department reported that the per capita income in the DRC was less than \$100. *See also* U.S. DEP’T OF STATE, BUREAU OF AFRICAN AFFAIRS, BACKGROUND NOTE: DEMOCRATIC REPUBLIC OF CONGO, <http://www.state.gov/r/pa/ei/bgn/2823.htm> (last visited Jan. 16, 2006) [hereinafter BACKGROUND NOTE: DRC].

68. WORLD BANK TECHNICAL ANNEX, *supra* note 67, at 2. The other three requirements included: “(I) Congolese nationality; . . . (iii) Proof of membership in a recognized armed group; (iv) Proof of having taken part in conflict in DRC between October, 1996 and May, 2003.” *Id.*

The number of DDR participants is illuminating. As the World Bank’s Multi-Country Demobilization and Reintegration Project (MDRP) notes, “[a]s of the end of September [2005], 17,549 men and 331 women were demobilized.” In Sierra Leone, women accounted for 7.4% (or 4,876) of the 72,490 combatants demobilized. THE WORLD BANK, THE MULTI-COUNTRY DEMOBILIZATION AND REINTEGRATION PROGRAM (MDRP), DRC, available at <http://www.mdrp.org/drc.htm> (last visited Jan. 16, 2006) [hereinafter WORLD BANK MDRP]. *See also* WOMEN’S COMM’N FOR REFUGEE WOMEN & CHILDREN, PRECIOUS RESOURCES: PARTICIPATORY RESEARCH STUDY WITH ADOLESCENTS AND YOUTH

By concentrating on combatants as the primary recipient of DDR services, rather than combatants in the context of their families⁶⁹ and communities, or on victims of combatants, or on individuals playing a combat support role, DDR programs' focus is flawed. A second programmatic weakness is the tendency of DDR programs to emphasize economic reintegration, rather than psychological and social rehabilitation in its final stage.⁷⁰ DDR programs tend to focus on providing food, allowances, and skills training, thereby overlooking the need for assistance with post-traumatic stress, domestic violence, and other psychological ailments that arise as a result of war.⁷¹

B. Reconstructing DDR Programs

In 2000, the U.N. Security Council adopted Resolution 1325.⁷² UNSCOR 1325 emphasizes the importance of women and girls to peace and security issues and specifically “[e]ncourages all those involved in the planning for disarmament, demobilization and reintegration to consider the different needs of female and male ex-combatants and to take into account the needs of their dependants.”⁷³ The U.N. is currently addressing this issue through “gender mainstreaming,”⁷⁴ which involves “assessing the implications for women and men of any planned action, including legislation, policies, or programmes.”⁷⁵ In its strategic plan on gender mainstreaming, the U.N.’s Department for Disarmament Affairs

IN SIERRA LEONE APRIL-JULY 2002 7 (2002), available at <http://www.womenscommission.org/reports/sl/13.shtml> [hereinafter PRECIOUS RESOURCES].

69. GENDER PERSPECTIVES ON DDR, *supra* note 64, at 2. The report notes: [E]x-combatants and their families may also require other types of support, including psychological trauma counselling, to rebuild their lives. For ex-combatants the transition to peacetime can be stressful and difficult. There is a need to look at the psychological transition as well as the socioeconomic. This is important from a gender equality perspective, as there are often high rates of domestic violence associated with returned combatants.

Id.

70. *Id.*

71. *Id.*

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

73. *Id.* at ¶ 13.

74. See *supra* note 6 and accompanying text. See also AGNÈS MARCAILLOU, UNITED NATIONS DEPT FOR DISARMAMENT AFFAIRS, GENDER PERSPECTIVES ON D, D AND R 2 (2004), available at <http://www.womenwarpeace.org/issues/ddr/CSWgenderDDR.pdf>.

75. NOELEEN HEYZER, UNITED NATIONS DEV. FUND FOR WOMEN (UNIFEM), GENDER, PEACE AND DISARMAMENT 7 (2003). Heyzer notes that “[t]he ultimate goal of mainstreaming is to achieve gender equality.” *Id.*

sets out an action plan which can be adapted in developing DDR programs and ensures “incorporation of gender perspectives.”⁷⁶

As the Security Council has already adopted Resolution 1325, one possible step could be a convention-type instrument explicitly addressing the importance of gender in a broader post conflict context.⁷⁷ Two scholars suggest that such an instrument could be added to the Convention on the Elimination of All Forms of Discrimination Against Women as a protocol and thereby open for ratification by all states, thus ensuring broad adherence to the principles.⁷⁸ Nonetheless, as this article argues, legal instruments are not panaceas. As discussed earlier, rights-based documents provide aspirations, but until those aspirations are implemented, they provide insufficient help on the ground.

Whether accomplished through a combination of gender mainstreaming, women-focused activities, or the promotion of gender equality, post conflict reconstruction must make gender central. Until a gender-centered perspective is implemented, post conflict reconstruction will remain ineffective.⁷⁹

1. Redesigning DDR Programs with Gender Centrality

Various reforms can be implemented throughout the DDR process to improve responsiveness to gender.⁸⁰ Basic recommendations include independent assessments of the DDR process with a mandated gender analysis; increased collaboration with youth groups and networks in order to facilitate community acceptance of stigmatized victims; and sensitivity training for deployed peacekeepers.⁸¹

76. DEP'T FOR DISARMAMENT AFFAIRS, GENDER MAINSTREAMING ACTION PLAN, PUB. VERSION 2 (2003), *available at* <http://www.disarmament2.un.org/gender/gmap.pdf> [hereinafter DDA GENDER MAINSTREAMING].

77. *See, e.g.*, GARDAM & JARVIS, *supra* note 33, at 256 (proposing the use of legal instruments to create a convention focusing on the protection of women in times of armed conflict).

78. *Id.*

79. A recent example of multilateral organizations recognizing the centrality of gender to successful post conflict reconstruction is the 2001 Bonn Agreement, recreating the state of Afghanistan. As the Initiative for Inclusive Security explains, “[t]he Bonn Agreement (2001) paved the way for the establishment of a Ministry of Women’s Affairs as part of the new Afghanistan administration.” INITIATIVE FOR INCLUSIVE SEC., GENDER AND POST-CONFLICT RECONSTRUCTION: LESSONS LEARNED FROM AFGHANISTAN (2003), *available at* <http://www.womenwagingpeace.net/content/articles/0245a.html>.

80. *See, e.g.* PRECIOUS RESOURCES, *supra* note 68, at 12-13. Although the recommendations are tailored to Sierra Leone, they provide useful insights for other DDR programs.

81. *Id.*

In their implementation, DDR programs should include increased cooperation among governments, NGOs, and civil society institutions. Indeed, increased coordination and support of local women's organizations that focus on disarmament and peace could effectively address gender issues that might otherwise be neglected.⁸² DDR programs can also be designed with gender centrality by preventing the use of gender stereotyping in skill and job trainings, ensuring adequate health and child care facilities (including separate bathrooms and maternity clinics) for female participants, and, if money is distributed, determining whether women have access to banks to deposit funds.⁸³

The rhetoric of DDR programs concerning gender has certainly improved, however, problems with applying gender equality in programming remain. For example, although the Multi-Country Demobilization and Reintegration Program (MDRP)⁸⁴ for the Great Lakes Region requires, among other gender-specific requirements, that benefits for male and female combatants at demobilization centers be equal,⁸⁵ a strict adherence to the rhetoric could be counter-productive. For example, with respect to special reintegra-

In the most notorious instance of abuse perpetrated by peacekeepers, U.N. peacekeepers in the Congo (primarily, though not exclusively, from Nigeria) were alleged to have committed sexual abuse and rape of Congolese women, some as young as thirteen. *Peacekeepers in Congo Abused Girls*, MSNBC.COM, Jan. 7, 2005, <http://www.msnbc.msn.com/id/6800560/from/RL.2/#storyContinued>. A total of seventy-two allegations, resulting in twenty cases, were made against U.N. personnel. *Id.* In 2005, Jane Holl Lute, U.N. Assistant Secretary-General for Peacekeeping Operations, condemned the incidents and shamefully noted, "[t]he blue (U.N.) helmet has become black and blue, through self-inflicted wounds of some of our number. And we will not sit still until the luster of that blue helmet is restored." *United Nations Organization Mission in the Democratic Republic of Congo: A Case for Peacekeeping Reform: Briefing and Hearing Before the Subcomm. on Africa, Global Human Rights, and Int'l Operations of the Comm. on Int'l Relations*, 109th Cong. 22 (2005) (statement of Jane Holl Lute, United Nations Assistant Secretary-General for Mission Support in the Department of Peacekeeping Operations).

82. See, e.g., Chinkin, *supra* note 30, at 877.

83. FARR, *supra* note 9, at 41-47. Farr has developed an extensive checklist of issues which seeks "to draw attention to the particular challenges that face women combatants, the wives of male soldiers and war widows during the demobilization phase and the process of reintegration. . . ." *Id.* at 40.

84. According to its website:

MDRP is a multi-agency effort that supports the demobilization and reintegration of ex-combatants in the greater Great Lakes region of Central Africa. The largest program of its kind in the world, MDRP currently targets an estimated 450,000 ex-combatants in seven countries: Angola, Burundi, the Central African Republic, the Democratic Republic of Congo, the Republic of Congo, Rwanda and Uganda.

WORLD BANK MDRP, *supra* note 68.

85. *Id.*

tion kits,⁸⁶ the MDRP policy in practice might mean that where men receive condoms, women would receive female condoms.⁸⁷ Such a focus on providing “equal benefits,” however, may overlook women’s additional need for sanitary supplies.⁸⁸ Equality, therefore, necessitates accounting for the different needs that men and women face, rather than merely requiring equal provisions.

2. *Reconceptualizing DDR*

If DDR programs are to contribute to long-term peace and stability, they must take a holistic approach to post conflict reconstruction. Critically, DDR programs must integrate a justice component.⁸⁹ Without doing so, true national reconciliation will never occur.⁹⁰ If for example, individuals who are perceived as having committed egregious human rights violations or war crimes are rewarded with money and skills, tensions will naturally develop between them and noncombatants who do not receive such assistance and who do not see human rights abuses being punished.⁹¹ This section considers four methods of reconceptualizing DDR. Not surprisingly, each method has positives and negatives.

The first method favors equality over stability. The International Peace Academy (IPA) suggests, for example, “[o]ffering reintegration benefits directly to the communities in which ex-

86. As Emily Schroeder notes:

“Immediate Assistance kits” in the DRC include a clothing kit (bag, blankets, shoes, trousers, t-shirts and underwear); domestic kit (soap, glasses, plates, pots, jerrycan); food kit (corn flour, vegetables, vegetable oil and iodized salt); and sanitary kits (condoms and brochure on sexual health). The reintegration kits for women also include female condoms, while pregnant women receive soap, plastic sheeting, razor blades, cord, brochure on healthy birthing, bag and cotton cloth.

Emily Schroeder, *A Window of Opportunity in the Democratic Republic of Congo: Incorporating a Gender Perspective on the Disarmament, Demobilization and Reintegration Process*, 5 PEACE, CONFLICT & DEV. 1, 24 (2003), <http://www.peacestudiesjournal.org.uk/docs/AWindowofOpportunity.PDF> (internal citations omitted).

87. *Id.*

88. *Id.*

89. See generally DUTHIE, *supra* note 20 (arguing that the integration of transitional justice measures to the process of reintegration of ex-combatants is critical to post conflict reconstruction).

90. See INT’L PEACE ACAD., A FRAMEWORK FOR LASTING DISARMAMENT, DEMOBILIZATION, AND REINTEGRATION OF FORMER COMBATANTS IN CRISIS SITUATIONS 6 (2002), available at <http://www.ciaonet.org/wps/hal07/hal07.pdf> [hereinafter IPA FRAMEWORK] (“DDR programs must be part of an integrated national recovery strategy. This strategy should encompass . . . justice and reconciliation initiatives. . .”).

91. *Id.* at 4 (“In cases such as Sierra Leone where ex-combatants have committed atrocities against the civilian population, there is resentment over what is often seen as their ‘special treatment’”).

combatants (as well as other displaced populations) are to be reintegrated” rather than to the ex-combatants themselves.⁹² On the positive side, this serves to mitigate tensions which may have developed between ex-combatants and non-combatants. It also serves to tie ex-combatants into their community. On the negative side, as IPA concedes, “since idle ex-combatants pose a serious threat to peace and security, they must indeed receive special attention.”⁹³

A second method is a hard and fast rule of denying reintegration benefits to anyone who has committed human rights violations. Such a proposal has been under discussion for several years in the context of the DRC’s DDR program.⁹⁴ Positively, this serves the dual purpose of signaling to community members that human rights violations will not be rewarded as well as increasing funding, as international donors are more likely to fund projects incorporating human rights.⁹⁵ Such an approach does have associated problems. Foremost, the scale of human rights violations in many of these conflicts is so widespread that to enforce such a norm would be unrealistic and counter-productive. Indeed, adherence to such a norm would mean there would be very few to reintegrate.

A third approach would be to screen all ex-combatants for human rights abuses yet only deny reintegration benefits to those responsible for committing truly egregious violations unlikely to be prosecuted by the International Criminal Court (ICC).⁹⁶ Positively, such an approach is a realistic modification of the previous approach and strikes a balance between community concerns and disarmament requirements.⁹⁷ Several negative aspects are associ-

92. *Id.*

93. *Id.*

94. See also DUTHIE, *supra* note 20, at 22 (“One way of linking DDR programs to transitional justice is to completely deny these benefits to anyone who is guilty of committing human rights violations during the conflict.”).

95. DUTHIE, *supra* note 20, at 18.

96. See, e.g., SEEKING JUSTICE, *supra* note 31, at 8 (suggesting that the U.N., and other multilateral donors “[e]nsure that a vetting process is implemented in all military integration programs”).

97. Kess Kingma argues for such a middle-of-the-road approach. See Kess Kingma, *The Role of Demobilisation in the Peace and Development Process in Sub-Saharan Africa: Conditions for Success*, 5 AFRICAN SEC. REV. 1 (1996), available at <http://www.iss.co.za/Pubs/ASR/5No6/Kingma.html> (“[I]t would strengthen people’s confidence in the future if past human rights violations of members of the armed forces are dealt with. However, this might create a dilemma. These people should be appropriately punished, but heavy punishment might actually increase tensions between the military and the rest of society.”).

Some DDR programs have attempted to implement this approach, with varying degrees of success. In Colombia, for example, the government must check whether those

ated with this method. First, such an approach is difficult to implement and may be beyond the means of many third world nations emerging from decades of conflict.⁹⁸ Problems are also associated with implementation of the screening process. Challenges range from ensuring that the vetting is done as neutrally as possible and in a manner that protects the procedural due process rights of alleged perpetrators, to protecting the security of groups that engage in the identification and vetting process, to establishing standards for who will be screened out of the DDR program. Although many victims know their perpetrators and may have identified them to local NGOs or authorities, the need to guard

seeking demilitarization are subject to ongoing prosecution. HUMAN RIGHTS WATCH, COLOMBIA: LETTING PARAMILITARIES OFF THE HOOK 7 (2005), available at <http://hrw.org/backgrounders/america/colombia0105/colombia0105.pdf>. Nonetheless, Human Rights Watch has grave reservations with the program's implementation and offers some thoughtful recommendations:

Under current procedures, the government conducts only a cursory check of its records to determine whether the individuals who are demobilizing are already the subjects of ongoing prosecutions or convictions. If they are not, they can immediately start receiving benefits. There is no further effort to carefully investigate each individual to determine whether he might be linked to crimes against humanity or other abuses. Because most paramilitary crimes do not yet have a known author, it is very likely that many individuals who have committed massacres, kidnappings, or other crimes will be able to avoid detection and prosecution. In effect, historically endemic failures to properly investigate and prosecute paramilitary abuses would become guarantees of impunity today.

Id. (internal citations omitted).

Human Rights Watch has also recommended that international donors withhold support from the DDR process until the Colombian legislature enacts a "comprehensive demobilization law" that conditions DDR benefits on armed groups' cooperation with the justice process by assisting law enforcement authorities in investigations of past crimes. *Id.* at 15.

Under the MDRP, the DDR plan in the DRC also provides for the exclusion of combatants suspected of war crimes. *See, e.g.*, THE WORLD BANK, GREATER GREAT LAKES REGIONAL STRATEGY FOR DEMOBILIZATION AND REINTEGRATION, Report No. 23869-AFR, (2002), available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDS/IB/2002/04/19/000094946_0204100401206/Rendered/PDF/multi0page.pdf. The Strategy explains:

Preliminary figures indicate that potentially 350,000 ex-combatants could be demobilized and reintegrated under the MDRP. This figure includes both ex-military and members of irregular forces. The screening of ex-combatants for war crimes would be an important activity and would be undertaken by national programs in coordination with relevant national and international authorities (for example, MONUC, the International Criminal Tribunal for Rwanda). Ex-combatants who are found to have committed war crimes would not be eligible for assistance in any national program or special project.

Id. at 20. To the author's knowledge, this screening has not been implemented.

98. For example, the thousands of trials that would need to be conducted would certainly overwhelm the justice system in many post conflict countries.

against false allegations remains. A possible solution could entail using reliable and well-established civil society groups that can verify the names on their lists, as well as collecting information from local prosecutors, court systems, and the military justice system (to the extent that such institutions and records exist) where victims may have attempted to file complaints. Many NGOs engage in rigorous data collection and could provide invaluable assistance for purposes of DDR screening.⁹⁹

Particularly because ex-combatants will challenge their identification as perpetrators, not only should the lists be highly reliable, but human rights norms may require that the ex-combatant receive an opportunity at a later stage to clear his name.¹⁰⁰ There are emerging norms in international law with regard to data collection.¹⁰¹ Moreover, the international war crimes tribunals have also developed jurisprudence concerning the right to confront witnesses.¹⁰² Finally, lustration laws have also dealt with sensitive data.¹⁰³

A second potential criticism is the argument that soldiers will not participate in a DDR program in which they will be subject to screening and possible prosecution. Such criticisms are generally misplaced. DDR offers the lure of money and skills training. Such incentives will, for most former combatants, be so great that they would be willing to risk the minute probability that they would be identified as having perpetrated a war crime. Indeed, given that

99. See Stephanie K. Wood, *A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 COLUM. J. GENDER & L. 274, 319 (2004).

100. Vetting processes, through which individuals suspected of past human rights abuses are screened from continuation in or commencement of public service jobs, raise similarly difficult issues, and most programs offer procedural protections to those screened out. See, e.g., The Secretary-General, *Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 3, 2004).

101. See, e.g., Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Data Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1326-27 (2000) (identifying ten principles to which an organization must adhere with respect to personal information).

102. See, e.g., Antonia Sherman, Note, *Sympathy for the Devil: Examining a Defendant's Right to Confront Before the International Crimes Tribunal*, 10 EMORY INT'L L. REV. 833 (1996).

103. See generally David, *supra* note 41; Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 805 (2004) ("Privacy law permits one to conceal those parts of one's past that are not of great relevance to the present; lustration law forces one to reveal those parts of one's past that are of great relevance to the present.").

most Congolese survive on less than \$2 per week, a promise of more than \$300 is a significant incentive.¹⁰⁴

A final approach would be to condition full participation in DDR programs on confessions to crimes and then reducing any subsequent sentencing, or simply requiring the combatant to testify in front of a Truth and Reconciliation Commission.¹⁰⁵ Positively, there is good reason to believe that ex-combatants would support the truth-finding process as a requirement to DDR.¹⁰⁶ Negatively, such an approach may not go far enough for many victims, thus hindering reintegration.

104. AMNESTY INT'L, DEMOCRATIC REPUBLIC OF CONGO: MASS RAPE: TIME FOR REMEDIES 29-30 (2004), available at [http://web.amnesty.org/library/pdf/AFR620182004ENGLISH/\\$File/AFR6201804.pdf](http://web.amnesty.org/library/pdf/AFR620182004ENGLISH/$File/AFR6201804.pdf) [hereinafter MASS RAPE] (noting that "[t]he vast majority of Congo's 50 million people live on around 20 US cents per person per day, and eat less than two thirds of the calories needed to maintain health").

105. Roger Duthie explains:

Another way of linking transitional justice and DDR programs is to condition benefits on cooperation with a specific justice effort. In Colombia, for example, among competing proposals for a legal framework for the demobilization of paramilitaries, Senator Piedad Cordoba's would make the provision of benefits conditional on confession of crimes before a truth commission.

DUTHIE, *supra* note 20, at 22.

106. Beth Dougherty, for example, considers a study conducted by a Sierra Leonean NGO on the views of ex-combatants toward the Sierra Leone Truth and Reconciliation Commission (SLTRC). The findings are worth quoting at length:

A majority of ex-combatants had heard about the SLTRC, supported it, and expressed a willingness to testify before it. However, the study did not determine if in testifying the ex-combatant planned to confess their own abuses or merely address events they had witnessed; in any case only 15% of those surveyed believed they had done anything wrong. The study also revealed that nearly half of the ex-combatants did not feel that they understood the SLTRC.

Concern about the SCSL [Special Court for Sierra Leone] and fears for their security (witness protection was rudimentary at best) initially kept ex-combatant participation low. But as the hearings went on, and the SCSL did not pursue those who testified, more and more ex-combatants came forward. Many ex-combatants wanted to return to their communities but were afraid of their reception; participating in the SLTRC was a means of easing the path of reintegration. In at least four districts, perpetrators (mostly RUF) [Revolutionary United Front] came forward and publicly asked forgiveness. By the end, an unprecedented 13% of individual statements came from perpetrators, and "approximately a third of those who appeared in hearings admitted to their own wrongs, often in great detail."

Beth K. Dougherty, *Searching for Answers: Sierra Leone's Truth & Reconciliation Commission*, 8 AFR. STUD. Q. 39, 48 (2004).

Whichever of the aforementioned approaches is implemented, for national healing to take root, DDR programs must incorporate a justice component.¹⁰⁷

III. GENDERED LAWS

Responding to gender issues through DDR is critical in establishing the context for gender equality.¹⁰⁸ In the short term, it provides an opportunity early in the post conflict process to focus on equity, to include women in training and community-based programs, and to screen for human rights abusers. A second gender-related aspect to post conflict reconstruction involves more long-term concerns about women's status under domestic law as enshrined in both civil and criminal law, and inscribed in cultural practices. The justice focus in large-scale conflicts and their aftermath is often on the role of international law.¹⁰⁹ This section argues for a change in focus to domestic issues. Specifically, it calls for changing the domestic law, culture, and tolerance for rape that stems from women's secondary status and archaic laws.¹¹⁰

A. *The Scope of the Problem*

The scale and scope of sexual violence against women in many contemporary international and intra-state conflicts are almost incomprehensible.¹¹¹

107. See DUTHIE, *supra* note 20, at 23.

108. UNITED NATIONS DEV. FUND FOR WOMEN (UNIFEM), ISSUE BRIEF ON DISARMAMENT, DEMOBILIZATION AND REINTEGRATION (DDR), http://www.womenwarpeace.org/issues/ddr/ddr_pfv.pdf (last visited Jan. 16, 2006). UNIFEM notes:

In order to ensure the effectiveness of peace support operations, the principles of gender equality must permeate the entire mission, at all levels, thus ensuring the participation of women and men as equal partners and beneficiaries in all aspects of the peace process — from peacekeeping, reconciliation and peace-building, towards a situation of political stability in which women and men play an equal part in the political, economic and social development of their country.

Id. at 5 (quoting the Namibia Platform to Mainstream Gender in Multidimensional Peace Operations).

109. International humanitarian law (IHL) tends to be more useful because it is generally more developed than the domestic laws of many nations emerging from conflict.

110. Berta Esperanza Hernandez-Truyol, *Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism — A Human Rights Proposal*, 17 WIS. WOMEN'S L.J. 111, 140-41 (2002) (“[L]ocally and globally women do not enjoy the universal human rights to which they are legally entitled. . . . [W]omen are a long way from being full citizens who are universally respected or heard, let alone safe.”).

111. See, e.g., U.N. OFFICE FOR THE COORD. OF HUMAN. AFFS., GENDER-BASED

In contemporary conflicts rape has come to be used as a weapon

VIOLENCE: A SILENT, VICIOUS EPIDEMIC, <http://www.irinnews.org/webspecials/GBV/> (last visited Jan. 16, 2006). The report notes:

An estimated half a million women were raped during the 1994 genocide in Rwanda. A staggering 50% of all women in Sierra Leone were subjected to sexual violence, including rape, torture and sexual slavery, according to a 2002 report by Physicians for Human Rights. In Liberia, an estimated 40 percent of all girls and women have fallen victim to abuse. During the war in Bosnia-Herzegovina in the 1990s, between 20,000 and 50,000 women were raped.

Id.

With regard to the Congolese War, a spokesperson for the U.N. World Food Programme observed, “[w]e have never come across as many victims of rape in a conflict situation” as in the Congo. *DRC Vows to Punish Rapists*, NEWS24.COM, Jan. 26, 2004, http://www.news24.com/News24/Africa/News/0,,2-11-1447_1474364,00.html (quoting Christiane Berthiaume).

A 2002 *Human Rights Watch* report on sexual violence against the women of Congo presents a harrowing picture of widespread abuse and unimaginable cruelty:

[T]here were other cases where the rapists inflicted severe injury on their victims by penetrating their vaginas with sticks or other objects or by mutilating their sexual organs with such weapons as knives or razor blades. A gynecologist said that in his many years of work he had never seen atrocities like those committed against women who had been raped whom he has treated recently. Among the cases are women whose clitoris and vagina lips had been cut off with razor blades.

HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO* 54 (2004), available at <http://www.hrw.org/reports/2002/drc/Congo0602.pdf> [hereinafter *WAR WITHIN THE WAR*].

The actual number of women subjected to gender-based violence in the Congo is not known as many attacks often occur in remote areas where it is difficult to contact victims. See PEACEWOMEN, *DRC: FOCUS ON RAMPANT RAPE, DESPITE END OF WAR* (2004), <http://www.peacewomen.org/news/DRC/Mar04/rampant.html>. Nevertheless, observers believe that, once it is finally established, the number of women subjected to sexual violence in the Congo will be much higher than the numbers in either Rwanda or Bosnia. See *id.*; see also Edith Lederer, *U.N. Report: Women Hard-Hit by Congo War*, ASSOC. PRESS, Oct. 29, 2003, <http://www.congokin.com/news/categories/society/archives/story1724.html>.

In the conflict in Sierra Leone, Amnesty International reports that between seventy-five and ninety percent of all abducted girls and young women were sexually abused during the conflict. AMNESTY INT’L, *SIERRA LEONE: RAPE AND OTHER FORMS OF SEXUAL VIOLENCE AGAINST GIRLS AND WOMEN*, <http://web.amnesty.org/library/Index/ENGAFR510352000?open&of=ENG-SLE> (last visited Jan. 16, 2006). Women and girls were forcefully abducted into combat, enduring repeated rape and forced sexual servitude (referred to as “AK-47 marriages”). WOMEN’S COMM’N FOR REFUGEE WOMEN AND CHILDREN, *DISARMAMENT, DEMOBILIZATION AND REINTEGRATION AND GENDER-BASED VIOLENCE IN SIERRA LEONE* 4 (2002) [hereinafter *COMM’N FOR REFUGEE WOMEN*]. Not only were civilians the victims of gender-based violence, so too were female soldiers, proving that joining a militia did not provide immunity from sexual violence. AMNESTY INT’L, *SIERRA LEONE: 1998 A YEAR OF ATROCITIES AGAINST CIVILIANS* (1998), available at <http://web.amnesty.org/library/Index/ENGAFR510221998?open&of=ENG-SLE>. Similarly, in its report on child soldiers in the Congo, Amnesty International found that virtually all girl soldiers had either been raped or sexually attacked by commanding officers or others in their units. AMNESTY INT’L, *DEMOCRATIC REPUBLIC OF CONGO: CHILDREN AT WAR*, para. 2.3 (2003), available at <http://www.amnesty.org/library/index/ENGAFR620342003>.

of war to terrorize and dehumanize the population.¹¹² Rape is used to establish the power of soldiers to take what they want, to punish anyone suspected of sympathizing with another faction, and to humiliate individuals and communities.¹¹³ The sexual violence against women and girls affects them physically, psychologically, economically, and socially.

The health impact of gender-based violence, is perhaps, the easiest to comprehend. Consequences range from unwanted pregnancies, miscarriages caused by the abuse, illness or death from illegal abortions,¹¹⁴ and sexually transmitted diseases, including HIV-AIDS.¹¹⁵

112. The armed conflict in Bosnia-Herzegovina of 1992-1995 represents an extreme circumstance. The systematic rape of an estimated 20,000 Muslim women by Serbian forces was used as a tool of "ethnic cleansing." See HUMAN RIGHTS WATCH, RAPE IN BOSNIA-HERCEGOVINA, <http://www.hrw.org/about/projects/womrep/General-25.htm> (last visited Jan. 16, 2006). Reports indicate that "Muslim women in Bosnia were forcibly impregnated and held in rape camps until they were too far into their pregnancies to abort the 'ethnically-cleansed' children." Tara Gingerich & Jennifer Leaning, U.S. AGENCY FOR INT'L DEV., THE USE OF RAPE AS A WEAPON OF WAR IN THE CONFLICT IN DARFUR, SUDAN 8 (2004), available at <http://www.reliefweb.int/library/documents/2004/hu-sud-31oct.pdf>.

113. See MARION PRATT & LEAH WERCHICK, U.S. AGENCY FOR INT'L DEV., DEV. FUND FOR WOMEN, SEXUAL TERRORISM: RAPE AS A WEAPON OF WAR IN EASTERN DEMOCRATIC REPUBLIC OF CONGO: AN ASSESSMENT OF PROGRAMMATIC RESPONSES TO SEXUAL VIOLENCE IN NORTH KIVU, SOUTH KIVU, MANIEMA, AND ORIENTALE PROVINCES 9 (2004), available at <http://www.peacewomen.org/resources/DRC/USAIDDCHADRC.pdf>. See also Sherrie L. Russell-Brown, *The Last Line of Defense: The Doctrine of Command Responsibility, Gender Crimes in Armed Conflict and the Kahan Report (Sabra & Shatilla)* 9 (2003), available at <http://law.bepress.com/expresso/eps/41/> ("Allowing the commission of gender crimes could also be viewed as a tactic of war, a way to demoralize, terrorize, and in the case of Bosnia and Rwanda, a way to destroy one's enemy.").

114. Because abortion is illegal or difficult to obtain in many countries emerging from conflict, women may try to arrange illegal abortions, often with disastrous consequences. See Naomi Cahn & Anne T. Goldstein, *The Constitution, Reproductive Rights, and Feminism: Roe and Its Global Impact* 6 U. PA. J. CONST. L. 695, 701 (2004). While practically no maternal deaths are attributed to unsafe abortions in the United States, unsafe abortions account for thirteen percent of maternal death in the rest of the world. *Id.* at 720.

115. See JSI RESEARCH & TRAINING INST., ASSESSMENT OF REPRODUCTIVE HEALTH IN THE DEMOCRATIC REPUBLIC OF CONGO 12 (2002), available at http://www.rhrc.org/pdf/drc_rh.pdf. The report notes:

Gang rapes by military forces, who have been shown to have higher STI and HIV infection rates than civilian populations, place women at risk for STIs. The Médecin Chef de Zone at Shabunda general hospital estimated that 80% of women treated at the hospital had STIs. According to MSF, at least one of the five women who went to the hospital in Bukavu for reconstructive surgery following a rape tested positive for HIV and was therefore refused care.

Id. (internal citations omitted).

Sexual violence also has profound psychological consequences on its victims.¹¹⁶ Victims experience insomnia, depression, post-traumatic stress disorder, and suicidal ideations.¹¹⁷ All of these symptoms are exacerbated by the unavailability of appropriate health services and make the reintegration of women into post conflict society all the more difficult.¹¹⁸ Many of these women are often frightened to report their rapes, fearing ostracism from their homes and communities. This fear is not misplaced. As Human Rights Watch notes, “[u]nmarried women and girls who became pregnant as a result of rape were far less likely to find husbands in the future and so risked remaining always on the margins of society.”¹¹⁹ Indeed, one doctor in the Congo estimated that an unmarried woman who had conceived a child by rape “would have only a 20 percent chance of being married in the future.”¹²⁰ Other young unmarried women who have conceived a child may be entirely abandoned by their families leaving them with no economic support.¹²¹ Finally, mothers themselves may reject children resulting from rape because the children are a visible and constant reminder of their abuse.¹²² In Rwanda, raped women sometimes labeled their children “little killers” while others abandoned their children or killed them.¹²³

B. International Law and Violence Against Women

116. See, e.g., UNITED NATIONS HIGH COMM’R FOR REFUGEES, SEXUAL AND GENDER-BASED VIOLENCE AGAINST REFUGEES, RETURNEES AND INTERNALLY DISPLACED PERSONS 10 (2003), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3f696bcc4>.

117. See LASHAWN R. JEFFERSON, HUMAN RIGHTS WATCH, IN WAR AS IN PEACE, <http://www.hrw.org/wr2k4/15.htm> (last visited, Jan. 16, 2006).

118. *Id.* (“Post-traumatic stress syndrome and other lasting psychological consequences of assault plague women survivors and can obstruct their full and productive reintegration into civil society.”).

119. WAR WITHIN THE WAR, *supra* note 111, at 66.

120. *Id.*

121. *Id.* at 65-66.

122. PRATT & WERCHICK, *supra* note 113, at 12. The authors explain: [U]p to 5000 children resulting from rape during the genocide in Rwanda were labeled ‘children of hate’ and ‘unwanted children.’ It is unknown how many such children there are in eastern Congo. Abortion is illegal in DRC, and the traditional capacity and willingness of Congolese families to adopt orphans or unwanted children have been extremely diminished by the current levels of poverty throughout the country. . . .

Id.

123. Emily Wax, *Rwandans Are Struggling to Love Children of Hate*, WASH. POST, Mar. 28, 2004 at A1.

The availability of international tribunals to impose criminal liability for violence against women symbolically shows the horrendous nature of these crimes.¹²⁴ Nonetheless, the recognition of gender-based violence by international tribunals is recent.¹²⁵ The new ICC statute,¹²⁶ which has specific provisions dealing with gender-based violence including the creation of a victim-witness unit,¹²⁷ is an example of the development of a new approach to sexual violence.¹²⁸ There are, however, limitations to this approach.¹²⁹

Recommendations have been made to more efficiently employ both the domestic and international justice systems to end the impunity that has protected rapists in the Congo.¹³⁰ Overall, these

124. The effectiveness of these international tribunals, however, remains questionable. As Jose Alvarez suggests with respect to international dispute settlement, this “requires a meaningful, long-term political commitment involving substantial resources and extensive efforts to provide transparency that, at least with respect to international tribunals, is not now apparent.” Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 *TEX. INT’L L.J.* 405, 412 (2003); Diane Orentlicher, *Judging Global Justice: Assessing the International Criminal Court*, 21 *WIS. INT’L L.J.* 495, 500-03 (2003) (acknowledging the many challenges and weaknesses of international tribunals, such as their failure to deter crimes).

125. See, e.g., Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 *AM J. INT’L L.* 97, 97 (1999).

126. Rome Statute of the International Criminal Court, July 17, 1998, 2187 *U.N.T.S.* 90, 37 *I.L.M.* 1002 (1998), available at www.un.org/law/icc/statute/rome.htm [hereinafter Rome Statute].

127. *Id.* at art. 43(6) (“This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.”).

128. E.g., Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 *BROWN J. WORLD AFF.* 65, 69-74 (1999) (providing a detailed account of the statute’s provisions on crimes of sexual violence); Jocelyn Campanaro, Note, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 *GEO. L.J.* 2557 (2001).

129. See, e.g., Rana Lehr-Lehnardt, Note, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 *BYU J. PUB. L.* 317, 345-46 (2002). Lehr-Lehnardt notes:

Rape still cannot be prosecuted as a crime in and of itself — as rape. Instead, it must be prosecuted as a subset of a war crime, a crime against humanity or genocide. Additional reasons why this step forward can arguably be classified as only a small step are because perpetrators of violence against women continue to serve relatively short sentences, because the ICC did not provide for means by which to deter future aggressors, and because protection for witnesses and victims is not yet adequate.

130. See, e.g., HUMAN RIGHTS WATCH, *DEMOCRATIC REPUBLIC OF THE CONGO: CONFRONTING IMPUNITY 2* (2004), available at http://hrw.org/english/docs/2004/02/02/congo7230_txt.pdf [hereinafter CONFRONTING IMPUNITY] (calling for “the creation and financial support of measures to enable adequate investigation and prosecution of a large number of these crimes”). The NGO has also recommended the development of a

recommendations contemplate a justice and parliamentary system that would be sensitive to the needs of victims, while ending the impunity that has protected perpetrators.¹³¹ Others have suggested a regional tribunal that would draw judges from the Congo as well as from other nations in the region.¹³² Such “hybrid tribunals” combine local participation with the legitimacy of international jurists and support.¹³³

States can be held liable for sexual violence under the laws of war pursuant to IHL.¹³⁴ IHL applies after armed conflict has begun and has traditionally accorded minimal attention to sexual violence.¹³⁵ International human rights law also provides protection against sexual violence. For example, the Convention on the Elimination of All Forms of Discrimination Against Women¹³⁶ and the International Covenant on Civil and Political Rights,¹³⁷ both

fair and transparent Truth and Reconciliation Commission to handle some of the crimes committed during the war. *Id.*

131. *See generally id.*

132. *See* William Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 *TEX. INT'L L. J.* 729, 731 (2004) (“[P]ursuant to the Rome Statute, the ICC can sit regionally. Likewise, a preference could be given to regional courts exercising universal jurisdiction, or semi-internationalized courts could draw heavily on judges and procedures from within their own region.”).

133. *See* Kelly D. Askin, *The Quest for Post-Conflict Gender Justice*, 41 *COLUM. J. TRANSNAT'L L.* 509, 521 (2003) (“Hybrid tribunals have the advantage of including a mixture of international and local participants redressing crimes in the state where the crimes are committed. Thus, there is typically local ownership and participation, resulting in an improvement in the domestic judicial system and a greater awareness of judicial efforts by the victimized community.”).

134. *See, e.g.*, Permanent Ct. of Arbitration (PCA), *Eritrea-Ethiopia Claims Commission: Partial Award, Central Front Ethiopia’s Claim 2, between the Fed. Democratic Rep. of Ethiopia and the State of Eritrea* 30(7) (Apr. 28, 2004), *available at* <http://www.asil.org/ilib/ilib0708.htm#j1> (finding liability of Ethiopia for “failing to take effective measures to prevent rape of women by its soldiers. . .”).

Unlike states, individuals can be held liable for both “crimes against humanity” and “war crimes”. For definitions of the two terms, see Rome Statute, *supra* note 126, at arts. 7, 8.

135. One exception is the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, which prohibits violence against civilians including “outrages upon personal dignity.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 *U.S.T.* 3516; 75 *U.N.T.S.* 287, art. 3(1)(c) [hereinafter Geneva IV].

136. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 *U.N.T.S.* 13; 19 *I.L.M.* 33 (1980), art. 2(b), (c) (holding state parties will “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”).

137. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 *U.N.T.S.* 171; S. Exec. Doc. E, 95-2 (1978); 6 *I.L.M.* 368 (1967), art. 3 (“The States Parties to the

guarantee the equal rights of men and women. The United Nation's 1993 Declaration on the Elimination of Violence Against Women defines gender-based violence broadly to include any gender-based act that causes physical, sexual, or psychological harm.¹³⁸

During the past decade, sexual violence against women has begun to be recognized as a war crime,¹³⁹ a crime against humanity,¹⁴⁰ and an instrument of genocide.¹⁴¹ War crimes now include "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and certain other forms of sexual violence of comparable severity."¹⁴² The first judgment issued by an

present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.").

138. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993), art. 1 ("For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.").

139. By 1993, for example, one scholar was able to write, "[i]ndeed, under the weight of the events in former Yugoslavia, the hesitation to recognize that rape can be a war crime or a grave breach has already begun to dissipate." Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426 (1993).

140. See, e.g., *Bosnia-Herzegovina: Foca Verdict — Rape and Sexual Enslavement Are Crimes Against Humanity*, AMNESTY INT'L, Feb. 22, 2001, <http://web.amnesty.org/library/Index/ENGEUR630042001?open&of=ENG-BIH> ("Today's verdict by the International Criminal Tribunal for the former Yugoslavia that rape and sexual enslavement are crimes against humanity, challenges widespread acceptance that the torture of women is an intrinsic part of war. . .").

141. When it comes to whether rape can constitute genocide, there are complicated issues. Steven Ratner and Jason Abrams observe that there have been questions about "whether rape committed in the Balkan War was genocidal, especially in light of the hope expressed by some Serb attackers that they would make their victims give birth to Serb babies." STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 42 (1998). Ratner and Abrams conclude that the characterization will ultimately depend upon the attackers' intent. *Id.* They explain:

Where an attacker rapes a victim solely as an act of vengeance or hostility toward the victim, the rape is not genocidal, even if the attacker has selected the victim on the basis of her religion or ethnicity. On the other hand, if evidence suggests that the attacker committed the rape as part of an effort to drive members of the victim's group into conditions which the attacker hopes will lead to their deaths, a finding of genocide becomes more plausible.

Id. But see *infra* note 160 and accompanying text.

142. See AMNESTY INT'L, IT'S IN OUR HANDS: STOP VIOLENCE AGAINST WOMEN, 77 (2004), available at [http://web.amnesty.org/web/web.nsf/8bad1ff50703146980256e32003c42f0/316e14580e57b88680256ea90037305a/\\$FILE/SVAW%20report%20ENGLISH.pdf](http://web.amnesty.org/web/web.nsf/8bad1ff50703146980256e32003c42f0/316e14580e57b88680256ea90037305a/$FILE/SVAW%20report%20ENGLISH.pdf). See also Rome Statute, *supra* note 126, at arts. 7, 8.

The changing norms of international law result, in part, from strong advocacy by women's groups. See, e.g., Askin, *supra* note 1, at 347. As Askin notes:

[I]ndefatigable efforts by . . . organizations working alongside or under the . . . Women's Caucus for Gender Justice in the ICC . . . that secured the

international tribunal recognizing rape as a war crime occurred in the monumental case against Jean-Paul Akayesu, a former mayor in Rwanda by the ICTR.¹⁴³ International tribunals like the ICTR serve to place blame at the individual rather than the collective level.¹⁴⁴ Such trials can also serve to dramatically illustrate that there is no impunity for sexual violence.¹⁴⁵ Nonetheless, such tribunals operate with a significant limitation; under international law, rape can only be prosecuted when it can be connected with the intention of assaulting a community.¹⁴⁶

C. Additional Means of Justice

In the United States, advocates have succeeded in strengthening rape laws over the past twenty-five years by, for example, abolishing the exceptions for marital rape, enacting rape shield

inclusion of rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization, sex trafficking, and other crimes of sexual violence within the war crimes and crimes against humanity provisions of the ICC Statute.

143. *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Sentence (Oct. 2, 1998), available at <http://65.18.216.88/ENGLISH/cases/Akayesu/judgement/ak81002e.html> (finding Akayesu guilty of failing to stop rape as a crime against humanity by his subordinates). Askin notes the significance of the Akayesu judgment:

The Judgement carries monumental legal significance: It concluded that rape and other forms of sexual violence were used as instruments of genocide, and also the crimes formed part of a widespread and systematic attack directed against civilians, constituting crimes against humanity. This was the first ever conviction of either genocide or crimes against humanity for sexual violence. The Trial Chamber also articulated the seminal definitions of rape and sexual violence under international law, and recognized forced nudity as a form of sexual violence constituting inhumane acts as crimes against humanity.

Askin, *supra* note 1, at 318.

144. See Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2033 (1998) ("With respect to the Balkans and Rwanda, advocates of these prosecutions start from the premise that such trials 'assign guilt for war crimes to the individual perpetrators . . . rather than allowing blame to fall on entire groups and nations.'").

145. See Mark A. Drumbl, *Punishment, Post Genocide: From Guilt to Shame*, 75 N.Y.U.L. REV. 1221, 1277-78 (2000) ("[T]rials may have significant declaratory values. Trials may set standards, codify legal principles and create precedent.").

146. As Hilary Charlesworth explains:

The emphasis on the harm to the Tutsi people as a whole is, of course, required by the international definition of genocide, and the *Akayesu* decision on this point simply illustrates the inability of the law to properly name what is at stake: rape is wrong, not because it is a crime of violence against women and a manifestation of male dominance, but because it is an assault on a community defined only by its racial, religious, national or ethnic composition.

Charlesworth, *supra* note 2, at 387 (internal citations omitted).

laws, and increasing the sentences for rapists.¹⁴⁷ Yet these reforms have had limited impact on the rates of rape reporting, prosecution, or conviction.¹⁴⁸ As advocates have come to realize, one of the most important factors in impacting rape prevalence is the cultural attitudes which the community holds toward rape.¹⁴⁹ This statement is also true in the international arena. Although international criminal tribunals do not necessarily deter future crimes, they help shape cultural attitudes by holding perpetrators accountable and by serving as a vivid reminder of the conflict's destruction.¹⁵⁰

The purpose of employing an international tribunal is designed to result in national and international attention and public accountability, rather than treating sexual violence as a more private matter to be resolved locally.¹⁵¹ Some international instruments, such as truth and reconciliation commissions, also have the advantage of healing a nation without prosecution, the so-called "forgive and forget" approach.¹⁵²

D. The Need for Domestic Reforms Regarding Women's Rights and Status

This section focuses on domestic rape law, using, as an example, the rape law of the DRC. Many third world nations emerging from conflict retain criminal codes modeled on colonial law.¹⁵³ In these societies, as in the DRC, domestic rape law is

147. Mary P. Koss et al., *Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable*, in *SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT* 384, 387 (Robert A. Prentky et al. eds., 2003).

148. *Id.* Similar efforts in the domestic violence context have had little impact on lowering its prevalence as well. See Hopkins et al., *supra* note 24, at 310.

149. See, e.g., Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 840 (1999).

150. Martha Minow, *Memory and Hate: Are There Lessons from Around the World?*, in *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 2* (Nancy Rosenblum & Martha Minow eds., 2002) ("[T]he tribunals and their work offer rituals of accountability, defying impunity and public acknowledgment, defying forced forgetting. International tribunals . . . also remind bystanders to take action to prevent the circumstances in which tyrants mobilize ordinary people to destroy others.").

151. In the United States, women's issues typically have been considered private matters. See Naomi Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1100 (1994).

152. U.S. INST. OF PEACE, *RETHINKING TRUTH AND RECONCILIATION COMMISSION: LESSONS FROM SIERRA LEONE 1* (2005), available at <http://www.usip.org/pubs/special-reports/sr130.pdf>.

153. Zambia, Botswana, South Africa, Namibia, and Zimbabwe all have their penal codes concerning rape drawn from British colonial law. See HUMAN RIGHTS WATCH, *MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN*

inadequate as it defines rape narrowly and fails to cover vaginal penetration other than by a penis.¹⁵⁴ Nor do the definitions of rape usually cover anal penetration of a man.¹⁵⁵

Formulating a model rape statute for post conflict countries requires provisions covering the crime of rape when it occurs both within and outside the conflict setting. As the country moves forward, it should redefine rape law so that it accomplishes the three goals of criminalizing conflict conduct, deterring and punishing prospective rapes, and promoting gender equity.

1. *Developing a Model Statute*

SOUTHERN AFRICA 281 (2003), available at <http://hrw.org/reports/2003/safrica/safriglhr0303.pdf> ("Laws against rape are a major social and political issue in southern Africa, amid the burgeoning incidence of sexual violence in the region. Colonial law gave successor states a heritage of laws with inexact definitions and inappropriate scope, which have provided only limited tools to counter the crisis.") [hereinafter MORE THAN A NAME].

Pakistan's criminal code is largely retained from its colonial period, for example. See HUMAN RIGHTS WATCH, PRISON BOUND: THE DENIAL OF JUVENILE JUSTICE IN PAKISTAN ch. I (1999), <http://www.hrw.org/reports/1999/pakistan2/> ("A legacy of British colonial administration . . . , the *jirgas* [tribal courts] conduct trials without regard to due process guarantees, such as the right to retain counsel, present evidence, or cross-examine witnesses."). Bangladesh and India also have penal codes against homosexuality originating from the British colonial law. See HUMAN RIGHTS WATCH, RAVAGING THE VULNERABLE: ABUSES AGAINST PERSONS AT HIGH RISK OF HIV INFECTION IN BANGLADESH 38 (2003), available at <http://www.hrw.org/reports/2003/bangladesh0803/bangladesh0803.pdf> ("An old colonial law against 'carnal intercourse' is interpreted to criminalize men who have sex with men.").

154. CONFRONTING IMPUNITY, *supra* note 130, at 7-8 ("The situation in the DRC is particularly complicated as the rape law excludes a number of sexual and other gender-based crimes that have frequently occurred in the DRC, for example bodily penetration with an object."). See also MORE THAN A NAME, *supra* note 153, at 185 (noting that in South Africa "rape is defined as non-consensual penetration of a vagina by a penis. Other forms of rape . . . would be charged only as 'indecent assault,' which carries a lower penalty").

By contrast, the Netherlands is often cited for its exemplary rape law. Section 242 of the Dutch Criminal Code provides:

He who by means of violence or another fact or by threats with violence or another act compels another person to undergo acts consisting or including sexual penetration of the body, will be punished as guilty of rape with imprisonment of twelve years as a maximum or a fine of the fifth category.

Wetboek van Strafrecht (Criminal Code) § 242 SR (Neth.), available at <http://www.actumail.nl/sexoffense.htm>.

155. MASS RAPE, *supra* note 104, at 16 ("Moreover, the rape of a man is not included in the legal definition of rape. Congolese law describes forced anal sex by one man on another man as indecent assault and not rape.").

In developing a model statute, one would do well to look to the ICTR, as it has provided the widest definition of rape in international law.¹⁵⁶ In *Akayesu*, the ICTR defined rape as:

[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed: (a) as part of a wide spread or systematic attack; (b) on a civilian population; (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.¹⁵⁷

The ICTR further clarified rape to include “acts which involve the insertion of objects and or the use of bodily orifices not considered to be intrinsically sexual.”¹⁵⁸

Similarly, the ICTY used broad language to describe rape in *Prosecutor v. Delalic*, in which a Serbian prison camp guard was charged with failing to prevent subordinates from committing war crimes.¹⁵⁹ The ICTY expressed agreement with the ICTR’s reasoning that rape is a form of both physical and mental violence and in the case at bar, constituted torture.¹⁶⁰

156. WOMEN FOR WOMEN INT’L, RAPE IN WAR, <http://www.womenforwomen.org/rarrape.html> (last visited Jan. 3, 2006). Nonetheless, like the ICTY and the ICC, because of its jurisdictional mandates, the ICTR’s statute’s references to rape are limited to listing rape as a crime against humanity and/or a war crime.

157. *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 598 (Sept. 2, 1998), available at <http://65.18.216.88/default.htm>.

Of particular significance is the ICTR’s finding that the systematic rape of Tutsi women in Rwanda constituted genocide. *Id.* at ¶ 731 (“These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”).

158. *Id.* at ¶ 596.

159. Although the prosecution “submitted a documentation . . . finding that Zejnel Delalic had control over the Celebici camp and was responsible for everything that went on in that camp’ he was acquitted of all charges.” Vera Raskov, *Delalic’s Acquittal Closes the Path to Izetbegovic*, SERBIAINFO, Jan. 25, 1999, <http://www.serbia-info.com/news/1999-01/25/8405.html>. See also *Prosecutor v. Zejnil Delalic (a/k/a “Pavo”)*, Case No. IT-96-21-A, Judgment, Procedural Background, Feb. 20, 2001, available at <http://www.un.org/icty/Supplement/supp23-e/index.htm> (“The Trial Chamber found Zejnil Delalic not guilty on all counts on the ground that he did not have sufficient command and control over the Celebici prison-camp and its guards to be found criminally responsible as a superior for the crimes they committed in the camp.”).

160. *Prosecutor v. Delalic*, Case No. IT-96-21-A, at ¶ 488 (“Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention.”).

2. *Changing Existing Law*

As countries transition from conflict to peace, sexual violence may continue. For example, the systematic sexual abuse of Congolese women continues.¹⁶¹ One NGO reported that in October 2004, eight to ten women were raped daily in Bunia, the main city in the resource-rich Ituri province.¹⁶² Drastically reducing the crime of sexual violence in post conflict countries takes more than merely revising the criminal code.¹⁶³ As rape advocates in the United States have learned, equally as important as revising the law is changing the cultural attitudes a community has toward rape.¹⁶⁴ Until women emerge from the second class status they have been forced to assume in the DRC, the most progressive rape laws in the world will not stop sexual violence against women there. As Human Rights Watch explained in a report on sexual violence in the DRC:

The inadequacies of the rape law reflect traditional notions of rape, especially the weak legal and social status of women in Congo. This second-class status of women is reflected throughout Congolese law. For instance, the Congolese Family Code defines the husband as the head of the household and requires his wife to obey him. The women also has to move wherever the husband chooses to live, and has to seek her husband's authorization to go to court. These laws violate international standards of equality between women and men.¹⁶⁵

Broadly, two sets of interrelated strategies can be used to change the social and cultural climate in a country to improve governance and responsiveness to gender. First, multilateral

161. *See generally* SEEKING JUSTICE, *supra* note 31.

162. *Id.* at 8-9.

163. Newly drafted criminal codes should be expanded to include different forms of sexual violence. For example, three provisions could be added to the Congolese Criminal Code. First, the code must be broadened to cover the insertion of objects into anyone else's vagina, anus, or mouth. *See id.* at 29. Second, Congolese rape law currently allows the victim's "loose morals" to be considered in the determination of whether a criminal act has been perpetrated. *See id.* The code should be revised to include a Congolese rape shield law. Third, the code should criminalize marital rape. In neighboring Uganda for example, women's groups have recently been advocating for enactment of a new Domestic Relations bill, which would criminalize marital rape. *See* HUMAN RIGHTS WATCH, UGANDA: DOMESTIC RELATIONS BILL WOULD SAVE LIVES, <http://hrw.org/english/docs/2005/05/31/uganda11051.htm> (last visited Jan. 16, 2006).

164. *See supra* note 149 and accompanying text.

165. SEEKING JUSTICE, *supra* note 31, at 27 (quoting Code Zairois de la Famille, arts. 444, 448, and 454).

institutions, bilateral aid agencies, and NGOs can exert pressure on the national government. Second, indigenous NGOs, individuals, and responsible governmental officials can pressure institutions from within the country (often with external support). Although international organizations have a wealth of comparative experiences for potential models, indigenous organizations have greater expertise with local models and with developing programs that work within their communities.¹⁶⁶

As the Congo is currently undergoing a complex post conflict reconstruction and attempting the difficult transition to a viable democracy, there are multiple opportunities for changing the legal system. Democratization projects typically involve improving civil society organizations, creating public consciousness about democracy, and developing the electoral process.¹⁶⁷ Various NGOs have also organized workshops to discuss legal reform, involving civil society institutions, human rights organizations, and representatives from local and national government.¹⁶⁸ As a result, the DRC legislature has before it various suggestions that would conform the Congolese penal code to international law on war crimes and rape.¹⁶⁹ Much of the legal reform is focused on ending impunity for perpetrators, but reforms that would help victims include improving their status as full citizens, legalizing abortions (at a minimum for cases of rape),¹⁷⁰ and protecting the confidentiality of information that survivors provide to medical and psychological care providers.¹⁷¹

166. The World Bank recently noted, "most lessons and best practices are derived from international judicial bodies and conventions." BOUTA ET AL., *supra* note 16, at 87. Although it is true that international conventions and courts have developed substantial expertise in the context of integrating gender into accountability, indigenous organizations should not be overlooked as they have developed their own models that are locally-sensitive.

167. Susan Hirsch, *The Power of Participation: Language and Gender in Tanzanian Law Reform Campaigns*, 49 AFRICA TODAY 51, 73 n.1 (2002).

168. Numerous organizations, such as Synergie des Femmes pour les Victimes des Violences Sexuelles, Coalition Contre Les Violences Sexuelles en Republique Democratique du Congo, and Global Rights (formerly the International Human Rights Law Group) are involved in this issue.

169. Given that the Congo is already a party to the relevant international conventions, these laws simply would conform domestic law to these instruments.

170. See, e.g., HUMAN RIGHTS WATCH, HELP FOR THE VICTIMS n.164 (2005), http://hrw.org/reports/2005/drc0305/8.htm#_ftn164 (last visited Jan. 16, 2006) ("In Congo, abortion is outlawed except when a doctor considers that the pregnancy could be fatal for the mother.").

171. SEEKING JUSTICE, *supra* note 31, at 5 ("[T]he Congolese Criminal Code [fails] to provide specific protective measures to victims of crimes of sexual violence, such as ensuring confidentiality of victims and witnesses").

3. *Implementation*

After a law on sexual violence has been changed, community education becomes critical to informing victims about their new rights and remedies. Encouraging victims to explore formal justice proceedings requires that they have sufficient information about the adjudicatory process and their role in that process, and that the law criminalizes the implicated behavior. In a country such as the DRC, where the adult illiteracy rate is approximately forty-five percent for women,¹⁷² and forty percent of school-age children do not attend primary school,¹⁷³ written materials must be supplemented with counseling and media broadcasts. In such an effort, churches can be used to disseminate materials, information can be provided in birthing centers, and peer-to-peer counseling can be employed in educating women about their new rights.¹⁷⁴ Several NGOs have also developed “know your rights” campaigns, which provide information about what women can do to report crimes and seek justice.¹⁷⁵

a. Gender-Sensitive Support

Providing funding to legal clinics and establishing safe houses will also increase the utility of newly-enacted laws on sexual violence. In an innovative program, the World Bank supported legal aid clinics for poor women in Ecuador as part of a larger project to

172. *See supra* note 56.

173. GLOBAL ISSUES, GEOPOLITICS, CONFLICTS IN AFRICA, DRC, <http://www.globalissues.org/Geopolitics/Africa/DRC.asp> (last visited Jan. 16, 2006).

174. The type of counseling will vary; some women will not want any while others will only be comfortable with a more traditional practice. As Beth Vann warns, “Western talk-therapy models of counseling are unfamiliar to clients in most displaced communities, and the appropriateness of using this type of service should be carefully examined.” BETH VANN, REPROD. HEALTH FOR REFUGEES CONSORTIUM, GENDER-BASED VIOLENCE: EMERGING ISSUES IN PROGRAMS SERVING DISPLACED POPULATIONS 72 (2002), available at http://www.rhrc.org/pdf/gbv_vann.pdf.

The author has visited centers for street children in Kinshasa, Congo, which have little artwork except for a poster on avoiding pregnancy. Similar posters could be developed on sexual violence. *See, e.g.*, HUMAN RIGHTS WATCH, POLICY PARALYSIS: A CALL FOR ACTION ON HIV/AIDS-RELATED HUMAN RIGHTS ABUSES AGAINST WOMEN AND GIRLS IN AFRICA 86 (2003), available at <http://www.hrw.org/reports/2003/africa1203/africa1203.pdf> [hereinafter POLICY PARALYSIS] (stressing “nationwide awareness campaigns” to “ensure basic protection against sexual violence and abuse”).

175. *See, e.g.*, AMNESTY INT’L, WOMEN’S RIGHTS ARE HUMAN RIGHTS THE STRUGGLE PERSISTS: KNOW YOUR RIGHTS, <http://www.amnesty.org/ailib/intcam/women/2000/rights.html> (last visited Jan. 16, 2006); WOMEN’S AID ORG., KNOW YOUR RIGHTS: RIGHT TO VOTE, http://www.wao.org.my/news/20030101knowrights_vote.htm (last visited Jan. 16, 2006).

reform the judicial system.¹⁷⁶ The project evaluation showed that in comparison to a comparable sample of non-clients, women who had received representation through the clinics were more likely to receive child support awards, were less likely to experience severe domestic violence after separation, were more likely to send their children to school, and were more likely to view the judicial system positively.¹⁷⁷ In focus groups, women explained that the primary obstacle to using the legal system were their perceptions that it was costly, corrupt, discriminatory, and not transparent.¹⁷⁸ The legal aid clinic, however, empowered them to face the system, and clients experienced an increased sense of self-worth as a result of their access to the legal system.¹⁷⁹

As many women also need protection from their abusers before, during, and after their experiences with the legal system, safe houses also become a necessity. They need not be formal structures, as they are in the United States, but could take the form of protection by a trusted member of the community or coordinating the housing situations of several women so that they can live together.

b. Gender-Sensitive Policies Within the Legal System

Even if rape laws are rewritten, the national justice system is entirely restructured, and women have the courage to use the system, there are still a series of reforms that must be implemented so as to ensure that the legal system is capable of handling such cases. The most basic requirement is development of policies and protocols on gender-based violence crimes. First, judges and court staff will need training on issues of sexual violence to include the psychological implications of the crimes.¹⁸⁰

Second, victims and witnesses will need to feel a sense of security heretofore lacking. Their identities must be protected from the public, and they may require special security needs such as safe

176. THE WORLD BANK, IMPACT OF LEGAL AID: ECUADOR x (2003), available at <http://www4.worldbank.org/legal/publications/LegalAid.pdf>.

177. Bruce M. Owen & Jorge Portillo, *Legal Reform, Externalities and Economic Development: Measuring the Impact of Legal Aid on Poor Women in Ecuador* 26, 28, 39, 44 (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 02-32, 2003), available at <http://scid.stanford.edu/events/Bruce%20Paper.pdf>. The five-year judicial reform project cost \$10.6 million and the three legal clinics received \$400,000 over a four-year period. *Id.* at 9.

178. *Id.* at 26, 47.

179. *Id.* at 47, 49.

180. POLICY PARALYSIS, *supra* note 174, at 64.

houses to ensure their physical safety.¹⁸¹ After some rape survivors offered testimony to the ICTR, for example, they received anonymous threats and other forms of harassment upon returning home.¹⁸² In some cases they even learned that members of their community (in some cases the perpetrators themselves) had detailed reports of their testimony.¹⁸³ Post conflict laws, therefore, should include comparable provisions to rape shield laws protecting witnesses or safeguarding confidentiality.¹⁸⁴

Third, judicial systems should also recruit more women as investigators, prosecutors, and judges as many women from traditional societies may feel uncomfortable discussing sexual violence with a man.¹⁸⁵ Women will not necessarily be better than men in hearing and investigating these cases, but gender balance may make victims feel more comfortable in reporting and discussing the violence and may provide alternative perspectives.¹⁸⁶ Indeed, survivors of the Rwandan genocide have reported that they would have been more likely to discuss the violence perpetrated against them had the investigations been conducted by women.¹⁸⁷

Finally, mobile investigative units could collect evidence at the victim's location and could begin operating more quickly than formally established prosecutors' offices.¹⁸⁸ So long as the units did

181. These safe houses would be comparable to battered women's shelters, providing shelter, food, and support in a confidential location.

182. JEFFERSON, *supra* note 117.

183. *Id.*

184. WAR WITHIN THE WAR, *supra* note 111, at 81-82. Several U.S. states, for example, have rape shield statutes that require hearings on possible inadmissible evidence (such as sexual history) to be held *in camera*, away from the press and the public. *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-407(2)(c) (2005).

185. *See, e.g.*, Askin, *supra* note 133, at 517-18.

186. HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 4 (1996), <http://hrw.org/reports/1996/Rwanda.htm> ("Many women interviewed by our team, composed solely of women, indicated that they would report rape to a female investigator, but not to a man.").

187. *See* Wood, *supra* note 99, at 318.

188. CONFRONTING IMPUNITY, *supra* note 130, at 8 ("Forming a mobile investigative unit would be a discrete measure that could be undertaken relatively quickly. It would represent a significant step forward in delivering justice for the most serious crimes under international law.").

Some activists have gone further than mobile investigative units to suggest mobile courts, which would render judgments on site. *See, e.g.*, Zoom. . . *Mobile Courts in DR Congo*, AVOCATS SANS FRONTIÈRES (Newsletter 2005-I), Jan. 2005, available at http://www.asf.be/EN/ENnews/Newsletter_2004_VII_EN.htm. Other organizations have expressed concerns with such courts. As Pratt and Werchick note for example:

Members of the international community have discussed the idea of "mobile courts" to fill the gap in the judiciary process. But interviewees in the eastern provinces felt strongly felt [sic] that such an approach would be inadvisable. First, without added long-term security measures, it would

not violate the victims' confidentiality and did not lead perpetrators to believe that the departure of the team implied the departure of accountability, mobile teams could help establish a base for prosecutions and provide visible evidence of change in prosecuting procedures.

4. What Difference Does It Make: Why Change Domestic Rape Laws?

Even in the United States, rape victims are often reluctant to pursue litigation.¹⁸⁹ The difficulties of prosecuting a rape case in a the United States, where there are functioning police departments and forensic units, are magnified in a country without these resources.¹⁹⁰ Even if local courts are capable of prosecuting rape trials, retributive justice may not always be the best solution, as it makes resettlement and reintegration more difficult.¹⁹¹

Moreover, domestic law covers individual crimes, rather than crimes against humanity. Prosecuting specific individuals for specific acts does not encompass and publicize the systematic nature and the gravity of the crimes committed. In many cases it

create risks for reprisals when the court leaves. Second, there would be a risk of "mobile" judgments not being accepted by traditional leaders. Last, judgments would risk being overturned when a new national justice system finally is put in place.

PRATT & WERCHICK, *supra* note 113, at 18.

189. See, e.g., PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>. See also Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOL. 3, 5 (2000), available at <http://restoreprogram.publichealth.arizona.edu/research/Koss%202000%20Blame,%20Shame,%20and%20Community.pdf> ("Official justice department estimates put the reporting rate at 36%.")

190. See MASS RAPE, *supra* note 104, at 36-37.

191. See MINOW, *supra* note 35, at 121 ("[I]f the longer term goals include avoiding cycles of revenge, social reintegration of at least lower-level perpetrators should be pursued. In many circumstances, demonizing all on 'that side' means demonizing large segments of the society. . . .").

Mark Drumbl eloquently notes the dilemma:

Assuming that it is the act of deliberation that generates national reconciliation, the question arises whether adversarial trials constitute the most effective vehicle for encouraging deliberation. If trials target a select few individuals (the approach of the ICTR), then they may be logistically feasible, but the deliberations may be too contained; if trials target a large number of individuals (the approach of the Rwandan domestic proceedings), then they may be infeasible logistically and result in massive incapacitation.

Drumbl, *supra* note 145, at 1280.

may also be impossible to convict high-level commanders based on command responsibility.¹⁹²

Notwithstanding these problems, domestic rape law remains useful for holding both low-level commanders and individual combatants who committed crimes of sexual violence accountable. Very few ex-combatants will be prosecuted by an international court, which must, based on limited resources, focus on the most egregious and widespread actors. Consequently, strong domestic rape law for wartime rape can be useful in prosecuting such individuals.¹⁹³ Even more importantly in the post conflict context, strengthening rape laws is one step towards gender equity and may encourage more women to report rapes committed against them.¹⁹⁴

Amnesty International has characterized the eastern half of the Congo as “a widely lawless region, characterized by the almost total degeneration of the Congolese judicial system.”¹⁹⁵ Nonetheless, the same report notes that the international community, particularly the EU, has helped restore judicial capacity in Bunia, one of the towns at the center of conflict in the Eastern Congo.¹⁹⁶ As a result of such support, by the end of the summer of 2004, the judiciary had begun investigations in 440 cases and issued judgments in 42

192. See FEDERICO BORELLO, INT’L CTR. FOR TRANSNATIONAL JUSTICE, A FIRST FEW STEPS: THE LONG ROAD TO A JUST PEACE IN THE DEMOCRATIC REPUBLIC OF CONGO iv (2004), available at <http://www.ictj.org/downloads/ICTJ.DRC.Eng.pdf>.

193. *Id.* at 21.

194. Evidence in the U.S. on the impact of rape law reform is ambiguous; however, some studies show an increase in reporting and arrest resulting from liberalization of rape laws. See, e.g., Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN’S L.J. 72, 83-85 (2001). Contra Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Law Reform*, 38 SUFFOLK U. L. REV. 467, 467-68 (2005) (“Few commentators can point to any data suggesting that criminal rape reform laws have deterred the commission of rape, increased its prosecution, or increased conviction rates.”).

195. See MASS RAPE, *supra* note 104, at 36-37. In detailing the extraordinary inadequacies of the Congolese judicial system, the report goes on to note:

In most provinces, civil courts do not function properly, and in many areas there are no judicial personnel, lawyers, civilian police officers or detectives. Judicial institutions are starved of financial resources and even of basic legal texts, including national legal codes. Judicial personnel have not been paid for several years and have no incentive to carry out their duties. Magistrates have rarely had any training in international law and human rights. Office materials and stationery are in short supply and buildings, including prisons and detention facilities, are dilapidated. . . . The judiciary is widely un-independent throughout the country, controlled or influenced by the political and military authorities, including the *de facto* authority of armed groups.

Id. at 37.

196. BORELLO, *supra* note 192, at 27.

cases.¹⁹⁷ The major challenge in Bunia, and elsewhere, remains the grossly inadequate security situation.¹⁹⁸

E. Rape Laws and Gender Equity

Calls to reform the cultural tolerance and law of rape may conflict with traditional practices and challenge historical views of women. Customary law practices such as a rape perpetrator paying the victim's family honor damage or marrying the victim remains strong in many sub-Saharan Africa.¹⁹⁹ Such practices stem from a belief that rape is a crime committed against a family's honor rather than against the victim.²⁰⁰ If new rape laws are to prove effective, cultural understandings such as these must be changed.²⁰¹ Governmental entities and NGOs have the ability of changing culture through a variety of mechanisms. First, the government must ensure that the new laws are widely distributed and translated into the different languages of the country.²⁰² Second, church groups and other civil society institutions can provide information and counseling, as well as legal support. Third, popular culture, including music and street theater, is extremely persuasive in influencing attitudes, and should be enlisted in changing sexist cultural values.²⁰³

197. *Id.*

198. *Id.* at 28 ("Victims and witnesses are reluctant to testify even in ordinary crime cases, let alone in serious human rights violations involving powerful militia members. Retaliation is a concrete possibility (some even say probability). . . .").

199. See, e.g., Tigist Hailu, *Formal and Informal Responses to the Recurring Forms of Violence Against Women in Ethiopia*, <http://www.preventgbvafrica.org/images/publications/research/vawethiopia.hailu.pdf> (last visited Jan. 14, 2006).

200. *Id.* ("In the first place cases of abduction and rape are wrongly perceived as cases affecting family honour and public moral. Their deadly effects on the well being of the female victim are not clearly recognized.")

201. As Abby Morrow Richardson notes, "[l]aws are only effective if enforced; enforcement is possible only with understanding and acceptance; and respect for the law is secured only when the people believe in its necessity." Abby Morrow Richardson, *Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform*, 11 HUM. RTS. BRIEF 19, 22 (2004).

Some of the newer approaches to justice, namely restorative justice and social services justice, also emphasize the importance of transforming the culture. For an explanation of each of these approaches, see Cahn, *supra* note 21, at 242-49.

202. While French is the official language of the DRC, for example, national languages include Lingala, Swahili, Kikongo, and Tshiluba. BACKGROUND NOTE: DRC, *supra* note 67.

203. For example, the Congo is one of the major epicenters for sub-Saharan Africa's popular music. See, e.g., *Rumba in the Jungle*, THE ECONOMIST, Dec. 18, 2003, http://www.economist.com/world/africa/PrinterFriendly.cfm?story_id=2281725 (describing the importance of Congolese music to the war-ravaged citizens of the DRC).

Revising the laws on rape and changing the cultural tolerance for sexual violence against women is, however, only part of the necessary reforms to improve women's status in post conflict societies. The focus on sexual violence against women cannot diminish the significance of other aspects of women's status and of the consequences of armed conflict for women.²⁰⁴ For example, rape law reform (apart from the criminalization of marital rape) does not address the somewhat related problems of civil and criminal responses to domestic violence. Other legal reforms involve guaranteeing women's rights to housing, holding and inheriting land, and financial credit.²⁰⁵

CONCLUSION

This article seeks to broaden our concept of post conflict justice to make gender central in the planning and execution of programs. Post conflict justice must include the centrality of gender in all post conflict activities, including punishment for past wrongs, demilitarizing society, and designing the justice system to ensure not just formal gender equality but also the removal of cultural and legal barriers to women's full exercise of their rights.

Making gender central can be accomplished through a combination of gender mainstreaming, women-focused activities, or gender equality promotion activities. As countries seek to redevelop after conflict, the centrality of gender can be justified on an economic, social, psychological, or legal basis.

This centrality requires reconceptualizing disarmament, demobilization, and resettlement (DDR) programs so that they are integrated with democracy promotion, gender equality, and economic and social development.

204. See, e.g., GARDAM & JARVIS, *supra* note 33, at 253.

205. See Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 *FORDHAM INT'L L.J.* 259 (2001); Richardson, *supra* note 201, at 22; HUMAN RIGHTS WATCH, *WOMEN'S PROPERTY RIGHTS, VIOLATIONS DOOM EQUALITY AND DEVELOPMENT*, <http://www.hrw.org/campaigns/women/property/> (last visited Jan. 16, 2006).