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CHAPTER 27

GENDER AND ARMED CONFLICT

CHRISTINE CHINKIN

1 INTRODUCTION

THE construction of social sex and gender roles means that armed conflict is sexed and gendered.¹ Men still make up the majority of the fighting forces, while women's generally unequal and subordinate social and economic position makes them vulnerable in particular ways during conflict. Women and men, girls and boys all suffer gender-based violence. Such violence is directed at a person because of his or her gender.² For instance men sustain specific harms such as disappearances and deliberate killings in greater numbers than women, while women disproportionately experience sexual violence. The detention of Bosnian Muslims at Potocari on 12 July 1995 and subsequent separation of women and men is illustrative of gender-based crimes. The International Tribunal for the former Yugoslavia (ICTY) found that after separation, the Bosnian Muslim men had suffered 'severe beatings and other cruel treatments'. In the compound 'rapes and killings were reported by credible

¹ J. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (Cambridge: Cambridge University Press, 2001).

² The UN Committee on the Elimination of Discrimination against Women, defines gender-based violence against women as: 'violence that is directed against a woman because she is a woman or that affects women disproportionately'. The UN Committee on the Elimination of Discrimination against Women, General Recommendation No 19, 1992, Violence against Women.

witnesses and some committed suicide out of terror. The entire situation in Potocari has been depicted as a campaign of terror. As an ultimate suffering, some women about to board the buses had their young sons dragged away from them, never to be seen again.³

While it is not spelled out by the ICTY Judges, witness evidence was that the rapes were of women and girls.⁴ The forcible separation of young boys from their mothers had different consequences for both: subsequent execution for the sons, along with thousands of 'military aged' men⁵ and the loss of their family members for the mothers. The same phenomenon was reported in Kosovo where 'young men were at risk, more than any other group of Kosovo society, of grave human rights violations. Many were executed on the spot, on occasion after horrendous torture'.⁶ Children are forcibly abducted into military units where their subsequent experience is likely to be gendered: boys may be required to become child soldiers and girls are likely to have to perform domestic tasks and become subject to sexual violence. Conflict is also gendered in that acts of violence, including sexual violence, are most frequently, but not exclusively,⁷ committed by men. Little attention is given to the role of women as combatants or as the perpetrators of international crimes.⁸

While recognizing the reality of gendered violence for all, this Chapter focuses on the gender-specific harms suffered by women in armed conflict. It outlines these harms and considers the international legal framework for responding to them. Despite the long history of rape and other forms of sexual assault against women during armed conflicts, and explicit evidence offered to tribunals of such offences, such acts of violence had not figured prominently in either the legal restraints on warfare, nor directly in judgments of war crimes trials until those of the 1990s. Although the Hague Regulations and the Geneva Conventions included crimes against women, these crimes remained for many years 'forgotten' and shrouded in silence. This Chapter outlines how the silence has been broken, as these crimes have come to the forefront through the legislative and jurisprudential developments of the ad hoc international criminal Tribunals, the ICTY and the International Criminal Tribunal for Rwanda (ICTR), the hybrid Special Court for Sierra Leone (SCSL), and

³ *Prosecutor v Krstić*, IT-98-33-T, 2 August 2001 (TC), § 517.

⁴ *Krstić* (n 3), §§ 45, 46.

⁵ The ICTY Trial Chamber noted that 'military aged' should be understood in its broadest, non-technical sense as including the men and boys who were broadly defined by the Bosnian Serb authorities as being within the vicinity of military age.' *Prosecutor v Krstić*, IT-98-33-T, 2 August 2001 (TC), § 1, note 3. The victims were all defined by their gender.

⁶ OSCE, *Kosovo/Kosova As Seen, As Told* (Kosovo Verification Mission, 1999), Ch 15.

⁷ For example, *Prosecutor v Pauline Nyiramasuhuko*, ICTR-97-21.

⁸ For example, *Prosecutor v Biljana Plavšić*, IT-00-39&40/1-S. The accused was a member of the Bosnian-Serb leadership. In sentencing, a number of factors were taken into account as both aggravating and mitigating factors, including her age and her behaviour after the conflict, but her sex was apparently irrelevant.

the International Criminal Court (ICC). In addition relevant UN Security Council Resolutions on 'women, peace and security' will be examined. Finally, the Chapter considers some of the tensions generated by the evolving international response to gender-based violence in armed conflict.

2 GENDER-BASED VIOLENCE IN CONFLICT

Conflict related gender-based violence is violence that occurs during or in the immediate aftermath of armed conflict and which has a link with the conflict.⁹ The concept of gender crimes 'emphasises that sexual crimes such as rape are crimes of gender inequality, enacted violently'.¹⁰ Such crimes occur widely in armed conflict and as the jurisprudence of the ad hoc international criminal Tribunals demonstrates, they are experienced by men as well as women.¹¹

The incidence and gendered consequences of such forms of violence for men are becoming better understood, although particular forms of trauma and shame lead to under-reporting and silence. Men may feel that being a victim of sexual violence is 'incompatible with their masculinity [...] both at the level of the attack itself—a man should have been able to prevent himself from being attacked—and in dealing with the consequences of the attack—to be able to cope "like a man"'.¹² While sexual violence against men in armed conflict, in the forms of rape, forced sterilization, and mutilations, still needs a great deal of research, it does not reach the levels of such violence committed against women and it is on this that the next section focuses.

Women's experiences of armed conflict and its aftermath vary greatly depending upon such factors as whether they are civilians or combatants, their national

⁹ For examples of how such a link may be established, see Report of the Secretary-General on the implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), A/65/592-S/2010/604, 24 November 2010, § 5.

¹⁰ L. Moreno-Ocampo, 'Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence', 35 *Law and Social Inquiry* (2010) 839–46 at 841.

¹¹ For example, *Prosecutor v Brđanin*, IT-99-36 (male detainees forced to commit oral sex on each other); *Prosecutor v Mucic*, IT-96-21 (brothers forced to commit oral sex on each other and sexual abuse).

¹² S. Sivakumaran, 'Sexual Violence against Men in Armed Conflict', 18 *European Journal of International Law* (2007) 253–76 at 255. Sivakumaran notes its occurrence in El Salvador, Chile, Guatemala, Argentina, Greece, Northern Ireland, Chechnya, Turkey, former Yugoslavia, Sri Lanka, Iraq-Kuwait, Coalition-Iraq, Sino-Japanese war, Liberia, Sierra Leone, Kenya, Sudan, the Central African Republic, Burundi, Uganda, Rwanda, the Democratic Republic of the Congo, Zimbabwe, and South Africa.

identity, race, class, economic circumstances, urban or rural location, family situation, age, employment, and health. Nevertheless, some frequent experiences can be described,¹³ resting on the reality that: '[c]onflict creates a free-fire zone, a sort of free for all in which pre-existing ideas about women as inferior, and other discriminatory [...] ideas may be given free expression by frequently all male groups of soldiers and other combatants.'¹⁴

Conflict-related sexual violence remains largely unreported for a range of reasons, including social stigma, fear, and a feeling of hopelessness because of both the lack of appropriate services and of any official response.¹⁵ Nevertheless it has been reliably recorded in many areas, including Afghanistan, Burundi, Chad, Colombia, Côte D'Ivoire, Democratic Republic of the Congo, Liberia, Peru, Rwanda, Sierra Leone, Chechnya/Russian Federation, Darfur, Sudan, Northern Uganda, and the former Yugoslavia.¹⁶ Rape and sexual violence are not only widespread, they occur in devastating numbers, with estimates of between 250,000 and 500,000 women raped during the 1994 Rwandan genocide; between 20,000 and 50,000 in Bosnia-Herzegovina in the conflict in the early 1990s; and around 200,000 in Bangladesh in 1971.¹⁷ Sexual violence continues in the conflicts and situations of political unrest of the twenty-first century: the 2012 report of the Special Representative of the Secretary-General on sexual violence in armed conflict records widespread sexual violence, and in some instances mass rapes, in many of the same places as those listed above, as well as in conflicts in Libya (during the violence against the Qadhafi regime), Myanmar (especially in militarized ethnic border areas) and Somalia; in post-conflict in such places as the Central African Republic, Chad, and Sri Lanka; and in election violence and political strife in Egypt, Guinea, and Kenya.¹⁸ In Syria there have been reports of rapes in detention, of abductions, and of rapes at checkpoints and during house searches committed by both Government forces and *Shabbiha* members.¹⁹

Witness testimony in proceedings before international criminal tribunals provides graphic accounts. For example, in the Central African Republic women have been raped by several perpetrators in turn: 'their clothes were ripped off by force [...] they

¹³ M. Urban Walker, 'Gender and Violence in Focus: A Background for Gender Justice in Reparations', in R. Rubio-Marin (ed), *The Gender of Reparations* (Cambridge: Cambridge University Press, 2009), 18.

¹⁴ K. Bennouna, 'Do We Need New International Law to Protect Women in Armed Conflict?', 38 *Case Western Reserve Journal of International Law* (2006) 363–92 at 370.

¹⁵ UN Secretary-General, *Conflict-related Sexual Violence*, UN Doc A/66/657-S/2012/33, 23 February 2012, § 16.

¹⁶ UN Secretary-General, *In-depth Study on All Forms of Violence against Women*, UN Doc A/61/122/Add.1, § 145.

¹⁷ UN Doc A/61/122/Add.1, § 146.

¹⁸ UN Secretary-General, *Conflict-related Sexual Violence*, UN Doc A/66/657-S/2012/33, 23 February 2012.

¹⁹ Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/21/50, 16 August 2012, §§ 96–102.

were pushed to the ground, immobilized by MLC soldiers standing on or holding them, raped at gunpoint, in public or in front of or near their family members.²⁰ In the Democratic Republic of the Congo, there is sufficient 'evidence to establish substantial grounds to believe that rape was a common practice following an attack and that combatants who forced women to engage in sexual intercourse intended to commit such acts by force or threat of force.'²¹ Girl soldiers, irrespective of their age, were subject to rape, sexual violence, sexual slavery, and forced impregnation.²² In Sierra Leone too 'women and girls were systematically [...] abducted in circumstances of extreme violence, compelled to move along with the fighting forces from place to place, and coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labour such as cleaning and cooking for the "husband", endure forced pregnancy and to care for and bring up children of the "marriage".'²³

Rape and sexual violence against women occur in varying circumstances: sometimes the perpetrators move on after the attacks, but may be followed by others; sometimes women and girls are abducted into situations of captivity where they are raped repeatedly;²⁴ sometimes they are raped prior to being murdered. Women cannot easily flee combat areas when they are pregnant, encumbered with children, or by social mores, which inhibit their presence in public spaces. Among the ten countries with the highest lifetime risk of maternal death, most are at war today or are in a post-conflict situation, such as Afghanistan, Sierra Leone, Chad, Angola, Liberia, Somalia, and the Democratic Republic of the Congo.²⁵ Women and girls are not safe even after they have fled the conflict zone, experiencing further sexual violence in camps for refugees and IDPs.²⁶ There are reports of men, in particular from Saudi Arabia and other Gulf states seeking young girls in the Syrian refugee camps to buy, offering them 'marriage'. Some are subsequently sent back, but since they feel shamed many do not return to their families and enter prostitution. Families agree to marriages for young girls as a form of protection against further sexual abuse and for the money they receive.²⁷

²⁰ *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute, ICC-01/05-01/08, 15 June 2009, § 165.

²¹ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07, 30 September 2008, § 443.

²² *Lubanga Dyilo* (n 22), §§ 70–3.

²³ *Prosecutor v Brima, Kamara, Borbor*, SCSL-2004-16-A, (AC) 22 February 2008, 190 (footnotes omitted).

²⁴ *Prosecutor v Kunarac, Kovač and Vuković*, IT-96-23-T and IT-96-23/1-T (TC) 22 February 2001 (also known as 'the Foča case').

²⁵ N. Puechguirbal, 'Greater Need, Fewer Resources: Ensuring Adequate Health Care For Women During Armed Conflict' (International Committee of the Red Cross, 3 March 2009) available at <<http://www.icrc.org/web/eng/siteeng.nsf/html/women-health-interview-010309>>.

²⁶ 'Sexual and gender-based violence is endemic, occurring too often and in every aspect of the lives of displaced women and girls and their families.' UN High Commissioner for Refugees, *Survivors, Protectors, Providers: Refugee Women Speak Out Summary Report* (2011), 16.

²⁷ International Civil Society Action Network, *What the Women Say Voices from the Ground: Syria's Humanitarian Crisis* (Winter 2013).

What is only too apparent is the extreme violence of sexual attacks and the humiliation and degradation that accompany them for both women and men victims. As well as the immediate pain and terror, rape survivors frequently experience long-term physical injury and psychological trauma. Sexual violence against women in armed conflict is structural, part of the instrumentality of conflict and often inherent to its very aims. The UN Security Council has affirmed that 'sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security'.²⁸

Rape and sexual violence are not the only gender-based ways women experience armed conflict,²⁹ although these have become the focus of the international legal system. Alongside the fear of physical violence civilians face economic and social hardships, increased by the danger of attacks involved in leaving the home for routine activities such as finding food, water, and fuel. Women's traditional domestic responsibilities mean that these tasks fall most heavily on them, as does caring for physically and psychologically injured fighters, the elderly, and children. Women whose male relatives have been killed or are otherwise absent may be left financially unassisted and without the requisite legal documentation to substantiate claims to property. Collapse of governmental agencies, including those for maintaining law and order, and the physical concentration of armed fighters all undermine community restraints on human rights abuses. Women also suffer from a higher incidence of violence at home during armed conflict, whether or not they are living within the combat zone.

The report of the UN Fact Finding Mission to Gaza illustrates a number of such gender-based consequences of conflict for women. The Mission heard that:

the blockade and the military operations had aggravated poverty, which particularly affected women, who must find food and other essentials for their families. Women were often the sole breadwinners [...] but jobs were hard to come by. [...] women bore a greater social burden, having to deal with daily life made harsher by the crisis and, at the same time, provide security and care for injured family members and children, their own and others who have lost their parents.³⁰

Living in tents without any privacy was hard for women who, for example, lacked adequate sanitary protection. 'Psychological pressures on men and women, together with financial difficulties, led to family disputes, family violence and divorce'.³¹

²⁸ UNSC Res 1820, 19 June 2008; UNSC Res 1960, 16 December 2010; UNSC Res 2106, 24 June 2013.

²⁹ C. Lindsey, 'Women and War—An Overview', 839 *International Review of the Red Cross* (2000) 561, lists issues relating to women combatants, missing persons and widowhood, displaced women, and women in detention as well as sexual violence in armed conflict.

³⁰ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, §§ 1275–9.

³¹ Report of the United Nations Fact-Finding Mission on the Gaza Conflict (n 30).

3 LEGAL REGIMES FOR ADDRESSING GENDER AND ARMED CONFLICT

A. International humanitarian law prior to 1990

Legal excavation has shown that ‘the laws and customs of war had undoubtedly long prohibited rape and other crimes of sexual violence, where they are core crimes within humanitarian law, and, as such, inductively shape the very interpretation of the procedural doctrines and the breadth of substantive crimes within humanitarian law.’³² Rape was included in the first recorded war crimes trial in 1474. Hugo Grotius asserted that ‘as Part of the Law of Nations viz. that whoever ravishes a Woman tho’ in time of War, deserves to be punished in every Country.’³³ Modern international humanitarian law with respect to the prohibition of sexual violence has developed since the nineteenth century. The Lieber Code, which gave directions to Union forces during the American civil war, prohibited under penalty of death ‘All wanton violence committed against persons in the invaded country, [...] all rape, wounding, maiming, or killing of such inhabitants.’³⁴ The Hague Regulations 1899, Article 46 required ‘Family honour and rights’ to be respected.³⁵ ‘Family honour’ is a coded way of referring to crimes of sexual violence. The 1929 Geneva Convention on Prisoners of War recognized that women may be combatants and thus detained as prisoners of war. Article 3 required women to be treated ‘with all the regard due to their sex.’³⁶ This provision was repeated in the Third Geneva Convention of 1949 with the addition that women prisoners of war ‘shall in all cases benefit by treatment as favourable as that granted to men’³⁷ and be provided with separate dormitories,³⁸ conveniences,³⁹ and quarters for disciplinary treatment.⁴⁰

The jurisdiction of the Nuremberg and Tokyo International Tribunals included war crimes (violations of the laws and customs of war) and crimes against

³² P. Viseur Sellers, ‘The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law’, in G.K. McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law*, vol 1 (The Hague: Kluwer Law International, 2000), 263.

³³ H. Grotius, *The Rights of War and Peace* Book III (ed Richard Tuck) (Indianapolis: Liberty Fund, 2005), 1301.

³⁴ General Orders No 100, 24 April 1863, Art 44.

³⁵ Regulations concerning the Laws and Customs of War on Land, 1899.

³⁶ Convention between the United States of America and Other Powers, relating to Prisoners of War, Geneva, 27 July, 1929.

³⁷ Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Art 14.

³⁸ Convention Relative to the Treatment of Prisoners of War (n 37), Art 25.

³⁹ Convention Relative to the Treatment of Prisoners of War (n 37), Art 29.

⁴⁰ Convention Relative to the Treatment of Prisoners of War (n 37), Arts 97 and 108.

humanity.⁴¹ In neither case was rape and sexual violence spelled out.⁴² In the case of war crimes the list of specified crimes was stated not to be exhaustive and crimes against humanity included 'other inhumane acts'. Persecution as a crime against humanity included political, racial, or religious grounds, but not those of sex or gender. The war crimes trials in both instances received a good deal of testimony about such crimes but they barely figured in the judgments.

Article 27 of the Fourth Geneva Convention,⁴³ provides that states parties are under an obligation to protect women in international armed conflict 'against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'. This is framed in terms of protection rather than as an express prohibition of the listed offences and designates rape as a crime against 'honour' rather than as one of violence.⁴⁴ Nor are rape, enforced prostitution, and sexual assault explicitly designated as grave breaches of the Convention,⁴⁵ although the definition of grave breaches to include acts 'wilfully causing great suffering or serious injury to body or health' allows sexual violence to come within it. Common Article 3 to the 1949 Geneva Conventions applicable to non-international armed conflicts prohibits 'at any time and in any place whatsoever [...] outrages upon personal dignity, in particular humiliating and degrading treatment'. This again is a formula that allows for the inclusion of rape and other forms of sexual violence, but without express wording to that effect.

The 1977 Additional Protocols make some further advances. Article 76 of AP I, does not refer to the notion of women's honour, but portrays women as the objects of special respect and protection. The fundamental guarantees stipulated in Article 75 include prohibition of any distinction based, inter alia, on 'sex', and the commission of any 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault' by any person, whether civilian or military. AP II, applicable in non-international armed conflicts, omits the language of protection and in Article 4(2)(e) prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'. However the formula identifies rape as a crime against dignity, not as an act of violence.

Other references to women in the Geneva Conventions emphasize their reproductive, mothering, and caring roles. Analysis of the Geneva Conventions provisions on safeguards for women in armed conflict indicates that the primary target

⁴¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945, Charter, Art 6; *International Military Tribunal for the Far East (IMTFE) Tokyo, 19 January 1946 Charter*, Art 5.

⁴² Control Council Law, No 10, 1945, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Art II(1)(c) includes rape.

⁴³ Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (GC IV).

⁴⁴ Lindsey points out that honour is more complex than simply a 'value' term but that it is women that must be protected; Lindsey (n 29), 567.

⁴⁵ GC IV, Arts 146, 147.

for protection is children. This reduces the status of women without children and obscures the reality that girls are especially vulnerable to forms of sexual attack. For these reasons Judith Gardam has concluded that international humanitarian law has constructed a gender hierarchy parallel to that found in human rights law that has discounted the interests of women in favour of those of combatants and in the name of the notion of 'military necessity'. Gardam asserts:

Far from being a neutral yardstick, military necessity in fact incorporates a hierarchy of values. It assumes [makes natural] that the military victory of the State is pre-eminent. From this flows the seemingly logical value judgment, that the life of the combatant is more important than that of the civilian, even more so if that civilian belongs to the enemy 'State'. [...] The military resists strongly the notion that combatants should assume risks to protect the civilian population. But their position is not immune to challenge. It assumes that war is inevitable.⁴⁶

B. Legal developments after 1991

International humanitarian law no longer provides the sole legal framework for the protection of women in armed conflict. Indeed, since 1977 there has been no further international humanitarian law convention relating to women in armed conflict. However, there has been considerable advancement through the application of international humanitarian law in international criminal courts, through human rights law, through regional treaties, and through UN Security Council Resolutions under the rubric of 'women, peace and security'. Together these legal regimes provide guidance with respect to the obligations of states and non-state actors for the prevention, protection, prosecution, and punishment of gender-based crimes against women in armed conflict.

4 INTERNATIONAL CRIMINAL LAW

A. Legislative provisions

From late 1991 and throughout 1992 global media coverage created widespread pressure for an international legal response encompassing accountability for the atrocities committed against women and men in the conflicts accompanying the disintegration of the former Yugoslavia. In particular, sufficient outrage was expressed

⁴⁶ J. Gardam, 'Women and the Law of Armed Conflict: Why the Silence?', 46 *ICLQ* (1997) 72.

about the 'massive, organized and systematic'⁴⁷ rapes and other violent assaults against women to ensure that they could not be ignored, or discounted as a normal phenomenon of armed conflict. Crimes of sexual violence against women became the focus of international campaigns by women's groups arguing for their acceptance as constituting violations of international criminal law and for their inclusion in the jurisdiction of the ICTY and subsequently the ICTR. Feminist advocates were active at the negotiations for the Rome Statute for a permanent International Criminal Court in 1998.

The ICTY Statute does not spell out crimes of sexual violence as a grave breach or violation of the laws and customs of war but does list rape as a crime against humanity.⁴⁸ The ICTR Statute includes rape as a crime against humanity⁴⁹ and Article 4 includes 'Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Rome Statute specifies 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' as crimes against humanity, as 'serious violations of the laws and customs applicable in international armed conflict' and as serious violations of Common Article 3. This list emphasizes that rape and sexual violence are not synonymous and that the latter takes many forms. The disaggregation of sexual violence into diverse categories permits a more focused approach to prevention.⁵⁰ In addition, 'Committing outrages upon personal dignity, in particular humiliating and degrading treatment' is a violation of the laws and customs of war in international armed conflict and of Common Article 3. The crime of persecution against a collectivity as a crime against humanity for the first time includes 'gender'.

Article 7(3) provides the first international legal definition of 'gender' as referring to 'the two sexes, male and female, within the context of society'.⁵¹ The Statute of the Special Court for Sierra Leone⁵² was agreed after the negotiation of the Rome Statute but before its entry into force. Article 2 includes the same crimes as crimes against humanity and Article 3 includes 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' as violations of Common Article 3 and AP II. An additional crime is that of sexual abuse against girls under Sierra Leone law.

⁴⁷ UNSC Res 820, 17 April 1993. ⁴⁸ ICTY Statute, UNSC Res 827, 25 May 1993, Art 5(g).

⁴⁹ ICTR Statute, UNSC Res 955, 8 November 1994, Art 3(g).

⁵⁰ Report of the Secretary-General on the implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), UN Doc A/65/592-S/2010/604, 24 November 2010, § 4.

⁵¹ A much fuller definition is given by the Committee on the Elimination of Discrimination against Women, General Recommendation No 28, CEDAW/C/2010/47/GC.2, 19 October 2010, § 5.

⁵² Established by Agreement between the United Nations and Sierra Leone under UNSC Res 1315, 14 August 2000.

The package of agreements under the umbrella of the Pact on Peace, Security, Good Governance, Economic Development and Regional Integration Stability in the Great Lakes Region, (Stability Pact) 2006, which seek to bring an end to conflict in the Great Lakes region of Africa, includes the groundbreaking Protocol on the Prevention and Suppression of Sexual Violence against Women and Children. The Protocol is a substantive agreement that seeks to fill the legal void that prevails in most of the legal systems in the region as a response to the systemic and massive rape of women and children that have occurred throughout the conflicts there, notably in the DRC. States parties seek 'to combat sexual violence against women and children through preventing, criminalizing, and punishing acts of sexual violence, both in times of peace and in times of war, in accordance with national laws and international criminal law'.⁵³ The Protocol also provides model language for other legal systems and peace negotiations. By drawing upon and bringing together language from other international instruments, notably the Convention on the Elimination of All Forms of Discrimination against Women, the Rome Statute, the Palermo Trafficking Protocol,⁵⁴ and the Protocol to the African Charter on Peoples' and Human Rights on the Rights of Women in Africa,⁵⁵ it enhances its own legitimacy and reinforces those instruments.

The Protocol asserts international standards to address crimes of sexual violence as war crimes and crimes against humanity in the region, defining them in accordance with the Statutes of the ICTY and ICTR and the ICC. It establishes links between sexual violence and the offences of trafficking, slavery, and genocide. The Protocol is not concerned solely with individual criminal responsibility as it incorporates preventive aspects, counselling for the rehabilitation of victims of sexual violence, and it advocates for maximum sentencing. Parties have committed themselves to set up regional mechanisms to protect women and children, and provide legal and material assistance for victims and survivors of sexual violence. The Protocol has not, however, been effective at putting an end to the extreme sexual violence in the Great Lakes region, notably the DRC. It has been followed by the Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region, 18 June 2008, which seeks in part to address the Protocol's shortcomings by offering a Plan of Action for implementation and language for future peace negotiations.

Another innovative treaty is the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.⁵⁶ The Convention requires states parties to criminalize and prosecute forms of gender-based violence

⁵³ Stability Pact, 2006, Art 11.

⁵⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted UNGA Res 55/25, 15 November 2000.

⁵⁵ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

⁵⁶ CETS No 210, 11 May 2011 (Istanbul Convention).

(including domestic violence) in their national courts. Article 2(3) makes the Convention applicable in 'times of peace and armed conflict', thereby recognizing the continuation of forms of violence during conflict that do not come within the ambit of war crimes.⁵⁷ Further, although the Convention identifies domestic violence as a gender-based crime that 'affects women disproportionately', it encourages states parties to apply it to all victims of domestic violence.⁵⁸

There is thus now a considerable body of treaty law addressing crimes of sexual violence against women. To date, the practical implementation of this body of law has been carried out through the ad hoc criminal Tribunals, which have developed some understandings of gender-based crimes and sexual violence. However, these have not progressed uniformly and there remain inconsistencies and uncertainties. The ICC Statute, Article 54(1)(b) explicitly requires the Prosecutor to 'take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children'. José Luis Moreno-Ocampo, former Prosecutor at the ICC, saw as his challenge 'to capture this "gendered" reality in our different cases and present them in connection with the contextual elements of the crimes as defined by the Rome Statute',⁵⁹ but, as discussed below, the first completed trials have been disappointing in this respect.

B. Application of law by international criminal tribunals

This section examines some of the ways in which various institutions have applied the somewhat skeletal legal provisions relating to violence against women in conflict situations. A first step in breaking the silence previously surrounding crimes against women in armed conflict is including relevant crimes within international instruments. A second is prosecuting perpetrators as a step towards ending impunity, ensuring accountability and giving practical application to the legal provisions. A third is ensuring that definitions and implementation take into account women's experiences of the crimes committed against them. A fourth is ensuring adequate and appropriate reparation for survivors.

When the ad hoc Tribunals commenced work they had little to rely upon other than the somewhat stark wording of their Statutes and the jurisprudence of the Nuremberg Tribunal and Tokyo Tribunals. There were, for example, no definitions of the various sexual offences under international law (rape, sexual violence, enforced prostitution) and no accepted applicable general principles. The ad hoc Tribunals have had to determine the understandings of sexual crimes as war crimes,

⁵⁷ See also the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo, 11 July 2003, Art 11.

⁵⁸ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Art 1(2).

⁵⁹ Moreno-Ocampo (n 10), 843.

crimes against humanity, and genocide. Although the ICC must work with the definitions in the Elements of Crimes agreed by the Assembly of States Parties, the Tribunals' jurisprudence is nevertheless likely to be influential, both for the work of the ICC, and in building understandings of these crimes in national courts.

The Tribunals have addressed issues of gender-based and sexual violence in a number of their judgments.⁶⁰ The Tribunals have determined that where the other elements are present:⁶¹

- rape can constitute a freestanding crime against humanity and a war crime;
- rape can constitute torture as a crime against humanity and a war crime when it comes within the definition of torture;⁶²
- rape and other forms of sexual violence can constitute genocide when committed with intent to destroy in whole or in part a national, ethnical, racial, or religious group;⁶³
- rape and other forms of sexual violence can constitute persecution and enslavement as crimes against humanity;
- sexual violence can constitute part of outrages on personal dignity and inhumane treatment.

Some judgments have made especially important contributions to the understanding of these crimes. For example in the *Foča* case the ICTY considered the situation of Bosnian Muslim women who were detained in a range of local buildings including schools, houses, and apartments.⁶⁴ They were forced to carry out tasks such as cooking and cleaning and were repeatedly raped and degraded in other ways. The ICTY held that the factors of enslavement include control of a person's movement and physical environment, psychological control, and control of sex.⁶⁵ Enslavement requires the exercise of any or all of the powers attaching to the right of ownership over a person,⁶⁶ which are present in the refusal of sexual autonomy and denial of choice to the detained women who had to provide sexual services on demand. When a woman cannot refuse sexual contact, where such matters as abortion, contraception, and personal hygiene are totally under the control of her abusers, and she has '[n]owhere to go and no place to hide,'⁶⁷ then her captors exercise ownership over her and she is enslaved.

⁶⁰ UN Department of Peacekeeping Operations, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820* (New York, 2010), 29, 46, 59.

⁶¹ UN Department of Peacekeeping Operations (n 60), 25.

⁶² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984), Art 1; Elements of Crime, ICC-ASP/1/3 (part II-B), 9 September 2002, Art 7(1)(f).

⁶³ Convention on the Prevention and Punishment of the Crime of Genocide (1948).

⁶⁴ *Kunarac*, (n 24).

⁶⁵ *Kunarac* (n 24), §§ 542–3.

⁶⁶ *Kunarac* (n 25), § 539.

⁶⁷ *Kunarac* (n 24), § 740.

The ICTY did not, however, make a finding of sexual slavery, as no such crime is determined as a crime against humanity in its Statute. In contrast, the Statute of the SCSL, Article 2(g) includes sexual slavery as a crime against humanity. The camps at Foča (and elsewhere in the former Yugoslavia) were a modern manifestation of the forced detention of the so-called comfort women detained across Asia by the Japanese military in World War II. Those women, too, had no control over their own destinies, even where they were not physically locked up.⁶⁸ Designation as enslavement removes issues of consent to individual acts of intercourse.

It is noteworthy that typical 'women's roles' (cooking, cleaning) were recognized as forced labour and gendered aspects of enslavement. Assignment of domestic tasks to women can be seen as everyday, natural, and as too mundane to be conceived of as constituting crimes against humanity. Forced labour is more readily associated with such atrocities as building the Burmese railway or factory labour, but at Nuremberg it was held that sending 500,000 women domestic labourers to Germany to relieve German housewives and the wives of German farmers also constituted slave labour.⁶⁹

A particular form of sexual slavery in armed conflict is forced marriage. The SCSL Trial Chamber found such occurrences to constitute sexual slavery as a crime against humanity.⁷⁰ Justice Doherty, partially dissenting, discussed various elements of 'bush marriages' that had been identified by the prosecution expert: the women's families were not involved in the marriage; there was no official marriage ceremony; it was a means of survival for a woman who by 'belonging' to a single person would be spared gang rapes, at least while the 'marriage' lasted; the woman was required to do as her 'husband' commanded and 'to gratify his sexual wishes whenever he so desired without question'. A bush marriage frequently involved long-term stigmatization and rejection by families and communities.⁷¹ The Appeal Chamber accepted Justice Doherty's characterization of forced marriage and found that a separate crime of forced marriage existed as a crime against humanity in the context of Sierra Leone. The separate element was that of forced conjugal association and sexual exclusivity.⁷²

The ICTR has been at the forefront of identifying rape as genocidal when committed with the intention to destroy in whole or in a part a group identified in national, ethnic, racial, or religious terms. Indeed, rape and other forms of extreme sexual violence have been at the very core of group destruction. These include preventing births within a group,⁷³ for example through sexual mutilation, forced

⁶⁸ G. Hicks, *The Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War* (New York: W.W. Norton & Co, 1995); C. Chinkin 'Peoples' Tribunals: Legitimate or Rough Justice?', 24 *Windsor Yearbook of Access to Justice* (2006) 201–20.

⁶⁹ *Kunarac* (n 65), § 523.

⁷⁰ *Prosecutor v Brima, Kamara and Kanu*, SCSL-04-16-T, 20 June 2007.

⁷¹ *Brima, Kamara and Kanu* (n 70), §§ 27–36 (sep op J Doherty).

⁷² *Brima, Kamara and Kanu* (n 70), §§ 190–5.

⁷³ Genocide Convention, Art II(d).

sterilization, forced birth control, separation of the sexes, prohibiting marriage, and mental trauma.⁷⁴ Forced pregnancy may also be directed towards destruction of the group. As the Trial Chamber in *Akayesu* stated:

In patriarchal societies [...] an example of a measure intended to prevent births within a group is the case where, during rape, a woman [...] is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.⁷⁵

The Statute of the ICC, Article 7(2)(f), defines forced pregnancy as a crime against humanity. Forced pregnancy is one of the few sexual crimes that can only be committed against women. It comprises two separate acts: forcible impregnation and the forced denial of access to abortion. The ICC definition of forced pregnancy is limited to where there is the 'intent of affecting the ethnic composition of any population'. That religious objections to abortion determined this restrictive understanding of forced pregnancy is made apparent by the rider that the definition 'shall not in any way be interpreted as affecting national laws relating to pregnancy'. In no other instance is there a requirement for an additional intent or motive for an offence to constitute a crime against humanity. Forced pregnancy constitutes a very particular denial of a woman's autonomy and bodily integrity by forcing her to bear a child. Yet in this one instance the continuing insistence for control over women's reproductive capacity has subjugated gender identity (that the crime was committed against her because she is a woman) to ethnic identity.

Rape is central to facts that have led to findings of torture, enslavement, and genocide. A crucial question is how rape is defined under international law. How the law constructs rape determines who has in fact been raped. Where there is dissonance between survivors' perceptions of what has occurred to them, and the law's verdict on this point, the impunity granted means that the law ceases to be relevant to survivors as either an instrument of protection or of punishment. Such impunity is often based upon the myths and stereotypes about male and female sexuality that inform decisions about rape,⁷⁶ but which ignore such factors as the trauma of rape, the practical and security reasons against reporting rape, especially in armed conflict, and the fear and shame experienced by the survivors. If impunity for sexual violence in armed conflict is to cease it is essential that such myths are confronted and dispelled. It is therefore important that the definitions, understandings, and procedures for the prosecution of such crimes before international tribunals reflect the perspectives of rape victims.

The Tribunals had to evolve their own definitions of rape and other sexual offences, and there have been divergent views between different Trial Chambers.

⁷⁴ *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, §§ 507–8.

⁷⁵ *Prosecutor v Jean-Paul Akayesu*, (n 74), § 507.

⁷⁶ For a discussion of 'rape myths' see *Vertido v the Philippines*, Communication No 18/2008, 1 September 2010, CEDAW/C/46/18/2008.

One view has been to define rape not through specific prohibited acts but to capture the essence of rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.⁷⁷ The emphasis on coercive circumstances addresses the situation where an individual may, through fear and desperation, not have actually protested or fought against sexual activity. Coercion is inherent in conflict and in the very presence of armed militia and genocidaires. This definition of rape is consonant with the context of the particular crimes within the Tribunals' jurisdiction—war crimes, crimes against humanity, and genocide—with all the elements of force, terror, and helplessness that are integral to situations where such offences are committed.

An alternative approach is to define rape through a mechanical description of body parts. The ICTY in *Furundžija* held the objective elements of rape to be:

- (i) the sexual penetration, however slight:
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator
- (ii) by coercion or force or threat of force against the victim or a third person.⁷⁸

This definition incorporates rape of men and non-penile rape. Brutal rapes with wood, guns, and other weapons are also prevalent in armed conflict. The Trial Chamber held oral rape to be 'a most humiliating and degrading attack upon human dignity' and stated that 'such an extremely serious sexual outrage as forced oral penetration should be classified as rape'.⁷⁹ However, the second part of this definition of rape requires coercion or force of the actual victim or third person. Further, the mechanical description of objects and body parts fails to capture the aggression of rape. In *Kunarac* the Trial Chamber emphasized issues of coercion, consent, and implied consent. It concluded that what appears to be common to legal systems around the world is 'the basic underlying principle [...] that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim'.⁸⁰ It adopted the *Furundžija* definition, but addressed the issue of consent by adding a final sentence derived from *Akayesu*: 'Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances'.⁸¹ The Trial Chamber accepted the evidence of the witness, who, *Kunarac* alleged, had consented to, and even initiated, sex with him, that she had been threatened by another soldier, that he would kill her unless she satisfied his commander, *Kunarac*. The Chamber was unmoved by *Kunarac*'s claim that he did not know she was acting out of fear. In the general context of war and the

⁷⁷ *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998, § 598.

⁷⁸ *Prosecutor v Furundžija*, IT-95-17/1-T, 10 December 1998, § 185.

⁷⁹ *Prosecutor v Furundžija*, IT-95-17/1-T, 10 December 1998, § 183.

⁸⁰ *Kunarac and others* (n 24), § 440.

⁸¹ *Kunarac and others* (n 24), § 460.

position of Muslim women and girls detained, at that time it was not credible that he was 'confused by her motives'.

The verdict reveals its understanding of the situation, but its analysis brought the issue of consent back into the definition. The Appeal Chamber approved the definition of the Trial Chamber⁸² adding that there is no basis in customary international law for requiring resistance on the part of the victim, a requirement that would be 'absurd on the facts'. In 2006 in *Gacumbitsi* the Appeal Chamber was asked by the prosecution to revisit the question of the elements of rape as a crime against humanity or as an act of genocide. The Appeal Chamber adopted the *Kunarac* definition and thus retained the elements of non-consent and knowledge thereof, thereby requiring the prosecution to prove these beyond reasonable doubt. Reference to consent in the Rules of Procedure refers only to the circumstances when evidence of consent is admissible.⁸³

5 WOMEN, PEACE, AND SECURITY

In addition to the development of international humanitarian law through international criminal law, the political organs of the United Nations have addressed gendered crimes and crimes of sexual violence. On 31 October 2000 the UN Security Council adopted Resolution 1325 on Women, Peace, and Security, addressing the important role of women in the prevention and resolution of conflicts and in peace building. In June 2008 the Security Council built upon Resolution 1325 with Resolution 1820. This resolution linked sexual violence to the primary purpose of the Security Council in the maintenance of international peace and security. It noted the jurisprudential developments confirming that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, and stressed the need to end impunity with respect to these crimes. It demanded that parties to armed conflict take appropriate measures 'to protect civilians, including women and girls, from all forms of sexual violence' and spelled out certain measures such as enforcing appropriate military disciplinary measures, upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuation to safety of women and children under imminent threat of sexual violence.

⁸² *Prosecutor v Kunarac and others*, IT-96-23/1-A, 12 June 2002, §§ 128–33.

⁸³ *Gacumbitsi v Prosecutor*, ICTR-01-64 –A, 7 July 2006, §§ 147–57.

Two Security Council Resolutions in 2009 continued the two-pronged approach of seeking enhancement of women's participation in relevant decision-making, and ensuring accountability for the commission of crimes of sexual violence. Security Council Resolution 1888, of 30 September 2009, reiterates much of Resolution 1820 and calls upon the UN Secretary-General to appoint a Special Representative 'to provide coherent and strategic leadership, [...] to address, at both headquarters and country level, sexual violence in armed conflict, while promoting cooperation and coordination of efforts among all relevant stakeholders.'⁸⁴ The Special Representative chairs UN Action against Sexual Violence in Armed Conflict, a network of 12 United Nations agencies established in order to enhance coordinated action and strengthen responses. The Secretary-General was also asked 'to deploy rapidly a team of experts to situations of particular concern with respect to sexual violence in armed conflict, working through the United Nations presence on the ground and with the consent of the host government, to assist national authorities to strengthen the rule of law'.

Resolution 1889, 5 October 2009, returned to women's participation in 'all stages of peace processes, particularly in conflict resolution, post-conflict planning and peacebuilding'. It encourages states to 'increase access to health care, psychosocial support, legal assistance and socio-economic reintegration services for victims of sexual violence, in particular in rural areas'. Security Council Resolution 1960, 16 December 2010, reaffirms the earlier Resolutions and the Council's commitment to the cessation of all acts of sexual violence. It adopts a 'naming and shaming' approach by requesting the Secretary-General to compile lists of those who are 'credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict' and goes further by indicating the use of such lists for 'more focused United Nations engagement with those parties', including potentially through sanctions.⁸⁵ The Security Council reiterates the importance of command responsibility and calls for the 'issuance of clear orders through chains of command prohibiting sexual violence'. In seeking implementation of Resolution 1960, the President of the Council has stressed the need for timely, verified, and reliable data which would assist in determining appropriate action, including possible targeted

⁸⁴ In February 2010 Margot Wallström from Sweden was appointed to this post; in 2012 Zainab Bangura from Sierra Leone took up the position.

⁸⁵ The 2012 report of the Special Representative on sexual violence in armed conflict lists a number of armed groups as parties to armed conflicts in the Central African Republic, Côte d'Ivoire, the DRC and names a leader (n 18); Annex, List of parties that are credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda. See also UNSC Res 2078, 28 November 2012 (financial and travel measures applicable to individuals in the DRC committing serious violations involving children or women in armed conflict, including killing and maiming, sexual violence, abduction, and forced displacement). UNSC Res 2106, 24 June 2013, § 13 urges sanctions committees to apply targeted sanctions against perpetrators.

and graduated measures.⁸⁶ The Security Council has recalled its Resolutions on women, peace, and security in country-specific resolutions.⁸⁷

The Security Council has thus recognized the systemic use of sexual violence 'for political motivations and as a tactic of war'⁸⁸ and its adverse impact on the maintenance of international peace and security. It has called upon parties to conflict, states and institutions, to take concrete measures to prevent such violence, to protect civilians, especially women and children,⁸⁹ to strengthen legal provisions and mechanisms to combat impunity, and to address the medical and social-economic consequences of sexual violence. In a range of resolutions it has also instituted a zero-tolerance policy of sexual exploitation and abuse in UN peacekeeping operations⁹⁰ and has reiterated the importance of including gender advisers, women protection advisers, and child protection advisers in UN missions.⁹¹

These Resolutions and Statements go a long way in recognizing the extent and pervasiveness of sexual violence in conflict and the importance of empowering women, for example through enhanced participation.⁹² Despite references, *inter alia*, to gender-based violence, gender advisers, and experts, the Resolutions focus 'in particular' on sexual violence against women and children, thereby conflating 'gender' and 'women' to the detriment of making more visible sexual violence against men. Unlike the Beijing Platform for Action, the resolutions do not make recommendations with respect to the reduction of military expenditures and the availability of armaments.⁹³

6 CONCLUSIONS: TENSIONS AND DEBATES

Feminist activism and interventions have ensured that gender and sex-based crimes in armed conflict have become visible and acquired higher priority within the international legal order since the early 1990s. Such crimes are now explicitly recognized

⁸⁶ UN Doc S/PRST/2012/3, 23 February 2012.

⁸⁷ For example, UNSC Res 2085, 20 December 2012 (Mali); UNSC Res 2062, 26 July 2012 (Côte D'Ivoire); UNSC Res 2121, 10 October 2013 (Central African Republic).

⁸⁸ UN Doc S/PRST/2013/2, 12 February 2013.

⁸⁹ The Security Council has repeated its condemnation of 'sexual and other forms of violence committed against civilians in armed conflict, in particular women and children' in other resolutions; eg UNSC Res 1674, 28 April 2006, on Protection of civilians in armed conflict.

⁹⁰ For example, UNSC Res 2086, 21 January 2013, United Nations Peacekeeping Operations.

⁹¹ UN Doc S/PRST/2013/2, 12 February 2013.

⁹² On the limited impact of UNSC Res 1325, see C. Bell and C. O'Rourke, 'Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements', 59 *ICLQ* (2010) 941–80. UNSC Res 2122, 18 October 2013 emphasizes the importance of implementation of Resolution 1325.

⁹³ Beijing Platform for Action, § 143.

by the Security Council as constituting a threat to the maintenance of international peace and security and have been effectively included within the jurisdiction of the ad hoc international criminal Tribunals and the Statute of the ICC. Convictions have been achieved within the former and relevant charges laid before the latter. They have been moved up in the hierarchy of crimes.⁹⁴ However, there remain conflicting concerns: on the one hand are considerations which show that much more work is still needed to make international humanitarian law truly responsive to women's experiences of armed conflict; while on the other hand are arguments that these developments themselves undermine women's exercise of autonomy.

The implementation of international humanitarian law through international criminal tribunals is still limited. First, only limited numbers of perpetrators of sexual violence are ever brought to justice.⁹⁵ International criminal trials deal only with the most serious incidents of war crimes and crimes against humanity (explicitly so in the case of the ICC⁹⁶). Prosecutorial discretion means that not all such cases are subject to criminal charges and considerations such as the availability, willingness, and credibility of witnesses, the perceived relative importance of diverse charges as well as selected locations for investigation all impact upon decision-making with respect to laying charges. Decisions not to include, or to limit, such charges may be controversial,⁹⁷ as illustrated by the *Lubanga* case, the first completed trial before the ICC. Although the Trial Chamber heard witness evidence of the rape and sexual violence committed against girl soldiers,⁹⁸ no charges relating to sexual violence were brought. In a separate and dissenting (on particular issues) opinion, Judge Odio Benito expressed her disquiet that by excluding sexual violence from its understanding of 'direct participation in hostilities' the majority had rendered it invisible. She continued that such invisibility leads to discrimination 'against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group'. She noted the gender-specific aspect of sexual violence in the potential consequence of pregnancy for girls 'that often lead[s] to maternal or infant's deaths, disease, HIV, psychological traumatising and social isolation'.⁹⁹ These crimes should have been charged and

⁹⁴ J. Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict', 9 *Melbourne Journal of International Law* (2008) 78, 83.

⁹⁵ UNSC Res 1960, 16 December 2010. ⁹⁶ Statute of the ICC, Art 1.

⁹⁷ For example, while celebrating the indictment in *Kunarac* as 'unparalleled in international, regional or national courts', Kelly Askin considered omission of 'appropriate charges of genocide' as a shortcoming; K. Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 *AJIL* (1999) 97–123 at 118; Askin also regretted that the decision did not use the term 'sexual slavery' referring only to enslavement; K. Askin, 'Prosecuting Wartime Rape and other Gender-related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', 21 *Berkeley Journal of International Law* (2003) 288–349 at 340.

⁹⁸ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment of 14 March 2012.

⁹⁹ *Thomas Lubanga Dyilo* (n 98), separate and dissenting opinion, Judge Odio-Benito, §§ 15–20.

evaluated separately. In setting out principles for determining appropriate reparations the Trial Chamber asserted that the Court 'should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence', ensuring a 'specialist, integrated and multidisciplinary approach'.¹⁰⁰ Nevertheless, in sentencing Lubanga, Judge Odio Benito found herself again in disagreement with the majority in Trial Chamber I, in particular with respect to what she considered their disregard of the damage caused by sexual violence to victims and their families.¹⁰¹ An expert witness had testified as to the post-traumatic stress disorder suffered by child soldiers following such events as experiencing or witnessing 'killing or mutilation, severe physical or sexual assault, sexual abuse and rape' and which could be long lasting. Again Judge Odio Benito emphasized the need to 'keep in mind the differential gender effects and damages that these crimes have upon their victims'.

Acquittals where the evidence cannot sustain conviction of particular accused persons can also cause distress to victims. Unlike in the *Lubanga* case, charges of rape and sexual slavery were brought in the case against Mathieu Ngudjolo Chui.¹⁰² Witnesses had testified to 'horrific attacks, rapes, gang rapes and enslavement' that took place during the attack on Bogoro village in February 2003. The accused was acquitted on the grounds that it was not proved beyond a reasonable doubt that he was the commander of the relevant forces at the time of the attack. Although the ICC stressed that this did not mean that crimes had not been committed, or that the population had not suffered, the decision was nevertheless described as a devastating outcome to victims and survivors.¹⁰³ The trials that take place represent a selective and limited picture of the reality and therefore cannot truly convey the extent or circumstances of gendered crimes in armed conflict. At the same time, the mediation of witnesses' narratives through the rules of evidence and procedure may inhibit their ability to provide the story they wish to tell.

The paucity of international criminal trials and the principle of complementarity in Article 1 of the Statute of the ICC make clear that the internalization of international criminal law into national legal systems and prosecution in national courts of international crimes, including those of gender-based and sexual violence, is a way forward. In this regard the announcement by the UK Foreign Secretary that the United Kingdom is seeking a Declaration from the G8 Foreign Ministers that rape and serious sexual violence amount to grave breaches of the Geneva Conventions,

¹⁰⁰ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 7 August 2012, Decision establishing the principles and procedures to be applied to reparations, §§ 207–8.

¹⁰¹ *Lubanga Dyilo* (n 22), 40ff.

¹⁰² *Prosecutor v Mathieu Ngudjolo Chui*, ICC-01/04-02/12-4, Judgment of 18 December 2012.

¹⁰³ Press statement by Brigid Inder, Women's Initiatives for Gender Justice, 18 December 2012.

and that they are prepared to pursue domestic prosecution of such crimes on the basis of universal jurisdiction is welcome.¹⁰⁴

Secondly, and linked, while international humanitarian law is regulatory and protective, international criminal law is reactive and its remedies are only punitive. It fails to take account of the multiple harms generated by acts of sexual violence: 'there is no discursive space to document the likelihood that victims of rape will face other secondary harms such as rejection, depression, destitution, and continuing prostitution.'¹⁰⁵ There is a practical need for international criminal law to recognize that many such witnesses are also victims of crime who are entitled to long-term financial and other remedies, such as medical care, support, shelters and refuges, resettlement, and retraining,¹⁰⁶ taking into account the gendered nature of the offences. Thirdly, inclusion of crimes against women within the canon of international criminal law does not address fundamental issues of power or question the 'objectivity' of the international legal system and its hierarchy based on gender. Focusing on specific crimes may exclude broader enquiry into the motives for such offences and result in a failure to ask important questions: Why is it that crimes of sexual violence against women are consistently committed both in armed conflict and non-conflict situations? What is the proper response of international criminal law to the gross inequalities of power that makes their commission so regular? Why does violence against women not stop when a cease-fire or negotiated settlement is achieved but continues in ways directly connected with conflict?¹⁰⁷ In sum, '[r]eparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives.'¹⁰⁸

These critiques go to the nature of the legal response. Other critiques consider what Janet Halley has termed 'governance feminism'—successful feminist insistence on the inclusion of crimes of sexual violence against women within the international legal system—as having become excessive with unconsidered consequences. Karen Engle noted that there were disagreements between feminists at the outset of the 1990s, with some arguing that 'genocidal rape' should be distinguished from 'normal, everyday rape' while others disagreed arguing that rape of women in conflict

¹⁰⁴ Parliamentary Debates, House of Commons, 14 February 2013, col 1141, available at <<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130214/debtext/130214-0003.htm#13021465000003>> The Declaration was adopted by the G8, 11 April 2013.

¹⁰⁵ R. Dixon, 'Rape as a Crime in International Humanitarian Law: Where to From Here?', 13 *European Journal of International Law* (2002) 697–720 at 705.

¹⁰⁶ UNGA Res 40/34, 29 November 1985, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; UNGA Res 60/147, 16 December 2005, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

¹⁰⁷ Cf S. Marks, 'Human Rights and Root Causes', 74 *Modern Law Review* (2011) 57–78.

¹⁰⁸ Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 2007, § 3H, available at <http://www.womensrightscoalition.org/site/reparation/signature_en.php>.

is nothing new, is committed by all sides, and that focus on genocide distorts this reality. She suggests that even though this disagreement was diluted with the founding of the ad hoc criminal Tribunals, nevertheless the focus on criminal prosecution undermines women's political and sexual agency.¹⁰⁹ Halley argues that armed conflict has become routinely represented as rape and forms of sexual violence against women, rendering invisible other atrocities and defining women solely through their sexuality and reproductive capacity rather than as holistic beings.

This indeed could promote sexual violence through the 'weaponization' of rape. Halley finds especially problematic the issue of consent: can a woman consent to intercourse with a person from the opposing side in the coercive circumstances of armed conflict? When a woman consents to intercourse with one man hoping for some security from being raped by other men, and also for some food and other unavailable items, conceptual differences between survival, prostitution, enforced prostitution, collaboration, forced marriage, and rape become blurred. The anonymous 'Woman in Berlin' asks: 'What does it mean—rape? When I said the word for the first time aloud [...] it sent shivers down my spine. Now I can think it and write it with an untrembling hand [...] It sounds like the absolute worst, the end of everything—but it's not.'¹¹⁰

Similarities between the coercive circumstances of armed conflict and those that force women into prostitution outside of armed conflict are apparent, and, coupled with the continued myths about rape and implied consent, undermine the applicability of different legal regimes to armed conflict and so-called peacetime. As is apparent from the account of *the Woman in Berlin*, concentration on crimes of sexual violence conceals the many other gender-specific ways in which women experience armed conflict, such as disappearances of male family members, and destruction of property and food sources for women who are the primary carers within family and community. Halley's position has been challenged, for example by Hilary Charlesworth who argues that the inclusion of feminist ideas into international law is not in fact that great, and that it is important not to become 'dazzled by the inclusive language' and the concept of gender integration that has spread through the UN system.¹¹¹

Dianne Otto argues that 'governance feminism' is a misnomer: that the 'the institutional reception and management of feminist ideas' has divested them 'of their emancipatory content', making it more a matter of co-option than governance.¹¹² Otto, however, is concerned about the continued protective stance towards women

¹⁰⁹ K. Engle, 'Feminism and its (Dis)contents: Criminalizing Wartime Rape', 99 *American Journal of International Law* (2005) 778–816 at 780.

¹¹⁰ Anonymous, *A Woman in Berlin* (Virago, 2005), 83.

¹¹¹ H. Charlesworth, 'Talking to Ourselves: Should International Lawyers Take a Break from Feminism?', in S. Kouvo and Z. Pearson (eds), *Between Resistance and Compliance? Feminist Perspectives on International Law* (Oxford: Hart Publishing, 2011), 17–33.

¹¹² D. Otto, 'The Exile of Inclusion: Reflections on Gender issues in International Law over the Last Decade', 10 *Melbourne Journal of International Law* (2009) 11–26.

that assumes their vulnerability, for example by the conjunction of ‘women and children’ and the zero tolerance response to sexual abuse committed by UN peacekeepers. This policy gives insufficient attention to ‘the grinding poverty or the poorly resourced charity-based models of aid that produce economies of survival sex’, diverting attention from the politics of social justice in order to ‘save the UN’s humanitarianism from scandal. It makes the survival of the “victims” it claims to protect even more precarious.’¹¹³ Otto’s intention is not to ‘understate the harm that can be inflicted by sexual violence, but rather to demystify it and suggest dealing with the problem in a way that is empowering for women.’¹¹⁴

Another concern is that focus on gender-based crimes against women minimizes those offences committed against men. As Adam Jones points out, ‘non-combatant men have been and continue to be the most frequent targets of mass killing and genocidal slaughter, as well as a host of lesser atrocities and abuses.’¹¹⁵ He notes that a leading work on ‘gendercide’ refers only to such behaviours when directed at women.¹¹⁶ Nevertheless, lessening the unnecessary suffering of mostly male combatants has been the objective of international humanitarian law and asserting accountability for crimes committed against them has formed the bulk of the work of war crimes tribunals. However, other forms of violence against men in armed conflict have remained less visible and accurate numbers of these offences will most probably never be known.

While acknowledging that the figures are nevertheless unlikely ever to equate to those relating to sexual violence against women, Sandesh Sivakumaran argues convincingly that this does not justify exclusive attention being given to female sexual violence.¹¹⁷ All sexual violence, whoever it is committed against, warrants attention from the international community. Indeed, breaking the silence about crimes committed against women has opened the door to the same with respect to men. As Sivakumaran notes ‘[i]n some respects, the situation facing male rape victims today is not so different from that which faced female victims, say, two centuries ago.’¹¹⁸ Further, sexual violence against males is part of the same context—gender dimensions of conflict—as that committed against females; understanding more about the causes, circumstances, and outcomes of one facilitates our greater understanding of, and therefore appropriate responses to, all kinds of sexual violence. In both manifestations of violence ‘the constructions of masculinity and femininity and the

¹¹³ D. Otto, ‘Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies’, in V. Munro and C.F. Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Oxon: Glass House Press, 2007).

¹¹⁴ D. Otto, ‘The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade’, 10 *Melbourne Journal of International Law* (2009) 11–26 at 24.

¹¹⁵ A. Jones, ‘Gendercide and Genocide’, 2 *Journal of Genocide Research* (2000) 185–211 at 186.

¹¹⁶ Jones (n 115), discussing M. Warren, *Gendercide: The Implications of Sex Selection* (Totowa, NJ: Rowman & Allanheld, 1985).

¹¹⁷ S. Sivakumaran, ‘Sexual Violence against Men in Armed Conflict’, 18 *European Journal of International Law* (2007) 253–77 at 260.

¹¹⁸ Sivakumaran (n 117), 253.

stereotypes involved are similar.¹¹⁹ Finally, this may assist in dispelling the stereotypes of women as victims and in need of protection and men only as perpetrators. Thus a more nuanced understanding of the role of gender in conflict can play a part in a transformation of gender relations.

These tensions demonstrate the complexity of gender-based crimes and crimes of sexual violence whether committed by or against women or men. It is evident that the somewhat blunt instruments of international humanitarian law and international criminal law are inadequate to address the multiple issues that are raised by their continuing commission. Nevertheless they are an important step and governments may find they cannot easily discount the formal legal commitments they have accepted. Without feminist critique and initiative, international criminal law would have continued to exonerate the most blatant gender-based crimes of sexual violence against women, thereby enhancing the expectation of impunity and allowing the unchallenged continuation of gender constructs.

¹¹⁹ Sivakumaran (n 117), 260.