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Too Rough a Justice: The Ethiopia-Eritrea Claims Commission and Civil Liability for Claims for Rape under International Law

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Too Rough a Justice: The Ethiopia-Eritrea Claims Commission and International Civil Liability for Claims for Rape Under International Humanitarian Law

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The developments in international law prohibiting rape during armed conflict have grown at a rapid pace in recent decades. Whereas rape had long been considered an inevitable by-product of armed conflict, evolution in international humanitarian law (IHL) has relegated this conception mostly to the past. The work of international criminal tribunals has been at the forefront of this change, developing the specific elements of the international crime of rape, and helping to change the perception of rape in international law. Violations of IHL, however, also give rise to civil liability. Despite the advances with respect to rape made in the international criminal law context, non-criminal adjudication of claims for rape has been rare. Recently, the Ethiopia-Eritrea Claims Commission completed eight years of work, making numerous damage awards for civil claims based on violations of IHL that occurred during the war between those two states. Among the claims that it heard were several claims for rape, brought by both parties. Thus, the completed work of the Ethiopia-Eritrea Claims Commission represents an important opportunity to examine civil adjudication of claims for rape under IHL.

This Article asks whether the work of the Commission has helped to extend the protections afforded by IHL, and whether its treatment of the claims for rape is in line with the progress made within IHL regarding the conceptualization of rape. It locates and analyzes the work of the Commission within the broader changes that have occurred within IHL with respect to rape, outlines the work of the Commission, and analyzes its substantive and procedural decisions. This Article argues that, while the Commission contributed certain substantive and procedural advances to IHL, it may have simultaneously created certain gaps in the IHL regime and hindered the conceptualization of rape within IHL.

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I. INTRODUCTION

The past several decades have witnessed a fundamental change in international law with respect to the norms prohibiting rape and sexual violence during armed conflict.[1] Prior to World War II, international legal prohibitions of sexual violence reflected a perception that acts of rape and sexual violence were either property violations or honor violations, and, inevitably, a by-product of armed conflict.[2] While some protections existed under international humanitarian law (IHL), norms were vague and rarely applied by tribunals that adjudicated violations of IHL. The advent of new legal categories such as crimes against humanity, followed especially by the application of IHL by international criminal tribunals, helped prompt a change in the perception of the nature of rape and sexual violence and opened the door to the development of norms with a greater degree of specificity, thereby ushering in an era of greater accountability.

1. *See* K. Alexa Koenig, Ryan S. Lincoln & Lauren E. Groth, *Contextualizing Sexual Violence Committed During the War on Terror: A Historical Overview of International Accountability*, 45 U.S.F. L. REV. 911, 916 (2010); Mark S. Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L L. 225, 227 (2006-2007).

2. *See* David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of* Jus Cogens*: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 237 (2005); *see also* Dustin A. Lewis, *Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law*, 27 WIS. INT'L L.J. 1, 22 (2009).

After several decades of work by international judges, prosecutors, advocates, activists, scholars, and others, IHL now includes more robust, specific prohibitions against rape during armed conflict.[3] To date, the prohibitions of rape under IHL have been applied predominately in the context of international criminal tribunals, namely the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY).

As a body of law, however, IHL can also give rise to civil liability and state responsibility.[4] While international criminal tribunals have been the loci of positive change and progressive development with respect to the perceptions and prohibitions of rape under international law, they are not the only engines of international law development, nor are they the only legal mechanism by which the protections of IHL may be levied. International claims practice—that is, international arbitration, mass claims procedures, and state-to-state claims—is a means for bringing claims for civil liability under IHL, and may thereby reinforce and further develop IHL protections for those at risk of rape and sexual violence during times of armed conflict in ways that are different, yet complementary, to international criminal tribunals.

Yet, to date, there have been very few instances in which an international tribunal has applied IHL to cases of rape in a non-criminal context. Thus, there has been little opportunity to examine the application of IHL norms developed primarily through criminal tribunals when those norms are applied in non-international criminal law contexts. Both real-world examples and scholarly attention to this phenomenon are rare.

The most recent example of IHL application by a non-criminal tribunal is the Ethiopia-Eritrea Claims Commission (the Commission), which, over a course of eight years, adjudicated state-to-state claims and some claims espoused by nationals, based on IHL, committed during the war between the two states that took place between 2003 and 2005.[5] On August 17, 2009, the Commission rendered its final damages awards, putting the capstone on a series of previously issued partial awards.[6]

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3. This Article focuses specifically on rape—as did the Commission—rather than the broader category of sexual violence.

4. Won Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in The Hague*, 25 WIS. INT'L L.J. 23, 23-24 (2007).

5. *See Ethiopia-Eritrea Claims Commission*, PERMANENT CT. ARB., http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited Apr. 22, 2012).

6. Final Award, Eritrea's Damages Claim (Eri v. Eth.), 26 R.I.A.A. 512, 528, ¶ 37 (Eri.-Eth. Claims Comm'n 2009).

Among the various claims presented by both sides were claims for rape of civilians, and the Commission's procedural and substantive decisions with respect to these claims are important examples of international claims adjudication applying IHL norms.

This Article examines procedural decisions and the jurisprudence of the Commission in light of the evolution of international norms prohibiting sexual violence as they have developed through application of IHL by international criminal tribunals. It argues that, although international criminal law and claims tribunals have important differences, they should be examined not only side-by-side, but also as complementary aspects of a common IHL regime. In many areas of international law, various tribunals "borrow" from one another, employing legal norms developed in a different legal context. But, in doing so, application of international norms in different legal contexts may fragment the cohesive legal protections that extend under the IHL regime. Violations of IHL can give rise to individual criminal responsibility, civil liability, and also international state responsibility. Nevertheless, IHL norms with respect to rape have been developed primarily in the criminal context. Little analysis has been given to the ways that criminal and civil application and adjudication, based on shared IHL norms, can enhance or disrupt the protective regime of IHL.

This Article argues that the work of the Commission, while making certain positive contributions to IHL norms with respect to rape, may also have introduced gaps in the overarching, protective legal regime and hindered the progress of how rape is conceptualized under international law. Specifically, the Commission's finding of an obligation among states to effectively prevent rape during armed conflict is an important decision, especially in the realm of civil claims for IHL violations. Additionally, the procedural decisions with respect to evidence of rape are significant, especially in light of the difficulty of adjudicating claims of rape. However, failure to fully articulate the requirements of this norm may have the unintended consequence of furthering wartime rape and sexual violence. Moreover, the method of calculating and awarding damages has more in common with property-based conceptions of sexual violence, which is counter to the Commission's desire to ensure that rape and sexual violence not be considered a mere by-product of armed conflict.

This Article proceeds in six Parts. Part II surveys the evolution of international criminal law norms prohibiting sexual violence during armed conflict. Part III analyzes the international law of state responsibility with respect to international norms prohibiting sexual

violence in order to contextualize the Commission's adjudication of state-to-state claims. Part IV compares the adjudication of norms prohibiting rape under international criminal law and civil adjudication of IHL violations. Finally, Part V evaluates the Commission's jurisprudence with respect to rape, arguing that the Commission's work, while laudable in many respects, carries potential setbacks for advances made within international law to safeguard against rape and sexual violence during armed conflict, and Part VI offers a brief conclusion.

II. INTERNATIONAL CRIMINAL NORMS PROHIBITING SEXUAL VIOLENCE[7]

In the decades following World War II (WWII), several international tribunals have, through their work, extensively developed international prohibitions against rape and sexual violence.[8] Perception of the nature of the crime of rape has changed wholesale, acknowledgment of the gravity of rape as an international crime has grown considerably, and a proliferation of international tribunal jurisprudence has brought the state of the law on this issue to maturity.

Viewed chronologically, the evolution of international norms prohibiting rape falls into three genealogical categories. The early period—from the Lieber Code of 1863 up to WWII—witnessed only limited or approximate prohibitions of rape. The middle, developmental period—from the tribunals following WWII to the ICTY and the ICTR—saw the rapid development of specific international norms prohibiting rape. Finally, the contemporary period—beginning roughly with the formation of the International Criminal Court (ICC)—unveiled the arrival of a mature international doctrine prohibiting rape.[9] The following sections provide a summary of the evolution of the doctrine.

A. The Early Period—Codes, Conventions, and World War II

Early prohibitions against rape were limited, often indirect, and based on a parochial and paternalistic view of women and the severity of sexually violent crimes.[10] For example, the earliest prohibitions against rape based on international law in the United States come from the Lieber Code of 1863, which contained prohibitions against rape,

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7. *See* Koenig, Lincoln & Groth, *supra* note 1.

8. *Id.* at 924.

9. *See* K. Alexa Koenig, Ryan S. Lincoln & Lauren Groth, The Jurisprudence of Sexual Violence 3-31 (Sexual Violence & Accountability Project Working Papers Series, 2011) (unpublished) (on file with the Human Rights Center, Univ. of California, Berkeley).

10. *See* Koenig, Lincoln & Groth, *supra* note 1, at 916-17.

categorizing it as a crime of troop discipline.[11] The 1907 Hague Conventions sought to protect the "honor" of women during armed conflict, but made no explicit condemnation of rape per se.[12]

WWII marked an important shift. No prosecutions for rape took place during the Nuremberg Trials, and the corresponding Charter did not contain any enumerated prohibitions against rape. The Nuremberg Charter, however, introduced the legal category of crimes against humanity.[13] Control Council Law Number 10, adopted by the Occupying Powers, included rape as a constituent act of crimes against humanity.[14] This marked an important shift in international jurisprudence, from rape as a property or "honor" violation to a violation of human dignity and autonomy.[15]

Trials in Japan following WWII had similarities to and differences from the Nuremberg Trials. The charter establishing the International Military Tribunal for the Far East (IMTFE) did not explicitly prohibit rape.[16] The IMTFE did, however, prosecute and convict two individuals for war crimes through a command responsibility theory for rape committed by troops.[17] These convictions, however, stand in stark relief to the failure to prosecute those responsible for over 200,000 "comfort women" held in Japanese rape camps.[18]

The 1949 Geneva Conventions and the 1977 Additional Protocols further developed the international norms against rape. The Fourth Geneva Convention explicitly prohibits rape, specifically naming rape, enforced prostitution, and "any other form of indecent assault" among the special protections afforded to women during times of conflict.[19] The Fourth Geneva Convention, then, made rape illegal, but failed to make it

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11. *Id.* at 916.

12. *See* Ellis, *supra* note 1, at 228; Mitchell, *supra* note 2, at 237; *see also* Lewis, *supra* note 2, at 2121-22.

13. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

14. *See* Koenig, Lincoln & Groth, *supra* note 1, at 915.

15. *See* Ellis, *supra* note 1, at 227; Mitchell, *supra* note 2, at 237; *see also* Lewis, *supra* note 2, at 22.

16. *See* International Military Tribunal for the Far East, at 23, Jan. 19, 1946, T.I.A.S. No. 1589.

17. Ellis, *supra* note 1, at 228.

18. YOSHIAKI YOSHIMI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II 153 (Suzanne O'Brien trans., 1995); YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II 153 (2008).

19. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

prosecutable by not listing rape among the prosecutable grave breaches of article 147.[20]

The 1977 Additional Protocols contained only minor additions with respect to rape. Additional Protocol I explicitly prohibited rape of women and prohibited enforced prostitution and indecent assault as forms of outrage upon personal dignity.[21] Nevertheless, Additional Protocol I still left out rape from the enumerated list of prosecutable grave breaches.[22] Additional Protocol II extended the prohibition of rape to all, without respect to biological sex.[23] Most now recognize the Geneva Conventions and Additional Protocol I as representative of customary international law.

As a result of these various international legal developments, IHL came to prohibit rape, even if it offered less than robust protection and left the legal definition of rape ambiguous.[24] Throughout the 1990s, new developments in international jurisprudence would further expand the law on rape.

B. The Developmental Stage—The International Criminal Tribunals

The ICTR and for the ICTY have been the most prominent contributors to the development of international prohibitions of rape. Prior to their creation, rape was clearly prohibited by IHL, but the specific elements of rape were unclear.[25] In response, the two tribunals have developed a substantial and concrete body of relatively new international law.[26]

Prosecutor v. Akayesu (*Akayesu*), decided by the ICTR in 1998, was the first significant decision in the line of cases developing the

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20. *Id.* arts. 146-147.

21. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 76, June 8, 1977, 1125 U.N.T.S. 3.

22. *Id.*

23. *Id.*

24. PATRICIA VISEUR SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE IN CONFLICT: THE IMPORTANCE OF HUMAN RIGHTS AS MEANS OF INTERPRETATION 7 (2007), *available at* http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf.

25. *See, e.g.*, *id.*

26. Mitchell, *supra* note 2, at 240:

> Successes include: expanding the definitions of crimes against humanity and genocide to include rape; the participation of women in high-level positions and the inclusion of staff sensitive to gender issues; effectively prosecuting various forms of sexual violence as instruments of genocide, war crimes, crimes against humanity, means of torture, forms of persecution, and enslavement; and generally defining, clarifying, and redressing gender-related crimes.

international norms against rape.[27] Not only did the case directly address charges of rape, but the decision contained two landmark holdings. Akayesu was ultimately convicted for rape as a constituent act of crimes against humanity, war crimes, and genocide for his knowledge of, presence at, and failure to prevent several acts of sexual violence that occurred under his authority.[28]

In reaching this decision, the trial chamber made a landmark determination that rape could satisfy the actus reus of crimes against humanity, war crimes, and genocide. Moreover, the trial chamber, for the first time, elucidated the elements necessary to prove rape. The trial chamber defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[29] Furthermore, an "invasion" could involve acts that did not involve penetration or even physical contact between persons.[30] The trial chamber also took up the notion of consent, albeit indirectly, ruling that coercion could be inferred from certain circumstances including armed conflict.[31] A finding of coercion—as in this case—precluded any analysis of consent either as an element of the crime or as an affirmative defense. *Prosecutor v. Musema* followed the ruling in *Akayesu*, solidifying the elements of rape delineated in the prior case.[32]

On the heels of *Akayesu*, the ICTY issued its own landmark decision with respect to rape in *Prosecutor v. Furundzija* (*Furundzija*), finding that rape could constitute torture under international law.[33] The ICTY established its own definition of rape,[34] and held that rape constituted torture and was, therefore, a grave breach under common article 3 of the Geneva Conventions, which had been incorporated into the Charter of the ICTY.[35] As such, Anto Furundzija, commander of a military police unit in the Croatian Defense Council, was charged and convicted of the war crime of torture by threatening to insert a knife into

27. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), http://www.inictr.org/Portals/0/Case\English\Akayesu\judgment\akay001.pdf.

28. *Id.* ¶ 1.

29. *Id.* ¶ 598.

30. *Id.* ¶ 688.

31. *Id.*

32. Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence ¶ 28 (Jan. 27, 2000), http://www.unictr.org/Portals/0/Case\English\Musema\judgment\000127.pdf.

33. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 10, 1998), http://icty.org/x/cases/furundzija/tjvg/en/fur-tj981210e.pdf.

34. *Id.* ¶ 185 ("(i) the sexual penetration, however slight: (a) of the vagina or anus 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").

35. *Id.*

the vagina of a victim and failing to intervene when the same victim was forced to have oral and vaginal intercourse with another victim.[36] The appellate chamber affirmed the trial chamber's judgment in its entirety upon appeal.[37]

Prosecutor v. Kunarac (*Kunarac*) marked yet another significant development in the international jurisprudence of rape as it departed from the *Akayesu* and *Furundzija* elements by including a two-pronged lack of consent requirement among the elements needed to prove rape.[38] Under this test, the trial chamber looked first to the consent or lack thereof of the victim and, second, to whether the perpetrator knew of the victim's lack of consent.[39] The trial chamber reasoned that the consent prong was needed to capture the essence of the crime of rape—violation of a victim's sexual autonomy.[40] This was the first time an international tribunal examined consent directly, rather than inferring lack of consent from inherently coercive circumstances. As a result, the ICTY in *Kunarac* defined rape as:

> [T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[41]

Ultimately, the trial chamber found Kunarac and his co-defendants, ethnic Serbs who participated in ethnic cleansing activities in Republika Srpska, guilty of rape as a war crime and as a crime against humanity, in part, for implementing a holding facility used to systematically rape Muslim women and girls.[42]

The trial chamber still left open the possibility for an inference of nonconsent, holding that a defense of consent could not be offered if the

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36. *Id.* ¶ 38.

37. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Judgment ¶¶ 80-127 (Int'l Crim. Trib. for the Former Yugoslavia, July 21, 2001).

38. Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment ¶ 459 (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 22, 2001).

39. SELLERS, *supra* note 24, at 21.

40. *Kunarac*, Case Nos. It-96-23-T & IT-96-23/1-T, ¶ 457.

41. *Id.* ¶ 460.

42. Press Release, Int'l Crim. Trib. for the Former Yugoslavia, Judgment of Trial Chamber II in the Kunarac, Kovač and Vuković Case (Feb. 22, 2001) (on file with author).

facts showed the victim was threatened with or suffered "violence, duress, detention or psychological oppression."[43] The Appeals Chamber upheld the trial chamber's decision, rejecting the defendant's argument that a victim must show "continuous" or "genuine" resistance to demonstrate lack of consent.[44]

The Appeals Chamber of the ICTR refined the issue of consent first given in *Kunarac* in *Prosecutor v. Gacumbitsi* (*Gacumbitsi*).[45] There, the Appeals Chamber rejected the prosecution's argument that consent is properly a defense, and not an element of the crime. Thus, the Appeals Chamber reaffirmed that lack of consent of the victim and the knowledge of lack of consent by the perpetrator must both be shown by the prosecutor in order to prove rape.[46] Again, lack of consent could be inferred either by a showing of coercion or duress, or by demonstrating the presence of coercive circumstances.[47]

Through their jurisprudence, the ICTR and the ICTY have given proper gravity to the crime of rape, and underscored that rape is a violation of dignity and bodily autonomy, rather than a property violation. While both tribunals treat rape as a prosecutable offense only as a constituent offense of war crimes, crimes against humanity, or genocide, they accomplished a great deal by clarifying the legal elements of the international crime of rape.

C. The Contemporary Period—The International Criminal Court

The ICC came to fruition upon ratification of the Rome Statute by the sixty-sixth state party in July 2002.[48] The ICC continued the progressive trajectory of the ICTR and ICTY, ultimately going further with the inclusion of prohibitions against sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other types of sexual violence in its statute.[49] Significantly, the ICC statute prohibits these forms of sexual violence as stand-alone offenses, rather than as

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43. *Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, ¶ 462.

44. Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment ¶ 125 (Int'l Crim. Trib. for the Former Yugoslavia, June 12, 2002), http://icty.org/x/cases/kunarae/acjug/en/kun-aj020612e.pdf.

45. Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, Judgment (July 7, 2006), http://www.unictr.org/Portals/0/Cases\English\Gacumbitsi\Decision\04D617-judgment.pdf.

46. *Id.* ¶¶ 153-154.

47. *Id.* ¶ 157.

48. *About the Court*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/About+the+Court/ (last visited Apr. 4, 2012).

49. ANNE-MARIE L.M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 85-86 (2005).

constituent offenses.[50] Perhaps most significant is the Rome Statute's declaration that rape is a grave breach of the Geneva Conventions.[51] Specifically, the ICC statute defines rape as the following:

> (1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
> (2) The invasion was committed by force, or by the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[52]

This definition reflects elements of force, coercion, and consent developed throughout the ICTR and ICTY jurisprudence, and includes specific language that allows for lack of consent to be inferred from inherently coercive circumstances. Finally, the ICC's authority extends to the ability to determine and award reparations to victims.[53]

Thus, the application of IHL prohibitions against rape has reached a relatively mature state in the context of international criminal law. In comparison, the adjudication of IHL claims either for civil liability or state responsibility is undeveloped. Violations of IHL can give rise to liability for damages and trigger the international law of state responsibility.[54] However, it is unclear how IHL norms developed predominately in the criminal context can and should be applied in an international claims tribunal and what results such application might have for the body of IHL as a whole.

The Ethiopia-Eritrea Claims Commission, thus, is an important case study for answering these open questions. In order to adjudicate the claims for rape brought before it, the Commission derived an obligation incumbent upon states to effectively prevent rape of civilians during armed conflict,[55] and made certain procedural allowances in order to

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50. THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 190-99 (Roy S. Lee ed., 2001).

51. Rome Statute of the International Criminal Court art. 8(2)(b)(xxii), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

52. Int'l Criminal Court, Report of Preparatory Comm'n for Int'l Criminal Court, Elements of Crimes, art. 8(2)(e)(vi)-1, U.N. Doc. PCNICC/2000/1/Add.2 (2000) (citations omitted).

53. Rome Statute, *supra* note 51, art. 75.

54. *See* Kidane, *supra* note 4, at 23.

55. Partial Award: Central Front—Eritrea's Claims 2, 4, 6, 7, 8 & 22 (Eri. v. Eth.), 26 R.I.A.A. 120, ¶ 42 (Eri.-Eth. Claims Comm'n 2004).

evaluate the evidence of rape presented by both states.[56] While these were novel and important advances under international law, this obligation, and the mechanism by which the Commission chose to award damages, has the potential to introduce gaps in the broader context of IHL protections. The following section details the Commission's jurisprudence with respect to claims for rape of civilians under IHL, setting the background for an analysis of the implications of the Commission's decisions.

III. INTERNATIONAL CLAIMS PROCESSES AND INTERNATIONAL HUMANITARIAN LAW—THE ETHIOPIA-ERITREA CLAIMS COMMISSION

A. The Ethiopia-Eritrea Claims Commission

From May 1998 to June 2000, Ethiopia and Eritrea engaged in an international armed conflict that was ultimately brought to an end through an international effort.[57] The conflicting parties signed an agreement in June that provided for a security zone to separate the respective armed forces and requested deployment of a United Nations peacekeeping force.[58] The parties signed a permanent peace agreement in December 2000 that established a Boundary Commission to delimit the border between the two countries and created the Claims Commission to adjudicate claims for "loss, damage, and injury resulting from the conflict."[59] The Claims Commission, like the Boundary Commission, was composed of five members: two chosen by each respective state, with the chosen four selecting the fifth member.[60]

The first phase of the Commission's work established rules of procedure, categories of claims, and types of remedies, and also determined the scope of its jurisdiction.[61] Then, from 2003 to 2005, the Commission heard claims from both states and issued thirteen partial awards ranging from claims of unlawful invasion (Eritrea) and killing of

56. *Id.* ¶¶ 39, 41.

57. Michael J. Matheson, *Introductory Note to Eritrea's and Ethiopia's Damage Claims*, 49 I.L.M. 101, 101 (2010). For an excellent survey of the events giving rise to the Boundary and Claims Commissions, see Christine Gray, *The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?*, 17 EUR. J. INT'L L. 699 (2006).

58. Matheson, *supra* note 57, at 101.

59. *Id.*

60. Michael J. Matheson, *The Damage Awards of the Ethiopia-Eritrea Claims Commission*, 9 L. & PRAC. INT'L CTS. & TRIBUNALS 1, 2 (2010).

61. Matheson, *supra* note 57, at 101.

civilians to property damage claims and improper treatment of prisoners of war brought by each state against the other.[62]

Finally, the Commission evaluated the amounts of compensation to be paid out and issued its final damages award on August 17, 2009.[63] Michael J. Matheson notes that throughout the proceedings several mechanisms for relief had been considered, but most were rejected.[64] Neither state chose to submit claims for fixed amounts for different categories of individual claims, a mechanism the Commission had created in its "Decision Number 5" that paralleled the method employed by the U.N. Compensation Commission.[65] Nor did the parties choose to negotiate a lump-sum settlement that could then be allocated to individuals.[66] Ethiopia had proposed that the Commission not issue damage awards, but rather create a mechanism to facilitate allocation of international aid to those who suffered damages in both countries.[67] Similarly, Eritrea suggested that rather than pursue monetary damages for rape claims, each state should set aside money to provide health care and support services for women.[68] In the end, however, the Commission's final damages awards were a function of limited time resources, available evidence, and a strong sense of practicality.

Thus, in issuing the damages awards, the Commission chose to "ma[ke] the best estimates possible on the basis of the available evidence ... even if the process involv[ed] estimation, or even guesswork, within the range of possibilities indicated by the evidence."[69] Nevertheless, the Commission did not issue damage awards in some cases where proof of damage was not substantiated. In other cases—such as rape, death of civilians, violence, or property loss—the Commission issued damages even when evidence was sparse.[70]

At conclusion, the Commission awarded approximately $161 million to the Government of Eritrea and approximately $2 million to Eritrean individuals. The Commission awarded $174 million to the Government of Ethiopia; thus, Ethiopia netted approximately $10

62. *See Ethiopia-Eritrea Claims Commission*, *supra* note 5.
63. Matheson, *supra* note 57, at 101.
64. Matheson, *supra* note 60, at 5.
65. *Id.*
66. *Id.* at 6.
67. *Id.* at 6-7.
68. *Id.* at 6.
69. Final Award—Eritrea's Damages Claim, *supra* note 6, ¶ 37. It is important to note that the damages have not been paid. *See Annual Report: Eritrea 2011*, AMNESTY INT'L USA (May 28, 2011), http://www.amnestyusa.org/research/reports/annual-report-eritrea-2011.
70. Matheson, *supra* note 60, at 7-8.

million.[71] Matheson has noted that the results of the awards going forward are uncertain.[72] There is no dedicated pool of funds to automatically pay out awards and ultimately the paying of awards depends on the "willingness and ability" of the two resource-poor governments.[73] Matheson notes a few possibilities that are open to the governments if the awards are not paid out, including offset or seeking enforcement through attachment or lawsuit in jurisdictions in which the opposing state has assets.[74]

Moreover, Matheson notes that the claims are mostly state-to-state claims and not claims directed to specific individuals, and that the net amount of $10 million that is owed to Ethiopia is far too small to cover the full range of damages sustained by the armed conflict.[75] As such, the two governments would receive any payments and would retain discretion to keep the payments, distribute them to the individuals who incurred damages, or create an alternative method of providing assistance or relief to those who suffered damages.[76]

Scholarly attention to the Claims Commission has been limited to date, but commentators have agreed that the jurisprudence and work of the Commission contains several important advancements for civil adjudication of violations of IHL.[77] Won Kidane states that while violations of IHL are compensable under article 3 of the Fourth Hague Convention, actual adjudications of violations have been rare, making the work of the Commission an important development.[78] In another article, Matheson lists several substantive and procedural findings (including the Commission's decisions on evidence with respect to rape discussed below) that he considers important outcomes of the Commission's work.[79]

J. Romesh Weeramantry argues that, despite the time and resource constraints placed on the Commission, its work resulted in several decisions with "practical detail that . . . will provide a useful guide to understanding and applying rules of international humanitarian law."[80] In

71. Matheson, *supra* note 57, at 102.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*; Kidane, *supra* note 4, at 44.
78. Kidane, *supra* note 4, at 44.
79. Matheson, *supra* note 60, at 3-5.
80. J. Romesh Weeramantry, *Prisoners of War (Eritrea v. Ethiopia), Eritrea's Claim 17/ Ethiopia's Claim 4, Partial Awards; Central Front (Eritrea v. Ethiopia), Eritrea's Claims 2, 4, 6, 7, 8 & 22/Ethiopia's Claim 2, Partial Awards*, 99 AM. J. INT'L L. 465, 471 (2005).

particular, he references the decisions regarding the standard of first aid treatment to be given to POWs, indicators of substandard medical care in POW camps, and the extent of the obligation to repatriate POWs.[81] Additionally, he comments that the awards underscore the "mandatory nature" of rules of customary international law as embodied in both the Hague and the Geneva Conventions and will help solidify the customary status of Additional Protocol I.[82]

Nevertheless, Weeramantry does level some criticism at the Commission. He says the Commission could have done more with credible evidence of isolated incidents of serious violations of IHL, such as rape and unlawful killing of POWs.[83] He writes:

> A failure to act upon evidence pointing to serious, but isolated, violations of universally accepted standards of humanitarian law sends out the wrong message. The point here is that a postconflict adjudication process must, as far as is possible, avoid giving the impression that isolated violations of humanitarian law are not sufficiently important—in the context of a large-scale armed conflict—to warrant investigation or to attract state and, possibly, individual responsibility.[84]

The Commission's jurisprudence with respect to each state's claims for rape has received praise but little in-depth analysis. These decisions are indeed praiseworthy in some respects, but, when examined in the fuller context of the Commission's work, with respect to the protective purposes of IHL, and in light of the progressive development of international prohibitions of rape, they reveal noteworthy weaknesses.

B. Allegations and Comments with Respect to Rape

Among the full range of claims presented by both parties to the Commission were several claims of rape.[85] The Commission determined that allegations of rape were worthy of special treatment—due to the difficulty of obtaining evidence of rape and the cultural taboo of discussing sexual violence—and carved out its comments on rape from

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81. *Id.*
82. *Id.*
83. *Id.* at 472.
84. *Id.*
85. *See* Partial Award: Central Front—Eritrea's Claims 2, 4, 6, 7, 8, & 22, *supra* note 55, ¶¶ 36-45, 80-81; Partial Award: Central Front—Ethiopia's Claim 2 (Eri. v. Eth.), 26 R.I.A.A. 159, ¶¶ 34-40 (Eri.-Eth. Claims Comm'n 2004); Partial Award: Civilians Claims—Ethiopia's Claim 5 (Eri. v. Eth.), 26 R.I.A.A. 249, ¶¶ 83-90 (Eri.-Eth. Claims Comm'n 2004); Partial Award: Western Front, Aerial Bombardment and Related Claims—Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26 (Eri. v. Eth.), 26 R.I.A.A. 291, ¶¶ 74-83 (Eri.-Eth. Claims Comm'n 2005); Partial Award: Western and Eastern Fronts—Ethiopia's Claims 1 & 3 (Eri. v. Eth.), 26 R.I.A.A. 351, ¶¶ 49-56, 68-69 (Eri.-Eth. Claims Comm'n 2005).

its analysis of other claims. The Commission, implicitly aligning itself with the current state of the law with respect to rape under international law, made it clear that it did not consider rape to be an inevitable by-product of armed conflict. Thus, in order to actually adjudicate claims for rape in light of a lesser quantity of evidence than might otherwise be needed, the Commission adopted the special procedural rules, discussed below, and carefully laid out the legal standard by which it would rule on the parties' rape claims.

Here, just as in the other claims, the Commission applied IHL. More specifically, the Commission turned to "customary international law, as reflected in the Geneva Conventions"[86] and measured the claims of the parties against common article 3 of the Geneva Conventions, article 27 of the Fourth Geneva Convention, and article 76.1 of Additional Protocol I.[87] The Commission did not turn to the definitions of rape developed through the jurisprudence of the ICTY, ICTR, and ICC. Rather, taking the above provisions together, the Commission found an international obligation for states to protect women civilians from rape during armed conflict, and evaluated the claims of both states against this obligation.[88]

In the partial awards, the Commission laid out the special evidentiary considerations that it took before discussing the merits of the claims. First, the Commission adapted its fact-finding criteria in light of the cultural context surrounding rape. Both parties had suggested the sensitive nature of rape in their culture made victims unlikely to come forward and made witnesses unlikely to give specific or detailed testimony, especially compared to non-sexual offenses.[89] Thus, the Commission abandoned its normal evidentiary requirement of "clear and convincing evidence" of a pattern of "frequent or pervasive" violations, instead setting the threshold at "several" incidents of rape.[90] Rape, said the Commission, "involves intentional and grievous harm to an individual civilian victim, [and] is an illegal act that need not be frequent to support State responsibility."[91]

With these considerations in place, the Commission focused its inquiry on specific geographic regions "where large numbers of opposing troops were in closest proximity to civilian populations . . . for

86. Partial Award: Central Front—Eritrea's Claims 2, 4, 6, 7, 8 & 22, *supra* note 55, ¶ 37.
87. *Id.*
88. *Id.* ¶ 42.
89. *Id.* ¶ 39.
90. *Id.* ¶¶ 40-41.
91. *Id.* ¶ 41.

the longest periods of time."[92] Such situations, stated the Commission, posed the highest risk of sexual violence, a fact that Eritrea and Ethiopia must have known. As such, the two states were "obligated to impose effective measures, as required by international humanitarian law, to prevent rape of civilian women."[93]

Eritrea put forth a claim for several rapes perpetrated in Senafe Town by Ethiopian soldiers in its Central Front Claims.[94] As evidence, Eritrea offered several eyewitness accounts of rapes, the testimony of a *Médicins Sans Frontières* physician serving in the area, and the testimony of another physician that supported the occurrence of several rapes.[95] The Commission found that Eritrea had made a prima facie case of breach on this claim.[96] Moreover, the Commission ruled that Ethiopia failed to rebut Eritrea's claim. Although Ethiopia tried to prove that rape complaints were investigated, that soldiers were arrested, and offered evidence of its IHL compliance training, this evidence was not enough to rebut Eritrea's claim.[97] Therefore, Ethiopia was found liable for "failure to take effective measures to prevent rape by its soldiers of Eritrean civilian women."[98]

Ethiopia, too, presented claims for rape among its Central Front Claims. As evidence, Ethiopia offered information from the Tigray Women's Association that had registered twenty-six rapes in Irob Wereda, which was corroborated by a government official who had investigated rapes in the area and put the number at thirty-five.[99] Other eyewitnesses, including local clergymen, also reported rapes by Eritrean soldiers.[100] The Commission found this evidence sufficient to establish a prima facie case that Eritrea did not attempt to rebut.[101] Thus, the Commission also found Eritrea liable for "failure to take effective measures to prevent rape by its soldiers of Ethiopian civilian women."[102]

Ethiopia also brought claims for rape in its Western and Eastern Fronts Claims.[103] Its evidence for the Western Front Claims consisted of

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92. *Id.* ¶ 42.
93. *Id.*
94. *See id.* ¶¶ 79-81.
95. *Id.* ¶ 80.
96. *Id.* ¶ 81.
97. *Id.*
98. *Id.*
99. Partial Award: Central Front—Ethiopia's Claim 2, *supra* note 85, ¶ 83.
100. *Id.*
101. *Id.* ¶ 84.
102. *Id.*
103. Partial Award: Western and Eastern Fronts—Ethiopia's Claims 1 & 3, *supra* note 85, ¶¶ 49-56.

five witness declarations—out of a total of approximately 200 declarations filed under this claim that were "extremely spare in their mention of or allusion to rape."[104] The Commission determined that the small number of declarations and their limited details were not enough to establish a prima facie case and thus the claim failed for lack of proof.[105]

There was, however, more evidence of rape in Ethiopia's Eastern Front Claims. For these claims, Ethiopia submitted ten witness declarations and a "credible and particularly troubling" eyewitness account of a gang rape.[106] Eritrea did not rebut these claims, and the Commission found Eritrea liable for failure to impose effective measures on its troops in order to prevent these rapes.[107]

Ethiopia's Claim 5—Civilians Claims also included allegations of rape. The Commission noted that of the 402 declarations and claims forms offered by Ethiopia under Claim 5, twelve included counts of rape.[108] Eritrea defended these allegations by pointing to the role of the International Committee for the Red Cross in inspecting detention facilities, which it argued would curb abuse, and offered a UNICEF report that found thirty-four percent of Ethiopian women returning from internally displaced persons (IDP) camps in Ethiopia had been raped by Ethiopian soldiers.[109] The Commission found Eritrea's evidence persuasive, not as a rebuttal of Ethiopia's claims, but rather as evidence that prevented Ethiopia from making a prima facie case.[110] In its partial award for Ethiopia's Claim 5, the Commission was careful to note, however, that it was not a criminal tribunal, nor was it "charged with assessing . . . liability in individual instances of violation of international humanitarian law."[111] Its finding here of no liability was not indicative, the Commission maintained, of disbelief of the evidence or inadequate appreciation of the gravity of the offenses.[112]

Eritrea, too, included additional claims of rape in its Western Front series of claims.[113] To support these allegations, Eritrea offered twenty-seven witness declarations, but none were from a rape victim and only

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104. *Id.* ¶ 55.
105. *Id.* ¶ 56.
106. *Id.* ¶ 68.
107. *Id.* ¶ 69.
108. Partial Award: Civilians Claims—Ethiopia's Claim 5, *supra* note 85, ¶ 87.
109. *Id.* ¶ 88.
110. *Id.* ¶ 89.
111. *Id.* ¶ 90.
112. *Id.*
113. Partial Award—Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25, & 26, *supra* note 85, ¶¶ 74-84.

two came from eyewitnesses.[114] Additionally, Eritrea offered the testimony of two doctors who testified about rapes, and an Australian television documentary that contained interviews with eight women who said they were victims of rape or attempted rape.[115] Considering the evidence in light of the difficulties posed by the quality of the evidence, the Commission determined Eritrea had presented an unrebutted, prima facie case and found Ethiopia liable for failure to impose effective measures on its troops.[116]

There are two noteworthy observations about the Commission's findings with respect to rape. The first concerns the nature of the obligations that Ethiopia and Eritrea were found to have breached. The second concerns the jurisprudence employed by the Commission to reach its findings of liability. Both will be discussed in turn below.

First, the Commission did not find either state liable for rape per se. Rather, each state was found liable for the failure to take effective measures to prevent the rape of civilians by their respective troops. In other words, the Commission considered each state under an international obligation to *prevent* the rape of civilian women. Evidence of rape in sufficient quantity, then, amounted to a breach of this obligation. Liability for this breach of duty thus extends to the state responsible for the failure of prevention, but this raises the question of to whom was the duty owed.

The Geneva Conventions, based on customary international law applied by the Committee, seem to suggest that the obligation is owed to civilians. The conventions were designed to protect civilians. The state does not breach its obligation to provide effective measures of prevention unless civilians have been raped. Yet the Commission found and imposed an affirmative obligation upon the states to prevent the rape of civilians by its troops.

Second, the Commission used an outcome-oriented presumption to reach its legal conclusions. Rather than rape as an element of breach, the Commission used rape as a presumption of breach. That is, evidence of rape by soldiers of one state, in sufficient quantity, creates a presumption of state responsibility for that state. In other words, evidence of the outcome—rape—presumes the breach of the obligation to provide effective measures of prevention.

In the Commission's jurisprudence, it is unclear how much evidence, and what type of evidence would be required to rebut a prima

114. *Id.* ¶¶ 80-81.
115. *Id.* ¶ 82.
116. *Id.* ¶ 83.

facie case. In the one instance in which Eritrea put forward sufficient evidence to prevent a favorable ruling for Ethiopia, the Commission, instead of determining that Eritrea had rebutted Ethiopia's claim, determined that Ethiopia had failed to make a prima facie case. It is unclear whether the defending state could put forward evidence of sufficient quantity and type to rebut allegations of responsibility for rape or whether the existence of incidences of rape led automatically to a conclusion of responsibility.

C. State Responsibility

The process for assessing the international responsibility for a violation of international law is different than that for international criminal trials. Under the international law of state responsibility, the breaching state is responsible for the breach when an actor breaches an obligation of international law, which causes damage either to another state or an individual, and the wrongful act can be attributed to the breaching state.[117]

When international responsibility is engaged, the breaching state is obligated to make reparations unless circumstances precluding wrongfulness exist.[118] Moreover, the reparations—be it restitution, compensation, or satisfaction—must, as much as possible, eradicate the consequences of the illegal act.[119] When the breach is of an obligation owed to an individual, the historic view was that the state of nationality of the individual could espouse the claim.[120] This position, however, has evolved—particularly in light of the development of the international human rights regime and corresponding interest in protecting the rights of individuals. There now exists a limited range of claims that individuals might make for breaches entailing state responsibility.[121]

In 2001, the International Law Commission completed its work on codifying the law on state responsibility, which resulted in the Draft Articles on Responsibility of States for Internationally Wrongful Acts

117. Francisco Orrego Vicuña, *Claims, International*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶ 1, http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e17&recno=13&subject=International%20responsibility (subscription required) (last visited Apr. 4, 2012).

118. *See* Case Concerning the Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 27-29, 31 (Sept. 13); *see also* Draft Articles on Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n, 53d Sess. Apr.-June, July 2-Aug. 10, 2001, § 31, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles], *available at* http://untreaty.un.org/ilc/texts/instruments/English/commentaries/9_6_2001.pdf.

119. *Factory of Chozów*, 1928 P.C.I.J. (ser. A) No. 17, at 47.

120. Vicuña, *supra* note 117, ¶ 1.

121. *Id.* ¶ 3.

(Draft Articles).[122] The Draft Articles purport to be a set of "secondary rules" that determine when a state is responsible for a breach of an international obligation.[123] Fault—that is, the determination of when a breach has occurred—is a notion that pertains to "primary rules," which encompass the specific international obligations themselves.[124]

James Crawford, the final Special Rapporteur of the Draft Articles, emphasizes the distinction between the two stages. He argues that the primary rules are those obligations that states have with respect to other states.[125] The secondary rules, he says, developed out of the emergence of a "general conception of the rights and duties of states, and of the consequences of breaches of those rights."[126] Ultimately, "[i]t is not the function of the law of state responsibility to tell states what obligations they may have,"[127] but rather to lay out the relationship of rights and duties among states vis-à-vis the obligations to which they have consented. Nevertheless, the Draft Articles, while focusing on the traditional primacy of states as the subjects of international law, recognize there are certain rights that pertain to individuals and may be breached by states.[128]

Assessing international state responsibility, then, is a multistage process, requiring both interpretation and application. More specifically, application of the general obligation of states vis-à-vis one another, or other actors to whom states owe obligations, requires interpretation of the specific international norms that apply between the states or the obligations states have toward other actors, analysis of the on-the-ground facts to determine whether breach has occurred, and, finally, an assessment of attribution. In this case, the process of determining breach and assessing attribution requires interpretation both of the content of *lex specialis* norms of armed conflict but also what the obligations require of states, and what types and degree of derogation from the obligations constitute a breach.

First, a tribunal must determine if a breach of an international obligation, called an "internationally wrongful act," has occurred.[129] To

122. *See* Draft Articles, *supra* note 118.

123. *See* Daniel M. Bodansky & John R. Crook, *Symposium on the ILC's State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT'L L. 773, 779 (2002).

124. *Id.*

125. James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 878-79 (2002).

126. *Id.* at 876.

127. *Id.* at 878.

128. Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 799, 809 (2002).

129. *See* Draft Articles, *supra* note 118, art. 1.

do this, the tribunal looks to the parameters of the specific obligation to determine if a particular act or omission amounts to a breach. The tribunal must also determine whether the obligation exists between the states or other actors in question.[130]

Second, the tribunal must turn to the law of state responsibility to determine if that breach is attributable to the state. Chapter II of the Draft Articles delineates those entities whose actions or omissions can give rise to state responsibility and includes state organs,[131] individuals, and entities exercising state authority,[132] organs of one state placed at the disposal of another state,[133] and even conduct of an insurrectional movement that becomes the new government of that state.[134] If the act or omission was committed by one of the given entities, then the tribunal can look to see if there are "circumstances precluding wrongfulness."[135] Circumstances, if proven, that might preclude state attribution include consent, self-defense, countermeasures, force majeure, distress, and necessity.[136] If the tribunal does not find any circumstances precluding wrongfulness, attribution attaches to the breaching state, and it may incur several legal consequences including obligations of cessation, nonrepetition, and reparation.[137]

Although the Commission did not explicitly apply the Draft Articles, the determination of state responsibility and awarding of damages for rape and all other claims was the central purpose of the Commission.

The Commission's approximate adherence to the method of analysis inherent to the Draft Articles is evident. First, the Committee began by analyzing the primary rules to determine the nature of the obligations. Here, the relevant international obligations stem from customary international law embodied in IHL, specifically common article 3 of the Geneva Conventions, article 27 of the Fourth Geneva Convention, and article 76.1 of Additional Protocol I. In the confluence of these provisions, the Commission isolated an international obligation of states to protect women civilians from rape during armed conflict.[138]

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130. *Id.* art. 13.
131. *Id.* art. 4.
132. *Id.* art. 5.
133. *Id.* art. 6.
134. *Id.* art. 10.
135. *Id.* arts. 20-27.
136. *Id.* arts. 20-25.
137. *Id.* arts. 30-31.
138. Partial Award: Central Front—Eritrea's Claims 2, 4, 6, 7, 8 & 22, *supra* note 55, ¶ 37.

Next, with the pertinent obligation identified, the Commission looked for evidence of breach. As discussed above, the Commission found evidence of breach by using a rebuttable, outcome-oriented presumption. "Several" rapes amounted to presumptive evidence of a breach of the obligation to provide effective measures to prevent the rape of women civilians.

Finally, the Committee was left to assess state responsibility. The Committee made no specific inquiry into whether those actors who committed the rapes were the type of actors for which states may be held responsible. Since the claims were based on allegations of rape by soldiers in the regular armed forces of the respective states, their conduct certainly falls under article 4 of the Draft Articles as an "organ . . . of the state," but the Commission did not make an explicit finding on this point.[139]

Similarly, the Commission did not make a specific inquiry into circumstances precluding wrongfulness. This is potentially an interesting omission. On the one hand, it is impossible to imagine a circumstance that would preclude the wrongfulness of rape. But it is important to remember that neither state was found responsible for rape, but rather for the failure to provide effective measures to prevent the rapes. If the commission of "several" rapes creates a rebuttable presumption of breach, then the respondent state has two strategies for defense. The respondent state can attempt to provide evidence to rebut the presumption. In this case, evidence would need to show that the respondent state did, in fact, employ effective measures to prevent rape. The measures, however, must be "effective" and not reasonably effective, which seems to create an impossibly high hurdle for a respondent state to overcome. In other words, the occurrence of rape demonstrates the ineffectiveness of any preventative measure.

Alternatively, the respondent state could have tried to argue for circumstances precluding wrongfulness. This line of defense is not available if the claims are for rape per se, but might offer limited lines of defense for claims of breach of the obligation to take effective measures to prevent rape. It is conceivable that there could be a set of circumstances that might appear in a force majeure defense—such as lack of resources to provide effective preventative measures or training. However, this line of argument would probably prove unpersuasive. Consent, self-defense, necessity, or distress would be unavailing

139. *See* Draft Articles, *supra* note 118, art. 4.

arguments in this context. In the absence of circumstances precluding wrongfulness, attribution for the breach flows to the state.

IV. INDIVIDUAL V. MASS—COMPARING INTERNATIONAL NORMS PROHIBITING RAPE AND THE COMMISSION'S JURISPRUDENCE OF RAPE

To the careful observer, jurisprudence from the international tribunals on the subject of rape offers a few points of comparison to the jurisprudence of the Claims Commission. The international tribunals from Nuremberg to the ICC were criminal tribunals, concerned with the commission of war crimes and crimes against humanity. As such, they applied—and with respect to rape, developed and clarified—international criminal law norms related to armed conflict. As criminal tribunals, they heard specific charges, with identifiable legal elements against discrete individuals for the purposes of prosecuting those accused of violating IHL. These tribunals had procedural issues, evidentiary requirements and standards, burdens of proof, and stakes riding on the outcome of the trial that were appropriate and unique to the criminal trial context.

In contrast, the Commission was an international claims process, more akin to a mass claims tribunal, and had the mandate to determine state, not individual, responsibility. The purpose of the Commission was to:

> decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.[140]

The Commission was not charged with, nor did it attempt to, investigate or assess any criminal liability related to the conflict between Eritrea and Ethiopia. The Commission's procedural rules, analysis of evidence, burdens of proof, and goals were adopted to serve its specific purpose of adjudicating claims for damages incurred as a result of violations of IHL that occurred during an international armed conflict. The nature of the

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140. *Eritrea-Ethiopia Claims Commission*, *supra* note 5 (internal quotation marks omitted).

claims advanced by the states, the remedies sought, and even the obligations analyzed by the Commission were appropriate to the claims context.

Because of these contextual differences, many types of comparison are inappropriate. For example, though rape is at issue in both the criminal tribunals discussed above and in the Claims Commission, the nature of the claims are different. In the criminal context, the charges of rape were charges of rape per se, even if the defendants were being prosecuted for genocide, war crimes, or crimes against humanity (crimes for which rape constitutes an element of the greater offense).[141] In the Commission, the states may have brought claims for rape per se, but the Commission awarded damages based on states' failures to provide effective measures to prevent rapes. Thus, the very legal obligations under consideration are different, much less the types of evidence needed or the standards required to satisfy proof of breach or criminal responsibility.

Moreover, the differences between mass claims processes versus individual processes, state responsibility compared to individual culpability, and even the legal and geopolitical purposes for which these tribunals were created might preclude a one-to-one comparison. Nevertheless, the difference between the "mass" nature of the state responsibility context and the "individualized" nature of criminal prosecution, however, may not be as great in the case of international law with respect to rape as it first seems.

First, there are important "mass" aspects to the criminal cases. Crimes against humanity and genocide each have elements that refer to a collectivity.[142] Crimes against humanity require a showing that a rape was "part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[143] Genocide, similarly, requires proof that rape was "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[144]

Doris Buss argues that while these crimes do entail the individual act of the rape in question, as charged in the ICTY and ICTR (as either crimes against humanity or genocide), rape is a crime against a community of persons.[145] This is not unlike the Commission's finding in

141. In the ICTR and ICTY cases that dealt with rape, rape served as a constituent element to satisfy actus reus requirements of genocide, crimes against humanity, and/or war crimes.

142. Doris E. Buss, *Rethinking 'Rape as a Weapon of War,'* 17 FEMINIST LEGAL STUD. 145, 150 (2009).

143. *Id.* (internal quotation marks omitted).

144. *Id.* (internal quotation marks omitted).

145. *Id.*

the Commission —breach of the obligation to effectively prevent rape required proof of "several" rapes. Second, in both contexts, the entity held responsible, whether criminally responsible or liable for damages, is singular. Individuals are held responsible through international criminal trials; individual states are found responsible under the law of state responsibility.

But rather than simply evaluate international criminal tribunals and international claims processes side-by-side, as above, the more important question is how, and to what extent, are these two international legal mechanisms interrelated aspects of the overarching body of IHL. Criminal tribunals and international claims processes that apply IHL may work in tandem, levying criminal responsibility and state liability where appropriate. The complex social and political situations that give rise to, and result from, armed conflict surely require a multifaceted and nuanced approach that is beyond the reach of a single type of tribunal.[146]

Lucy Reed has made a compelling case that international criminal tribunals and international claims processes are complementary components of an international legal response to violations of IHL.[147] Reed argues that international criminal law prosecutors and those that practice international arbitration—or what she calls international claims practice—approach their respective tasks from opposite directions.[148] Prosecutors, she says, are primarily concerned with punishing the perpetrators of international crimes in the hope that prosecutions will deter future conduct and reduce future violations.[149] The goal of international claims practice, on the other hand, is to "compensate or otherwise directly relieve the suffering of victims of past international law violations, criminal or civil."[150]

Despite the differences, both approaches can advance the same goal, help to restore dignity and bring closure to victims, and can "creat[e] a synergy and magnify[] the results of what each group does."[151] Reed makes a case for the continued separation of criminal prosecutions

146. Some have argued that international criminal proceedings may be an *inadequate* response to rape during armed conflict because they focus on punishment of the perpetrator rather than allowing for any compensation to the victim. *See* Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326, 337 (1994).

147. Lucy Reed, *International Claims Tribunals: What International Criminal Prosecutors Might Need To Know, in* PROCEEDINGS OF THE SECOND INTERNATIONAL HUMANITARIAN LAW DIALOGS: AUGUST 25-26, 2008 AT THE CHAUTAUQUA INSTITUTION 207, 207 (Elizabeth Anderson & David M. Crane eds., 2009), *available at* http://asil.org/pdfs/lucyspeechchautauqua.pdf.

148. *Id.* at 210.

149. *Id.*

150. *Id.*

151. *Id.* at 211.

and claims procedures.[152] She says that criminal prosecutions must be "slow and careful" to provide fair trials, while victims need the "rough justice" of claims processes in order to regain dignity and rebuild lives.[153]

Reed highlights a few distinctive characteristics of mass claims processes with a particular eye toward the way efforts aimed at reparation differ from efforts focused on deterrence.[154] First, she notes that claims processes typically group victims into categories and give remedies in two discrete forms: either reparations or restitution.[155] The principle of what she calls "rough justice"—that is, giving an award to as many people as possible—is justified because at least some justice is better than none.[156] Second, she states that mass claims processes use a "very low" standard of proof, more akin to arbitration or administrative proceedings.[157] This standard is justified, she argues, due to the lack of evidence or sheer number of claims.[158] In such cases, she gives examples of the United Nations Compensation Commission (UNCC) and the Bosnia-Herzegovina Real Property Commission, the commissions often employ presumptions to arrive at the award of claims.[159] Furthermore, the low evidentiary standard is legitimate because the proceedings are concerned primarily with the "fact" of loss rather than the "fault" for loss.[160] Third, mass claims processes must use "mass claims techniques" to deal with the inundation of claims that are necessary to give compensation fairly and quickly to those in need.[161]

Finally, Reed makes a few comments with respect to the Commission, ongoing at the time of her remarks, which are noteworthy.[162] She highlights the fact that the Commission is not a mass claims process, but rather a tribunal in which the respective states are espousing their nationals' claims.[163] Nevertheless, she says the Commission shares the features of "rough justice" and the claims are based on classes of people.[164] Of particular importance, she states the

152. *Id.* at 220.
153. *Id.* at 220-21.
154. *Id.* at 212.
155. *Id.*
156. *Id.* at 214.
157. *Id.* at 215.
158. *Id.*
159. *Id.* at 216.
160. *Id.* at 217-18.
161. *Id.* at 218.
162. *Id.* at 219.
163. *Id.*
164. *Id.* at 219-20.

Commission has found the respective states liable for various violation of IHL.[165]

If Reed is correct—and her arguments are compelling—that international criminal law and international claims processes can work toward advancing the same goal, then the work of the Commission with respect to rape can and should be evaluated in light of the international norms that prohibit rape and the progress that has been achieved within the international community about the nature of rape during armed conflict. Moreover, if criminal adjudication and claims process adjudication are to work as complementary means of enforcing IHL and advancing the protective goals of IHL, then it is important to analyze whether the Commission's awards with respect to rape do, in fact, dovetail with the work done by the international criminal tribunals.

Again, both the criminal tribunals discussed above and the Commission applied IHL, a body of law designed to protect persons at risk during armed conflict.[166] Marco Sassòli argues that many of the obligations under IHL are framed in a "human rights-like manner as entitlements of war victims."[167] The obligations that protect persons from rape and sexual violence, with their concern for the protection of human dignity, fall squarely in this category. If this is the case, and, further, if international claims processes and international criminal law are complementary mechanisms for enforcing IHL, then the question is: to what extent did the Commission's awards with respect to rape further the goal of international humanitarian law with respect to rape? Put another way, did the Commission's jurisprudence uphold and/or enhance the protections from rape envisioned by IHL, thereby safeguarding human dignity? Moreover, did the Commission's awards adequately remedy those violations of dignity brought before the Commission?

V. EVALUATING THE RESULTS OF THE COMMISSION

A. Does the Commission Jurisprudence Advance the Goals of International Humanitarian Law?

The IHL regime—from customary rules to the Hague tradition to the current widespread acceptance of the Geneva Conventions—has been

165. *Id.* at 220.

166. *See* Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT'L REV. RED CROSS 401, 401 (2002) ("Although international humanitarian law came into being ... as a law regulating belligerent inter-State relations, it has today become nearly irrelevant unless understood ... namely as a law protecting war victims against States and all others who wage war.").

167. *Id.* at 419.

developed and adapted in order to protect civilians and those *hors de combat* during periods of armed conflict.[168] As such, IHL governs conduct of states engaged in armed conflict, and, more recently, has developed to govern the conduct of some non-state armed groups during conflict periods.[169]

As discussed above, IHL has served as the body of law substantively applied in international criminal tribunals, while at the same time these tribunals have helped to develop this body of law progressively. In the context of international criminal law, IHL "protects" through general and specific deterrence and by threat and imposition of punishment, as charges are adjudicated by criminal tribunals and guilty perpetrators are punished.

In the case of the Commission, IHL also has the potential to protect in both a similar and different sense. The obligation to provide effective measures to prevent (in this case, rape) and the corresponding regime of state responsibility also serve a deterrent purpose. Additionally, in the claims context, reparations for violations of IHL have the potential to alleviate the suffering of those who sustained damages in violation of IHL norms.[170]

This is especially true in the case of rape, where women tend to be at even greater risk due to armed conflict.[171] While it may be the case that in many situations that this increased level of insecurity is due to armed conflict in general, rather than specific violations of IHL, reparations for specific violations can have an ameliorative capacity even if the specific violation is not compensable. IHL provisions seek to protect against the dignity-destroying nature of sexual violence. Beyond the deleterious physical, psychological, and emotional effects, rape can have widespread consequences that put the very survival of the rape victim at risk. While reparations may not be able to directly compensate specific physical, emotional, or psychological damage, they may be able to address the broader needs that persist for many women following this type of

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168. *See* Emanuela-Chiara Gillard, *Reparations for Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529, 529 (2003).

169. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 1125 U.N.T.S. 609, *available at* http://www.icrc.org/ihl.nsf/FULL/475.

170. Gillard, *supra* note 168, at 530.

171. *See, e.g.*, Buss, *supra* note 142, at 148; *see also* Gillard, *supra* note 168, at 530. *See generally* Charlotte Lindsey, *The Impact of Armed Conflict on Women*, *in* LISTENING TO THE SILENCES: WOMEN AND WAR 21-23, 25 (Helen Durham & Tracey Gurd eds., 2005); CHARLOTTE LINDSEY, INT'L COMM. OF THE RED CROSS, WOMEN FACING WAR: ICRC STUDY ON THE IMPACT OF ARMED CONFLICT ON WOMEN 51-52 (2001), http://www.icrc.org/eng/assets/files/pther/icrc_002_0790_women_facing_war.pdf.

violation. Reparations, then, serve as a form of protection in that they help ameliorate losses incurred by violations of IHL.

The Commission had occasion to advance the goals of IHL on both accounts with particular respect to raped civilians, but its success was limited. Several components of the Commission's work with respect to rape are in line with the protective goals of IHL. First, the determination of an international norm that states are obligated to implement effective measures to prevent rape should not be taken lightly. The Commission notes that rape during times of armed conflict has far too long been thought of as a by-product of war, and argues that such thinking is coming to an end.

Second, the Commission's nuanced recognition of the difficulty of obtaining evidence, gathering witness testimony, and sufficiently proving claims of rape is noteworthy. The difficulties of presenting rape claims in international tribunals are well known.[172] Thus, the Commission's evidentiary decisions are welcomed advances for IHL procedural jurisprudence.

Third, the norm of effective prevention articulated by the Commission is a nail in the coffin of this outmoded conception of rape as a by-product of war. The strength of this norm, however, is tempered by the corresponding evidentiary rules employed by the Commission. Outcome-oriented presumptions, as employed here by the Commission, may not actually strengthen the protective force of this obligation. By creating what is essentially a strict liability regime for occurrences of rape—that is, evidence of rape is presumptive evidence of the failure to employ effective preventative measures—states may actually be encouraged to accept rape as an inevitable by-product of war. If several incidents of rape are sufficient for a finding of liability, then states may not have the incentive to put protective measures into place, to train their officers and subordinates on the illegality of rape and sexual violence during conflict, and to expend resources in the prevention or punishment of rape. This obligation might result in a utilitarian offset: the costs of effective measures of prevention—if effective means near-absolute prevention—may be too high to ever be implemented. The Commission gives no guidance on what types of measures would have been effective, nor does it explain what level of effectiveness would have been enough to satisfy either state's obligation. Without such guidance, a state may

172. *Cf.* Beth Van Schaack, *Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, 17 AM. U. J. GENDER, SOC. POL'Y & L. 361, 364-65 (2009).

almost certainly face liability, and have no incentive to try to implement effective measures.

Finally, the failure to provide a specific mechanism to provide the monetary damages to the victims constitutes a failure to uphold the protective goals of IHL. The claims put forward by Ethiopia and Eritrea with respect to rape were based on violations of IHL suffered by individuals. This is true even though the obligation breached was a failure to provide effective measures to prevent rape. This obligation is an obligation owed primarily to the individuals that IHL seeks to protect and only an obligation owed to the other state indirectly. If the individuals are unable to receive monetary damages awarded based on *their* incurred damages, they have not received the full scope of protection afforded by IHL.

There are numerous ways in which the criminal and civil applications of IHL for perpetration of wartime rape fit together to provide a more thorough protective regime for potential and actual victims than could be achieved by either form of legal response on its own. Criminal responsibility may serve a general deterrent purpose for individual perpetrators, and, for those charged and convicted, there is a measurable amount of specific deterrence. Moreover, IHL obligations give states and the international legal community a legal form through which to hold perpetrators accountable for their actions.

State responsibility and international claims mechanisms can hold states accountable to one another for breaching obligations to protect civilians from rape during times of armed conflict. Damage awards hold out, at least, the possibility reparations might be made to those who survive wartime rape and sexual violence so that they might be able to find some measure of compensation to rebuild their lives.

However, the criminal and civil aspects of IHL do not come together as a seamless whole. Significant gaps exist so that the protections envisioned by IHL for civilians during times of armed conflict are not complete. It is not the case that one regime, be it criminal tribunal applications of IHL or international claims mechanisms, is to blame. Nor should one mechanism be preferred, or should one mechanism be expected to extend or reinvent itself in such a way to fill the gaps. Rather, the important task is to identify the gaps in order to bring the two regimes closer together, thereby increasing the protection of IHL for those at risk. With respect to IHL prohibitions against rape, one way to assess the extent of the gaps is to evaluate the work of the Commission in light of the jurisprudential progress made in the international criminal tribunals to define and refine the IHL doctrine, and

push international law beyond the perception that rape is a by-product of armed conflict.

B. *Does the Commission's Jurisprudence on Rape Advance the Progress Made on the Nature of Sexual Violence During Armed Conflict?*

The first Part of this Article charts the change in the international jurisprudence and understanding of rape. A well-developed set of norms prohibiting rape and sexual violence now exists in international law. This change has paralleled a change in the conceptualization of the nature of rape and sexual violence. What was, in the near past, often considered a spoil of war, a by-product of armed conflict, a problem of troop discipline, or a property rights violation, is now properly considered a violent crime against the dignity, autonomy, and bodily integrity of the victim.

The Commission recognized these developments and sought to adjudicate the rape claims in a way that reflected these important changes. It is, however, not clear that their decisions have advanced the conceptual posture of rape within IHL jurisprudence. By focusing on the breach of the obligation to employ effective measures to prevent rather than on the rape itself, the Commission fails to point its analytic lens at the nature of the violation and the essence of the damages. Instead, the Commission focused solely on an obligation to prevent rape. While the obligation to provide effective measures to prevent rape should not be understated nor overlooked, such focus—without damage awards and a mechanism to allocate the awards specifically designed to redress those damages actually incurred by victims—may have the unintended effect of backsliding to property-based conceptions of rape.

By focusing on the obligation to prevent, without focusing on the prohibitions against sexual violence, damage awards are decoupled from actual damages. By awarding damages in a mechanism that allows offset by the states and does not mandate damage awards to be paid to victims, the Commission implicitly treats rape in a way not unlike the way that it treated property claims.

Historically, mass claims processes have primarily been used to adjudicate claims of property damage, and some inertia may exist with respect to this function.[173] But in the case of international claims for

173. *See* Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY J. INT'L L. 314, 317, 322, 324, 331 (2005); *see also* Roland Bank & Friederike Foltz, *Lump Sum Agreements*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶ 19, http://www.

cases of rape, courts and tribunals should take care to avoid procedural moves and award mechanisms that reinforce property-based conceptions of rape by failing to address the violation of human dignity. While it may be true under international law that a state is injured when a violation of IHL occurs on its territory,[174] there are also strong indications that states owe obligations to certain individuals who suffer damages, and are obligated to make full compensation when breach of an obligation occurs.[175]

Reparations may not be able to directly restore the dignity taken by the physical, emotional, and psychological damage of the violation. But reparations may be able to help restore the social and economic damage incurred by a rape survivor. Buss, in her analysis of the paradigm shift from rape as an inevitable by-product of war to the instrumentalist conception of rape as a weapon of war, highlights one important symbolic role occupied by women during times of conflict. Citing Jean Bethke Elshtain, Buss argues that within nationalist ideology, women become "'symbolic representations' of the body politic, to be protected during war as the very nation itself. Women thus become the embodied boundaries of the nation-state, and as such, are targets for violence directed against a national collectivity."[176]

This insight may help answer the question of why rape occurs during conflict—and even why rape might become a strategic policy—but it also recalls property-based conceptions of rape. The rape of a "symbolic representation," sexual violence against the embodiment of the nation-state, no matter how individualized the body, is an abstract act perpetrated against an idea, not a person. This abstraction obscures violence against autonomy, bodily integrity, and human dignity.

Framing obligations with respect to rape during armed conflict as an obligation existing between states, rather than an obligation owed to individuals, perpetuates this abstraction. International state responsibility for the failure to provide effective measures to prevent rape may provide some level of protection for those at risk of rape and sexual violence during conflict as it imposes an obligation upon states to create, employ, and enforce measures to prevent rape. But this obligation operates at the state-to-state level, and adjudication of state responsibility for breaches

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mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e842 (subscription required) (last visited Apr. 4, 2012).

174. *See* Sassòli, *supra* note 166, at 423.

175. *See* Draft Articles, *supra* note 118, art. 34.

176. Buss, *supra* note 142, at 148. For a brief survey of theories on why rape occurs during armed conflict, see Chinkin, *supra* note 146, at 328.

of this obligation alone—without parallel or additional adjudication of the claims of specific victims—abstracts away from the violation of dignity and autonomy that lies at the heart of rape and sexual violence. Moreover, awarding damages to states with no specific provision for how those damages might actually reach victims predicates damages on the breach of an obligation between states, and not on the damage incurred by victims. While this might hold states accountable to one another—if such accountability is not undermined by the unintended incentives discussed above—it provides no level of relief to survivors who are most in need of reparations.

At best, a state-to-state obligation, with no mechanism for damage awards to be rendered to individual survivors, yields only indirect protection to individuals. In other words, the obligation between states to provide effective measures to prevent rape during conflict provides protection only through the threat of international responsibility for the breach of the obligation. It makes one state accountable to the other state, but not to those who bear the damage of the breach.

Without specific provisions to provide reparations to victims, Ethiopian and Eritrean survivors of rape will not even have a "rough" justice. The restrictions of time, resources, and mandates levied upon the Commission—and even the financial restrictions of impoverished states like Ethiopia and Eritrea—cannot be ignored. But these restrictions should not influence the adjudication of claims for damages incurred as a result of violations of IHL. Where norms are designed to protect individuals during armed conflict and where obligations exist to provide reparation in the case of breach, decisions should reflect those norms as closely as possible. This means that adjudication of violations must be viewed through the lens of violations of human dignity and not property. Moreover, these violations must be redressed at the individual level and not allowed to be offset at the state level. Anything less, even in the context of claims processes, is to retrogress to outmoded views of rape during armed conflict.

VI. CONCLUSION

The work of the Ethiopia-Eritrea Claims Commission has made many noteworthy contributions to the jurisprudence of international humanitarian law claims. Especially with respect to claims for rape during armed conflict, the Commission's evidentiary decisions and good-faith efforts to ensure that sexual violence no longer be considered an inevitable by-product of war are commendable.

Despite these important contributions, given the history of the perception of sexual violence during armed conflict, the gendered perception of harm incurred during conflict, and the evolution of international norms with respect to sexual violence, a critical analysis of the Commission's work is necessary. While important distinctions remain between adjudicating international criminal charges against individuals and claims brought in the international claims context, the goals of IHL may be more effectively realized through the complementarity of the international criminal law and the international claims processes. In the case of the Commission, some of this complementarity was evident, but more could have been done. Several aspects framing the norm to provide effective measures to prevent rape solely as an obligation between states, rather than as an obligation owed to individuals, decoupling state responsibility from the actual damages (that is, the suffering) incurred by victims, and the lack of specific provision for damages to be paid to victims—fell short of the protections granted by IHL. Without direct reparations, rape survivors are denied a remedy that could help them overcome the broader, even if not the specific, violations of dignity that result from sexual violence.