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Contextualizing Sexual Violence Committed During the War on Terror: A Historical Overview of International Accountability

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> [A] woman in civilian clothes entered the room and the [interrogator] said, "Well, we'll leave you with her, maybe this will change your mind." I kept my head down, I did not know what was going on, I was trying not to talk to her, but she started to undress. And while she was talking to me in English, this lasted a long time. I was still looking down, I was not looking at her, I do not know if she was completely naked or still in her underwear. But she started to touch me and then after a while, after about an hour, a guard came in and said, "Okay, it's not working, that's enough." And I could hear the laughter of the people who were watching this from behind the mirror . . . . I could hear the laughter, and this was . . . a very humiliating experience.[1]

Introduction

THE ABUSES PERPETRATED against detainees at Abu Ghraib, Guantánamo, and other U.S. military sites have been extensively documented. Among the most shocking accounts have been those of detainees who were the victims of sexual violence. These accounts were startling not only for the diverse forms of violence that were employed

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1. LAUREL E. FLETCHER ET AL., GUANTÁNAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES 44 (2008) (quoting a former Guantánamo detainee).

but for the identities of the perpetrators and the victims. That a significant number of the perpetrators were American *women*, while many of the victims were *men*, challenged long-standing stereotypes of Americans as the vanguard of human rights, of men as the sole perpetrators of sexual violence, and of women as the quintessential victims.[2]

Various government and military reports have revealed both the depth and breadth of the sexual abuse experienced by detainees in U.S. custody. For example, a report prepared by Lt. Gen. Randall Schmidt and Brig. Gen. John Furlow for the Department of Defense—which investigated approximately twenty-four thousand interrogations that took place at Guantánamo between September 2001 and July 2004—documented many sexually explicit acts perpetrated by American military personnel. Their findings included the following example:

> [O]n both 21 and 23 Dec [2002], a female interrogator straddled [the detainee], without putting any weight on the detainee . . . while he was being held down by [military police officers]. During these incidents, a female interrogator would tell the detainee about the deaths of fellow Al-Qaeda members. During the straddling, the detainee would attempt to raise and bend his legs to prevent the interrogator from straddling him and prayed loudly. Interrogation [records] also indicate that on 04 Dec 02, a female interrogator began to enter the personal space of the [detainee], touch him, and ultimately massage his back while whispering or speaking near his ear. Throughout this event, the [detainee] prayed, swore at the interrogator that she was going to Hell, and attempted to get away from her.[3]

While the report's authors recommended that "the use of gender coercion" be "withheld" from Guantánamo personnel, the perpetrators' supervisor admitted to having approved these approaches, and thus no disciplinary action was recommended.[4]

The report's authors also found that personnel had subjected another detainee to sexualized treatment, such as forcing him to wear a woman's bra and a thong on his head; telling him his mother and sister were whores; telling him that he was homosexual and that other

2. Celia Rumann has argued that sexual abuse committed by female interrogators at Abu Ghraib and Guantánamo may not have only been illegal treatment of detainees but may have also constituted abusive and/or illegal treatment of female soldiers that violated the Mann Act as well as various antitrafficking laws. Celia Rumann, *Use of Female Interrogators: The Analysis of Sexualized Interrogations the Detainee Interrogation Working Group Did Not Conduct*, 21 HASTINGS WOMEN'S L.J. 273, 286–302 (2010).

3. RANDALL M. SCHMIDT & JOHN T. FURLOW, ARMY REGULATION 15-6: FINAL REPORT, INVESTIGATIONS INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUÁNTANAMO BAY, CUBA DETENTION FACILITY 16 (2005).

4. *Id.*

detainees knew about this; tying a leash to his chains, leading him around the room, and forcing him to do dog tricks; forcing him to dance with a male interrogator; and forcing him to stand naked in front of women for five minutes as part of a strip search.[5]

Some of the most shocking examples of sexual violence, however, were detailed in a report authored by Maj. Gen. Antonio M. Taguba in response to the U.S. government's request that he investigate allegations of detainee abuse at Abu Ghraib.[6] Taguba found "amply supported evidence" of various coercive practices, including: videotaping and photographing naked male and female detainees; forcibly arranging detainees in various sexually explicit positions for photographing; forcing detainees to remove their clothing and keeping them naked for several days at a time; forcing naked male detainees to wear women's underwear; forcing groups of male detainees to masturbate themselves while being photographed and videotaped; arranging naked male detainees in a pile and then jumping on them; positioning a naked detainee on a box with a sandbag on his head and "attaching wires to his . . . penis to simulate electric torture," placing a dog chain or strap around a naked detainee's neck and having a female soldier pose for a picture; and (in one case) "having sex with a female detainee."[7] Taguba also described "credible" evidence of guards threatening male detainees with rape and "sodomizing a detainee with a chemical light and perhaps a broom stick."[8]

Such abuses committed by U.S. soldiers are, unfortunately, not without precedent. There is strong evidence that rape and sexual violence were common occurrences throughout the Vietnam War.[9] Although attention to this phenomenon has been relatively scarce, several scholars have documented that rape and sexual violence were

5. *Id.* at 19. The report acknowledged that the "cumulative effect" of the detainee's interrogation was "abusive and degrading." *Id.* at 20.

6. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 6–7 (2004).

7. *Id.* at 16–17.

8. *Id.* at 17.

9. *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 96–112 (1975) (qualifying the limited record of courts-martial for rape as "practically worthless" for gauging the actual number of rapes, and quoting a soldier who called rape an "everyday affair"); GINA MARIE WEAVER, IDEOLOGIES OF FORGETTING: RAPE IN THE VIETNAM WAR 35, 51 (2010) ("[A]s early as 1967, eyewitnesses reported rape as an unofficial military policy."); Gary D. Solis, *Military Justice, Civilian Clemency: The Sentences of Marine Corps War Crimes in South Vietnam*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 59, 68–69 (2000) (indicating that the true number of American war crimes in South Vietnam "cannot be estimated").

often part of the American military's "standard operating procedure" during combat operations.[10]

Gary Solis researched the record of war crimes committed by U.S. soldiers during the Vietnam War—including rape[11]—and reported that cumulative findings are impossible to produce in part because only the Army kept track of war crimes cases.[12] Nor is the record of courts-martial complete.[13] Nevertheless, Solis did cite some statistics, for example, finding forty-two court-martial convictions across all branches of the military for the rape of Vietnamese civilians between 1965 and 1973.[14] However, this apparently represented only a small fraction of the sexual violence that actually occurred.

Indeed, the vast majority of sexual abuse committed by American soldiers, both during the Vietnam War and the War on Terror, has never been accounted for in a court of law. While Lynndie England, Charles Graner, and a few others have been convicted in military courts for their treatment of detainees at Abu Ghraib, including various forms of sexual violence,[15] most of the violence has remained unaddressed, at least in official fora.[16] Unfortunately, this is not surprising, since the historical, global norm has been immunity for sexual violence committed during times of war and political unrest[17]—an

10. BROWNMILLER, *supra* note 9, at 107, 111; WEAVER, *supra* note 9, at 35, 51.

11. The Uniform Code of Military Justice prohibits rape, currently stating that "any person . . . who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. § 920 (2006).

12. *See* Solis, *supra* note 9, at 67.

13. *Id.*

14. *Id.* at 68 (citing W. Hays Parks, *Crimes in Hostilities, Part I*, MARINE CORPS GAZETTE, Aug. 1976, at 18, *available at* http://archive.mca-marines.org/gazette/2006/06haysparks1reprint.pdf).

15. *See, e.g.*, Mark Follman & Tracy Clark-Flory, *Prosecutions and Convictions: A Look at Accountability to Date for Abuses at Abu Ghraib and in the Broader "War on Terror"*, SALON.COM (Mar. 14, 2006, 3:03 ET), http://www.salon.com/news/abu_ghraib/2006/03/14/prosecutions_convictions/index.html; Rumann, *supra* note 2, at 273.

16. Unfortunately, not only foreign populations have suffered from rape and sexual violence perpetrated by American soldiers; female American soldiers purportedly suffer sexual assaults at twice the rate in the civilian population but often do not report such assaults due to fear of retribution and a lack of confidentiality. Nancy Gibbs, *Sexual Assaults on Female Soldiers: Don't Ask, Don't Tell*, TIME MAG. (Mar. 8, 2010), http://www.time.com/time/magazine/article/0,9171,1968110,00.html#ixzz1KeaMqnKN.

17. *See, e.g.*, Thom Shanker, *Sexual Violence, in* CRIMES OF WAR 323, 323 (Roy Gutman et al. eds., 1999) (arguing that customary laws of war had "scant impact on public acceptance of rape as a natural, if unfortunate, by-product when men took up arms against men").

immunity that international and domestic courts have only recently begun to challenge.[18]

In this Article, we review the evolution of the international jurisprudence related to sexual violence to demonstrate structural and normative advances designed to increase accountability for sexual violence during times of war and political unrest. The U.S. government can and should consider such advances, including the shift toward greater accountability, as it continues to develop its approach to combating war-related sexual violence. We also discuss the tremendous need for domestic mechanisms to address sexual abuses committed during periods of political upheaval. Such mechanisms would circumvent the significant resource and jurisdictional constraints imposed on international criminal tribunals, the primary drivers currently ensuring accountability for wartime abuses. Specifically, this Article considers how recent international and domestic legislation suggest a growing attention to sexual violence and related offenses, as well as an emerging international consensus as to which sexualized practices should be considered criminal.

In recent years, while jurisprudence at the international, regional, and national levels has come to recognize an ever-expanding array of sexually violent crimes—ranging from sexual harassment to gang rape—and an ever-expanding array of victims—including men and children—several obstacles to full accountability remain. For example, in addition to an almost pandemic failure to prosecute crimes of sexual violence, many courts continue to grapple with such tasks as defining the crimes of sexual violence and sexual assault, as well as clarifying where consent ends and force begins. Courts have also struggled with the conditions under which high-level officials should be held liable for sexual violence committed by their subordinates. Despite these challenges, however, the jurisprudence of sexual violence continues to evolve to better acknowledge and redress the horrific experiences of victims, including recognizing the all too common use of sexual violence as a "weapon of war."[19]

18. *See id.* at 323–29.

19. *See* Rumann, *supra* note 2, at 274; Rape as a Weapon of War: Sexual Violence in Armed Conflict, Testimony Submitted to the S. Judiciary Comm., Subcomm. on Hum. Rts. and the Rule of Law, at 3 (2008) (statement of Alexandra Arriaga, Amnesty Int'l USA), *available at* http://www.amnestyusa.org/women/svaw/pdf/IVAWA_Apr08Senate_testimony.pdf.

I. The Development of International Legal Norms Criminalizing Sexual Violence

Prohibitions against sexual violence have been codified as part of international humanitarian law since at least the late 1800s, with some warrior codes prohibiting sexual violence as far back as the first century.[20] In the intervening decades, the ways in which these norms have been defined and adjudicated have evolved considerably.

In slightly more than a century, international prohibitions against sexual violence have been transformed from vague protections afforded women by virtue of their status as the property of men,[21] to well-defined, gender-neutral declarations that establish rape and other forms of sexual violence as among the most egregious of crimes. Customary international law prohibiting sexual violence during conflict was first codified in the United States during the Civil War.[22] In 1863, Abraham Lincoln and the Union government released General Order No. 100,[23] now known as the Lieber Code. Guided by "the principles of justice, honor, and humanity,"[24] the Lieber Code sought to regulate the conduct of the Union Army during the war. The Lieber Code is widely recognized as an important precursor to international humanitarian law, prescribing that only *lawful* aggression could be used to attain military victory.[25] Amongst the behavior prohibited by the Lieber Code were acts of wanton and unnecessary violence, which were illegal and prohibited at every rank in the Union Army.[26] Both rape and sexual violence were understood to be "wanton violence" and thus not permitted during times of war.[27] More specifically, arti-

20. *See* PATRICIA VISEUR SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE IN CONFLICT: THE IMPORTANCE OF HUMAN RIGHTS AS MEANS OF INTERPRETATION 6–7 (2009) [hereinafter SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE], *available at* http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf.

21. *See, e.g.*, JANE DOWDESWELL, WOMEN ON RAPE 43 (1986).

22. KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 35–36 (1997). As early as 1847, the United States military explicitly banned rape. *Id.* at 34 (excerpting Order No. 20, a supplement to the U.S. Rules and Articles of War).

23. General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiøí Toman eds., 1988) [hereinafter Lieber Code].

24. Lieber Code, *supra* note 23, art. 4.

25. *See* Patricia Viseur Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, *in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: COMMENTARY 263, 271–73 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) [hereinafter Sellers, *The Context of Sexual Violence*].

26. Lieber Code, *supra* note 23, art. 44.

27. *See id.* arts. 37, 44, 47.

cle 37 of the Lieber Code, which governs the administration of occupied territory, expressly protected against rape: "The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, *especially those of women*; and the *sacredness of domestic relations.*"[28] Under article 44 of the Code, the punishment for any perpetrator caught in the act of rape who refused to cease such conduct, was immediate execution.[29]

In 1907, the Lieber Code was adopted as international law at the International Peace Conference in Copenhagen and became the basis for Hague Convention IV for respecting the laws and customs of war on land.[30] In conjunction with the earlier Hague Convention of 1899,[31] the Hague Convention IV of 1907[32] quickly became the leading authority underlying international humanitarian law. Both article XLVI of the 1899 Convention and article 46 of the 1907 Convention indirectly enjoined rape, speaking to the protection of "family honour,"[33] which was widely understood to forbid sexual violence.[34] Much like in the Lieber Code, such violence was prohibited both during war and during occupation.[35]

One of the first attempts to prosecute war crimes through an international tribunal took place during the aftermath of World War I. In an effort to hold German troops accountable for their crimes, the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties endeavored to prosecute Kaiser Wilhelm II.[36] Amongst the variety of crimes indexed by the Commission were

28. *Id.* art. 37 (emphasis added).

29. *Id.* art. 44.

30. *International Humanitarian Law—Treaties & Documents*, INT'L COMMITTEE RED CROSS, http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/a25aa5871a04919bc12563cd002d65c5?OpenDocument (last visited Feb 4, 2011).

31. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter First Hague II].

32. Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, art. 4, 36 Stat. 2277, T.S. No. 539 (Oct. 1907) [hereinafter Hague IV].

33. *See* First Hague II, *supra* note 31, at 1803, 1822; Hague IV, *supra* note 32, at 2277, 2306.

34. Sellers, *The Context of Sexual Violence*, *supra* note 25, at 275 n.64.

35. *Id.* at 275.

36. JOHN HORNE ET AL., GERMAN ATROCITIES 1914: A HISTORY OF DENIAL 331 (2001). Some scholars, however, place the origins of accountability for rape in an international military tribunal as much earlier, noting the 1474 conviction of Sir Peter van Hagenbach for crimes committed during the military occupation of the town of Breisach in Austria. *See* Shanker, *supra* note 17, at 323; ASKIN, *supra* note 22, at 5 n.11.

rape and the abduction of women for prostitution.[37] Unfortunately, the international community fell short of prosecuting these crimes, amongst others, as American authorities expressed significant concern over the thought of prosecuting Kaiser Wilhelm in an international tribunal, suggesting that national military courts were a preferable alternative.[38] Thus, no international tribunal was created. Because of this, as well as a lack of political will for war-related trials more generally, and the evidentiary and capacity issues that tend to arise with widespread sex crimes, soldiers were largely excused from accountability for the numerous incidents of rape and sexual assault that had occurred.[39]

During the Second World War, rape and sexual violence were more actively acknowledged and accounted for. Extensive documentation of incidents of rape and sexual violence committed by German and Japanese military forces can be found, including revelations about the infamous "comfort stations" implemented by the Japanese government to provide sexual services for military personnel during the war.[40] Although reporting on violations committed by American troops is less pervasive, subsequent investigations have revealed Japanese women's allegations of rape by American soldiers in Okinawa,[41] as well as rapes of French women "sufficiently pervasive to cause General Eisenhower's headquarters to issue a directive . . . instructing that speedy and appropriate punishments be administered."[42]

While the Lieber Code and Hague Conventions' prohibitions against sexual violence had been based on the notion that women de-

37. Sellers, *The Context of Sexual Violence*, *supra* note 25, at 276.

38. *Id.*

39. *See, e.g.*, James R. McHenry III, *The Prosecution of Rape Under International Law: Justice that is Long Overdue*, 35 VAND. J. TRANSNAT'L L. 1269, 1276–77 (2002) (noting the general lack of accountability for war crimes committed during World War I); ASKIN, *supra* note 22, at 48 ("Even after reports of thousands of rapes during World War I, there were no post-war initiatives to prevent future abuses.").

40. *See* YOSHIMI YOSHIAKI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II (Suzanne O'Brien trans., 2000) [hereinafter COMFORT WOMEN]; James Sterngold, *Japan Admits Army Forced Women into War Brothels*, N.Y. TIMES, Aug. 5, 1993, at A2; Teresa Watanabe, *Japan Admits That WWII Sex Slaves Were Coerced*, L.A. TIMES, Aug. 5, 1993, at A1; Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845, 864–65 (1995).

41. *See* PETER SCHRIJVERS, THE GI WAR AGAINST JAPAN (2002).

42. Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 655 n.5 (1996) (citation omitted). The author reports statistical data from World War II suggesting that during certain World War II army advances, or "'breakouts,'" in France and Germany, the rates of rape committed by military forces was almost three times that of the normal civilian rate. *Id.* at 666, 666 n.46, 669 n.56, 669–70.

served protection because they were the property of men, it was not until the introduction of the Nuremberg Trials in 1949 that courts were directed to seriously consider rape and sexual violence as crimes against women themselves.[43] Control Council Law No. 10, which was adopted by the occupying powers in Germany and served as the basis for later prosecutions of German military and civilian personnel that were overseen by U.S. authorities, listed rape for the first time as a crime against humanity in an attempt to provide a uniform basis for prosecuting war criminals.[44] One scholar notes three important principles established by this law:

> (1) that rape on a wide scale could be prosecuted as a war crime; (2) that crimes of sexual violence committed during peacetime could constitute crimes against humanity; and (3) that responsibility for such crimes could not be limited to military personnel and consequently, liability could attach to persons occupying other key positions.[45]

Interestingly, though, the Nuremberg Charter—which established the rules and procedures governing the International Military Tribunal through which prominent members of the Nazi party were tried following World War II—did not specifically mention rape among its enumerated list of prohibited acts,[46] nor did any prosecutions for rape *per se* take place during the Nuremberg Trials.[47] In article 6(c), the Nuremberg Charter did define Crimes Against

43. *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, 238, 238 n.69 (2005); Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L L. 225, 227–29 (2007); *see generally* Dustin A. Lewis, *Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law*, 27 WIS. INT'L L.J. 22 (2009).

44. 1 TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NURENBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 250 app. D (1949).

45. Lewis, *supra* note 43, at 22–23 (citing Catherine N. Niarchos, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649, 677–78, 678 n.175 (1995)).

46. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter], *available at* http://avalon.law.yale.edu/imt/imtconst.asp.

47. ASKIN, *supra* note 22, at 163. However, as Askin explains, the Nuremberg Tribunal did permit evidence of sexual violence in prosecuting crimes against humanity, and in that sense, it allowed prosecution of sexual violence. *Id.* at 142, 163.

Humanity,[48] however, which became an important precursor to later laws prohibiting rape and sexual violence.[49]

The Charter for the International Military Tribunal for the Far East ("IMTFE")—created through special proclamation by Gen. Douglas MacArthur to try leaders of the Empire of Japan following World War II—similarly contained no direct reference to rape or sexual violence.[50] However, IMTFE defendants were charged with rape and sexual violence.[51] The IMTFE charter contained three categories of crimes: conspiracy to wage war, commission of crimes against humanity, and failure to prevent atrocities at the command level.[52] Under this last category, General Iwane Matsui, Commander Shunroku Hata, and Foreign Minister Hirota were all found guilty of crimes—including rape—through a theory of vertical liability by which a commander may be held liable for war crimes perpetrated by his troops if he knew the crimes were occurring and had the power to stop them but failed to prevent them or to punish offenders.[53] These convictions should be contrasted, however, with the failure to pursue accountability on behalf of the more than two hundred thousand Japanese women who were forcibly placed in rape camps (the "comfort stations" referenced above) by the Japanese government.[54] Japanese military rulers used these camps as a means of "institutionalized sexual violence" intended to check unauthorized sexual violence in Japanese occupied territories and prevent the spread of sexually transmitted diseases beyond the camps.[55] Such rape camps were based on certain

48. Nuremberg Charter, *supra* note 46, art. 6(c) ("Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.").

49. *See* ASKIN, *supra* note 22, at 345–47.

50. *See generally* Charter of the International Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 [hereinafter IMFTE].

51. ASKIN, *supra* note 22, at 180, 202–03; Ellis, *supra* note 43, at 228; Richard J. Goldstone & Estelle A. Dehon, *Engendering Accountability: Gender Crimes Under International Criminal Law*, 19 NEW ENG. J. PUB. POL'Y 121 (2003); SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE, *supra* note 20.

52. IMFTE, *supra* note 50, arts. 5(a)–(c).

53. Ellis, *supra* note 43, at 228.

54. Ellis has noted the continual plight of these women who have yet to receive any measure of recognition or compensation. *Id. See also* COMFORT WOMEN, *supra* note 40; YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II (2008).

55. Suzanne O'Brien, *Translator's Introduction*, *in* COMFORT WOMEN, *supra* note 40, at 1, 9 (noting that the Japanese military strategy "failed miserably"). In 2000, a mock trial was

presumptions about male sexuality, particularly during times of war, and failed to recognize the criminal nature of rape and sexual violence. Similarly invisible were the up to two million German women estimated to have been raped by Soviet soldiers toward the end of World War II, an event that has been called "the greatest phenomenon of mass rape in history."[56]

Article 27 of the Fourth Geneva Convention of 1949 was the first multilateral international agreement to both explicitly mention and prohibit rape.[57] The Geneva Conventions expanded the protections previously available to individuals during wartime by granting new protections to those *hors de combat* ("out of action") during conflict, as well as civilians (those not taking part in hostilities). According to the International Committee for the Red Cross, article 27 "occupies a key position among the Articles of the [Fourth Geneva] Convention" by proclaiming the foundational principles on which the conventions are based.[58] At a minimum, the convention entitles all protected persons "to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."[59]

The Convention then goes a step further by granting special protection to women, prohibiting "any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[60] The International Council of Women and the International Federation of Abolitionists provided the language for these additional protections; Claude Pilloud of the International Committee of the Red Cross urged their adoption during the drafting phase of the Fourth Geneva Convention.[61] The article made rape, enforced prosti-

held in Japan during which the late Emperor Hirohito was found guilty of crimes against humanity, and the government of Japan liable, for this practice. *See, e.g.*, *'Comfort Women' Case*, HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/eCache/DEF/11/085 (last visited May 10, 2011) (summarizing the case and the court judgment).

56. Paul Sheehan, *An Orgy of Denial in Hitler's Bunker*, SYDNEY MORNING HERALD, May 17, 2003, http://www.smh.com.au/articles/2003/05/16/1052885399546.html.

57. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

58. *Commentaries on Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949*, at para. 1, INT'L COMMITTEE RED CROSS (ICRC), http://www.icrc.org/ihl.nsf/COM/380-600032?OpenDocument.

59. Fourth Geneva Convention, *supra* note 57, art. 27.

60. *Id.*

61. II-A Final Record of the Diplomatic Conference of Geneva of 1949, at 643 (1949). The travaux préparatoires of the convention show no resistance to his proposal. *Id.*

tution, and other forms of indecent assault illegal, but the convention stopped short of including rape as among the grave breaches[62] listed in article 147. Although not mandated, rape could, of course, still be prosecuted domestically.

In combination, articles 146 and 147 create a regime of enumerated acts that bind contracting parties to pursue and prosecute those persons within the territory of a contracting state who violate those specific prohibitions.[63] While the convention does not include specific reference to rape or other forms of sexual violence as "grave breaches," some scholars have argued that rape could be included among the grave breaches by implication.[64] The *travaux préparatoires* (the official record of the negotiations underlying the development of the Convention) do not indicate whether rape and sexual violence were considered for inclusion among the grave breaches, nor do they clarify whether any of the enumerated grave breaches were intended to encompass rape and sexual violence.[65]

Several decades later, on June 8, 1977, the Geneva Conventions' Additional Protocols I and II entered into force to address changes in methods of warfare that had developed in the intervening decades since World War II, including during the Vietnam War.[66] Susan Brownmiller's seminal work *Against Our Will* contained the first widely available treatment of rape during the Vietnam War.[67] She relied on testimony from journalists who spent time in the field, court-martial

62. Those crimes that are termed "grave breaches" carry with them an obligation on the part of nations to enact and enforce laws that penalize those who engage in such activities.

63. Fourth Geneva Convention, *supra* note 57, arts. 146, 147.

64. SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE, *supra* note 20, at 9 ("[T]he grave breaches enumerated in [art.] 147 . . . 'obviously cover[ ] not only rape, but also any other attack on a woman's dignity.'") (citation omitted); *see also* Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L L. 287, 298 (2002) [hereinafter Sellers, *Sexual Violence*]; *Practice Relating to Rule 93. Rape and Other Forms of Sexual Violence*, INT'L COMMITTEE RED CROSS (ICRC), http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule93 (last visited Apr. 2, 2011).

65. *See* I Final Record of the Diplomatic Conference of Geneva of 1949, at 216, 235, 274, 328 (1949); II-A Final Record of the Diplomatic Conference of Geneva of 1949, at 217, 230, 603, 873 (1949); II-B Final Record of the Diplomatic Conference of Geneva of 1949, *passim* (1949).

66. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 (1979) [hereinafter Protocol II].

67. BROWNMILLER, *supra* note 9.

records, and eyewitness testimony offered during the 1971 Winter Soldier Investigation.[68] In short, she found that rape and other forms of sexual violence were widely perpetrated by the American military, ranging from military-run brothels located in some Army camps, to rape, gang rape, and sexual torture committed by soldiers while on patrol.[69]

More recently Gina Marie Weaver has reviewed oral histories of South Vietnamese peasants[70] to corroborate accounts of sexual violence uncovered by the Winter Soldier Investigation[71] and reports that three forms of sexual violence were common: sexual torture of prisoners, rape, and "murder rape (often associated with mass killings)."[72] Sexual torture of male prisoners occurred, while rape and sexual mutilation, or threat of such treatment, was often used as a technique to extract information from female prisoners.[73] Weaver reports one eyewitness account from an American soldier who testified to the prevalence of rape: "In other words, if I saw a woman, I'd say, 'Well, it won't be too long.' That's how widespread it was."[74]

Additional Protocol I—which applies to situations of international armed conflict—explicitly prohibits "outrages upon personal dignity," including enforced prostitution and indecent assault.[75] It also explicitly prohibits the rape of women but still does not include rape or sexual violence among the grave breaches, leaving state actors without the pursue-and-prosecute obligation.[76] Additional Protocol II—relating to non-international armed conflict—prohibits rape without regard to biological sex[77] but is restricted in force due to the limited number of states that have ratified the treaty.[78] Nevertheless, by the early 1990s, International Humanitarian Law at least prohibited sexual violence perpetrated against civilians, combatants, and prison-

68. *See id.* at 86–113.

69. *Id.*

70. WEAVER, *supra* note 9, at 32 (citing MARTHA HESS, THEN THE AMERICANS CAME: VOICES FROM VIETNAM (1994)).

71. Weaver reports that the full transcript of the investigation includes twenty-one separate eyewitness accounts of rape or sexual violence. WEAVER, *supra* note 9, at 54.

72. *Id.* at 33.

73. *Id.* at 33–34.

74. *Id.* at 75.

75. Protocol I, *supra* note 66, art. 75(2)(b).

76. *Id.* art. 76.

77. Protocol II, *supra* note 66, art. 4(2)(e).

78. Sellers, *Sexual Violence*, *supra* note 64, at 299.

ers of war during periods of armed conflict,[79] although prosecution for such crimes remained anything but certain.

These efforts to recognize sexual violence as criminal, most notably undertaken through Allied Control Council Law No. 10 and the 1949 Geneva Conventions, laid the basic foundations for the development of the international crime of rape, although the laws and norms that emerged from these endeavors had little practical impact on the prosecution of sexual violence. It was not until the 1990s that the International Criminal Tribunal for Rwanda ("Rwanda Tribunal") and the International Criminal Tribunal for the former Yugoslavia ("Yugoslavia Tribunal") would become the primary engines driving the development of an international jurisprudence prohibiting rape and sexual violence during war; with no binding international definitions for these crimes, the tribunals struggled to create workable definitions for use by their courts. The legal doctrines that emerged from these tribunals ultimately laid the foundation for relatively broad definitions of rape and sexual violence and established a key list of elements that must be satisfied to ensure accountability.

II. The Refinement of International Criminal Accountability for Sexual Violence Through the *Ad Hoc* Tribunals

The Rwanda Tribunal and the Yugoslavia Tribunal have been two of the primary engines driving the contemporary evolution of rape and sexual violence jurisprudence.[80] Prior to the creation of these tribunals in the 1990s, international law had failed to clearly articulate the elements necessary for the effective prosecution of rape and sexual violence.[81] Thus, the tribunals had to establish their own definitions, which they did during a series of key cases. Through these cases, the Yugoslavia and Rwanda Tribunals have helped clarify international norms prohibiting rape and other forms of sexual violence dur-

79. SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE, *supra* note 20, at 10 n.33 ("In summary, this represents the combined protection of the four Geneva Conventions of 1949, inclusive of Common Article 3 and the two Additional Protocols of 1977 to the four Geneva Conventions.").

80. Mitchell, *supra* note 43, at 240 (listing the following successes of the Rwanda Tribunal and Yugoslavia Tribunal: "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.").

81. Ellis, *supra* note 43, at 229.

ing times of war and political unrest.[82] In particular, the tribunals have included rape/sexual violence as a constituent violation under the crimes of genocide, war crimes, and crimes against humanity.

Prosecutor v. Akayesu, in the Rwanda Tribunal, was the first case from the tribunals to render a decision that directly implicated rape and sexual violence.[83] Akayesu was a *bourgmestre*—the top-ranking public official in his particular commune—who was found to have known about and been present for several instances of sexual violence and sexual abuse that occurred under his authority, including rape and forced nudity.[84] He was charged with rape as a constituent act of crimes against humanity, outrages upon personal dignity as a war crime, and sexual violence as a constituent act of genocide.[85]

Two aspects of the *Akayesu* decision are particularly important. First, the Trial Chamber in *Akayesu* discussed the relationship between sexual violence and genocide. Namely, sexual violence could be committed with the intent of killing members of a group,[86] could constitute serious bodily or mental harm,[87] could be composed of measures intended to prevent births within the group,[88] and could amount to forcibly transferring children of the group to another group.[89] This was an unprecedented development in international law.

Second, the trial chamber identified the specific elements of the crime of rape, for the first time in international law, and distinguished sexual violence from rape. Although the Rwanda Tribunal had previously included rape among the enumerated acts that could constitute crimes against humanity,[90] it was in *Akayesu* that a Trial Chamber first defined rape as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive."[91] Sexual violence

82. SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE, *supra* note 20, at 12–13. It should be noted that in early cases the specific elements of sexual-violence crimes were only elucidated upon a conviction or acquittal. *Id.* at 13.

83. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998).

84. *Id.* ¶¶ 704–07.

85. *Id.* ¶ 6 ("The Indictment").

86. *Akayesu*, ICTR 96-4-T, ¶ 733.

87. *Id.* ¶ 731.

88. *Id.* ¶ 507 (including acts such as sexual mutilation, sterilization, forced birth control, separation of the sexes, and prohibition of marriages).

89. *Id.* ¶ 509.

90. Statute of the International Criminal Tribunal for Rwanda art. 3(g), Nov. 8, 1994, 33 I.L.M. 1602. Also, the Trial Chamber concluded that sexual violence could be included under the Statute's prohibitions against "inhumane acts" in art. 3(i), "outrages upon personal dignity" in art. 4(e), and "serious bodily or mental harm" in art. 2(2)(b). *Akayesu*, ICTR 96-4-T, ¶ 688.

91. *Akayesu*, ICTR 96-4-T, ¶ 598.

was broadly defined as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[92] Such an act, the Trial Chamber declared, could involve dignitary harms that did not involve penetration or even physical contact.[93] For example, the instance of a student being forced to publicly undress and do gymnastics in the nude was found to constitute sexual violence.[94] Two other issues the Tribunal addressed were whether a victim needed to establish that he or she had been coerced into sexual behavior—something that could be difficult to prove and thus a major barrier to prosecution—or whether the accused could raise a defense that the victim had consented to the sexually-violent conduct. In addressing coercion, the Trial Chamber determined that "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress that prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict."[95] They further clarified that in the presence of coercion, the need to prove a lack of consent was obviated. Thus, as the violence under Akayesu's control was deemed coercive, the Trial Chamber did not have to analyze the issue of consent.[96] *Prosecutor v. Musema*, decided approximately two years later, affirmed much of the jurisprudence established in *Akayesu*.[97]

Prosecutor v. Furundzija, at the Yugoslavia Tribunal, quickly followed the *Akayesu* judgment.[98] Anto Furundzija was a commander of "The Jokers," a special unit of the military police of the Croatian Defense Council.[99] Furundzija, along with another soldier, interrogated "Witness A," who was in their custody; as Furundzija questioned Witness A, the other soldier rubbed a knife along her inner thigh and threatened to insert it into her vagina if she did not truthfully answer their questions.[100] In addition to charges related to this circumstance, Furundzija was accused of failing to intervene while Witness A was

92. *Id.*

93. *Id.* ¶ 688.

94. *Id.*

95. *Id.*

96. *See* SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE, *supra* note 20, at 20.

97. Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement and Sentence (Jan. 27, 2000).

98. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

99. *Id.* ¶ 38 ("The Amended Indictment").

100. *Id.*

forced to have oral and vaginal sexual intercourse with the knife-wielding soldier.[101]

Because the decision of one tribunal is not necessarily binding upon another, the Trial Chamber for the Yugoslavia Tribunal also decided to establish the elements of rape and did so in part to determine whether rape could constitute torture. The Tribunal ultimately defined the violation as:

> (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 a victim or third person.[102]

Using this definition, the Tribunal convicted Furundzija of torture, as well as outrages of personal dignity—both war crimes under Common Article 3 of the Geneva Conventions and incorporated under article 3 of the statute of the Yugoslavia Tribunal.[103]

The Trial Chamber's holding that rape could constitute torture was a significant development in international law.[104] Although on appeal, Furundzija challenged the sufficiency of the evidence against him,[105] the Appeals Chamber affirmed the judgment in its entirety.[106]

Prosecutor v. Kunarac was the first Yugoslavia Tribunal case to find individuals guilty of rape as a constituent offense of crimes against humanity.[107] Crimes against humanity differ from war crimes by, among other things, not requiring a nexus to armed conflict, but requiring that any crimes have been committed as part of a widespread or systematic attack against a civilian population.[108] Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic were ethnic Serbs who took part in a Serb military campaign in the municipality of Foca in the Republika Srpska. One of the purposes of the military campaign was to cleanse the municipality of Muslims, especially through a campaign of terror targeting Muslim women.[109] The Yugoslavia Tribunal

101. *Id.*

102. *Id.* ¶ 185.

103. SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE, *supra* note 20, at 20.

104. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgement, ¶ 163 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

105. *Id.* ¶¶ 80–127.

106. *Id.*

107. Prosecutor v. Kunarac, Case No. IT-96-23/1-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

108. *Id.*

109. Press Release, Int'l Criminal Tribunal for the Former Yugoslavia, Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case (Feb. 22, 2001).

referred to this case as the "rape camp" case, as the three defendants had taken part in systematic sexual violence against Muslim women that had included maintaining a detention center and other facilities in which women and girls were routinely raped.[110] The three men were charged and convicted of rape as a war crime and as a crime against humanity under articles 5(g) and 3 of the Yugoslavia Tribunal statute for personally raping, or being present while other soldiers raped, Muslim women.[111]

However, in *Kunarac*, the Trial Chamber departed from the definitions of rape established in *Furundzija* by including a two-pronged lack-of-consent element that required assessing the lack of consent of the victim and the knowledge of the perpetrator that the victim did not consent.[112] The Trial Chamber reasoned that this change was necessary because the facts of *Furundzija* were narrower than in *Kunarac*, and the "non-consensual or non-voluntary" element of the crime needed to be calibrated to reflect the appropriate scope of the norm against rape under international law.[113] This was a significant change in international legal jurisprudence, as the court included an explicit inquiry into the consent of the victim rather than an inquiry into the presence of force or coercion, which would *imply* nonconsent.

The Trial Chamber offered this definition of rape:

> [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.[114]

The Trial Chamber found that the "basic principle" underlying the crime of rape was a violation of sexual autonomy, which is captured by the consent prong of the definition.[115] Nevertheless, the Trial Chamber softened the requirement somewhat by also stating that consent could not be offered as a defense if the "victim has been subjected to or threatened with or has reason to fear violence, duress,

110. *Id.*

111. *Kunarac*, IT-96-23/1-T, ¶¶ 4–8, 685–727, 782, 822.

112. SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE, *supra* note 20, at 20–21.

113. *See Kunarac*, Case No. IT-96-23/1-T, ¶ 459.

114. *Id.* ¶ 460.

115. *Id.* ¶ 457.

detention or psychological oppression."[116] On appeal, the defendants challenged the Trial Chamber's definition of rape, arguing that the standard should be that victims must show "continuous" or "genuine" resistance to demonstrate nonconsent.[117] The Appeals Chamber, however, rejected the defendants' argument and affirmed the Trial Chamber's approach.[118]

The next significant attempt to grapple with the standard in an international tribunal appeared in *Prosecutor v. Gacumbistsi.*[119] As noted above, *Kunarac* had required physical elements of penetration coupled with the lack of a victim's consent *and* the perpetrator's knowledge of the victim's lack of consent. The second prong of the *Kunarac* consent test—that the alleged perpetrator committed the act with knowledge of the victim's lack of consent—can be an especially difficult element to satisfy in the context of armed conflict. In *Gacumbitsi,* the Appeals Chamber reexamined the lack-of-consent element, purportedly to clarify any ambiguity in the relevant jurisprudence.[120] On appeal, the prosecution argued that lack of consent should not be considered an element of the offense that the prosecution has to prove but rather that the defendant could attempt to show consent by the victim as a defense against the charges, effectively shifting the burden of proof[121] from the prosecution to the defense, thereby facilitating a conviction.[122] The Appeals Chamber affirmed that both the victim's nonconsent and the accused's knowledge of lack-of-consent are elements that must be established by the prosecution.[123] The Appeals Chamber did, however, elaborate that nonconsent may be

116. *Id.* ¶ 462.

117. Prosecutor v. Kunarac, Case No. IT-96-23-A, IT-96-23/1-A, Judgement, ¶ 125 (Jun. 12, 2002).

118. *Id.* ¶ 128.

119. SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE, *supra* note 20, at 21–22 (referencing Prosecutor v. Stakic, Case No. IT-97-24-T, Judgement, ¶ 755 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003); Prosecutor v. Nikolic, Case No. IT-94-2, Judgement and Sentence, ¶ 113 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003)). The *Kunurac* definition was also employed by the Rwandan Tribunal in Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, ¶ 345 (May 15, 2003).

120. Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgement (June 17, 2004); *see also* SELLERS, THE PROSECUTION OF SEXUAL VIOLENCE, *supra* note 20, at 22–23.

121. "Burden of proof" is a legal term of art that signifies which party has the burden of affirmatively proving his case. For example, must the prosecution affirmatively establish that a particular act occurred (as occurs when the prosecution has the burden of proof), or is it the defense's burden to establish that a particular act did *not* occur? In cases of a "tie," where it is difficult to tell whether the act did or did not occur, the party with the burden of proof will be the one to "lose."

122. *Gacumbitsi,* Case No. ICTR-2001-64-A, ¶ 147.

123. *Id.* ¶ 153.

proven if circumstances can be demonstrated "under which meaningful consent is not possible."[124] Per this standard, the prosecution does not need to produce evidence of the victim's conduct or evidence indicating the use or threat of force, but rather nonconsent may be inferred from examining relevant and admissible evidence of the background circumstances, such as an "ongoing genocide campaign" or detention of the victim.[125] The *Gacumbitsi* decision, however, seems to stop short of creating a presumption that such situations are inherently coercive.[126]

Importantly, for purposes of comparison with abuses perpetrated at Abu Ghraib, Guantánamo and other military detention sites, the use of sexual violence against men also gained some precedent during this period, helping to underscore the possibility that men could be the victims of sexual violence. For example, in the *Tadic* case prosecuted in the Yugoslavia Tribunal, Dusko Tadic was convicted under Common Article 3 for a violation of the laws or customs of war, for the role that he played in the forcing of a detainee to bite off the testicle of another.[127] The *Celebici Prison-Camp* case continued this trend; there, defendant Zejnil Delalic was convicted of inhumane acts in part for forcing two men (brothers) to commit fellatio on each other.[128] In that case, the court noted that this could have constituted rape instead of cruel treatment, "if pleaded in the appropriate manner."[129]

In summary, due to the work of the Rwanda and Yugoslavia Tribunals, as well as other courts, the issue of sexual violence has gained critical prominence in international law, as has an understanding of its potential breadth—both in terms of what acts are sexual violence and who might be considered victims.[130] The international

124. *Id.* ¶ 155.

125. *Id.*

126. The Appeals Chamber affirmed this definition in Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgement, (Nov. 28, 2007). For more information on the debate surrounding the "lack of consent" element, see A.L.M. de Brouwer, *Gacumbitsi Judgement, in* ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, VOLUME 24: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 2005–2006, at 583, 583–94 (Andre Klip & Goran Sluiter eds., 2009).

127. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 198 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

128. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, ¶ 1062 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

129. *Id.* ¶ 1066. *See also* Shanker, *supra* note 17, at 326.

130. Additional cases from the Rwandan Tribunal that we do not have room to cover that are particularly notable for the detail they contribute to the international jurisprudence of sexual violence include Prosecutor v. Renzaho, Case No. ICTR-97-31-T, Trial Judgment (July 14, 2009); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgment

approach to sexual violence during armed conflict has moved dramatically away from norms that conceived of sexual violence as a violation of a man's property rights over a woman,[131] to norms that come closer to respecting the human dignity and bodily integrity of the victims themselves.[132] Equally important has been the development of international jurisprudence that has established sexual violence as a constituent element of genocide, crimes against humanity, and war crimes, including rape and torture. Ultimately, the gains realized in the Rwanda and Yugoslavia Tribunals have paved the way for the prosecution of rape and other forms of sexual violence in the International Criminal Court.

III. Accountability for Sexual Violence Through the International Criminal Court

In July of 1998, a diplomatic conference gathered in Rome to finalize the framework for a permanent institution with the authority to investigate and prosecute "the most serious crimes of concern to the international community,"[133] including genocide, war crimes, and crimes against humanity.[134] The resulting Rome Statute of the International Criminal Court ("ICC" or "Court") was overwhelmingly adopted on July 17, 1998.[135] By July 1, 2002, sixty-six countries had

and Sentence (Sept. 12, 2006); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence (May 15, 2003); Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Trial Judgment (Feb. 27, 2009); Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgement and Sentence (Jan. 22, 2004); Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgement (Dec. 18, 2008); and Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence (Dec. 1, 2003). Similarly important advances have been realized through other international and hybrid courts, such as the Special Court for Sierra Leone and the Ad-Hoc Tribunal for East Timor, as well as through the state court of Bosnia and Herzogovina.

131. *See* DOWDESWELL, *supra* note 21, at 43.

132. *See, e.g.*, ASKIN, *supra* note 22, at 372–75.

133. Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

134. *See, e.g.*, United Nations, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, June 15–17, 1998, Official Records, Vol. II, at 65 para. 12 (2002) [hereinafter United Nations, Diplomatic Conference of Plenipotentiaries] (summary records of the plenary meetings) ("Clearly, the Statute of the Court must encompass genocide, crimes against humanity and war crimes . . . ."), *available at* http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf. *See* Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 80 INT'L REV. RED CROSS 59 (1998).

135. THE RECKONING: THE BATTLE FOR THE INTERNATIONAL CRIMINAL COURT (Skylight Pictures 2009).

ratified the statute, and the Court officially came into being.[136] While the Court's mandate to address only the highest level perpetrators and most serious international crimes will limit it to a relatively small number of cases, the Court has the potential to have a significant impact, normatively and symbolically, on the development of international criminal law, due to its enhanced visibility as a permanent international court. Accordingly, we devote an entire section of our Article to the structure, laws, and jurisprudence of this single institution.

One of the ICC's most notable features has been its commitment to expanding the scope of sexual violence-based crimes in international law. Building upon the prior work of the Rwanda and Yugoslavia Tribunals, the Rome Statute added sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence to the list of war crimes and crimes against humanity.[137] The Rome Statute further acknowledged that sexual violence could be committed against both men and women and confirmed that defendants could and should be held liable for their own actions as well as those committed by their inferiors and/or partners, through the theory of command responsibility and another form of liability ("co-perpetration") that somewhat resembles the domestic theory of conspiracy.[138]

Another notable feature has been the ICC's unprecedented commitment to ensuring victims a participatory role in the Court's proceedings.[139] When the Rome Statute was being negotiated, civil law countries were especially adamant that victims be accorded extensive participatory rights.[140] As French Justice Minister Élisabeth Guigou ar-

136. *Ratification of the Rome Statute*, COALITION INT'L CRIM. CT., http://www.iccnow.org/?mod=romeratification (last visited Apr. 3, 2011). As of April 2011, the agreement had been ratified by 114 countries and signed by 139. *Id.*

137. Rome Statute, *supra* note 133, art. 7(1)(g); *see* ANNE-MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 85–86 (2005); THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE (Roy. S. Lee ed., 2001) [hereinafter ICC ELEMENTS & RULES].

138. DE BROUWER, *supra* note 137, at 338.

139. *See* United Nations, Diplomatic Conference of Plenipotentiaries, *supra* note 134. For example, Ms. Nagel Berger, Minister of Justice for Costa Rica, emphasized the need for the ICC to have "full powers" to deal with crimes infringing upon the dignity of women, such as rape, sexual slaves, prostitution, and forced sterilization. *Id.* at 77. Ms. Obando, an observer for the Women's Caucus for Gender Justice in the ICC, stressed the need for gender compliance in the investigation of crimes. *Id.* at 96.

140. Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 253–54 (2007); *see also Who We Are*,

gued, "Victims are not simply witnesses whose participation . . . should be limited to gathering the information which they are able to provide. They have a separate role to play, and this must be recognized by the [ICC]."[141] This perspective contrasted with that of many common-law countries, for whom the concept of victim participation was, quite literally, a foreign one.[142] The ICC ultimately adopted the broadest victim-participation scheme of any previous tribunal.[143] This was intended to enhance the capacity of the Court to empower victims, including victims of sexual violence, to speak out about the atrocities they experienced.

While the precise purpose behind such expansive participation is somewhat ambiguous,[144] some commentators have suggested that it is instrumentally designed "to reliev[e] the suffering and afford[ ] justice to victims not only through the conviction of the perpetrator by [the] Court, but also by attempting to redress the consequences of genocide, crimes against humanity and war crimes,"[145] for example, by granting reparations. Others have suggested the goal is expositive, to help clarify the facts surrounding an alleged crime,[146] since victims have experienced the atrocities firsthand and thus have valuable information to share. Most agree, however, that the overall objective is to

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VICTIMS' RTS. WORKING GROUP http://www.vrwg.org/smartweb/about-vrwg/who-we-are (last visited Apr. 27, 2011).

141. Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, at 1397 (Antonio Cassese et al. eds., 2002) (quoting Élisabeth Guigou, French Justice Minister, Address of the Ministry of Justice at the International Colloquium on "L'Accès des victims à la Cour Pénale Internationale" (Apr. 27 1999)).

142. Jouet, *supra* note 140, at 253, 255–58.

143. The victim participation scheme adopted by the later-established Extraordinary Chambers in the Courts of Cambodia ("ECCC") would become even broader by empowering some victims to become not only participants but parties to cases. *See* James P. Bair, *From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, 31 U. HAW. L. REV. 507, 508 (2009).

144. Jouet, *supra* note 140, at 268 (explaining that, "Most importantly, the Statute and Rules do not concretely specify the purpose of victim participation.").

145. Int'l Criminal Court, *The Role of the Trust Fund for Victims and its Relation with the Registry of the International Criminal Court*, *in* PRESS-KIT: FIRST MEETING OF THE BOARD OF DIRECTORS OF THE TRUST FUND FOR VICTIMS OF ICC (2004), *available at* http://www.icc-cpi.int/NR/rdonlyres/044E7728-77AB-4B65-AC57-38485082E631/144059/PIDS0082004EN.pdf; *see also* Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189 (2007) (explaining the purpose of providing victim reparations).

146. Miriam Cohen, *Victims' Participation Rights Within the International Criminal Court: A Critical Overview*, 37 DENV. J. INT'L L. & POL'Y 351, 353 (2009).

give victims a voice in the proceedings and "to shed light on the suffering and harm that occurred."[147]

A. Prosecuting Sexual Violence Though the International Criminal Court

1. Jurisdiction and Complementarity

Before crimes can be prosecuted through the ICC, including crimes of sexual violence, a number of obstacles must be surmounted. The first is ensuring that the Court has jurisdiction and the case is admissible. The ICC can only prosecute individuals accused of committing or assisting in the commission of genocide, crimes against humanity, and/or war crimes.[148] The accused must be a national of a country that has accepted the Court's jurisdiction, the crime must have taken place within the borders of a country that accepts the Court's jurisdiction, or the U.N. Security Council must have referred the situation to the Court Prosecutor. In addition, the purported crime must have taken place after the date that the Rome Statute entered into force for the nation under consideration.[149]

The second hurdle is satisfying the principle of complementarity: the ICC is designed to complement—not replace—national court systems. Specifically, there must be an absence of national proceedings designed to prosecute the alleged crime.[150] A case is deemed inadmissible if "the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution."[151] The Court's Appeals Chamber has elucidated this requirement, explaining that there is a twofold test that must be passed to establish the requisite complementarity: "[T]he initial questions to ask are (1) whether there are ongoing in-

147. *Id.* at 373.

148. *About the Court*, COALITION INT'L CRIM.CT., http://www.iccnow.org/?mod=court (last visited Apr. 27, 2011). The Court will also be able to exercise jurisdiction over crimes of aggression, at the earliest, after January 1, 2017. *See The Crime of Aggression*, COALITION INT'L CRIM. CT., http://www.iccnow.org/?mod=aggression (last visited Apr. 3, 2011).

149. *Jurisdiction and Admissibility*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm (last visited Oct. 29, 2010).

150. Indeed, per the principle of complementarity, it is the state and not the Court that has primary responsibility for investigating and prosecuting serious international crimes within its borders; the ICC is considered a "court of last resort" that acts only when states cannot or will not. HUMAN RIGHTS WATCH, MAKING KAMPALA COUNT: ADVANCING THE GLOBAL FIGHT AGAINST IMPUNITY AT THE ICC REVIEW CONFERENCE 35–53 (2010) [hereinafter MAKING KAMPALA COUNT], *available at* http://www.hrw.org/en/node/90282.

151. Rome Statute, *supra* note 133, art. 17(1)(a).

vestigations or prosecutions, or (2) whether there have been investigations in the past and the State having jurisdiction has decided not to prosecute the person concerned."[152] If those two questions are answered affirmatively, then the Court must consider whether the nation under consideration is unwilling or unable to prosecute. If so, then the ICC can assume jurisdiction.

A third criterion is whether the case is of "sufficient gravity" to justify the Court's involvement.[153] In one decision, the Pre-Trial Chamber explained that "all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases."[154] Gravity can be established both quantitatively and qualitatively. For example, while the existence of a large number of victims may help quantify a crime's gravity, "it is not [just] the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave."[155] Factors determining whether a crime is sufficiently grave from a qualitative perspective include the geographical and temporal intensity of the alleged crimes, the nature of the alleged crimes, how the crimes were committed, and the impact on victims and their families.[156]

Finally, as an overall principle, the ICC must deny jurisdiction if it has "substantial reasons to believe that an investigation would not serve the interests of justice."[157]

Importantly, these requirements ensure that only a few individuals, relatively speaking, will ever be held accountable for their crimes through the ICC. Thus, criminal prosecutions in national courts continue to be crucial mechanisms for addressing major crimes and lessening the threat of impunity,[158] even in countries where the ICC has elected to act.

152. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Appeals Chamber Judgment, ¶ 178 (Sept. 25, 2009).

153. Rome Statute, *supra* note 133, art. 17(1)(d). *See also Jurisdiction and Admissibility*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm (last visited Oct. 29, 2010).

154. Situation in the Republic of Kenya, Case No. ICC-01/09, Pre-Trial Chamber II, ¶ 56 (Mar. 31, 2010) [hereinafter Kenya Decision].

155. *Id.* ¶ 62.

156. *Id.*

157. *Id.*; Rome Statute, *supra* note 133, art. 53(1)(c).

158. For an excellent overview of some of the challenges to providing domestic trials to complement international prosecutions that have arisen at the ICTY, see Anna Petrig and

2. Substantive Laws Addressing Sexual Violence

The Rome Statute incorporates a number of the normative and practical advances in the prosecution of rape and sexual violence that have developed within the last century. Specifically, it builds upon the recognition of sexual violence as a serious international crime by the Rwanda and Yugoslavia Tribunals.[159]

As mentioned, the Rome Statute also expands upon the list of sexual violence-related crimes that are considered crimes against humanity and war crimes, including sexual slavery, enforced prostitution, enforced sterilization, and forced pregnancy.[160] Further, unlike the Rwanda and Yugoslavia Tribunals, which merely prohibit persecution on the basis of religion, politics, and/or race, the Court also prohibits persecution based on gender, helping to ensure gender-related crimes can be more expansively prosecuted than ever before.[161]

Another advancement is that the Rome Statute explicitly declares rape to be a war crime—along with sexual slavery, forced pregnancy, enforced prostitution, enforced sterilization, persecution based on gender, and other sexual violence.[162] Finally, the Court has confirmed that rape can constitute genocide by causing "serious bodily or mental harm" committed with the intent to "destroy" a particular population,[163] codifying the holding in *Akayesu.*

Fausto Pocar, *Case Referral to National Jurisdictions: A Key Component of the ICTY Completion Strategy*, 45 CRIM. L. BULL. 1, 1–21 (2009). *See also* OPEN SOC'Y FOUNDS., PUTTING COMPLEMENTARITY INTO PRACTICE: DOMESTIC JUSTICE FOR INTERNATIONAL CRIMES IN DRC, UGANDA, AND KENYA (2011).

159. Rome Statute, *supra* note 133, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi); Ellis, *supra* note 43, at 239.

160. Ellis, *supra* note 43, at 235.

161. *Id.* at 246; Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 33 CASE W. RES. J. INT'L. L. 277 (2002). Proposals offered by the United States and Switzerland played a significant role in developing the statutory prohibitions against these crimes, providing a foundation for how they should be defined as war crimes in the Rome Statute, Herman van Herbel, *Introduction to Chapter 5: The Elements of War Crimes*, *in* ICC ELEMENTS & RULES, *supra* note 137, at 109, 109–11. Three proposals were similarly critical to the development of these as crimes against humanity: one by the United States, one by a group of Arab states (largely designed to protect longstanding cultural and religious norms regarding the rights of husbands over wives), and one by Canada and Germany. *Id.* The nongovernmental Women's Caucus for Gender Justice also played a seminal role in helping to shape the ICC's conceptualization of sexually violent crimes. DE BROUWER, *supra* note 137, at 20, 177–78; Darryl Robinson, *Article (1)(g)—Crime Against Humanity of Rape*, *in* ICC ELEMENTS & RULES, *supra* note 137, at 80, 93 n.80.

162. Rome Statute, *supra* note 133, art. 8(2)(b)(xxii).

163. *Id.* art. 6(b). It is explained in a footnote that rape can satisfy the elements of the crime of genocide. Int'l Criminal Court, Elements of Crimes 2 n.3 (adopted and entered into force Sept. 9, 2002) [hereinafter Elements of Crimes], http://www.icc-cpi.int/NR/

The ICC's definition of rape builds on those used at the Rwanda and Yugoslavia Tribunals. Specifically, article 7(1)(g)-1 "Crime against humanity of rape" recognizes rape as having two elements:

> 1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.[164]

This definition includes the elements of force and coercion required in *Akayesu* and *Furundzija*, however, it recognizes that coercion can be shown by demonstrating that the individual who perpetrated the crime took advantage of coercive circumstances.[165] This signals an additional step in the move away from the historic assumption of implied consent by recognizing that in certain coercive situations, coercion can be implied.[166]

As with the other tribunals, the ICC also provides for more than just direct perpetration. Specifically, the Rome Statute recognizes a variation on joint criminal enterprise (called "co-perpetration") and superior (or "command") responsibility. Regarding co-perpetration, article 25 states:

> (2) A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (3)(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible . . . [or] (3)(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.[167]

Meanwhile, article 28 explicitly declares that military commanders and other superiors can be held responsible for the acts of the subordinates under their authority and control under certain cir-

rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

164. Elements of Crimes, *supra* note 163, at 8.

165. Ellis, *supra* note 43, at 240.

166. *The Statute of the International Criminal Court Protects Against Sexual Crimes*, CENTER ON L. & GLOBALIZATION, http://clg.portalxm.com/library/keytext.cfm?keytext_id=204 (last visited Apr. 28, 2011).

167. Rome Statute, *supra* note 133.

cumstances.[168] This is particularly important for cases of sexual violence, where those who physically commit the crimes are often relatively low on any chain of command and thus fall outside the Court's mission to ensure accountability at the highest levels. Additionally, authorizing command responsibility improves the likelihood that sexual violence can be recognized as a tool of warfare and not just a random crime of opportunity—and thus as an act either directly or indirectly encouraged by leaders.

The ICC's decision to embrace these liability modes have likely contributed, at least tangentially, to the United States' reluctance to become a party to the Court's Rome Statute. While accountability for the abuse of detainees has, so far, been limited to a few relatively low-level soldiers in military courts, these modes would facilitate international criminal prosecutions of those who knew of and/or authorized the sexual abuse of detainees but did not prevent or punish such abuse, including those who have served in some of the U.S. government's most prominent positions.[169]

Finally, and especially importantly, the Rome Statute has a relatively broad reparations provision underscoring its commitment to victims. The ICC is empowered to determine the extent of damages suffered by victims[170] and to order reparations against the accused, to be coordinated by its Trust Fund for Victims.[171] Such reparations can include restitution, compensation, and/or rehabilitation.[172] This varies from many earlier international forums, such as the Yugoslavia Tribunal, where victims typically had to sue in national court or elsewhere to obtain compensation for the crimes they suffered.[173]

168. *Id.* art. 28(a).

169. For an overview of these various liability modes and their potential impact on prosecutions, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 187–252 (2d ed. 2008).

170. Rome Statute, *supra* note 133, art. 75.

171. The Fund is a Court institution designed to assist the victims of those being tried by the Court; its functions include the coordination and management of reparation awards. *See, e.g., Victims Trust Fund*, COALITION INT'L CRIM. CT., http://www.iccnow.org/?mod=trustfund (last visited March 16, 2011).

172. Rome Statute, *supra* note 133, art. 75. Restitution generally requires that a convicted party pay money damages to a victim equivalent to the amount by which he or she was unjustly enriched by the crime. Compensation is an amount paid to compensate the victim for his or her losses. Rehabilitation would likely be other damages designed to make the victim or victims "whole," e.g., the provision of medical or psychological treatment.

173. CASSESE, *supra* note 169, at 422 & n.39. This commitment to provide reparations is a particularly important advancement for victims, many of whom have stated a preferance for obtaining reparations even over seeing perpetrators tried in court. This issue is critical enough that it could easily fill (and deserves) an analysis of its own, and thus a careful discussion of reparations is beyond the scope of this particular Article.

3. Procedural Laws Addressing Sexual Violence

Several evidentiary rules establish how to deal with rape and sexual violence cases in the ICC. For example, Rule 63 declares that the Court's Chambers cannot require corroboration to prove any crime within the Court's jurisdiction, particularly crimes of sexual violence.[174] This represents an explicit break from historic practices, in which a woman's word was often not recognized as having sufficient evidentiary weight to establish rape on its own.[175]

Further, Rule 70 is dedicated to addressing evidentiary concerns underlying the historically controversial issue of "consent." The issue of whether a woman's consent could be introduced as a defense to rape charges was hotly debated throughout the process of drafting the Court's substantive and procedural rules.[176] The procedural rule that resulted is divided into four key principles for adjudicating sexual violence. Specifically,

> (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; [and] (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.[177]

While this rule discourages a consent defense, it also allows for one in limited situations. This triggers an equally controversial issue: when and how consent can be raised. During the Rules' drafting, Australia proposed that the Chamber first determine *in camera* (privately, in the judges' chambers) whether evidence of consent is relevant and credible before such evidence can be introduced at trial.[178] Some delegates, especially those from civil-law countries who had no experience with the provision of separate hearings to address whether

174. Int'l Criminal Court, Rules of Procedure and Evidence Adopted by the Assembly of States Parties, First Session, Official Records, ICC-ASP/1/3, Rule 63(4), at 22 (adopted and entered into force Sept. 9, 2002) [hereinafter Rules of Procedure and Evidence], *available at* http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf.

175. *See, e.g.*, ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 104 (1984) (discussing reforms to corroboration requirements in rape cases).

176. Donald K. Piragoff, *Evidence, in* ICC ELEMENTS & RULES, *supra* note 137, at 369–71.

177. Rules of Procedure and Evidence, *supra* note 174, at 24.

178. Piragoff, *supra* note 176, at 373–74.

particular evidence is admissible, were uncomfortable with the proposal because they felt it would require the Chamber to make a partial and advanced decision on the merits of the case without benefit of all of the evidence that would be introduced in a full trial.[179] However, those arguing for *in camera* proceedings eventually won the debate, supported by their argument that repeatedly questioning a victim in court about his or her purported consent to sexual activity tends to "blame and re-traumatise the victim."[180]

The resulting Rule 72 establishes:

> Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness . . . notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.[181]

Once such notice is given, the Chamber is to consider *in camera* the views of the Prosecutor, defense, witness, and victim or his or her legal representative. The Chamber then weighs the probative value of the evidence, as well as any potential prejudice. The Rule specifies that the Chamber, in considering whether to admit the evidence, should be guided by the principles laid out in Rule 70 regarding the limits on establishing consent. If the Chamber decides the evidence is admissible, then the Chamber must state on the record the precise purpose for which the evidence can be admitted.[182]

A fourth procedural rule, focused on whether a victim's sexual history can be discussed at trial, also generated much debate. The resulting rule ultimately went even further than the initial proposal, which had duplicated procedural aspects of the Yugoslavia Tribunal.[183] While, as at the Yugoslavia Tribunal, Rule 71 forbids the introduction of prior sexual conduct, the ICC now prohibits the introduction of *subsequent* sexual conduct as well.[184]

The Rome Statute drafters were especially concerned about protecting victims and others who assisted the court. Importantly, when

179. *Id.* at 374.

180. *Id.* at 373.

181. Rules of Procedure and Evidence, *supra* note 174, at 24 (Rule 72).

182. *Id.* at 25.

183. *See Rules of Procedure & Evidence, Rule 96(iv)*, INT'L CRIM. TRIBUNAL FORMER YUGOSLAVIA, (revised Dec. 8, 2010), http://www.icty.org/sid/136.

184. Rules of Procedure & Evidence, *supra* note 174, at 24 (Rule 71); Piragoff, *supra* note 176, at 384.

deciding whether special protections should be granted to victim witnesses, the Court must specifically consider "the nature of the crime [and] whether the crime involves sexual or gender violence."[185] While the anonymity of witnesses is not guaranteed, the Court can guarantee *confidentiality*, meaning that witness's identities can be withheld from the public, although not necessarily from the defense. Various electronic and other means have been provided to help safeguard confidentiality. In addition to valuing security in its own right, the Court recognizes security as necessary for establishing the "truth,"[186] since many victims and other witnesses may choose not to testify if sufficient protections are not in place.

Finally, to help protect witnesses who may be especially vulnerable, the Rome Statute requires that the prosecutor "appoint advisors with legal expertise on specific issues, including sexual and gender violence."[187] In concordance with the Court's Victims and Witnesses Unit (which is under the purview of the Registry), a Gender and Children Unit in the Office of the Prosecutor is designed to help the prosecution adequately address the specific issues faced by victims of sexual violence.[188]

4. International Criminal Court Case Law

Several ICC arrest warrants have been sought on the basis of sexual violence. They include, but have not been limited to, the following: In Northern Uganda, charges against Joseph Kony include sexual slavery and rape as crimes against humanity and rape as a war crime.[189] The Prosecutor has similarly sought charges against Vincent Otti, also of Northern Uganda, for sexual slavery and rape as a war

185. Rome Statute, *supra* note 133, art. 68(1).

186. *The Statute of the International Criminal Court Protects Against Sexual Crimes*, *supra* note 166.

187. Rome Statute, *supra* note 133, art. 42(9).

188. *See Victims and Witness Background*, COALITION INT'L CRIM. CT., http://www.iccnow.org/?mod=victimsbackground (last visited Apr. 28, 2011). Prof. Catharine A. MacKinnon has been appointed the court's Special Adviser on Gender Crimes. Press Release, Int'l Criminal Court, ICC Prosecutor Appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes (Nov. 26, 2008), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases (follow "Press Releases (2008)" hyperlink). For additional structures that have been put into place to assist victims, please see A.L.M. de Brouwer, *What the International Criminal Court Has Achieved and Can Achieve for Victims/survivors of Sexual Violence*, 16 INT'L REV. VICTIMOLOGY 183, 183–209 (2009).

189. *See, e.g.*, WOMEN'S INITIATIVES FOR GEND. JUSTICE, ADVANCING GENDER JUSTICE: A CALL TO ACTION app. (2010), http://www.iccwomen.org/documents/Advancing-Gender-Justice-A-Call-to-Action-FINAL.pdf [hereinafter ADVANCING GENDER JUSTICE]. For an overview of the ICC's current cases, see *Prosecutions*, INT'L CRIM. CT., http://www.icc-cpi.int/

crime.[190] In the Democratic Republic of Congo, the Prosecutor has sought charges against Germain Katanga and Mathieu Ngudjolo Chui for sexual slavery and rape, both as a war crime and crime against humanity.[191] Similar charges have been sought against defendants in Darfur, including "genocide based on rape and sexual assault" (Omar Hassan Ahmad Al'Bashir) and persecution by rape and outrages upon personal dignity constituting a crime against humanity (Ali Muhammad Ali Abd-Al-Rahman).[192] ICC arrest warrants have also been issued for Ahmed Harun and Ali Kushayb for crimes—including rape—committed in Darfur.[193] Finally, Jean-Pierre Bemba Gombo is currently being tried for crimes committed in the Central African Republic[194] (discussed below), while several arrest warrants have been issued in relation to the Situation in Kenya (also discussed below).

However, in the case of Thomas Lubanga Dyilo, the first ICC case to go to trial, the prosecutors failed to charge the defendant with sexual violence, despite the fact that "witness after witness" testified to the repeated rape of young girl soldiers by their commanders.[195] In May 2010, the lawyers for ninety-nine victim participants petitioned the Court to consider additional charges against the accused, including sexual slavery and cruel and unusual treatment, to reflect the routine rape of child soldiers.[196] Ultimately, despite the Lead Prosecutor's opening pledge that "in this court . . . girl victims will not be invisible," the request to expand the charges against Lubanga to include sexual

Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Prosecutions/ (last visited March 18 2011).

190. ADVANCING GENDER JUSTICE, *supra* note 189, app. at 8.

191. *Id.* at app.

192. *Id. See also Prosecutions, supra* note 189.

193. *See, e.g.*, Press Release, Int'l Criminal Court, Prosecutor Briefs UN Security Council, Calls for the Arrest of Ahmed Harun and Ali Kushayb for Crimes in Darfur, ICC-OTP-PR-20070607-222 (May 2, 2007); *ICC Issues Darfur Arrest Warrants*, BBC (May 2, 2007), http://news.bbc.co.uk/2/hi/africa/6614903.stm.

194. *The International Criminal Court Bares its Teeth*, THE ECONOMIST, May 12, 2011, *available at* http://www.economist.com/node/18682044?story_id=18682044&fsrc=rss.

195. Lisa Gambone, *Failure to Charge: The ICC, Lubanga & Sexual Violence Crimes in the DRC*, WAR CRIMES: WORLD AFFS. BLOG NETWORK (July 22, 2009 9:00 AM), http://warcrimes.foreignpolicyblogs.com/2009/07/22/failure-to-charge-the-icc-lubanga-sexual-violence-crimes-in-the-drc.

196. *Id.* Many girl soldiers have been required to play multiple roles. Radhika Coomaraswamy, UN Special Representative for Children and Armed Conflict, has reported that the girl soldiers she interviewed in the DRC "spoke of being used as fighters one minute, a 'wife' or 'sex slave' the next, and domestic servants and food-providers at other times." Katy Glassborow, *Call for Lubanga Charges to Cover Rape*, INST. WAR & PEACE REPORTING (May 12, 2008), http://iwpr.net/report-news/call-lubanga-charges-cover-rape.

and gender-based violence was rejected.[197] Although two of the three Trial Chamber judges had agreed to recharacterize the charges, their decision was later overturned by the Appeals Chamber.[198] While the appellate judges acknowledged the Trial Chamber may "change the legal characterisation of facts," the Trial Chamber cannot "exceed[ ] the facts and circumstances described in the charges and any amendments to the charges."[199] From a victim's perspective, this controversial interpretation of Court regulations underscores the need for more effective advocacy on behalf of victims at the earliest stage of proceedings, to ensure their interests and experiences are adequately reflected in the initial charges.[200]

The Court will finally have its first opportunity to consider rape charges in the case of Jean-Pierre Bemba Gombo, whose trial began in November 2010.[201] The Court's Pre-Trial Chamber II authorized the prosecution to pursue charges of rape as a crime against humanity, based on evidence of "widespread and systematic rape in [Bemba's] role as former President and Commander-in-chief of the Movement for the Liberation of Congo"[202] in the Central African Republic. Victims' advocates, while supporting these charges, have criticized the Pre-Trial Chamber II's decision to refuse to allow charges for outrages upon personal dignity and torture based on mass rapes as a distinct charge (the Pre-Trial Chamber II subsumed the torture charges into the charge of rape as a crime against humanity).[203] Such advocates believe Bemba should have to defend against both since the two crimes have distinct elements, although the Pre-Trial Chamber declined to adopt this reasoning "as a matter of fairness and expeditious-

197. *Sexual Violence Against Girl Soldiers*, AEGIS (Sept. 27, 2010), http://www.aegistrust.org/Lubanga-Chronicles/backgrounder-sexual-violence-against-girl-soldiers.html (online video).

198. *Background*, LUBANGA TRIAL INT'L CRIM. CT., http://www.lubangatrial.org/background (last visited Apr. 28, 2010).

199. Int'l Criminal Court, Regulations of the Court Adopted by the Judges of the Court on 26 May 2004, Fifth Plenary Session The Hague 17–28 May 2004, ICC-BD/01-01-04, Regulation 55(1), at 32 (May 26, 2004), *available at* http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf. *See also* Amy Senier, *The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in Prosecutor v. Lubanga*, ASIL INSIGHT, http://www.asil.org/files/insight100108pdf.pdf.

200. *See* Senier, *supra* note 199.

201. *Bemba Trial Begins 22 November 2010*, ACCESS: VICTIMS' RTS. WORKING GROUP BULL., Winter 2010, at 1–2.

202. *Id.* at 2.

203. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, ¶¶ 71–72 (June 15, 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf.

ness."[204] At least one critic has voiced her concern that the Pre-Trial Chamber's refusal to view these as separate crimes has begun a "recharacterization" of rape and torture in the Court, and possibly in international jurisprudence more broadly, while another has explained that the Chamber's refusal to allow both charges overlooks the experience of victims, who experienced mass rapes *both* as a crime against humanity and as a form of public torture designed to terrorize the local population.[205] At the very least, however, the *Bemba* case will allow the world its first glimpse into how the Court will handle rape charges in practice.

A second opportunity may arise in the context of an investigation into sexual violence purportedly committed in Kenya. In December 2007, the election of incumbent Kenyan President Mwai Kibaki resulted in an eruption of ethnic and political violence, resulting in widespread displacement as well as hundreds of reported deaths and incidents of sexual violence.[206] In order to address the atrocities that occurred, the Waki Commission of Inquiry was established, and the Kenyan government agreed to the development of a Special Tribunal to investigate and prosecute any crimes that had been committed.[207] The Special Tribunal, however, was never realized. In the absence of state action, on November 5, 2009, Court Lead Prosecutor Luis Moreno-Ocampo alerted the Court President, Judge Sang-Hyun Song, that he had determined that there was "a reasonable basis to proceed with an investigation into the Situation in the Republic of Kenya in relation to the post-election violence."[208] On November 6, 2009, the situation was assigned to Pre-Trial Chamber II.[209] The Pre-Trial Cham-

204. Maria McDonald, *Rape and Torture Charges in the Case Against Jean-Pierre Bemba*, ACCESS: VICTIMS' RTS. WORKING GROUP BULL., Winter 2010, at 4–5.

205. Mariana Goetz, *Interview with Maitre Marie-Edith Douzima, Lawyer and Victims' Representative in the Bemba Case*, ACCESS: VICTIMS' RTS. WORKING GROUP BULL., Winter 2010, at 3; *see also* Press Release, Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo (Nov. 22, 2010) (statement of Brigid Inder, Exec. Dir., Women's Initiatives for Gend. Justice).

206. COMM'N OF INQUIRY INTO THE POST-ELECTION VIOLENCE, REPORT ON POST ELECTION VIOLENCE, at vii–ix (2008), http://www.communication.go.ke/media.asp?id=739. *See also* Antonina Okuta, *National Legislation for Prosecution of International Crimes in Kenya*, 7 J. INT'L CRIM. JUST. 1063, 1064 (2009), *available at* http://jicj.oxfordjournals.org/content/7/5/1063.full.pdf+html.

207. *Id.* at 18–19.

208. Letter from Prosecutor Luis Moreno-Ocampo, to Sang-Hyun Song, Int'l Criminal Court President (Nov. 5, 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/doc778245.pdf.

209. Situation in the Republic of Kenya, ICC-01/09, Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II (Nov. 6, 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/doc778243.pdf.

ber ultimately concluded there was a reasonable basis to believe that the Kenyan population had been the victim of several crimes against humanity, specifically murder, the deportation and forcible transfer of populations, rape and other sexual violence, and additional inhumane acts.[210] On March 31, 2010, the Pre-Trial Chamber granted Moreno-Ocampo permission to begin his investigation.[211] With that permission, the investigation became the fifth under the Court's authority and the first as an investigation *proprio motu*—one that is requested on the Prosecutor's own initiative.[212]

The Pre-Trial Chamber explained that evidence of rape and other forms of sexual violence would be evaluated based on the definition provided in the ICC's Element of Crimes, namely penetration of any part of the victim's body with a sexual organ, or penetration of the victim's anus or genitals with any part of the perpetrator's body or a foreign object.[213] To establish sexual violence as a crime against humanity, the prosecution must establish that the perpetrator "committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion" in the context of a widespread and/or systematic attack against a civilian population.[214]

Ultimately, the prosecutor sufficiently demonstrated that "numerous incidents of sexual violence including rape of men and women" had occurred.[215] Specifically, the Pre-Trial Chamber relied on evidence that the Kenya Police Crime Record detailed "876 cases of rape and 1,984 cases of defilement" in 2007.[216] Between the end of December 2007 and February 29, 2008—a period of just two months—the Nairobi Women's Hospital's Gender Violence Recovery Centre "treated 443 survivors of sexual and gender based violence, 80 percent of which were rape or defilement cases."[217] From January 2008

210. Kenya Decision, *supra* note 154, ¶¶ 73, 102. The Pre-Trial Chamber was careful to limit the scope of the investigation substantively, temporally, and geographically. Moreno-Ocampo is only permitted to investigate (1) crimes against humanity, (2) crimes that occurred between the Rome State's entry into force in Kenya on June 1, 2005 and November 26, 2009, and (3) crimes that took place within the Republic of Kenya. *Id.* ¶¶ 94, 173, 175.

211. AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT'L CRIMINAL COURT (AMICC), ICC PRE-TRIAL CHAMBER APPROVES PROSECUTOR'S INVESTIGATION IN THE KENYA SITUATION 1 (2010).

212. *Id.*

213. Elements of Crimes, *supra* note 163, at 8 (art. 7(1)(g)-1(1)).

214. *Id.* at 10 (art. 7(1)(g)-6(1)).

215. Kenya Decision, *supra* note 154, ¶¶ 152–53.

216. *Id.* ¶ 154.

217. *Id.*

through March 2008, the Nairobi Women's Hospital and other local partner hospitals took in "at least" 900 sexual violence cases. The Pre-Trial Chamber also noted the "high" number of documented gang rapes and the brutality of such rapes, which included cutting and inserting weapons and other foreign objects into women's vaginas.[218]

The devastating impact on victims was reported as especially severe among sexual violence victims, who were alleged to have experienced "psychological trauma, social stigma, abandonment, and being infected with HIV/AIDS."[219] Victims were also alleged to have been impregnated and/or otherwise subjected to rape and sexual violence, as well as forced into transactional sex and sexual exploitation while in internally-displaced persons camps.[220]

On December 15, 2010, Moreno-Ocampo announced that he had asked the Pre-Trial Chamber II to issue summonses to appear for six Kenyan politicians whom he suspected may have been at least partially responsible for these crimes.[221] The six suspects include William Samoei Ruto (Kenya's Minister of Higher Education, Science and Technology (suspended), Henry Kiprono Kosgey (Minister of Industrialization), Joshua Arap Sang (Head of Operations for KASS FM), Francis Kirimi Muthaura (Head of the Public Service and Secretary to the Cabinet and Chairman of the National Security Advisory Committee), Uhuru Muigai Kenyatta (Deputy Prime Minister and Minister of Finance), and Mohamed Hussein Ali (Chief Executive of the Postal Corporation of Kenya and previously Commissioner of the Kenya Police).[222] The Court's Pre-Trial Chamber II has since found reasonable grounds to believe four of the six men are criminally responsible as indirect co-perpetrators and two of the six men otherwise contributed to the commission of various crimes related to the Kenyan post-election violence;[223] on March 8, 2011 the Pre-Trial Chamber issued summonses to appear for all six.[224] The Kenyan Government has since

218. *Id.*

219. *Id.* ¶ 194.

220. *Id.* ¶ 195.

221. Press Release, Int'l Criminal Court, Kenya's Post Election Violence: ICC Prosecutor Presents Cases Against Six Individuals for Crimes Against Humanity (Dec. 15, 2010), *available at* http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm.

222. *Id.*

223. *Situation in the Republic of Kenya*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/Situation+Index.htm (last visited May 12, 2011).

224. *Background*, INT'L CRIM. CT. KENYA MONITOR, http://www.icckenya.org/background/timeline (last visited May 12, 2011).

filed two petitions challenging the International Criminal Court's involvement in the cases against these suspects.[225]

While at the time of writing this Article, the Kenya cases are still in the pre-trial phase, they have the potential to establish key international jurisprudence on sexual violence because of the large number of sexual-violence-related charges being considered. Building upon the prior jurisprudence of the Rwanda and Yugoslavia Tribunals, the ICC represents a relatively new and expansive mechanism through which perpetrators may be held accountable for acts of sexual violence and through which victims may be granted a voice. However, ICC prosecutions will not be enough to ensure accountability on their own; to reverse the current apparent impunity for sexual violence, it is important that various nations of the world incorporate the ICC's provisions into their own legal systems when more expansive than their own, to facilitate prosecutions based on national and international law.

IV. Challenges for Domestic Legal Systems

The ICC's accomplishments can be seen as part of a broad-based effort to adequately address rape and sexual violence at both the international *and* domestic levels. Several countries that have recently engaged with the ICC provide notable examples of the ways in which domestic legal systems can implement the jurisprudential frameworks necessary to effectuate the prosecution of international crimes at the domestic level. Their advances may prove informative for the United States even if the United States never ratifies the Rome Statute, since their efforts model the ways in which the international laws and norms favoring increased accountability may be encouraged domestically, including in nations hostile to the idea of their leaders being prosecuted in an international tribunal. Kenya and Uganda are particularly notable examples of countries that have been working on developing the domestic jurisprudential framework necessary to effectuate the prosecution of international crimes in a domestic setting, by adopting the legal norms currently being promulgated by the ICC.

225. *See* Press Release, Coal. for the Int'l Criminal Court, Kenyan Government Challenges ICC Involvement in Post-Election Violence Case (April 1, 2011), *available at* http://coalitionfortheicc.org/documents/Kenya_article_19_CICC_advisory_010411.pdf. The English version of the first petition, the "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute," March 31, 2011, is available through the International Criminal Court Website at http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf. The English version of the second petition, filed on the same date, is available at http://www.icc-cpi.int/iccdocs/doc/doc1050028.pdf.

As discussed above, Kenya has been subject to ICC attention following the widespread incidents of post-election violence in 2007. Prior to the 2007 violence, Kenyan law had incorporated some provisions of international law, namely through the creation of domestic human-rights protections in alignment with international norms. For example, Kenyan citizens are constitutionally protected from torture, inhuman treatment, and degrading punishment.[226] Specific protections for the incorporation of international crimes of sexual violence, however, have historically been limited.

International crimes—including crimes against humanity, war crimes, and genocide—were first addressed in Kenyan courts following Kenya's ratification of the Rome Statute in 2005.[227] Although there was little political will at the time to actively incorporate the ICC's standards into domestic law, Kenya did begin the process of adopting implementing legislation via the drafting of a comprehensive International Crimes Bill.[228] However, with the presidential election looming, consideration of the bill by the parliament was postponed, and any prospect of its enactment was suspended in 2007.[229] Only after the 2007 post-election violence did the Kenyan government hastily agree to establish the Special Tribunal recommended by the Waki Commission to address the dearth of Kenyan legislation related to the prosecution of crimes recognized in international law.[230]

In addition to the agreement to establish a Special Tribunal, Kenya also drafted a "Special Tribunal for Kenya Bill," or Draft Statute, which was meant to govern crimes within the tribunal's jurisdiction.[231] The Special Tribunal Bill was progressive legislation seeking to align Kenyan law with international criminal-law norms, thereby allowing for effective prosecution within the tribunal itself. Perhaps most significantly, section 43(3) of the bill provided that where international norms were inconsistent with any other written law, the international

226. CONSTITUTION, art. 25(a) (2010) (Kenya).

227. *See* Okuta, *supra* note 206, at 1063.

228. *Id.* at 1064.

229. *Id.*

230. Following the post-election violence, the Kenyan Commission of Inquiry recommended that the country prosecute those who had violated international norms, but Kenya had no laws in place through which to do so. The Kenyan Penal Code did not contain any provisions that define or provide for penalties for international crimes. *Id.* at 1065.

231. *Id.* at 1066. Specifically, the Draft Statute granted the tribunal jurisdiction to consider crimes against humanity, genocide, gross violations of human rights, and other crimes committed in relation to the 2007 general election. *Id.*

norm would prevail.[232] This was a significant departure from the prior jurisprudence of the Kenyan High Court—which had previously prioritized domestic law—and was believed to constitute an "important milestone and an acceptance by the Kenyan legal order that norms of international law had to be taken into account and could at times prevail over domestic law."[233]

Following delay in adopting the Special Tribunal Bill,[234] in December 2008, the Kenyan government successfully adopted the International Crimes Act, which incorporated many of the Special Tribunal Bill's provisions.[235] The content of the act mirrors much of the Rome Statute and is designed "to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court."[236] It does not define international crimes on its own but instead refers to the Rome Statute.[237] The Act further stipulates that any provisions of the Kenyan Penal Code that may be inconsistent should not apply.[238] The Act also makes certain provisions of the Rome Statute directly applicable for purposes of proceedings for an international offense, including article 28,[239] article 29,[240] and article 33.[241]

Kenya's adoption of the International Crimes Act specifically provides for the domestic use of the Rome Statute. Because "rape, sexual slavery . . . or any other form of sexual violence of comparable gravity" are considered "crimes against humanity" by the Rome Statute, this Act could give rise to co-perpetration prosecutions when there was an

232. *Id.* at 1068.

233. Okuta, *supra* note 206, at 1069.

234. In order to ensure the constitutionality of the Special Tribunal for Kenya Bill, a complementary Constitutional Amendment Bill was also drafted, which attempted to amend the constitution by providing parliament with the ability to establish a Special Tribunal. *Id.* at 1069. This Constitutional Amendment Bill was rejected by the Kenyan Parliament, requiring a reformulated approach, the International Crimes Act, which was eventually successful. *Id.* at 1072.

235. *Id.*

236. International Crimes Act, (2008) Preamble (Kenya).

237. *Id.* at Cap. 1 § 5.

238. *Id.* at Cap. 2 § 7(5)(b).

239. Rome Statute, *supra* note 133, art. 28 (relating to the responsibility of commanders and other superiors).

240. *Id.* art. 29 (excluding any statute of limitations).

241. *Id.* art. 33 (relating to superior orders). Interestingly, the International Crimes Act gives the Kenyan Courts jurisdiction over an individual who, after committing any of the offenses under the Act, is present in Kenya, thus applying what can be seen as an element of universal jurisdiction to the Act and Kenya's prosecution of international crimes. International Crimes Act, (2008) Cap. 1, § 8 (Kenya).

objective to commit sexually violent crimes.[242] In this way, Kenya's incorporation of the provisions and jurisprudence of the ICC as they relate to rape and sexual violence can supplement its own national Sexual Offences Act[243] and facilitate complementary prosecutions at the domestic level. If ICC interpretations are enforced effectively and taken in conjunction with the International Crimes Act, Kenyans may find that their government has successfully aligned much of its domestic jurisprudence with international efforts to raise accountability for acts of sexual violence.

As the Kenyan example illustrates, efforts to effectively prosecute crimes of sexual violence on a significant scale frequently require both domestic criminal legislation, like a Sexual Offences Act, and legislation to incorporate international criminal norms. While domestic implementation of ICC provisions remains limited globally, Kenya is not without counterparts. Currently, thirty-one African states are parties to the Rome Statute, and three countries from the Great Lakes Region—Central African Republic, Democratic Republic of Congo, and Uganda—have engaged in self-referrals to the ICC prosecutor.[244] Of the thirty-one African states, several have attempted to initiate domestic investigations and prosecutions intended to supplement (and in some cases, challenge) any ICC prosecutions.[245] To date, these countries' efforts have met with mixed results.

Uganda, for example, has spent several years attempting to integrate the Rome Statute into domestic legislation, in part to incorporate shifting international norms into its domestic framework. Although Uganda signed the Rome Statute in 1999 and ratified it in 2002, it did not immediately develop implementing legislation.[246] In-

242. *See* Rome Statute, *supra* note 133, art. 7(1)(g).

243. *See* Sexual Offences Act, (2006) Cap. 3 (Kenya). It should be noted that this adoption is not synonymous with implementation or effective regulation. Despite the development of the International Crimes Act, Kenya received a great deal of negative attention in August 2010 when the country failed to arrest Omar Al-Bashir while he was on a visit to the country. *See* Int'l Justice Desk, *Al-Bashir Rains on Kenya's Party*, RADIO NETH. WORLDWIDE (Sept. 6, 2010 10:22 AM), http://www.rnw.nl/international-justice/article/al-bashir-rains-kenya's-party. Al-Bashir, president of Sudan, currently has an international warrant for his arrest from the ICC for crimes against humanity and war crimes. *Id.* Despite widespread agreement that Kenya had an international legal obligation to cooperate in enforcing the warrant, they failed to do so. *Id.*

244. DAPO AKANDE ET AL., INST. FOR SEC. STUDIES, AN AFRICAN EXPERT STUDY ON THE AFRICAN UNION CONCERNS ABOUT ARTICLE 16 OF THE ROME STATUTE OF THE ICC, at 7 (2010).

245. MAKING KAMPALA COUNT, *supra* note 150, at 19.

246. PUB. INTEREST LAW AND POLICY GRP. ET AL., OUTREACH STRATEGY FOR WAR CRIMES DIVISION OF HIGH COURT OF UGANDA (2010) [hereinafter PILPG REPORT]; *Uganda*, INT'L

stead, Uganda self-referred its situation to the ICC, which issued arrest warrants with the intention of investigating the situation to the greatest of its abilities.[247] In 2008, however, the Ugandan government reversed the forward march toward ICC prosecutions by agreeing to the development of a *domestic* court—the War Crimes Division of the High Court—to address international crimes.[248] In June 2010, indicating its intent to challenge ICC jurisdiction over the Uganda situation, Uganda formally incorporated the Rome Statute into Ugandan law through its International Criminal Court Act.[249] Like Kenya's International Crimes Act, the International Criminal Court Act formally recognizes the international violations of crimes against humanity, war crimes, and genocide and provides that the War Crimes Division will have jurisdiction over these crimes. Uganda is set to begin its first war-crime trial in the coming months in the prosecution of Thomas Kweyolo, a former Lords Resistance Army commander.[250] Although Kweyolo is not himself charged with crimes of sexual violence, several other Lords Resistance Army commanders, including Joseph Kony, face charges of sexual enslavement, rape, and sexual violence.[251]

Despite the relatively successful efforts of countries such as Kenya and Uganda to incorporate international criminal law—including provisions of the Rome Statute—into their domestic legislation, thereby facilitating the diffusion of emerging international norms, many nations continue to hold divergent views on conceptualizing the act of rape, defining consent and coercion, and addressing sexual assault. Indeed, the crime of sexual assault is gaining recognition as a critical tool for combating sexual violence and is particularly important for nations to recognize because of the need of many jurisdictions to use sexual assault provisions to prosecute several less-recognized forms of sexual violence, including sexual violence directed at men. At its most basic level, sexual assault is commonly defined as "sexual aggression that does not involve penetration."[252] This

CRIM. CT., http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Uganda.htm (last visited Apr. 28, 2011).

247. PILPG REPORT, *supra* note 246, at 14–15.

248. *Id.* at 16.

249. Luke Moffett, *The Ugandan International Criminal Court Act 2010: What does it mean for victims?*, VICTIMS' RTS. WORKING GRP. (Oct. 20, 2010), http://www.vrwg.org/smartweb/home/home/post/21-the-ugandan-international-criminal-court-act-2010-what-does-it-mean-for-victims.

250. PILPG REPORT, *supra* note 246, at 17.

251. *Id.* at 14–16.

252. ELIZABETH BARAD & ELISA SLATTERY, GENDER-BASED VIOLENCE LAWS IN SUB-SAHARAN AFRICA 32 (2007).

definition, however, is at best ambiguous and, at worst, unworkable in the context of a criminal trial, which typically requires precise definitions for effective prosecution. Perhaps unsurprisingly, many countries, when recognizing the crime of sexual assault, tend to do so indirectly.[253] Indeed, among the sub-Saharan African countries, only South Africa has directly addressed the offense within its legislation.[254] There, the crime has been defined expansively, including contact between genital organs, the mouth, any other area of the body resulting in sexual stimulation, any object used for sexual purposes, and sexual contact with an animal.[255] Such an expansive understanding of sexual assault has many advantages. First, it is gender-neutral with respect to both victim and perpetrator. Second, "it accepts that purposefully inspiring in a victim the belief that he or she will be sexually assaulted should also be punishable."[256] Third, by carefully delineating what actions constitute sexual assault, it increases the power of the statute by more clearly illustrating the difference between sexual assault and rape.[257]

253. *Id.*

254. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 §§ 5–7, 16 (S. Afr.).

255. Specifically, "sexual violation" is defined as:

(a) direct or indirect contact between the—
  (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
  (ii) mouth of one person and—
    (aa). the genital organs or anus of another person or, in the case of a female, her breasts;
    (bb). the mouth of another person;
    (cc). any other part of the body of another person, other than the genital organs or anus of that person or, in the case of female, her breasts, which could—
      (aaa). be used in an act of sexual penetration; or
      (bbb). cause sexual arousal or stimulation or
      (ccc). be sexually aroused or stimulated thereby or;
    (dd). any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
  (iii) the mouth of the complainant and the genital organs or anus of an animal;
(b) the masturbation of one person by another person; or
(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.

Id. § 1.

256. BARAD & SLATTERY, *supra* note 252, at 35.

257. There are also extensive comparisons on the nature of domestic violence statutes throughout Sub-Saharan Africa. *Id.*

Ultimately, building upon the efforts of the Rwanda and Yugoslavia Tribunals, as well as advances realized in the Rome Statute, Kenya and its neighbors continue to make significant strides toward implementing a domestic legal framework through which to prosecute and redress sexual offences that occur during periods of war and political unrest. At a minimum, their example provides an important model for reconciling domestic with international law and signaling to the world community that they are capable and willing to facilitate accountability through domestic mechanisms. While challenges remain, such domestic initiatives, in combination with the ongoing efforts of the international community, should continue to help foster an ever-stronger and more effective framework for prosecuting sexual violence around the world.

Conclusion

Over the last several decades, the international community has grappled with several issues that must be considered as various nations—including the United States—continue to struggle with whether and how to effectively address war-related sexual violence through legal mechanisms. The birth of the International Criminal Court in 2002[258] offered an opportunity to begin to strengthen accountability for sexual violence in an international forum, while simultaneously encouraging the diffusion of relatively recent substantive developments to domestic legal systems. Indeed, this unprecedented institution—designed to establish a means to prosecute the perpetrators of the most significant international crimes, including crimes of sexual violence—has refined the definitions of rape and sexual violence established by earlier international tribunals with an eye toward improving accountability. Through the Rome Statute, various acts of sexual violence have gained prominence as named crimes. At the same time, the Court has endeavored to broaden popular understandings of the categories of individuals who might be recognized as victims, including men.

However, the ICC's jurisdiction is limited, ensuring that most cases of sexual violence will never be eligible for consideration by the Court. And many nations, including the United States, will probably never ratify the Court's Rome Statute in an attempt to fall outside its

258. As explained above, while the Court was established in 1998, in 2002 the Court's founding treaty, the Rome Statute, entered into force. *See* discussion *supra* Part III.

jurisdictional scope.[259] Indeed, the United States has gone so far as to secure bilateral immunity agreements with other countries to try to shield U.S. citizens and employees from the Court's jurisdiction, even imposing economic penalties on those countries that refuse to sign.[260] These agreements "provide that current or former U.S. government officials, military and other personnel (regardless of whether or not they are nationals of the state concerned, i.e., foreign sub-contractors working for the U.S.) and U.S. nationals would [never] be transferred to the jurisdiction of the ICC."[261] In addition, the ICC is limited by the doctrine of complementarity and the mandate that it only prosecute crimes of "sufficient gravity," as well as structural capacity and resource limitations. As such, the ICC cannot assume full accountability for enforcing international norms against sexual violence; thus it is crucial that individual nations do their part to complement the Court's work.

First, the United States and other nations can and should implement legislation to fully adopt the Rome Statute's gender and sexual-violence provisions when those provisions are more expansive or protective than existing legislation. For states that are a party to the Rome Statute, implementing the elements of crimes and rules of procedure and evidence will be particularly beneficial. Not only will this help to ensure that domestic laws are as protective of victims' rights as international law, but such legislation has the potential to streamline prosecution and enforcement by ensuring consistency among jurisdictions. In the absence of the United States becoming a party to the Rome Statute, the United States can and should review current legislation, including its military codes, to ensure its prohibitions against sexual violence are no less stringent than the laws currently promulgated by the International Criminal Court. Of course, such prohibitions will only prove effective to the extent that they are used to establish a basis for prosecutions; indeed, a clear effort on the part of the United States (and other nations that have refused to ratify the Rome Statute) to engage in domestic investigations and prosecutions has tremendous potential to deflate international criticism, as well as calls for some form of international accountability.

259. *See, e.g.*, Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124 (2001).

260. *Status of US Bilateral Immunity Agreements (BIAs)*, COALITION INT'L CRIM. CT., http://www.iccnow.org/documents/CICCFS_BIAstatusCurrent.pdf (last visited March 17, 2011).

261. *Id.*

Second, courts and the nations that house them must be receptive to changing understandings of the nature of sexual violence, as well as the nature of its victims. While courts are not the only mechanisms through which sexual violence can and should be addressed, law plays an important role in structuring how sexual offences are conceptualized. Courts and other institutions charged with developing relevant law may find it necessary to consider (1) broader understandings of "who" constitutes a victim, including men and children; (2) the issue of secondary victimization, including the impact on those closely affiliated to victims, such as victims' children, spouses and surrounding communities; (3) the needs of children born of rape and forced pregnancies; (4) looking beyond rape and sexual violence to address sexual assault and domestic violence; (5) the realities of force and violence, which may blur and/or negate consent; and (6) the most effective means to empower victims through the advancement of sexual violence laws and policies, including opportunities for reparations. Abuses committed at Abu Ghraib and Guantánamo, as well as other military sites, particularly underscore the need to consider men as potential victims and the complexities that arise when women are among the possible perpetrators.[262]

Further complicating the possibility of prosecutions for sexual violence at Guantánamo and other military facilities are the intercultural nature of the violence and cross-cultural differences in perception, issues that have yet to be adequately addressed in jurisprudence and secondary literatures. For example, several of the sexualized acts perpetrated by American soldiers, such as lap dances performed on detainees, may have been considered relatively tame by Western standards but were experienced as especially harmful by many Muslim detainees. This raises the question: Whose standards should be prioritized when establishing the gravity of an act? In addition, the ambiguous purpose of some practices complicates the issue of accountability. Interviews conducted by researchers at U.C. Berkeley and the University of San Francisco with former detainees,[263] for instance, have revealed that many detainees believe they were raped

262. For example, one question this raises is whether military personnel who are encouraged to commit sexual violence against detainees are, themselves, being coerced into such activity, and thus also being victimized by the state.

263. The U.C. Berkeley interviews were led by Laurel E. Fletcher, Director of the International Human Rights Law Clinic, and Eric Stover, Faculty Director of the Human Rights Center, while the University of San Francisco interviews are currently being conducted by law professor Peter Jan Honigsberg through the Witness to Guantánamo Project. WITNESS TO GUANTÁNAMO, http://witnesstoguantanamo.com (last visited May 12, 2011).

while in U.S. custody.[264] Several of these incidents appear to have actually been prostate exams or cavity searches conducted by medical military personnel.[265] However, when soldiers do not communicate what they are doing to detainees' bodies or why and fail to employ adequate translation staff, the perceptions of populations who have had little to no previous exposure to such practices may understandably differ from those of U.S. personnel. And when such practices are conducted in a manner that is especially rough (as typically occurred during intake procedures designed to establish U.S. authority and control over incoming detainees and terrorize detainees into submission), the reality of whether these are "just" cavity searches or might also be conceptualized as rape becomes an important question.[266]

While international law has demonstrated its willingness and (less frequently) its ability to address and prosecute an increasingly expansive variety of sex-related crimes, the efforts of the international community to grapple with questions such as the ones posed above and to facilitate prosecutions when appropriate, are and will continue to be most effective when coupled with investigations and prosecutions conducted by national governments. Encouraged by advances made in the Yugoslavia and Rwanda Tribunals and International Criminal Court, an increasing number of countries, including Kenya and Uganda, have begun to address war-related rape and sexual violence through their domestic jurisprudence, tackling definitional issues and procedural hurdles to create systems that have the potential to protect and redress victims. Indeed, without international *and* national prosecutions, the vast majority of offenders will continue to enjoy impunity for their crimes. This is certainly true in cases involving American personnel, whose actions are considered by many to be beyond the reach of the International Criminal Court, and frequently perceived as outside the jurisdiction of even the United States' Article III courts.

In light of apparent U.S. reluctance to ensure adequate domestic accountability for sexual violence and other abuses purportedly committed during the War on Terror, efforts to ensure international accountability will inevitably persist. For example, on February 7, 2011, it was announced that former President George W. Bush had can-

264. *See, e.g.*, K. Alexa Koenig, "The Worst": Institutional Cruelty, Resistance and the Law (forthcoming dissertation, University of California, Berkeley School of Law) (analyzing interviews conducted with former Guantánamo detainees through U.C. Berkeley and through the Witness to Guantánamo Project) (on file with author).

265. *Id.*

266. *Id.*

celled a planned trip to Geneva, due in part to the anticipated filing of a criminal complaint in Swiss courts for his alleged participation in the torture of detainees.[267] Drafted by the Center for Constitutional Rights and other human-rights and humanitarian organizations,[268] the complaint alleged that the former president's involvement in the treatment of detainees violated the Convention Against Torture.[269] While the complaint does not specifically include allegations of sexual violence, the preliminary indictment (which was published online but never filed due to the trip's cancellation) does mention forced nudity and sexual humiliation as facts underlying the torture allegations.[270]

Although the U.S. government has repeatedly painted the abuse of detainees as "the work of a few rogue soldiers deserving of punishment,"[271] efforts such as the drafting of the complaint mentioned above reflect the international community's expanding recognition of the use of sexual violence as more than mere *ad hoc* abuse. Indeed, such abuse is increasingly being acknowledged as a deliberate tool of war: a tool that has been implicitly and/or explicitly encouraged by high-level military and government officials and employed systematically around the world.[272] If the United States is to credibly join the fight to combat war-related sexual violence and continue the advances it so impressively began with its promulgation of the Lieber Code, it will have to recognize *and* acknowledge use of that tool not only by others but by itself.

267. *See* Letter from the Ctr. for Constitutional Rights et al., to the Gen. Prosecutor of the Canton of Geneva, Re: Letter of Denunciation in Support of the Two Complaints Filed Against George W. Bush for Torture (Feb. 7, 2011), http://ccrjustice.org/files/Updated%20Bush%20Denunciation%20Letter%207%20Feb%202011%20English%20.pdf.

268. *Id.*

269. Devin Dwyer, *George W. Bush Cans Swiss Trip as Groups Promise Prosecution for War Crimes*, ABC NEWS (Feb. 7, 2011), http://abcnews.go.com/Politics/george-bush-cancels-swiss-trip-rights-activists-vow/story?id=12857195.

270. CTR. FOR CONSTITUTIONAL RIGHTS, PRELIMINARY INDICTMENT FOR TORTURE: GEORGE W. BUSH BROUGHT PURSUANT TO THE CONVENTION AGAINST TORTURE 13 (Feb. 7, 2011).

271. Rumann, *supra* note 2, at 273.

272. *Id.* at 274, 278.