The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation.

Patricia Viseur Sellers

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Executive Summary

The myriad forms of gender-based violence exemplify the human rights violation of gender discrimination. Pervasive sexual violence, a manifestation of gender-based violence, occurs during wartime, in its aftermath or in any period of societal breakdown. Gender-based violence undermines, impairs, nullifies and deprives females of the exercise of their human rights which are deemed inalienable, interdependent and indivisible from any and all other human rights. War related gender-based violence usually encompasses individual criminal responsibility and can exacerbate the denial of women's human rights. Accordingly, several human rights instruments, declarations and pronouncements, such as the Convention on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 19 uphold a right to equal access to justice under the recognized and emerging humanitarian norms and international criminal law.

International humanitarian law (IHL) throughout most of its gestation evolved separately from human rights law. Indeed, prohibitions against wartime sexual violence enumerated in the Geneva Conventions or the Protocols to the Geneva Conventions pre-date CEDAW and other modern human rights instruments or provisions that specifically address gender discrimination. Trial chambers sitting in the recently created international criminal courts, the *ad hoc* tribunals and mixed courts are challenged to deliver gender-competent interpretations of humanitarian norms that govern war crimes, international crimes, and doctrines of individual responsibility, such as command responsibility or procedural safeguards of due process, especially in light of the plethora of evidence submitted by witnesses recounting gender-based violence.

In this light, the prosecution of rape, a core violation of humanitarian law, serves as a measurement of the protection from gender-based violence and of the right to equal access to judicial forum that is afforded women and girls. As a result of the creation of judicial institutions and their co-existing international penal jurisdictions, several definitions of the elements of rape as a crime exist. There is the *Gacumbitsi/Kunarac* elements, from the *ad hoc* Tribunals for Rwanda and the Former Yugoslavia (ICTR and ICTY respectively), the *AFRC* elements from the Special Court for Sierra Leone (SCSL) and the Elements of the Crime of the International Criminal Court (ICC). There are also the operative elements for rape from Special Panels for Serious Crime Panels in East Timor (SPSC) and the Extraordinary Chambers of the Courts of Cambodia (ECCC). Swirling tension engulfs the these definitions and hence the adjudication of rape as an international crime. Tension focuses on whether or not to include proof of the element of "non-consent of the victim" in the definition of rape, and if included, how to legally and factually interpret that element. Given that females, and increasingly girls, are the overwhelming victims/survivors of rape in today's armed conflicts, a gender-competent interpretation of the elements of rape is pivotal.

Human rights law jurisprudence and international criminal law treaties that penalize trafficking or torture provide compelling legal analogies that indicate that rape and sexual violence, as international violations, often forego emphasis on the lack of consent of the victim, and instead underscore the circumstances of the criminal conduct or the status of the victim, for example, whether the victim is considered a child under international law. This paper concludes that all international judicial forums, akin to the ICC's substantive and procedural mandate, must at a minimum, comply with human rights law and ensure that women and girls have equal access to justice under humanitarian norms and that such access be free from gender-based discrimination.

I. Introduction

Gender-based violence encompasses a multitude of patriarchal sanctioned[1] conduct, directed at persons because of their gender. It particularly resonates as a code phrase for violence inflicted, against women and girls,[2] precisely because they are females. Gender-based violence is itself, a manifestation of the human rights violation of discrimination based on sex. The pervasiveness of sexual violence impedes or deprives women and girls of the ability to exercise their: 1) civil and political rights; 2) economic, social and cultural rights; and, 3) third generation rights such as the right to peace and development. Prominent studies[3] have unflinchingly identified the rise of sexual violence during periods of war and national emergencies engendering a demise in the observance of human rights, especially for women and girls.

This paper, examines the so-called hard law that international tribunals and courts have produced in the wake of recent international and internal armed conflicts and genocide. It attempts to identify, on the one hand, progress made, and on the other hand to highlight gaps in the IHL and international criminal regimes that possibly undermine the rights of women and girls. Ultimate concentration extends to rape as an international crime, and in particular, to the element of "lack of consent," and its factual and legal interpretation. Arguments surrounding the necessity to eliminate or to prove lack of consent in rape cases exerts substantive and procedural pressure upon women and girls' equal access courts and to exercise of their rights to equality, security, dignity, and self-worth and, hence, enjoyment of their fundamental freedoms. Ultimately, therefore, redress of the crime of rape functions as an indicator, that measures a critical aspect of women's access to justice under humanitarian norms and international criminal law.

Can the human rights framework be of service to women during or in the direct aftermath of wars or genocides, when other bodies of law, namely (IHL) or international

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[1] See, Preamble language of the Declaration on the Elimination of Violence Against Women, G.A. res. 48/104, 20 Dec. 1993, that states:

> "Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into subordinate position compared to men."

Thirteen years later, the language is reiterated in the Preamble of G.A. res 61/143, 19 December 2006, that states:

> "Recognising that violence against women is rooted in historically unequal power relations between men and women and that all forms of violence against women seriously violate and impair or nullify the enjoyment by women of all human rights and fundamental freedoms and constitute a major impediment to the ability of women to make use of their capabilities."

[2] Gender-based violence and violence against women, meaning female adults and girl-children, will be used interchangeably in this paper.

[3] See, Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Periods of Armed Conflict, 50 UN ESCOR, UN Doc. E/CN./4/Sub.2/1998/13 (1998), and Update to the Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Periods of Armed Conflict, 52 UN ESCOR, UN Doc. E/CN.4/Sub.2/2000/21/(2000); Special Rapporteur on Violence Against Women, its Causes and Consequences, 54 UN ESCOR, UN Doc. E/CN.4/1998/54/(1998).

criminal law, hampered by their own discriminatory precepts,[4] become the governing legal regimes used in disintegrating societies? More pointedly, does the current and proposed adjudication by international courts and tribunals of IHL prohibitions and international crimes of gender-based violence, comply with the human rights framework that safeguard against gender discrimination?

II. Sexual Violence and Access to Justice – Progress and Obstacles

This section will trace the "hard law" gains in the recognition of sexual violence and rape under international law and in the adjudication of sexual violence pursued in the recently created criminal jurisdictions of international courts, tribunals, special mixed courts and panels. Then, it will scrutinize the continuing obstacles created by the interpretation of the crime of rape, a pervasive act of gender based violence and the leading indicia of women and girls' access to justice under humanitarian norms.

a. Progress

a.i. The Recognition of Sexual Violence under International Humanitarian, Criminal and Human Rights Law

1. International Humanitarian Law

An historical analysis to IHL provides a crucial understanding of how the redress of wartime sexual violence evolved.[5] IHL, commonly known by the phrase the laws of armed conflict refers to the rules, regulations and laws that govern members of the armed forces and certain civilians during periods of armed conflict. IHL governs *jus in bello,*[6] irrespective of

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[4] See, Gardham, 'Woman and Armed Conflict: The response of International humanitarian Law', in *Listening to the Silences: Women and War*, Durham and Gurd (eds.), Martinus Nijhoff Publishers, 2005.

[5] The definition of sexual violence first given in the *Prosecutor v. Akayesu,* Judgment, Case No. ICTR-96-4-T, 2 September 1998, and later concurred with in the *Prosecutor v. Kvocka et. al.,* Case No. IT/98-30/1-T, 2 November 2005, held:

> "The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the body and may include acts that do not involve penetration or physical contact." para. 598

In the ICC Elements of Crimes, UN Doc. PCNICC/2000/1/Ass 2(2000), sexual violence, as an enumerated crime against humanity in Article 7(1)(g)-6 and as war crimes Article 8(2)(b)(xxii)-6 and (2)(e)(vi)-6, is defined as:

> "The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such a person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent."

[6] A distinctions is made in international law between *jus ad bellum,* the lawful right to declare hostilities, and *jus in bello,* the laws that govern hostilities. Any impact that sexual violence or acts of rape could exert on the current debate regarding the definition of the crime of aggression are not undertaken in the present paper. See, Helen Durham, 'International Humanitarian law and the Protection of Women', in *Listening to the Silences: Women and War*, Durham and Gurd (eds.), International Humanitarian Law Series, No. 8, Martinus

whether a war is characterized as an international or internal armed conflict. Even though woefully un-enforced, sexual violence formed part of the "early" humanitarian law prohibitions in several regions of the world.

Discernable in early warrior codes dating from even the first century, and unmistakably inserted into military codes of the eighteenth century, wartime sexual violence was intended to spare the presumed innocent, persons such as scholars, farmers, women, merchants, priests or children. The prohibitions did not validate the worth of the individual akin to any modern human rights conception, but rather, ensured that the non-military segments of society remained functional.[7] War-related sexual violence was not to be inflicted upon persons occupying these functional societal rungs. Acts of rape, constituted a core component of the proscription of wartime sexual violence, as a means to guarantee continued economic productivity, and also to preserve a society as a unified political entity.[8]

Exceptions to the wartime *de jure* proscription of sexual violence against non-military persons were readily available to a sovereign head. Their use was dependant only upon the political exigency required to achieve a decisive military victory. By way of illustration, during a military campaign, an attacking sovereign could legitimately exercise the prerogative to surround an opponent's fortress or headquarters, in essence, conduct a military siege to force his opponent's capitulation. If the opponent surrendered, safe passage to the presumed innocent inhabitants of the besieged town could be granted. If the opponent refused an attacking sovereignty, in compliance with *jus in bello,*[9] was entitled to and militarily justified to storm the fortress. Under those circumstances, *jus in bello* sanctioned murders, pillaging, looting, the infliction of rapes, etc., upon enemy soldiers and the presumed innocent inhabitants of the enclave under siege.

Despite the normative *de jure* legal proscription of sexual violence in early IHL, the *de facto* situation attested to utter disregard of sexual assault prohibitions. Sexual violence proved rampant. Moreover, there was ubiquitous disregard or feigned justification and hypocritical posturing when military campaigns were waged to "protect" or to "spread" Western societal and religion values or to export racial superiority under a sacred duty to civilize so-called primitives or backward societies. The relentless inflictions of sexual violence during Crusades, colonial wars, and wars of conquest, raids on indigenous lands,

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Nihoff, 2005, at 96. It is nonetheless acknowledged that inflictions of rape and other sexual abuse can suffice the evidentiary requirement of an "attack" against the civilian population, a prerequisite jurisdictional element of crimes against humanity.

7 See generally, Susan Brownmiller, *Against Our Will: Men, Women and Rape*, 1975; T. Meron, 'Shakespear's Henry the Fifth and the Law of War', 86 Am. J. Int'l L. 1 (1992); *See also,* Treaty of Amity and Commerce, US-Prussia, 10 Sept. 1785, *reprinted in* 2 TREATIES, CONVENTIONS, ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1776-1909, MALLOY COLLECTIONS, (1910).

8 Sellers, 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law', in *Substantive and Procedural Aspects of International Criminal Law*, McDonald and Swaak (eds.), wherein it is argued that sexual violence and, in particular rape, equally prompted the regulation of armed conflict and shaped the breadth of other IHL substantive crimes, such as torture, and procedural doctrines, such as command responsibility, military necessity and wanton conduct, pp. 289-291.

9 Historical examples exist such as the wars referred to in Europe as the Crusades. For instance, the 12th century Arab historian, Ibn al-Athir recounts that the sacking of Constantinople, under Greek rule in 1204, was among the most destructive acts of the middle Ages. The Franks rampaged the city, looted and destroyed art treasures, defiled orthodox churches, killed clergy members and raped Greek nuns who were cloistered in monasteries. Amin Maalof, *Les Croisades Vues par Les Arabes,* 1983*; See also,* Alex Obote Odora, The Judging of War criminals: Individual Criminal Responsibility Under International Law, 1997 (unpublished doctorial thesis) pp.107-117.

and various forms of military occupation were not even claimed as exemptions to *jus in bello,* but accepted as conquerors' rights.

Nonetheless, the codification of sexually violent crimes, including wartime rapes, modestly advanced in the late nineteenth and early twentieth centuries. This is termed the initial modern period of IHL. Several military codes and treaties illustrate the progression. The 1863 Lieber Code, drew upon customary international law and forbade in Article 44, "all rape" and provided in Article 47 that "crimes … such as …rape … are punishable."[10] Article I of the Annex to the II Hague Convention of July 1899 and Article I of the IV Hague Convention of 1907, and admonished belligerents to "conduct their operations in accordance with the laws and customs of war"[11] that, *sub silencio,* prohibited all conventional war crimes, including rape. In Section III, the Regulations to the IV Hague Convention of 1907, Article 46 states that during periods of military occupation, "family honour … must be respected."[12] In the decade after World War I, the drafters of the 1929 Geneva Convention provided in Article 3, that, "Prisoners of war have the right to have their person and their honour respected. Women shall be treated with all the regard due to their sex,"[13] a genteel phrasing of a prohibition against sexual violence including rapes.

At the conclusion of WWII, the Allied powers drew up the London and the Tokyo Charters, instruments that would govern the adjudication of the Major Axis criminals before the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East in Tokyo. The charters claimed jurisdiction over conventional war crimes, "namely, violations of the laws and customs of war"[14] as well as crimes against humanity and crimes against the peace. Each military tribunal admitted and ruled upon evidence of rapes,[15] even though the lingering legacy of the Nuremberg Tribunal remains one of presumed inattention to sex based crimes.[16] The Tokyo Tribunal prosecutors, resolutely indicted the rape of prisoners and female nurses,[17] The judges at the Tokyo Tribunal upon deliberating upon denoting the plethora of extreme sexual misconduct, forthrightly issued convictions

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[10] General Order 100, Instructions for the Government of the Armies of the United States by the Field by Order of the Secretary of War, 24 April 1863 ("the Lieber Code"), Articles 44 and 47.

[11] Convention Respecting the Laws and Customs of War on Land, and Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land (Hague IV), The Hague, 18 October 1907, 3 Martens (3rd) 461, 36 Stat. 2277, T.S. No. 59 (Hague Convention IV), *reprinted in* AM. J. Int'l. 90 51908, Supp. (The IV Hague Convention of 1907).

[12] *Ibid*, The IV Hague Convention of 1907, Section III, Article 46.

[13] Article 3 of the 1929 Geneva Convention Relating to Prisoners of War; the Victorian language of Article 3 permeated several legal instruments, but did not occult the intent of the drafters to condemn sexual violence, including rape.

[14] Charter of the International Military Tribunal, Annexed to the London Agreement, 8 August 1945, art. 26, 82 U.N.T.S. 280, 59 Stat. 1544, 8 AS No. 472 ("London Charter"); Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, art. 17, T.I.A.S. 1589, as *amended,* 26 April 1946 ("Tokyo Charter").

[15] Trial of the Major War criminals Before the International Military Tribunal, 14 November 1945-1 October 1946, 542 Vols., 1947, at vol. 1, 43, 51-52. One specific example of sexual assault included occurred in the Stalingrad region where the mutilated bodies of women were found with their breasts sliced off. *See,* Tokyo trial documents reprinted in The *Tokyo War Crimes Trial: The Complete Transcript of the Proceedings of the International Military tribunal for the Far East*, 22 Vols., R. Pritchard and S. Zaide (eds.), 1981, IMTFE Docs, vol. 20 at 49 and 605.

[16] For example, in the Nuremberg judgment the forced deportation of 500,000 females should have at least been examined as a gender-based crime of massive female enslavement, irrespective of any overt sexual component.

[17] IMTFE Doc., footnote 78 …. vol. 1, at 13.

subsumed under the category of the war crimes of "murder, rape, and other cruelties".[18] Regrettably, the Tokyo prosecutors did not indict, nor present evidence on the systemic military sexual slavery conducted by the Japanese Army against tens, if not hundreds of thousands of Korean, Indonesian, Chinese, Burmese, Japanese and other women from Japanese conquered and occupied territories in Asia.[19]

Minor Axis criminals were tried in Allied military proceedings subsequent to the Nuremberg and Tokyo Tribunals. These "subsequent trials", as they are often called, prosecuted rape as a war crime, especially, in the Asia-Pacific theatre. [20] In the European theatre, the governing instrument of the subsequent trials, (1) (c) Control Council Law No. 10 retained jurisdiction under Article II (a) to prosecute rape as a crime against humanity.[21] Few, if any cases in the European theatre utilized Article II (a) for rape, although most concentration camp cases confirmed the common practice wartime medical experiments, especially the gender-based violence of forced sterilization, castrations and fertility experiments conducted against men and women in several concentration camps administered by the Nazi regime.[22]

The post-war codification of IHL cumulated with the signing of the four Geneva Conventions of 1949. A notable omission is an express prohibition of rape from each Conventions' grave breaches provisions. Rape, as an explicit prohibition was only articulated, in Article 27 of the Fourth Geneva Convention Relative to Civilians under the prohibitions aimed to protect civilians who were under enemy occupation. Article 27 stated, *inter alia,* that, "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault…" [23] Nevertheless, common articles 12 of the First and Second Geneva Convention and article 14 of the Third Geneva Convention, reprise the language of the Article 3 prohibition found in the 1929 Geneva Convention, namely, that "(w)omen shall be treated with all consideration due

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18 IMTFE, vol. 1 at 1029.

19 *See*, Civil society trial conducted to "prosecute" the perpetrators of military sexual slavery that rendered a substantive judgment evaluating criminal conduct and civil liability, "Comfort Women Judgment," 4 December 2001, Women's Caucus for Gender Justice, website http://www.icc.org/archive/tokyo/summary.htm.

20 *See*, generally in the Far East, the Trial of General Tomoyuki Yamashita*,* IV Law Reports of Trials of War Criminals 1 (1946); the Trial of Takashi Sakai, Case No. 83, XIV Law Reports of Trials of War Criminals 1 (1946); and the Trial of Washio Awochi*,* XIII Law Reports of Trials of War Criminals 1 (1946).

21 Allied Control Council No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany.

22 *See* also, The Trial of Obersturmbannfuher Rudolf Franz Ferdinand Hoess, VII Law Reports of Trials of War Criminals 11, 1947 (crimes committed in the Auschwitz camp); The Trial of Joseph Kramezr and II 44 Others, Law Reports of Trials of War Criminals I (crimes committed in Birkenau).

23 Article 27 of IV Geneva Convention of 1949. The commentary to Article 27 is imbued with patriarchal respect for women civilians, noting that: "(t)he Conference listed as examples certain acts constituting an attack on women's honour, and expressly mentioned rape, enforced prostitution, i.e. the forcing of a woman into immorality by violence or threats, and any form of indecent assault. These acts are and remain prohibited in all places and in all circumstances, and women, whatever their nationality, race, religious beliefs, age, marital status or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women."; from J.S. Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1958, 38 (hereinafter: COMMENTARY TO GENEVA IV). The Commentary's illusion to dignity or honour in relation to crimes of sexual assault de-emphasizes the violent nature of most sexual crimes. It is similar to Article 44 of the Regulations Annexed to The Hague Convention IV of 1907 that views sexual assault victims and survivors as person who have been subjected to moral defamation, and not a violent crime.

to their sex."[24] Most importantly, Article 3, common to the First, Second, Third and Fourth Geneva Conventions of 1949, regulated conflict of a non-international character and used the phrase "outrages upon personal dignity, in particular humiliating and degrading treatment". This was Victorian code language, that alluded to sexual violations and reproductive experiments. It was purposely drafted with flexible wording to cover whatever future acts could be prompted by the bestial instincts of torturers.[25]

However, in December 1992, post the ratification of the Additional Protocols to the Geneva Conventions, the International Committee of the Red Cross issued an *Aide-memoire* to clarify the prohibition of rape under the Geneva Conventions of 1949. It stated, in part, that the grave breaches enumerated in Article 147 of the Fourth Geneva Convention, especially the breach of wilfully causing great suffering or serious injury to body or health, "obviously covers not only rape, but also any other attack on a woman's dignity".[26] The interpretation of the *Aide-memoire* sheds some luminosity on the legal breadth of prohibitions enumerated under Article 147, and by inference upon the analogous prohibitions of the grave breach provisions in the First, Second and Third Geneva Conventions of 1949.

In 1977, the First and Second Additional Protocols to the Geneva Conventions of 1949 complemented and expanded. The minimum standards of Common Article 3 to the First, Second and Third Geneva Conventions of 1949 and an explicit prohibition of rape were sanctioned in international armed conflicts as well as in armed conflicts not of an international character.[27]

Specifically, Additional Protocol I regulates *jus in bello* during international armed conflict. It recognized in Article 75(2)(b), entitled the Fundamental Guarantees that civilians and military agents are prohibited from inflicting, "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault".[28] In Article 76(1), women are especially protected from "rape, forced prostitution and any other form of assault",[29] and in Article 77 (1) children, including the girl child, are protected against "indecent assault".[30] Additional Protocol I, in its entirety, forms part of international customary law that is binding on all States.[31]

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[24] Article 12 of the First Geneva Convention Relative to Wounded on Land, Article 12 of the Second Convention relative to the Shipwrecked and Wounded at Sea, and Articles 13 and 14 of the Third Convention Relative to Prisoners of War.

[25] Moreover, an organic relationship exists between common article 3 and article 27 of Geneva Convention IV. The Commentary to common article 3 notes that "humane treatment" must be understood within the meaning of article 27 of the Fourth Geneva Convention (COMMENTARY TO GENEVA IV, 38).

[26] International Committee of the Red Cross, *Aide-memoire*, December 1992, para. 2.

[27] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, done 8 June 1977, 1125 U.N.T.S. 3, entered into force 7 December 1978 (Additional Protocol I), *reprinted in* 16 I.L.M.1391 (1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, done 8 June 1977, 1125 U.N.T.S. 609, entered into force 7 December 1978 (Additional Protocol II), *reprinted in* 16 I.L.M.182 (1977).

[28] Commentaries to API, Article 75(2) (b) reiterate that Common Article 3 to the Geneva Conventions of 1949 and the prohibition of enforced prostitution and indecent assault, a particular form of outrages, applies to everyone, men, women and children.

[29] API, Article 76(1), entitled Protection of Women, underscores the special protection extended to women. It states: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault".

[30] API, Article 77(1), entitled Protection of Children states, *inter alia* in paragraph 1 that, "(c)hildren shall be the object of special respect and shall be protected against any form of indecent assault"..

[31] *See,* Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989.

The Second Additional Protocol of 1977 to the Geneva Conventions is relative to non-international armed conflict. Article 4, entitled the Fundamental Guarantees, lists prohibitions including "outrages against personal dignity, rape, enforced prostitution and any form of indecent assault" at any time and any place when committed against persons who "do not take a direct part or have ceased to take part in hostilities".[32] Article 4, an outgrowth of Common Article 3, enlarged the proscribed acts that extend to internal armed conflict. Regretably, Additional Protocol II of 1977 to the Geneva Conventions 1949, has not, in its entirety, been accepted as customary international law by all States. Nevertheless, during the past decade the Common Article 3 provisions that cover gender-based violence may certainly be argued to have attained the status of customary law.

Thus, by the early 1990s, IHL prohibited the infliction of sexual violence, upon enemy civilians, members of the armed forces and persons accompanying them, prisoners of war, during international armed conflict, and, upon persons no longer engaged in combat during non-international armed conflict.[33]

Moreover, since World War II, a handful of prosecutions condemning wartime rape took place[34] under national military codes and domestic laws. Also, various national military codes[35] and national legislation[36] incorporated provisions of IHL that protected against sexual assaults. These prohibitions against wartime violations of sexual integrity, based upon the IHL principle of humane treatment, continue to reside in both treaty and customary international law.[37]

2. International Criminal Law

Parallel to the post World War II developments of IHL, rape also incrementally gained recognition as an international crime, including as a crime against humanity. The international crime of crimes against humanity never generated a separate and distinct international law treaty on a par with other international crimes such as genocide or apartheid. The evolution of crimes against humanity, and the enumeration of the crime rape, was organic. Rape was accepted as an express form of crimes against humanity *via* the incorporation of international crimes into national military codes[38] and national legislation. More recently, the recognition

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[32] APII Article 4. This position has been confirmed in the *Prosecutor v. Dusko Tadic,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-AR72, para. 92, ("*Tadic* Jurisdiction Decision").Tthe Appeals Chamber held that protections of common article 3 apply through article 3 of the ICTY Statute to persons taking no active part in hostilities. *Id.* Para. 69.

[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.

[34] *See,* US Court of Military Appeals, *John Schultz case*, Judgment 5 August 1952, wherein rape was held to be a crime universally recognized as properly punishable under the law of war.

[35] *See generally,* provisions of military manuals of Argentina, Australia, Canada, China, Dominican republic, El Salvador, France, Germany, Israel, Madagascar, Netherlands, New Zealand, Nicaragua, Nigeria, Peru, Senegal, Spain, Switzerland, Uganda, United Kingdom and United States, in *Customary International Humanitarian Law*, Volume II: Practice, Henckaerts and Doswald-Beck (eds.), ICRC, Cambridge Press 2005, paras. 1586-1617.

[36] *Id,* paras. 1620-1660.

[37] Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989, pp. 2-5.

[38] *See infra,* footnote 36. *See also,* In 1973, Bangladesh, in anticipation of prosecuting Pakistani prisoners of war held by India, published Act No. XIX of 1973 *entitled An Act to Provide for the Detention, Prosecution and Punishment of Persons for Genocide, Crimes Against Humanity, War Crimes and other Crimes under*

of rape as an international crime was anchored by its listing in the statutes of international courts and tribunals and their modern judicial interpretation.

Indeed, the declarations, resolutions, reports, commissions, preparatory meetings and other precursors[39] of the specially mandated international criminal courts and tribunals created in the 1990s and early years of the twenty-first century, foresaw that the jurisdiction invoked by these international bodies would certainly include crimes of sexual violence, as central violations to IHL and international criminal law, including crimes against humanity. The constitutive instruments of these international judicial bodies, in varying degrees, bore out that prediction. The governing statutes of the International Criminal Court for the former Yugoslavia[40] and the International Criminal Court for Rwanda[41] the Special Panels for Serious Crime,[42] the Special Court for Sierra Leone,[43]the International Criminal Court[44] and the Extraordinary Court Chambers for Cambodia[45] list the crime of rape, together with other expressly named sex crimes such as trafficking and slavery, that are, on their face not of a sexual nature, but crimes whose *actus reus* could certainly include acts of sexual violence.[46]

To recount briefly, provisions of these constitutive instruments that established the subject-matter jurisdiction of these international bodies, mandated that the following sexual assaults crimes could be the basis for criminal charges:

a) The Statute of the ICTY – Article 5 (g) lists rape as a crime against humanity;

International law. The provision for crimes against humanity listed rape. The Bangladeshi Gazette, 20 July 1973, pp. 5987-5988.

39 For example, in contemplation of the creation of the Yugoslav Tribunal, Security Council Resolution 820 of 17 April 1993 condemned:

> [A]ll violations of international humanitarian law, including in particular, the practise of " ethnic cleansing" and the massive, organized and systematic detention and rape of women, and reaffirms that those who committed or who have committed or order or ordered the commission of such acts will be held individually responsible in respect of such acts."

40 Statute of the International Criminal Tribunal for the former Yugoslavia, *attached* to the Report of the Secretary general Pursuant to Paragraph 2 of the Security Council Resolution 808, U.N. Doc. S/25704, Annex (1993), reprinted in 32 I.L.M. 1159 (1993) (hereinafter ICTY).

41 Statute of the International Criminal Tribunal for Rwanda, *attached to* Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed on the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex (8 Nov. 1994), *reprinted in* 33 I.L.M. 1598 (1994) (hereinafter ICTR).

42 UNTAET/Reg/2000/15, *On the Establishment of Panels with the Exclusive Jurisdiction Over Serious Criminal Offences,* 6 June 2000 (hereafter SPSC).

43 Statute of the Special Court for Sierra Leone, 16 January 2002, established by *Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone, Annex- Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315,* 14 August 2000, UN Doc. S/2000/915 (hereinafter SCSL).

44 *See supra*, footnote 2*,* Rome Statute of the ICC.

45 *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period Democratic Kampuchea*, 10 August 2001, NS/RKM/0801/12, I supplemented and superseded by the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period Democratic Kampuchea*, 6 June 2003 (hereinafter ECCC).

46 Article 7(2) (c) of the Rome Statute states that enslavement entails the "right to ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

b) The Statute of the ICTR – Article 3 (g) lists rape as a crime against humanity, and Article 4 lists rape, enforced prostitution and indecent assault of any kind as a serious violation of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977;

c) The SPSC – Section 6(1)(b)(xxii) and 6 (1)(e)(vi) lists rape, sexual slavery, enforced prostitution, forced pregnancy … enforced sterilization or any other form of sexual violence as constituting a grave breach of the Geneva Conventions, and serious violations of Article 3 common to the four Geneva Conventions;

d) The Statute of the SCSL – Article 2 (g) lists rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as a crime against humanity, and Article 3(e) lists outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977;

e) The Statute of the ECCC – Article 9 lists crimes against humanity, as defined in the 1998 Rome Statute;

f) The Rome Statute of the ICC – Article 7 (1)(g) lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as a crime against humanity; Article 8(2)(b)(xxii) lists rape, sexual slavery, enforced prostitution, forced pregnancy… enforced sterilization or any other form of sexual violence as serious violations of the laws and customs applicable in international armed conflict; and Article 8(e)(vi) lists rape, sexual slavery, enforced prostitution, forced pregnancy… enforced sterilization or any other form of sexual violence as a serious violation of article 3 common to the four Geneva Conventions armed conflict not of an international character.

Beyond the latter explicit references to rape and other forms of sexual violence, subsequent judicial interpretations of the ICTY, the ICTR, the SCSL, the SPSC as well as explanatory paragraphs of the ICC Statute, further provide that provisions other than explicit sexual assault crimes can also be the basis for adjudication of sexual violence. For example, the jurisprudence of the ICTY and the ICTR attest that the legal breadth of several provisions, including those of genocide,[47] direct and public incitement to commit genocide,[48] torture,[49] persecution,[50] enslavement,[51] inhumane acts[52] as crimes against humanity or cruel

[47] *See*, *Prosecution v. Muhimana,* Judgment, Case No. ICTR-95-1B-T, 25 April 2005.

[48] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze,* Judgment, Case No. ICTR-99-52-T, 3 December 2003 (Media Case).

[49] *See, Prosecutor v. Kvocka et al.,* Judgment, Case no. IT-98-30/&-T, 2 November 2001; *Prosecutor v. Delic et al.,* Judgment, Case No. IT-96-21-T, 16 November 1998. Commonly called the *Celebici* case, this judgment held rapes to be acts of torture.

[50] Media Case.

[51] *Prosecutor v. Dragoljub Kunarac, Radomir* Kovac and Zoran Vukovic, Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2000, convicted Kunarac and Kovac for enslavement under crimes against humanity.

[52] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamera, Santigie Borbor Kanu,* SCSL-04-16-A, 22 February 2008, para. 202 (AFRC case).

treatment,[53] inhumane treatment,[54] outrages upon personal dignity[55] and slavery[56] as war crimes, proscribe acts of sexual violence.

The list of sexual assault crimes within the subject matter jurisdiction of the international and mixed international forum has therefore progressively expanded, especially after the drafting of the multilateral Rome Statute of the ICC. Moreover, the crime "sexual violence" found in the Rome Statute, the Statute of the SCSL, and the ECCC, presumably functions as a residual clause[57] allowing the courts to exercise jurisdiction over any other, un-enumerated serious sexual assaults of comparable gravity to the named sex based crimes. Sexual mutilation, for instance, might constitute sexual assault conduct covered by the residual crime of sexual violence. The enlarged listing of specific crimes should enable broader coverage of all serious sexually abusive conduct.

Furthermore, the Rome Statute is complemented with the Elements of the Crime Document, that sets out the agreed upon elements, namely, the *mens rea* and the *actus reus*, of each crime contained in the ICC subject matter jurisdiction, including the sex-based crimes. Unlike defendants who at early trials in the ICTY, ICTR or SCSL only learned the judges' pronouncement about the precise elements of the charged crimes upon their conviction or acquittal, under the ICC jurisdiction, defendants will be fully aware of the legal elements of each charge at the issuance of the charging documents. [58]

Finally, in addition to the development of the crime of rape under IHL and international criminal law, rape exists *sub-silencio* as a type of criminal conduct that underpins other international crimes, such as trafficking [59] or slavery, the slave trade or slavery-like practices.[60]

a.i.i. Direct and Indirect Criminal Responsibility

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53 The Yugoslav Tribunal's first case, the *Prosecutor v. Tadic, Judgment,* Case No. IT-94-1-T, 7 May 1997, held that acts of male sexual assault, including mutilation, fellatio, and indecent assault constituted inhumane treatment, cruel treatment as war crimes and inhumane acts as crimes against humanity.

54 *Tadic.*

55 *Prosecutor v. Anto Furundzija*, Judgment, IT-95-17/1-T, 10 Dec. 1998, convicted for the nudity and humiliation, in addition to acts of rape (hereinafter Furundzija); *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamera, Santigie Borbor Kanu,*SCSL-04-16-T, 20 June 2007 (AFRC case), para. 1068/1188.

56 *Kunarac*.

57 The residual clause of sexual violence potentially prohibits sexual assault conduct, such as a sexual mutilation, that is not specifically listed as crimes, but that is of comparable gravity.

58 Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, 2000 (hereinafter EoC).

59 *See supra,* discussion of the UN Protocol on Trafficking Protocol.

60 *See also,* The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, *entered into force* 30 April 1957, states in Article 1(c)(i-iii):

> (c) Any institution or practice whereby:
>
> (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
>
> (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
>
> (iii) A woman on the death of her husband is liable to be inherited by another person;

Too often the lack of judicial redress of sexual violence was bemoaned, but excused on two grounds. First, was the inability to identify physical perpetrators and second was the inability to charge non-physical perpetrator, such as persons, geographically removed from the criminal scene, but who were responsible as political leaders or military commander. However, two forms of criminal individual liability exist: direct criminal responsibility and indirect responsibility that resolve the perceived dilemma.

1. Direct Responsibility

Direct responsibility implicates any accused who has planned, instigated, committed, ordered, aided or abetted the execution of crimes within the jurisdiction of the Statute. The texts of Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute, respectively,[61] are traditional renditions of direct responsibility, and have provided for convictions persons who have committed,[62] aided or abetted,[63] instigated,[64] or planned of sexual violence, such as rapes or forced nudity. Direct liability does not necessarily equate with physical perpetration. In some instances the perpetrator did not have physical contact with the sexual assault victim/survivor although he might have been in close proximity of the crime or far removed from the site. This is captured in the ICC's reformulated provisions on direct criminal liability.[65]

A direct form of individual criminal liability recognized by the ICTY judges derived from "committed" and is known as joint criminal enterprise (JCE). It has important implications for the adjudication of sexual assaults. Whenever perpetrators undertake to participate in criminal conduct with a plurality of actors, he or she, commits a JCE. This

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[61] Both articles have common language which reads: 'A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in article … of the present Statute, shall be individually responsible for the crime.'

T[62] *Kunarac.*

[63] *Prosecutor v. Nikolic*, Sentencing Judgment, Case No. IT-94-2-S, 18 December 2003, para. 119.

[64] *Prosecutor v. Gacumbitsi,* Judgment, Case No. ICTR-2001-64-T, 17 June 2004, para. 292.

[65] Direct Individual Criminal Liability in Articles 25(3)(a-f) of the Rome Statute reads as follows:

> "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (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;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (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. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
>
> (f) Attempts to commit a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose."

direct form of liability is increasingly used at the *ad hoc* Tribunals to establish guilt, especially of accused who occupied top political or military functions. JCE evolved from the language of 'common purpose' in the *Prosecutor v. Tadic*[66] judgment and was further refined in the *Furundzija*[67] decision which distinguished a co-perpetrator who is a participant in a JCE from a person who does not commit, but who is an aider and abettor. JCE's application permitted convictions for crimes of sexual violence in cases such as the *Furundzija*[68] Appeals Judgment, the *Krstic*[69] and *Kvocka*[70] Trial and Appeals Judgments, the *Stakic* Appeals Judgment[71] and the *Krijsnik* Trial Judgment.[72]

The *Tadic* Appeals judgment[73] recognized three categories of JCE. The third category is defined as:

> (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purpose of that enterprise; and (ii) the foresee ability of the possible commission by other members of the group of offences that do not constitute the objects of the common criminal purpose…What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless, willingly took the risk.[74]

Two extremely important judicial pronouncements have emerged from the jurisprudence of this third category which could further ensure women the access to redress for gender-based violence proscribed by IHL and international criminal law. First, in the *Krstic* Judgment, the bench surmised that as a member of a joint criminal enterprise formed to execute massive forced transfers that precipitated a humanitarian crisis, General Krstic was guilty of the "incidental murders and rapes, beatings and abuses" that resulted from the humanitarian crisis because such rapes were the "natural and foreseeable consequences of the intended joint criminal conduct.[75] It opined:

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66 *Prosecutor v. Tadic*, Judgment, Case No. IT-94-16T, 7 May 1997, para. 536.

67 *Furundzija*, para.274.

68 *Prosecutor v. Furundzija,* Judgment Case No. IT-95-17/-A 21 July 2000 (*Furundzija Appeals Judgment*).

69 *Prosecutor v. Krstic,* Judgment, Case No. IT-98-33-T, 2 August 2001, para. 2 (*Krstic)*.

70 *Prosecutor v. Kvocka et al,* Judgment, Case No. IT-98-30/&-T, 2 November 2001 (K*vocka*).

71 *Prosecutor v. Stakic,* Judgment, Case No. IT-97-24-A, 22 March 2006, para. 85.

72 *Krijsnik Trial*.

73 *Prosecutor v. Tadic,* Judgment, Case No. IT-94-1-A, 15 July 1999, para. 222. In the *Tadic Appeals Judgment*, the Judges concluded that the pre-requisites of the JCE, also called common purpose were, "derived from customary law and resided, albeit implicitly, in Article 7(1). The common purpose doctrine can be divided into three distinct categories of co-perpetration, that differ, not only because of the factual nature of the crime, but more importantly because of the accused's possession of specific *mens rea*The two other categories are:

> First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent).
>
> Secondly, in the so called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent maybe proved directly or as a matter of inference from the nature of the accused's authority within the camp or organizational hierarchy.

74 *Tadic Appeals Judgment*, para. 222.

75 *Krstic*, para. 617.

> [T]here is no doubt that these crimes were the natural and foreseeable consequences of the ethnic cleansing campaign. Furthermore, given the circumstances at the time the plan was formed, General Krstic must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds the vulnerable condition of the refugees, the presence of the regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection."[76]

The *Krstic* decision ruled that sexual violence could be a natural and foreseeable consequence of other wartime violations, thereby reversing the conventional and gender discriminatory belief that wartime sexual abuse is inevitable, isolated deviate conduct of soldiers whose abuses do not inure to their military superiors. The *Kvocka* judgment upheld the *Krstic* reasoning when it convicted four accused of sex based crimes based upon JCE. The *Kvocka* bench pointed out that the detention of female prisoners, the presence of only male guards and unruly demeanour of those guard could only portend the occurrence of sexual violence. The chamber insisted that such ingredients do not distort any logic; rather, they lead to a foreseeable conclusion.

> "In the Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This is particularly true in light of the clear intent of the criminal enterprise to subject the targeted group to persecution through such means as violence and humiliation.[77]

The second important judicial pronouncement in relation to sexual violence and JCE came from the *Krijsnik* decision. In addition to the original, intended crimes of the JCE, subsequent crimes can become part of the JCE. If the participants of the JCE take no effective measures to prevent the recurrence of these new crimes they face increased exposure for JCE liability.[78] Hence, persistent sexual violence, committed in and outside of detention camps, [79] that evolves out of other criminal conduct, and that is not addressed by participants in the JCE can expand their liability exposure since these subsequent crimes are now considered part of the common purpose of the JCE.

Therefore, crimes of sexual violence, whether as part of the original common criminal plan, or as a foreseeable consequence of another common plan or as subsequently evolved crimes that adhere to the original common purpose, create individual criminal liability through JCE. The JCE approach, recognising the foresee ability of sexual violence provides a useful, lucid framework for joint liability, especially for participant/perpetrators who are physically far removed from the locations of sexual assault crimes, including military and political leaders.

2. Indirect Responsibility

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[76] *Krstic*, para. 615.
[77] *Kvocka,* para. 327.
[78] *Krijsnik,* para. 1098.
[79] *Krijsnik,* para. 1105.

The second form of individual criminal liability is indirect criminal responsibility. That form liability to a person in a position of superior authority, whether military, political, business, or any hierarchical status, for acts directly committed by his or her subordinates.[80] Crimes endemic to wartime scenarios involve the military personnel in a chain of command or political persons in bureaucratic hierarchies. Indirect superior responsibility is an extremely appropriate means to reach the liability of some persons who reside higher in command than direct perpetrators.

Superior responsibility was the basis of liability in the *Prosecutor v. Blaskic*[81]. The Trial Chamber rendered a verdict of guilt for inhumane acts for the war crimes of cruel treatment, finding that sexual violence was deemed "foreseeable" because Colonel Blaskic had barracked HVO soldiers in a school where civilian females were detained. The Trial Chamber admonished Colonel Blaskic saying that he "could not have been unaware of the atmosphere of terror and rape which occurred at the school."[82] Reminiscent of Kirstic's natural and foreseeable consequence language, yet under the indirect, command/superior responsibility form of liability, the *Blaskic* trial chamber decision, in principle, reaffirms that gender-based violence, in particular rape can be characterized as foreseeable crimes that military superiors are required to prevent or punish so as not to run foul of IHL and international criminal law.[83]

Superior responsibility was also the individual basis for liability in the ICTR case of *Nahimana,* in which convictions of three accused for the substantive crime of "public incitement to commit genocide" were based upon their employment relationship with persons who during the Rwandan genocide broadcast on the public airways and wrote in the press to urge the infliction of gender-based violence, such as multiple rapes upon Tutsi women.

Although there might be a tendency for command and superior responsibility to cede charging ground to the JCE form of liability, only future ICC prosecutions and judgments can unearth the long-term legal acceptance and feasibility of JCE liability. Even with the evolving legal principles of JCE, military or civilian leaders who fail to ensure the discipline of their subordinates,[84] ensure the continued relevance of the superior responsibility doctrine.

Together with the substantive sexual assault crimes, access to direct and indirect theories of individual liability, based upon the facts and acts of the perpetrator must be part of the exercise of equal judicial access to ensure women's human rights.[85]

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[80] Article 7(3) of the ICTY Statute captures indirect criminal responsibility in these terms: 'The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.'

[81] *Prosecutor v. Blaskic,* Judgment, Case No. IT-95-14-T, 3 March 2000, para. 721.

[82] *Blaskic,* para. 732.

[83] Upon appellate review, the *Blaskic* Appeals Chamber held that "the detainees in Dubravica and … the detention centers there (the former JNA barracks and the Rotilj village) were beyond the appellants control" and overturned the conviction for sexual violence. *Prosecutor v. Blaskic,* Case No. IT-95-14-A, 29 July 2004, para. 613.

[84] *See,* the Trial Chamber's acceptance of the individual responsibility form under Article 25(3) (a) in the case of *Le Procureur c. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges, Cour Pénale Internationale, Chambre Préliminaire I, Doc. No. ICC-01/04-01/06, 29 Janvier 2007 ("Confirmation of Charges Decision").

[85] At the OHCHR Expert Meeting of October 2007 conducted by the Women's Rights and Gender Unit, participants discussed the importance of providing legal training modules to military officers, peacekeeping

b. Obstacles – Prosecuting Rape – the Elements of Consent

The recent development of IHL and international criminal law has witnessed considerable progress in the investigation, prosecution and adjudication of the crime of rape.[86] Obstacles still remain. Access to equal protection under humanitarian norms for women can be assessed, if not measured by the success and failures of the investigation, prosecution and adjudication of rape. Although relevant criticism, among feminist lawyers, scholars and activists correctly assert that rape has dominated the international judicial stage to the detriment of other gender-based crimes and other vital issues such as protective measures and gender parity of personnel. [87] It, nevertheless, must be conceded that redressing the adjudication of rape is a bell weather that can measure women's access to justice. [88]

The chronological trajectory of judgments that have deliberated on the crime of rape extends from the 1998 ICTR case of *Akayesu*[89] rape as a crime against humanity and rape a component of genocide to the SCSL case of the *AFRC* that characterized rape as a crime against humanity, and as a war crime. What has constantly distinguished and possibly continually marred the interpretation of the "rape" jurisprudence, from that of other substantive core IHL and international crimes, has been the constant tension surrounding rape's legal elements. Specifically it has been debated whether to include, the element of "non-consent of the victim," and if so included, how to interpret that element.

In *Akayesu*, the first ICTR trial judgment, the trial chamber found the accused guilty of genocide[90] and of rape as a crime against humanity. During the Rwandan genocide,

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officials and police officers on this emerging jurisprudence of command responsibility and JCE, especially the premise of sexual violence as a foreseeable consequence of other actions or omissions. Participants also discussed whether the superiors might not invoke their responsibility from a framework similar to the tort law concept of *caveat emptor*.

86 See, Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law*, Kluwer Law International, 2002, wherein noted criticism of the ICTY and the ICTR judgments, and indeed prosecution focus, is directed at the premise of women as sexual assault victims while little judicial observations and findings challenged the gendered aspects of the inherent doctrines of IHL such as collateral damage and military necessity.

87 *Id.,* Cogent criticisms raised notes that the emphasis on rape has deflected the spotlight away from other gender-based discrimination violations, such as: how to provide more concerted guidance to the procedural and administrative issues that concern women and girls; witness protection access to courts and tribunals; identifying staff and campaigning for gender judges; establishing programs for compensation, reparations and restitution of women and girls physical, mental, and economic injuries sustained by conflict and genocides.

88 *See*, Binaifer Noworojee, 'Your Justice is too Slow: Will the ICTR Fail Rwanda's Rape Victim?', Occasional Paper 10, Untied Nations Research Institute for Social Development, pp. 18-19, available at www.unrisd.org/publication/opgp10.

89 *Akayesu* Judgment.

90 The substantive crimes punishable under Article 2, Genocide, of the ICTR Statute are:

> 3. The following act shall be punishable:
> (a) genocide;
> (b) conspiracy to commit genocide;
> (c) direct and public incitement to commit genocide; …
> (e) complicity in genocide

To understand what acts are intended under the crime genocide, reference to Article 2(2) of the ICTR Statute is necessary. It states:

Akayesu, as the highest political official in the Taba Commune in Rwanda exhorted the members of the Hutu population to unite against the Tutsis population and to kill them. Distraught and seeking refuge from the massacres, displaced Tutsis, mainly women and children, streamed into the Taba municipal offices where Akayesu worked.

At trial, Witness J testified that the Interhamwe militia raped her six year old daughter in the Taba commune. Witness H testified that the Interhamwe raped women near Akayesu's office and that she herself was raped near the municipal offices. As a result, the Prosecutor requested and was granted a stay of the proceedings to file an amended indictment[91] that subsequently charged Akayesu with: rape and inhumane acts as crimes against humanity; outrages upon personal dignity as a war crime, and, sexual violence in respect to genocide under article 2(b), namely, causing serious bodily or mental harm to members of the group. The factual allegations included that:

> … [M]any women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.
>
> Jean Paul AKAYESU knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul AKAYESU facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul AKAYESU encouraged these activities. [92]

Akayesu's genocide conviction, based *inter alia* on evidence of sexual violence, constituted groundbreaking jurisprudence.[93] The Trial Chamber listed seven incidences of rape and multiple rapes that couched Akayesu's guilt. The seminal conviction for rape as a crime against humanity produced the first definition of the legal elements of rape at an

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> 2. Genocide means any of the following acts committed with the intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part;
> (d) imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

[91] In the judgment, the Trial Chamber acknowledged the justified public concern over the historical neglect of the investigation and prosecution of sexual violence at the international level, but understood that the Prosecutor's motion to amend the indictment 'resulted from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of the trial and the subsequent investigation of the prosecution, rather than from public pressure' (*Akayesu* Judgment, para. 417).

[92] *Prosecutor v. Jean Paul Akayesu,* Amended Indictment, ICTR-96-4-1, para. 12.

[93] The Trial Chamber held that article 2(2)(b) 'without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment (or) persecution', sufficed as proof of allegations in paragraph 12(A) and 12(B) serious bodily or mental harm, emphasizing that, 'in its opinion, they (rapes and sexual violence) constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group targeted as such' (*Akayesu* Judgment, para. 731).

international judicial forum. The elements of rape were "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"[94] In contrast to "traditional domestic" elements of rape, the *Akayesu* judgement abstains from any prerequisites that the victim physically or verbally communicated their non-consent to the perpetrator regarding the physical invasion of the sexual nature. Therefore, the judges did not enter into a prolonged discussion on consent, given that the surroundings in the Taba commune and the municipal offices where the rapes happened evidenced "circumstances which are coercive". The *Akayesu* elements of rape were not challenged on appeal,[95] thus, the ICTR Appeals Chamber, in upholding the conviction, upheld in *obiter dicta* the Trial Chamber's pronouncement of the elements.

On December 1998, four months after the *Akayesu* trial judgment,[96] an ICTY Trial Chamber convicted, in the *Furundzija* Judgment,[97] a Special Forces commander for rape and torture as war crimes under Common Article 3 of the Geneva Convention, as recognized under Article 3 of the ICTY Statute. In this case, witness A described how she was arrested and held at the Special Forces barracks where, during an interrogation led by the accused and co-perpetrator B, she was subjected to public rape and threats of sexual mutilations.[98] The trial chamber held that the elements of rape were: (i) the sexual penetration, however slight: of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or 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.[99]

The *Furundzija* elements of rape, departed from the *Akayesu* definition in two respects; its mechanical physiological approach and its inclusion of the gender neutral use of third persons. However, both definitions eschewed the non-consent of the victim as a prerequisite to the commission of rape.[100] The *Furundzija* Trial Chamber underscored that "any form of captivity vitiated consent."[101] Like the *Akayesu* definition, the essential elements of the *Furundzija* definition of rape were not challenged nor reversed on appeal.

The following ICTR case, *Musema,* [102] retained the Akayesu definition of rape, although the appellate chamber overturned the sexual assault conviction based on the credibility of the witness and the new factual findings. Thus, the *Akayesu* elements reined in

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94 *Akayesu* Judgment, para. 598. The Trial Chamber also held sexual violence to be, 'any act of a sexual nature which is committed on a person under circumstances which are coercive', para. 598. The Trial Chamber imposed several consecutive ten year prison terms, amounting to life imprisonment for Akayesu.

95 *Prosecutor v. Jean-Paul Akayesu,* Judgment, Case No. ICTR-96-4-A, 1 June 2001 Judgment (*Akayesu* Appeals Judgment).

96 One month after *Akayesu*, in October 1998, the Yugoslav Tribunal trial chamber held in the *Celebici* case that prison rapes committed against Bosnian Serbs by Bosnian Muslims constituted torture, and concurred, albeit in *obiter dicta,* with the definition of rape that was pronounced in *Akayesu*, para. 478-479.

97 *Furundzija* Judgment.

98 Accused B, whose name was later revealed as Bralo, was indicted, but only arrested several years after Furundzija was tried and convicted. Bralo pleaded guilty to raping Witness A. He is currently serving a term of 20 years imprisonment. *See, Prosecutor v. Miroslav Bralo,* Judgment, IT-95-17-A, 2 April 2007, Disposition, p.44.

99 *Furundzija Judgment* para. 180.

100 *See* Anne-Marie L.M. de , 'Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR', *in School of Human Rights Research Series*, University of Tilburg, Volume 20, (2006), at 121.

101 *Furundzija*, para. 271.

102 *Prosecutor v. Alfred Musema,* Judgment, Case No. ICTR-96-13-T, 27 January 2000 (hereinafter '*Musema* Judgment'); *Prosecutor v. Alfred Musema,* Judgment, Case No. ICTR-9613-A, 16 November 2001 ('*Musema* Appeals Judgment').

the ICTR case law until the ICTY jurisprudence on sexual assault overturned its legal sway, In the Kunarac case of February 2001, the Trial Chamber sentenced three accused to prison terms for rape characterized as a crime against humanity. Bosnian Muslim girls and women who were detained for prolonged periods in a detention setting were incessantly subjected to rape.[103] The Trial Chamber formulated the elements of rape as:

> The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such penetration occurs without the consent of the victim. Consent for this purpose, must be consent given voluntary, as a result of the victim's free will, assessed in the contents 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.[104]

Kunarac mandated a two-pronged lack-of-consent requirement, namely the victim's consent that is given voluntarily as a result of the victim's free will, and the perpetrator's knowledge that penetration occurs without consent. It opined that consent must be assessed in the contents of the surrounding circumstances. The *Kunarac* definition is at times referred to as the *Furundzija/Kunarac* definition since it retains the mechanical elements of the *Furundzija* definition albeit it removed on the elements of coercion, force and threat of force. The *Kunarac* Appeals Chamber upheld the *Kunarac* trial chamber definition retaining the prerequisite of "lack of consent "of the victim, even though the judges intoned that the detention centers where the victims were held amounted to "circumstances that were so coercive as to negate any possibility of consent". [105]

The Akayesu trial judgment thus gave judicial prominence to the *Kunarac* Appeals Chamber and pronounced the binding law about the elements of rape that would apply to the trial chambers at both *ad hoc* Tribunals.[106]

The *Prosecutor v. Laurent Semanza*[107] that led to a conviction of the former *bourgmestre* who instigated assailants to rape witness A during the genocide, was handed down after the *Kunarac* Appeals judgment and was thus obligated, under the doctrine of *stare decisis,* to define rape according to the elements set forth in Kunarac. After *Semanza*, the Rwandan trial chambers followed the *Kunarac* appellate definition of rape, even though certain trial chambers[108] endeavored to formulate a practical congruency that reconciled the

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[103] Accused Kunarac and Kovac were also sentenced for enslavement as a crime against humanity.

[104] *Kunarac* Judgment, para. 460.

[105] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-A and IT-96-23/1-A, 12 June 2002.

[106] The requirement exist that an appellant chamber or trial chamber is bound by the doctrine of *stare decisis* that is to be adhered to when cases are similar or substantially similar, but not in cases that are unlike or that can be readily distinguished from each other since such an application would lead to an unjust conclusion (*Prosecutor v. Zlato Aleksovski,* Judgment, Case No. IT-95-14/1-A, 24 March 2000, para. 110-111).

[107] *Prosecutor v. Laurent Semanza,* Judgment and Sentence, Case No. ICTR-97-20-T, 15 May 2003 (*Semanza* Judgment). Semanza was also found guilty of complicity to commit genocide, extermination, murder, torture. His sexual assault convictions for rape and torture were upheld on appeals. *Prosecutor v. Laurent Semanza,* Judgment and Sentence, Case No. ICTR-97-20-A, 20 May 2005 ('*Semanza* Appeals Judgment').

[108] *See, Prosecutor v. Kajelijeli,* Judgment and Sentence, Case No. ICTR 98-44A-T, 1 December 2003.

conceptual Akayesu definition[109] with the mechanical *Kunarac* elements of rape. In the *Prosecution v. Muhimana,* Judgment,[110] the Trial Chamber stated that:

> (I)t considers that Furundzija and Kunarac, which sometimes have been construed as departing from the *Akayesu* definition of rape – as was done in Semanza – actually are substantially aligned to this definition and provide additional details on the constituent elements of rape.
>
> The Chamber takes the view that the Akayesu definition and the Kunarac elements are not incompatible or substantially different in their application. Whereas *Akayesu* broadly referred to a "physical invasion of a sexual nature" *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.
>
> On the basis of the foregoing analysis, the Chamber endorses the conceptual definition of rape established in *Akayesu*, which encompasses the elements set out in *Kunarac*.[111]

The elements of rape developed by the SPSC [112] are identical to those of the EoC of the ICC. Nevertheless, in the *Cardoso* case, the SPSC judges sent mixed signals when interpreting their ICC inspired elements of rape. On the one hand, they opined that the absence of consent was persuasive, particularly in cases of rape charged as a crime against humanity, and that coercive circumstances or threatening situations would render an act non-consensual. The Judges nevertheless expressed their agreement with the *Kunarac* – that consent is central to the elements of rape and that it must be given voluntary and out of the victim's free will.[113]

Apart from the contrasting wording of the ICC and SPSC elements of rape and that of the *Kunarac* appellate definition, the latter continued to be the prevailing interpretation of the law of rape in subsequent cases before the Rwandan and Yugoslav Tribunals.[114] Only after an express appellate ground raised by the Prosecutor in the wake of the ICTR *Gacumbitsi*[115] trial judgment did the ICTR Appeals Chamber revisit the legality of the prerequisite "lack of consent element." The ICTR Appeals Chamber took up the ground, as a matter of 'general significance' for the Tribunal's jurisprudence, not in order to determine if the defence merited a reversal of conviction.

At trial, the *Gacumbitsi* facts which were used to prove the victims' lack of consent demonstrated that the women and girls were raped 'under precise circumstances, namely that: 1) prior to the rapes the Accused admonished the Interhamwe to kill, in an atrocious manner, any females who resisted the sexual attacks; and 2) the heretofore rape victims were attempting to flee from their attackers when raped. The Trial Chamber found these circumstances adequately established the victims' lack of consent to the rapes.[116]

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109 Catherine MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu', *Columbia Journal of International Law* (2006) at 941.

110 *Prosecution v.Muhimana,* Judgment, Case No. ICTR-95-1B-T, 25 April 2005.

111 *Muhimana,* Judgment, para.

112 UNTAET Regulation 2000/25, Section 34.

113 *Cardoso*, at 449 and 452.

114 *See, Prosecutor v. Milomir Stakic,* Judgment, Case o. IT-97-24-T, 31 July 2003, p. 755; *Prosecutor v. Dragon Nikolic,* Sentencing Judgement, Case No. IT-94-2, 18 December 2003, para. 113.

115 *Prosecutor v. Gacumbitsi,* Judgment, Case No. ICTR-2001-64-T, 17 June 2004 ('*Gacumbitsi* Judgment').

116 *Gacumbitsi* Judgment, para. 325.

Upon deliberating whether examination of the coercive circumstances *a la Akayesu* or *Furundzija* was the appropriate inquiry, or whether the 'lack of consent' was the proper legal construction, the *Gacumbitsi* Appeals judges reconfirmed that the victim's non-consent, and the perpetrator's knowledge of such non-consent were indeed elements of the crime of rape that the Prosecutor must prove beyond a reasonable doubt.[117] Still, the appeals chamber noted that:

> The Prosecution can prove non-consent beyond a reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary as a legal matter, for the Prosecutor to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an on-going genocide campaign or the detention of the victim.[118]

While the inquiry would be into coercive circumstances the actual wording of the elements retain phrases about the victim's consent. The *Gacumbitsi* Appeals Judgment, thus, held that the *Kunarac* definition prevailed, conceptually and *de jure.* The subsequent *Mahimana* Appeals judgment respected the *stare decisis* doctrine and applied the *Gacumbitsi* Appeals judgment.

The *Gacumbitsi* stance on circumstances versus a lack of consent has been the subject of scholarly examination and criticism. Schomberg argues against the *Gacumbitsi* wording, pointing out that the sharply unequal positions of the perpetrator and the victim/survivor are inherent in the "international element,"[119] the very circumstances that transforms rapes committed during wartime into crimes against humanity into the international crimes. A lack of consent is inappropriate in the international law context since the determination of the jurisdiction amounts to a determination that the sexual act took place in a context in which sexual autonomy was absent.[120] Sellers opted for a strict procedural legal evaluation. She argues that both appellate chambers misused their available legal tools, asserting that the *Gacumbitsi* Appeals Chamber should have overruled the *Kunarac* Appeals Chamber's decision, citing its too hasty dismissal of relevant municipal rape laws that governs prison rapes and sexual abuse, that routinely regards any lack of consent prerequisite as legally irrelevant and noting its unwise reliance solely on ordinary domestic rape laws. She asserts

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117 *Prosecutor v. Gacumbitsi,* Judgment, Case No. ICTR-2001-64-A, 7 July 2006, para.153 (hereinafter *Gacumbitsi* Appeals Judgment*)*.

118 *Gacumbitsi* Appeals Judgment, para. 153.

119 W. Schomberg and I. Petersen, 'Notes and Comments on Genuine Consent to Sexual Violence Under International Criminal Law', *101 American Journal of International Law 128*, 2007.

120 The Expert Meeting participants discussed whether reliance upon the 'international element' in essence fulfilment of the international jurisdictional elements hindered and presented an unnecessary barrier for the domestic advocates from encouraging the domestic judiciary from using international criminal jurisprudence. If the international element were so peculiar to international crimes, then, different elements of rape, at the domestic or municipal level might be justifiable. Participants commented that reliance upon the international element as the basis for not requiring the lack of consent element at the international level could detract from recognition of the immediate circumstances analogy, that exist in domestic settings and international crimes such as scenarios of detention, prolong domestic battering, or status, such as that of a minor or mentally disabled child or adult wherein an elimination of the lack of consent element is justified.

that the Gacumbitsi Appeal's Chamber failed to correct the *Kunarac* Appeal's *per incuriam*[121] decision and then compounded the error by confirming the relevancy of a lack of consent element among the elements of the international crime of rape.[122] Other critiques of the elements of rape as an international crime that predate the actual issuance of the *Gacumbitsi* Appeals Decision remain cogent.[123]

In June 2007, the SCSL issued it first trial judgment, in the AFRC case.[124] The SCSL trial chamber deliberated upon evidence against the three defendants that occurred in several locations in Sierra Leone during the course of a prolonged, brutal armed conflict. The charges consisted of crimes against humanity, namely murder, extermination, enslavement, rape, sexual slavery, other forms of sexual violence, and inhumane acts and war crimes, consisting of terrorism, collective punishments, violence to life, health and physical or mental well being of persons, outrages upon personal dignity and pillage.

The SCSL trial chamber heard numerous witness accounts about sexual violence, replete with incidences of public rape, sexual enslavement of young women and girl-child by rebels that often perpetuated themselves as forced marriages, called "bush wives", and numerous occurrences of sexual mutilations and sexual threats.[125]

Several, unfortunate technical charging errors plagued the case. The errors, are highlighted to demonstrate how procedural faults, work as a ban against the exercise of women's human right to equal access to humanitarian norms and thus to legal justice. Firstly, the trial judges dismissed the charges brought under Count 7 – sexual slavery and the residual clause, other forms of sexual violence – because the charges were cumulative and not in the alternative, thus vague and duplicitous. The judges opined that Count 7, as pleaded, rendered the indictment defective since the accused was unable to understand what evidence pertained to sexual slavery and what evidence substantiated the charge of sexual violence.[126]

Secondly, as a consequence, of the dismissal of Count 7 charges, the Trial Chamber was obliged to acquit the defendants under the remaining Count 8, inhumane acts as a crime against humanity, that was based upon the identical evidence submitted for the sexual slavery count as it argued that acts detailing forced marriages would have been better characterized as sexual slavery. The trial chamber reiterated that the factual allegations amounted to sexual

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121 A decision that is given *per incuriam*, is a judicial decision that has been wrongly decided, usually because the judges were ill-informed about the applicability of the law or used inapplicable law (*Prosecutor v. Zlato Aleksovski,* Judgment, Case No. IT-95-14/1-A, 24 March 2000, para. 108).

122 Sellers, 'The 'Appeal' of Sexual Violence: Akayesu/Gacumbitsi', *in Gender-base Violence in Africa*, Karen Stefisyn (ed.), University of Pretoria, 2007.

123 See, MacKinnon, 'Defining Rape Internationally: A Comment on *Akayesu'*, in ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES,The Belknap Press of Harvard University Press (2006), at 237; Anne-Marie L.M. de Brouwer, 'Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR', *infra* note100, at 115-120.

124 *Infra,* note 55.

125 AFRC, paras. 969-1188, the breadth of the evidence is daunting. As a preliminary manner, it undermines the supposed stereotypes that persons, especially women are unwilling to come forward and testify about sexual violence at international forums. More importantly, it underscores the frequency of rape in the Sierra Leone conflict and the breadth of sexual violence.

126 AFRC, para. 92- 96. Even though the defense's argument to strike Count 7 from the indictment was raised after the close of the proceedings, the trial chamber viewed the prosecution's error as an egregious omission that must be remedied in order to protect the defense's due process rights by an outright dismissal of the count, irrespective of the witness testimony.

slavery and therefore should have been charged *only* under Count 7, sexual slavery as a crime against humanity.[127]

Notwithstanding, these errors, the trial chamber convicted the defendants of rape as a crime against humanity, and finally, based upon the sexual slavery conduct, of outrageous upon personal dignity, as a war crime. The trial chamber relied upon the same sexual assault evidence of sexual slavery that it heard for the dismissed Count 7 and the acquittal under Count 8.

The trial chamber set forth the elements for rape under crimes against humanity as follows:

1. The non consensual penetration, however slight, of the vagina or anus of victim by the penis of the perpetrator or by any object used of the perpetrator or of the mouth of the victim by the penis of the perpetrator; and

2. The intent to effect this sexual penetration and the knowledge that it occurs without the consent of the victim.[128]

This AFRC case gave the fourth[129] definition of rape handed down by the international courts and tribunals. The AFRC definition was influenced by international law and, if not more importantly, bound by national law. The court's position on non-consent prominently distances itself from the ICC and SCSP definitions, yet reaffirmed in reality the *Kunarac/Gacumbitsi* position, regardless of the differing wording. After pronouncing the definition, the judges further found that:

> Consent of the victim must be given voluntarily, as a result of the victim's free will, assessed in the context of the surroundings … in situations of armed conflict, coercion is almost always universal. Continuous resistance of the victim and physical force or even threat of force by the perpetrator are not required to establish coercion. Children below the age of 14 cannot give valid consent.[130]

Finally, the ICC Elements of the Crimes (The EoC of the ICC) presented its definition of rape as:

> (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 threat of force or coercion,

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127 XIII Disposition, pp. 571-573. Since Count 7, sexual slavery, was dismissed, the trial chamber held that evidence of forced marriage, better characterized as the crime of sexual slavery, should not be characterized as inhumane acts. The expansion of explicit sexual assault crimes in the SCSL Statute caused the judges to require that sexual assault evidence be pleaded precisely, in accordance with certain enumerated acts. This approach to sexual violence signals a turning point from the approach of the *ad hoc* Tribunals that have fewer explicit sex-based crimes and prompt gender-biased outcomes.

128 AFRC, para. 693.

129 Note that *Gacumbitsi/Kunarac* definition derives from two separate definitions of rape. The "third definition", that of the ICC, is spurred identical wording of those of the SCSP of East Timor and of the ECCC.

130 AFRC, para. 694. The Trial Chamber's definition of rape was not directly challenged by the defence nor the prosecution at the appellate level, thus, the AFRC definition stands as appellate obiter dicta.

such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such a 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.[131]

The ICC definition of rape is a mixture of the ICTY and ICTR rape definitions and parts of the ICTY/ICTR procedural Rule 96[132] of the Rules of Procedure and Evidence employed by the *ad hoc* Tribunals. The ICC definition refrains from making a decisive choice between *Akayesu* or *Furundzija* elements but rather combines them. It also eliminates any inquiry into situations whereby due to incapacity genuine consent is impossible.[133] The ICC definition still has not been subjected to judicial interpretation. What factual findings will suffice for each element, especially the phrase "genuine consent", which is *de novo* under international criminal law, remains to be determined?[134] What procedural regulations[135] will

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131 EoC, Article 8(2) (b) (xxii)-1.

132 Rule 96 of the ICTR Rules of Procedure and Evidence reads:

> In cases of sexual assault:
>
> (i) Notwithstanding Rule 90 (C), no corroboration of the victim's testimony shall be required;
>
> (ii) Consent shall not be allowed as a defense if the victim:
>
> (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
>
> (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.
>
> (iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
>
> (iv) Prior sexual conduct of the victim shall not be admitted in evidence or as defense.

Rule 96 of Evidence and Procedure (UN Doc. IT/32, 1 February 1994): At the OHCHR Expert meeting convened by the Women's Rights and Gender Unit in October 2007, participants voiced regret that the original Rule 96, that plainly disallowed consent as a defense had been serially amended to wherein the present rule details the qualifying of circumstances of when consent cannot be a defense. The Expert Meeting participants acknowledged the crucial distinction yet related legal and procedural dilemma of the witness being situated between the Prosecutor's obligation to prove and element, and the defense's ability to raise a defense (*See*, *infra* note 134).

133 *See* Anne-Marie L.M. de Brouwer, 'Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR', p. 130.

134 The Expert Meeting participants agreed that the conditions or circumstances should be determined in the alternative. Any alternative designation such as force or threat of force or abuse of power suffices to establish sub-section (2). The participants also agreed that the phrases "such as" would allow for situations of economic or cultural constraints to be viable, comparable factors. Whether the last alternative condition that recognized the inability to give genuine consent implied a permanent or temporary status of the victim/survivor, such as age, or a mental deficiency or whether its interpretation was open to broader circumstances, for example, the conditions of trafficking was discussed and it was suggested that any contemplation of its procedural execution should promote, not restrict females access to the ICC's rape provisions.

135 The element of lack of consent, that which must be proved beyond a reasonable doubt by the Prosecutor is distinguished from a defendant's ability to raise the victims consent, as a defence to rape. Rule 70 of the ICC Rules of Procedure and Evidence prefaces that the Court, 'shall be guided by and, *where appropriate,* follow the principles that:

> a) Consent cannot be inferred by reason of any words, or conduct of a victim where 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.'

ensure that the *de jure* factual inquiry does not devolve into a *de facto* search for the victim's lack of consent, in particular through defendant's raising the defence of the victim's consent, either on cross examination or in the direct presentation of their case?[136]

The international courts and tribunals that redress gender- based violence have spurred more than just a definitional tension of legal elements. The differing versions of the elements of rape as an international crime provided by the ICTY/ICTR *Gacumbitsi/Kunarac*, the SCSP, the ECCC, the recent SCSL definition, and the ICC exist jurisdictionally concurrently to each other. There is no overall legal hierarchy providing guidance as to which definition is in a position of primacy over another. Each has authority in its respective international judicial forum.

A number of human rights concerns are created as a result of the inconsistent definitions of the crime of rape. What impact on the human right of equal access to justice, do the various definitions of rape have on victim/survivors, especially when proof must be offered that the victim did not consent and that the perpetrator was aware of the victim's lack of consent? Are the ICC/SCSP/ECCC elements of alternative circumstances or genuine lack of consent in compliance with the human rights instruments that promote equal protection *via* equal access to justice and freedom from gender based violence? Moreover, does the existence of several international legal definitions of rape undercut each international judicial forums "definitive" interpretation and authority? Does the multiplicity of definitions or interpretations undermine the extent to which women and girls can exercise their right to be free from gender violence and to enjoy the full realm of inalienable, interdependent and indivisible human rights? Is a sixteen year old girl victim of the Sierra Leone civil war less protected against gender violence, than for example, a sixteen year old girl whose perpetrator will be judged by the ICC?

Rule of Procedure and Evidence of Chapter 4, Provisions Relating to Various Stages of the Proceedings, Section 1 Evidence, Rule 70, "Principles of Evidence in Cases of Sexual Violence", ICC/ASP/1/3.

[136] At the OHCHR Expert meeting convened by the Women's Rights and Gender unit in October 2007, participants recognized that Rule 70 of the ICC Rules of Evidence and procedure boarders on, but stops short from fully disallowing consent as a defence dependent on the circumstances of its eventual use by the defendant. However, the participants noted the caveat in Rule 70's application since it would only be invoked where judicial discretion deemed it "appropriate." Further precautions are found in the structures of Rule 72, entitled, "*In camera* procedure to consider relevance or admissibility of evidence" provides:

1. 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 as referred to in principles (a) through (d) of rule 70, 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.
2. In deciding whether the evidence referred to in sub-rule 1 is relevant or admissible, a Chamber shall hear in camera the views of the Prosecutor, the defense, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, in accordance with article 69, paragraph 4. For this purpose, the Chamber shall have regard to article 21, paragraph 3, and articles 67 and 68, and shall be guided by principles (a) to (d) of rule 70, especially with respect to the proposed questioning of a victim.
3. Where the Chamber determines that the evidence referred to in sub-rule 2 is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceedings, the Chamber shall apply principles (a) to (d) of rule 70.

III. Possible solutions – The international human rights and criminal law frameworks

In the last 15 years, the humane treatment owed to different categories of persons under IHL and the respect for the inherent dignity of the human being under human rights law have begun to identify common ground. The conscious cross-fertilization is owed, in significant part, to the deeper examination of gender-based violence, including sexual violence, and to the realistic acknowledgment of women as indelible subjects of both bodies of law.[137]

a. The relevance of International human rights law standards

In 1992, CEDAW's General Recommendation No. 19 recognized that gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the CEDAW which also includes "the *right to equal protection* according to humanitarian norms in times of international or internal armed conflict".[138] Several observations arise from this. Firstly, it is axiomatic that the right to equal protection embodies the human rights precepts of non-discrimination voiced in IHL as principles of humane treatment without adverse distinction. Secondly, CEDAW General Recommendation No. 19 regrettably left unspecified which 'humanitarian norms,' were not to be undermined. From a normative perspective it most likely entails IHL doctrines, rules, regulations, procedural guarantees, prohibitions, breaches, customary violations, war crimes and presumably crimes against humanity and acts of genocide committed contemporaneously with an armed conflict. Thirdly, CEDAW General Recommendation No. 19 surely must be read as prophylactic, able to encompass humanitarian norms that have evolved since 1992. Irrespective of these observations, CEDAW General Recommendation No. 19 functions as an authoritative legal interpretation of CEDAW and thus, unambiguously interprets that the Convention accords women and girls the right to equal protection or non-discriminatory application of humanitarian norms in times of international or internal armed conflict and reaffirms the redress of war-related gender-based violence, such as rape, has a human rights dimension.

The 1995 Beijing Platform for Action[139] also addressed the situation of women and girls in armed conflict. The Platform noted that "(m)assive violations of human rights, especially in the form of genocide, ethnic cleansing as a strategy of war and its consequences, and rape, …are abhorrent practices…" [140] Genocide, rape and ethnic cleansing were considered human right violations. The Platform further stated that, "violations of human rights in situations of armed conflict and military occupation are violations of the fundamental

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[137] Legitimate commentaries and critiques of the breadth of coverage and responsiveness of IHL and human rights law to women and girls' real lives and real concerns have steadily questioned the patriarchal premises of both legal regimes. *See generally,* Charlesworth and Chinkin, *The Boundaries of International Law – A feminist Analysis*, Manchester University Press, 2000; Catharine McKinnon, *Are Women Human? And Other International Dialogues*, 4 Belknap Harvard, 2006; Gardham, 'Woman and Armed Conflict: The response of International humanitarian Law', *in Listening to the Silences: Women and War*, Durham and Gurd (eds.), Martinus Nijhoff Publishers, 2005.

[138] Paragraph 7(c) of the CEDAW Recommendation No. 19. See note 6.

[139] Beijing Declaration and Platform for Action, Fourth World Conference, 15 September 1995, UN Doc. A/Conf.177/20 (1995), Section E, *Women and Armed Conflict*, para. 132-137.

[140] Beijing Platform, para. 132.

principles of international human rights and humanitarian law as embodied in international human rights instruments and in the Geneva Conventions of 1949 and the Additional Protocols thereto."[141] The Declaration appears to underscore the indivisibility of human rights violations and the respect for humanitarian norms, meaning IHL prohibitions operative during wartime and during periods of military occupation.

> In 2000, Security Council Resolution 1325 on Women Peace and Security[142] reaffirmed the Beijing Declaration's prescience, and recognized the "need to implement fully, international humanitarian and human rights law that protects the rights of women and girls during and after conflicts" and called "upon all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse".[143] Security Council Resolution 1325, passed almost a decade after the CEDAW General Recommendation No. 19, specified the IHL basis of protection and the human rights law bases of rights to be extended to females during armed conflict and in the immediate aftermath of armed conflict. It moreover, cited the Rome Statute of the (then pre-operative) International Criminal Court.[144]

Moreover, the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences, issued in 2002, poignantly recognize that wartime gender crimes, such as rape, constituted human rights offences, and seek accountability of gender-based violence, "committed *even* in peacetime."[145]

By 2003, with the adoption of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (African Protocol), the definition of gender violence, enshrined protection against all acts of violence, in any temporal/political dimension. Article 1(j) stated:

> …that 'violence against women' means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary

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141 Beijing Platform, para. 133.

142 Security Council Resolution, S/RES/1325, 31 *October* 2000 (SC Res. 1325).

143 Preamble and Paragraph 10 of SC Res.1325.

144 Paragraph 9, of S. C. Res. 1325:

> "Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999 and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court."

At the OHCHR Expert meeting convened by the Women's Rights and Gender unit in October 2007, the participants discussed whether the SC Res. 1325 initiates a nascent mechanism to ensure that General Assembly members to redress war-related gender-based violence committed against women and girls. In the intervening year, the Security Council passed Security Resolution 1820, on Women, Peace and Security that urges States to prosecute wartime offences, such as sexual violence, committed against the civilian population, especially women and children (S/Res/1820, 19 June 2008).

145 Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights, *see,* http://www.kituochahakatiba.co.ug/cairo-arusha.htm.

restrictions on or deprivation of fundamental freedoms in private or public life *in peace time and during situations of armed conflicts or wars.*[146] (Emphasis added)

According to the African Protocol, women and girls' rights are to be safeguarded by the scrutiny of a (gendered) human rights framework, wherever, whenever. Therefore, whether in periods of armed conflict, military occupation, during repatriation of internees and prisoners of war, return of war refugees, or settlement of internally displaced persons,[147] gender-based violence explicitly contravenes the human rights of the African female.

In addition, the 2006 General Assembly Resolution 61/143, implicitly, stressed that States eliminate gender-based violence, "whether occurring in public or private life",[148] to ensure the human rights' protection of "women and girls in situations of armed conflict, post armed conflict settings and refugee and internally displaced settings, where women are at greater risk of being targeted for violence…"[149]

On June 19th 2008 the Security Council gave recognition to the fact that sexual violence is, indeed a security concern and unanimously passed resolution 1820. The resolution noted that, women and girls are particularly targeted by the use of sexual violence, including in some cases as "a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group". It stressed that such violence could significantly exacerbate conflicts and impede peace processes, the text affirmed the Council's readiness to, where necessary, adopt steps to address systematic sexual violence deliberately targeting civilians, or as a part of a widespread campaign against civilian populations.

Further to the text, the Council demanded that all parties to armed conflict take immediate and appropriate measures to protect civilians, including by, among others, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility; training troops on the categorical prohibition of all forms of sexual violence against civilians; debunking myths that fuel sexual violence; and vetting armed and security forces to take into account past sexual violence. The jurisprudential developments were recognized with reference to sexual violence being a crime against humanity, a war crime and an element of genocide.

Whilst at present the resolution applies only to those countries that are the subject of SC resolutions, it does bring into sharp focus the change in perception as to the nature of sexual violence. The recognition that it represents a threat to security and the potential consequences of such a recognition are profound.

Despite the fact that there exists no legally binding international human rights instrument that is expressly devoted to the proscription of gender-based violence,[150] the

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146 African Woman's Protocol Article 1

147 *See,* Gardam, Judith and Charlesworth, Hilary, *Protection of Women in Armed Conflict* Human Rights Quarterly - Volume 22, Number 1, February 2000, pp. 148-166; 2001 Women Facing War, ICRC Study on the Impact of Armed Conflict on Women, www.reliefweb.int/library/documents/2001/icrc-women-17oct.pdf.

148 GA Resolution 61/438, para. 3.

149 GA Resolution 61/438, para. 8(o).

150 CARE, a non-governmental organization, has initiated a campaign to draft an international protocol devoted to sexual and gender based violence. http://www.care.org/newsroom/articles/2007/03/20070326_greatlakes_gbv.asp?source=170760870000

modern trend in human rights law consolidates protection against gender-based violence committed *also* during armed conflict by declarations, recommendations and resolutions at the international level, and by conventions, protocols or specific treaty provisions at the regional level. Indeed, human rights law has progressively acknowledged that gender-based violence redressed by humanitarian law must simultaneously adhere to the non-discriminatory precepts seminal to the human rights framework. In fact, the concretisation of the spirit of CEDAW Recommendation No. 19 is found in Article 21(3) of the Rome Statute which admonishes the ICC judicial chambers to employ a legal standard whereby "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and without any adverse distinction founded on grounds such as gender."[151]

b. Rape under International Human Rights and International Criminal Law

A two prong approach will look at comparative provisions of international human rights law and international criminal law that proscribe sexual violence or sexual exploitation, to inquire how they address the consent or "lack of consent of the victim, taking into account, the age of the victim. The aim is to understand how human rights law can inform IHL and *vice versa*, what human rights law demands, particularly in relation to non-discrimination can impact the manner in which IHL should be interpreted.

b.i. International Human Rights Law

Examining the legal reasoning adopted by regional human rights courts in adjudicating cases of rape is pertinent. The Inter-American Commission on Human Rights, exercises jurisdiction over the rights protected by the American Convention on Human Rights,[152] the Convention of Belem do Para and other regional human rights instruments.[153] The *Raquel Martí de Mejía v. Perú* case,[154] usually cited for its interpretation of the American Convention's guarantee of the right to be free from rape, did not define the elements of rape. *Mejía v. Perú*, held that the act of rape could violate the safeguards of torture which are prohibited by Article 5 of the American Convention. The State was assigned responsibility for torture. Rape, thus, fulfilled one of the elements of torture, namely: 1) an intentional act through which physical and mental pain and suffering is inflicted on a person. The other two

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[151] Article 21(3), Rome Statute of the International Criminal Court, opened for signature 17 July 1998, UN Doc. A/CONF.183/9 51998, 37 ILM 999 (1998), entered into force 1 July 2002 (hereafter Rome Statute of the ICC).

[152] Organization of American States, American Convention on Human Rights, 22 November 1969, O.A.S.T.S. No, 36, 1144 U.N.T.S. 123.

[153] These include the Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador', arts. 8(a), 13, 19, 17 November 1988, O.A.S.T.S. No. 69; Organization of American States, Inter-American Convention to Prevent and Punish Torture, 9 December 1985, O.A.S.T.S. No. 67; Organization of American States, Inter-American Convention on Forced Disappearance of Persons, art XIII, 9 June 1994, 33 I.L.M. 1429.

[154] See, also *Raquel Martín de Mejía v. Perú*, Case 10.970, Inter-Am.C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7, at 157, 1996.

elements of torture held that such an act is; 2) committed with a purpose; and 3) committed by a public official or by a private person acting at the instigation of the former." [155]

In *Miguel Castro Prison v. Peru*,[156] a detention case, whereby women visitors to a male detention centre were caught in a two-day uprising, the Court held forced nudity inflicted upon the women violated their personal dignity. The Court, did not define the sex-based conduct, but relied on the definitions that were put forth by the ICTR in the Akayesu, such as sexual violence, when determining that forced nudity was an act of sexual violence.[157] Upon recognition that one of the women had been subjected to "a finger vaginal 'inspection', carried out simultaneously by several hooded people the Court again resorted to the ICTR jurisprudence to classify the sexual conduct as "sexual rape", the gravity of which was made clear after drawing on several other sources of international human rights law.[158]

The European Court of Human Rights, (ECHR) exercises jurisdiction over all matters of interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR has held that State Parties are responsible for rape crimes either when State agents perpetrated rape or when the State failed to provide an adequate remedy at the national level. The European Convention, like the American Convention, never explicitly provides for the right to be free from sexual violence. As a result, the ECHR initially characterized rape as a violation of the right to privacy. Later, the ECHR followed the progression of the Inter-American Commission's jurisprudence, when it recognized rape as torture and as a severe form of inhumane treatment.

In *X & Y v. Netherlands*, the ECHR[159] held that rape abridges the right to privacy under Article 8, which protects the "physical and moral integrity of the person, including his or her sexual life". The Court did not define the elements of rape.

In *Aydín v. Turkey*,[160] decided in 1997, the ECHR found that rape can also constitute a violation of Article 3 of the European Convention, which prohibits torture. In this case, a local Turkish police officer had been charged with the rape of a seventeen-year-old Kurdish girl who was illegally detained. The Court did not pronounce itself on the elements of rape, since its deliberations focused on rape as a form of torture which is a human rights violation.

The case of *M.C. v. Bulgaria*[161] concerned a 14 year-old girl that had mental disabilities and who had been raped by two men while on a date. The age of consent in Bulgaria was 14 years old. The *M.C.* Court found that the State's investigation procedures and interpretation of the rape elements should have take into account M.C.'s mental deficiencies when interpreting evidence of whether force by the perpetrator or resistance by M.C. had been established. Neither, in M.C. was deemed a requirement. Hence, the Grand Chamber found a violation of Article 3 and Article 8 – prohibition of degrading treatment and the right to respect for private life respectively – and held that Bulgaria had failed to fulfil its

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155 The Court also found that Meija's right to privacy under Article 11.1 was violated. The *Mejia* Court's holding that the rape satisfied the human right prerequisites of torture was cited to by the Delalic Trial Chamber when it delivered the first ICTY conviction for acts of rape as torture.

156 Case of the *Miguel Castro-Castro Prison v. Peru*, Inter-Am Ct. H.R. (ser. C) No. 160, 25 November 2006.

157 *Id.,* para. 306, citing to *Akayesu*, para. 688.

158 *Id.,* para. 309 -312.

159 *X&Y v. Netherlands*, ECHR, 1983.

160 Case of *Aydin v. Turkey*, 25 EHRR 251, 1988.

161 Case of *M.C. v. Bulgaria,* ECHR 646, 2003.

positive obligations to enact criminal legislation to effectively investigation, prosecution and punish the rape of M.C..

As to whether M.C. consented to the sexual intercourse, the Court opined that historically in rape cases domestic law and practice required proof of the use of physical force by the perpetrator and physical resistance on the part of the victim. It noted, however, that now, many European countries, including common-law jurisdictions, had removed references to physical force from their legislation. The Court held that lack of consent, *via* assessment of the surrounding circumstances, not a *sine qua non* of resisting force, had become the critical assessment in defining rape. The M.C. jurisprudence noted that ICTY's interpretation of the definition of rape under *Kunarac*, paid heed to the circumstances in which the rape occurred as did the ICTR in their recognition of the coercive circumstances approach established in *Akeyesu*. It, moreover, found that failure to protect victims subject to coercive surrounding would lead to impunity and contravenes the State responsibility to investigate and prosecute appropriate to any pertinent status of the victim/survivor.

In general, the Court recognized that the State's positive obligation to adopt measures to secure respect for private life must be in conformity within the wider requirements of non-discrimination within the Convention. The *M.C.* case is the first to raise sexual autonomy and equality as relevant to the State's obligation to investigate and prosecute sexual violence, in order to comply with its ECHR Art 3 substantive and procedural obligations. The Court also observed that law and legal practice reflect the changing social attitudes requiring respect for the individual's sexual autonomy and equality.

How sexual autonomy and equality were examined in the non-war context might be of relevance to conflict-related prosecutions. The ICC could glean support from the *M.C.* holding. To interpret elements of rape, one must be cognizant of the factual circumstances, such as the age or relevant status of the victim, for example, limited mental ability. This approach is reflected in the sub-provision Article 8(2) (b) (xxii)-1 of the Element of the Crimes that supplements the Rome Statute. It reads, in pertinent part, that rapes can be perpetrated "by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[162]

Regional human rights jurisprudence has examined a range of human rights violations, such as torture, degrading treatment of violations of privacy, factually established by the inflictions of rape. Nevertheless, the regional human rights courts are slim on any assessments of rape as an enumerated human rights violation in and of itself or other specific acts gender-based violations. Accordingly, the elements of rape as an international crime are only indirectly assessed and only when relevant to determining the presence or absence of a human rights violation, such as inhumane treatment. Two decisions from regional courts have invoked jurisprudence from the *ad hoc* Tribunals. The 2006 decision in *Miguel Castro Prison* resorted to ICTR opinions concerning rape and sexual violence, while the 2003 decision in *M.C.*, cited to the ICTY and ICTR jurisprudence on rape. Accordingly, the jurisprudence of human rights law cannot offer definitive responses about the requirement of the lack of consent element under international criminal law, however, their opinions, such as the regional human rights expression of sexual autonomy and sexual equality, enlighten the purview of human rights standards that inform the prosecution of gender-based violence.

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[162] EoC, Article 8(2) (b) (xxii)-1.

b.i.i. International criminal law

To further address the "lack of consent of the victim," for rape as an international crime, it is necessary to examine international criminal treaties that govern specific criminal regimes, notably of slavery and slavery-like practices, genocide, torture and trafficking in human beings. In these contexts, rape conduct that regional courts acknowledge can be instrumental in the determination of human rights violations such as torture, could also comprises evidentiary indicia of international crimes, such as trafficking. The prime analogy that is consistent with the penalization of rape, is trafficking, whose policy interest inherently seeks to outlaw all forms of sexual exploitation.

The multilateral UN Trafficking Protocol[163] to the Trans-national Organized Crime Convention "descends" from several treaties that hold a historical bias against the incorporation of "lack of an of victim's consent" as an element of the crime of trafficking. For example, the International Convention for the Suppression of the Traffic in Women of Full Age[164] states:

> Whoever, in order to gratify the passions of another person, has procured, enticed or led away *even with her consent*, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.
>
> Attempted offences, and, within the legal limits, acts preparatory to the offences in question, shall also be punishable[165]. *(emphasis added)*

Likewise, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery[166] seeks to abolish, *inter alia*:

> (c) *Any institution or practice* whereby:
>
> …
>
> (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

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163 *See*, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Untied Nations Convention Against Transnational Organized Crime, G.A. Res. 25 annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I), 2001, entered into force 9 September 2003 (hereinafter, 2001 Trafficking Protocol). The Trafficking Protocol defines Trafficking as a crime that contemplates sexual abuse and exploitation, without reference to the elements of an *actus reus* of sexual exploitation, that could encompass rape:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipts of persons, *by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person*, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;" (emphasis added).

164 International Convention for the Suppression of the Traffic in Women of Full Age**,** 11 October 1933, 150 L.N.T.S., entered into force 24 August 1934.

165 *Id.,* Article 1.

166 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, entered into force 30 April 1957.

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) *Any institution or practice* whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.[167] *(emphasis added)*

In particular the UN Trafficking Protocol states that:

(b) The consent of the victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipts of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) 'Child' shall mean any person under eighteen years of age. [168]

The UN Trafficking Protocol unequivocally states that the heinous crime of trafficking, when evidenced by coercive circumstances, renders consent as a defence irrelevant. Consent to any resulting sexual exploitation, that could implicitly comprise acts of rape,[169] therefore would be banned. The UN Trafficking Protocol's elimination of the legitimacy of consent is especially strict whenever children - persons under 18 years of age [170]- are the victims of trafficking. The UN Trafficking protocol, irrespective of the coercive circumstances, or even in the absence of coercive circumstances, render the consent given of a child immaterial to the liability of the offender.

The UN Trafficking Protocol's two tiered approach to consent, dependant on whether the victim is an adult or child could resonate with the ICC distinction between a person incapacitated by one or more multifaceted circumstances that form a coercive environment or a person irrespective of the given circumstances whose status, such as age renders genuine consent impossible.[171] In an independent Background Paper on the Vienna Forum on Trafficking, an Expert Meeting[172] to discuss implementation of the UN Protocol on

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167 *Id.,* Article 1(c)

168 Trafficking Protocol in Article 3(b-d).

169 *See,* A/55/383/Add.1, para. 64, wherein it has been expressed that no forms of sexual exploitation other than in the context of UN Trafficking Protocol.

170 Convention on the Rights of the Child, U.N. Treaty Series, Vol. 1577, 20 November 1989.

171 At the OHCHR Expert meeting convened by the Women's Rights and Gender unit in October 2007, participants noted that Rule 63(5) of the ICC Rules of Procedure and Evidence states "That Chambers shall not apply national laws governing evidence, other than in accordance with Article 21," and thus anticipated that the ICC's respect for the Article 1 of the Convention on the Rights of the Child, that recognizes a child as a human being below 18 years of age, unless under the law applicable to the child, majority is attained earlier. *See supra,* n. 26. In the the SCSL's AFRC judgment, according to national Sierra Leone law consent was dependent upon a child's age, be it 13 years old, 14 years old or 16 years old. *See infra.* n. 130.

172 The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna, Background Paper: 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation. UN.GIFT B.P.: 023

Trafficking, the legal consequence of consent under Article 3(b) was discussed. The Background Paper stated:

> "The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forward in subparagraph (a) have been used."
>
> It is logically and legally impossible to consent to being exploited where consent has been obtained through improper means, or in the case of children 4 , where their particular status as vulnerable persons makes it impossible for them to consent in the first place. *Real consent is only possible and legally recognisable, when all the relevant facts are known and a person is free to consent or not. Moreover, one cannot legally consent to forced labour, slavery or practices similar to slavery or servitude.* Consent of the victim can be a defence in domestic law, but as soon as any of the means of trafficking are established, consent becomes irrelevant and consent-based defences cannot be raised. Trafficking occurs if consent is nullified or vitiated by the application of any improper means by the trafficker. In addition, it may be argued that consent of the victim at one stage of the process cannot be taken as consent at all stages of the process and without consent at every stage of the process, trafficking has taken place. This means that even if a person consented to work abroad or to enter the country illegally, but did not consent to the exploitation, the offence has been committed. *(emphasis added).*

The UN Trafficking Protocol would seem to argue for a severely limited if not eradication of a "lack of consent" element under international criminal law for the forms of sexual violence or gender-based violence, that it governs.

Regional proscriptions of trafficking are coherent in approach with the UN Trafficking protocol. The 2005 Council of Europe Convention on Actions against Trafficking in Human Beings[173] sets forth as a purpose of the convention the guarantee of gender equality[174] and precepts of non-discrimination,[175] *inter alia,* based upon sex, before inserting the identical definition of trafficking adults and children as penalized in the UN Trafficking Protocol. Likewise, the ECOWAS Declaration on the Fight Against Trafficking in Persons [176] assimilates the definition of trafficking in persons contained in the UN Trafficking Protocol It recalls that children are particularly vulnerable to trafficking,[177] replete with the provisions that render the establishment of a child's consent immaterial.

Therefore, the international criminal law of trafficking, appears to favour an approach to rape or any sexual exploitation that incorporates the prevailing coercive circumstances when determining, the ability to consent, yet excludes even consideration of circumstances whenever children are the subject of sexual exploitation.

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[173] 2005 Council of Europe Convention on Actions against Trafficking in Human Beings CETS No.: 197 entry into force 1 February 2008**.** The advances under the Council of Europe Convention include re-enforced support and protection for victims of trafficking, even if their cooperation with state authorities is not readily forthcoming.

[174] *Id.,* Article I(1)(a)

[175] *Id.,* Article 3

[176] ECOWAS Declaration www.unodc.org/pdf/crime/trafficking/Declarationr_CEDEAO.pdf

[177] *Id.*.

An illustration of national criminal law that accords with the policy of the UN Trafficking Protocol is the United States Trafficking in Victims Protection Act[178] that attributes part of its origins to international law.[179] The TVPA in particular addresses international trafficking that results in persons being trafficked onto the territory of the United States.

Under the TVPA, "trafficking includes all the elements of the crime of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force or coercion."[180] Coercion is defined as (a) threats of a serious harm to or physical restrains against the person; (b) any scheme plan or pattern intended to cause a person to believe that failure to perform and act would result in serious harm or physical restraint against any person; or (c) the abuse or threaten abuse of the legal process.[181] The breadth of the alternative term 'coercion' must be read together with the meaning attributed to the terms 'fraud' or 'force'.

Further United States legislation aimed at criminalizing foreign trafficking and trafficking that occurs within the US boundaries, the Mann Act, 18 USCS 2421, states:

> "Whoever knowingly transports any individual in interstate or foreign commerce, or any in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with an offense."

The crimes under the Mann Act are limited to two elements, namely, transportation in interstate commerce and transportation for prohibited purposes.[182] It is noteworthy that the knowledge or consent of the individual transported was not necessary to sustain a conviction,[183] nor was it legally material to prove an immoral purpose on the part of the victim to find the violation to hold the perpetrator liable.[184] Accordingly, transportation across State lines for the purpose of rape violates the Mann Act.[185]

These limited examples of national trafficking criminal provisions, underscore the legal immateriality of the victims/survivors' consent or lack of consent to underlying acts of sexual exploitation when prosecuting trafficking and resonate with the policy underpinning

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178 US Code, Title 22, Chapter 78, Sec. 701, Trafficking in Victims Protection Act (TVPA).

179 The provision 7107(b)(23) recalls the international legal grounding that prompted of the international community to outlaw trafficking include: the Universal Declaration of Human Rights; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labour Convention; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations General Assembly Resolutions 50/167, 51/66, and 52/98; the Final Report of the World Congress against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); and the 1991 Moscow Document of the Organization for Security and Cooperation in Europe.

180 *Id.,* Section 7101(b)(9).

181 *Id.* Section 71022(a-c).

182 8 USC 2421 II, Elements of the Crimes (12).

183 *Prdjun v United States,* (1916, CA6 Mich) 237 F 799; Qualls v United States (1945, CA5 Ga) 149 F2d. 891.

184 *Hart v United States* (1926, CA9 Or) 11 F2d 499, cert den (1926) 273 US 694, 71 L Ed 844, 47 SCt 92.

185 *Poindexter v United States* (1943, CA8Ark) 139 F2d 158; *Brown v United States* (1956, CA8 Mo) 237 F2d. 281; *Wegman v United States* (1959, CA8 Mo) 272 F2d 31.

international criminal law. To that extent, the proffered analysis of the removal of a 'lack of consent' element of rape under IHL and international criminal law are not unlike other national and international policies enacted to confront gender-based violence.

IV. Concluding observations

CEDAW General Recommendation No. 19, and the other human rights instruments, that promote non-discrimination against women and girls are operational, at all times and under all circumstances, even during armed conflict. A review of humanitarian law, human rights law and international criminal law reveal a growing tendency to define forms of sexual violence, including rape, and use their investigation and prosecution to redress impunity for gender-based violence. These areas of law also appear to be developing the precept that reduces or eliminates the legal relevance, and thus requirement of a victim's lack of consent to acts of sexual exploitation, especially rape as a prerequisite for prosecution. Jurisprudence of rape is more likely to qualifies its examination based upon the context of the coercive physical or mental circumstances, abuse of power, or the status of the victim/survivor. Coupled with judicial acknowledgment of a victims inherent sexual integrity, sexual autonomy, sexual equality and right to human dignity, judicial pronouncements have broadened their understanding of gender-based violence. Human rights protection now augurs for more refined and responsive right to equal access to justice under the humanitarian norms and international criminal law for women and girls.

Those rights must encompass procedural and substantive aspects of access to justice, that are not mired in gender-weighted myths about sexual violence nor legal inaction nor inappropriate actions, especially when dealing with the crime of rape. Tellingly, if the "impact" of the lack of consent element in rape, is sanctioned and raised more frequently with female victim/survivors, even when rape is prosecuted under another crime, like persecution or torture, or sexual slavery, a disproportionate gendered chilling effect will descend on the females' exercise of their rights to access humanitarian norms.

Notably, when females witnesses gave live testimony as to the lack of consent element in the *Kunarac* case, Bower noted:

> "The reaction of (female) Witness 95 … to the question posed by the prosecutor, -viz-. whether the sexual contact had been against her will – was met with outrage, and is illustrative in this regard: 'Please Madame, if over a period of 40 days[186] you have had sex with someone, several individuals, do you really think that is with your own will?"[187]

Male accused are less frequently charged with male rape. An exception, was Ranko Cesic, an ICTY male perpetrator, who entered a guilty plea to war crimes, including to having committed rape against male victims. His plea acknowledged that the two men had not consented to the sexual conduct. [188]

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[186] Witness FSW-95 had testified that she had been raped more than 150 times in the 40 day period.

[187] Bower, 'Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR', *supra,* note 100, citing to *Kunarac*, Transcript, pp. 2235-2236.

[188] Ranko Cesic admitted that, on approximately 11 May 1992, he intentionally forced, at gunpoint, two Muslim brothers detained at Luka Camp to perform fellatio on each other in the presence of others. Ranko Cesic acknowledged that he was fully aware that this was taking place without the consent of the victims.

These two scenarios, based more on antidote than empirical study reveal the fragile "neutrality" of the elements of the rape under international law. Charging provisions such as torture, persecution, inhumane acts etc., unlike rape are not dependant upon the establishment of coercive circumstances or lack of the victim's consent. Characterizing male sexual assault acts under crimes such as torture or inhumane acts, spare and possibly privilege male victim/survivors over women. One male witness who testified in the *Milosevic* case demonstrated how evidence about the multiple, group rapes of men charged as persecution under crimes against humanity "avoided" the consent issues.[189]

Women and girls are securing the right to equal access to the judicial process as a means to redress discrimination, including gender-based violence. Exercising these rights and further securing them necessitates an analysis of the procedural and substantive aspects of investigation, prosecution and adjudication of IHL norms and international criminal law. Sexual violence, in particular rape, serves as a beachhead and a yard stick to dissect and discern the female community's real ability to exercise its access to justice during war or times of national emergencies or in their immediate aftermath. The hard law gains of the specialized international courts and tribunals still require a vigilant, even handed application of the appropriate sex-based crimes, and their attendant liability forms. Due diligence, on the part of judges to resistance any sexist interpretations of the laws, elements, procedural rules and the evidence, remains critical to the endeavour of constructing a non-discriminatory international justice system. Gains must be constantly safeguarded, questioned and then further developed, especially at the ICC. Regional human rights courts and appropriate national *fora* must also ensure that females retain comprehensive, dynamic protection and full enjoyment of the human rights.

Equality, security, dignity, self-worth and the fundamental freedom to be free of gender discrimination, in particular gender based violence, under IHL and international criminal law are central to the human rights of women and girls.

He forced both brothers to perform fellatio on each other and left the office after he told a guard to make sure that they would not stop until he returned. He left the door open when he went out and several guards could watch and laugh. The witness stated that the situation lasted for about 45 minutes, until Ranko Cesic returned with another guard. *Prosecutor v. Ranko Cesic,* Sentencing Judgement, Case No. IT-95-10/1-S, 11 March 2007, paras. 13 and 14 regarding Incident 4.

189 *See,* the attached Annex. .

ANNEX

Prosecutor v. Milosevic, Case No. IT-02-54-T*

Example of Male Sexual Assault Evidence (Charged as persecution under Article 5 (g) of the ICTY Statute)

Open court testimony from Witness B 1461 in Prosecution Case:

Q. Did there come a time when men in the building were subjected to brutal treatment?
A. Yes.
Q. I'd ask you to please describe what types of treatment you observed while you were detained in that room.
A. I saw them asking for fathers and sons to get on the stage, to take off their clothes, to strip, and to engage in oral sex using their mouths and genitals. At first it had to be fathers with sons, and after that, sons with fathers.
The people who applied, some were fathers and sons, others were not. At first it appeared that the group was too small. Then they asked or, rather, separated people at random, at will, sending them to the stage and to join the others.
Q. Approximately how many pairs of fathers and sons were forced to engage in this type of activity?
A. Two or three pairs of fathers and sons, but the total was about eight to ten couples.
Q. And what were the other men in the building required to do while this was taking place?
A. The other men were ordered to sit facing the stage, and they all had to watch what was going on the stage.
Q. What happened if one of the other men in the room did not look at what was going on?
A. They required that they watch and follow the happenings on the stage.
Q. Can you approximate for us, as best you can recall, when this occurred, during what period of your detention?
A. This was roughly between the 10th and the 11th of June. That was when we celebrate our religious holiday Bajram.
Q. Did there come a time when some of the men were forced to perform even more violent acts against each other?
A. Yes.
Q. Could you explain.
A. They demanded that certain couples, certain men, bite off the genitals of others. They asked men to show those penises. They actually forced a man to show the penis he had bitten off and to swallow it. One man refused to, but the other one did actually do it. And then they asked one person to -- to push the broom -- the handle of a broom into the behind of another man.
Q. And how many men who were detained there are you aware of were subjected to sexual abuse of the type you've described?
A. Some 30 men…….

The trial of the *Prosecutor v. Slobodan Milosevic* terminated without final judgement due to the death of the defendant in March 2006.