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Comment: **A Call for New Justice:** Victims of Sexual Violence in Africa's Internal Conflicts

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**SUMMARY:**

... For instance, UN peacekeeping forces violated the trust and weaknesses of its African protectorates when they raped and sexually assaulted women and young girls. ... In issuing a judgment against Akayesu, the tribunal found his guilt stemmed from his encouragement of acts of rape committed by soldiers under his authority. ... The definition set forth by the court allows a broad reading of rape, in order to prosecute those individuals not traditionally seen as conducting rape, as a means of ensuring that rape victims will see their perpetrators, and their commanding officers, brought to justice. ... Also, the ICTR is currently trying its first female defendant, Pauline Nyiramasuhuko for rape as a war crime, for her incitement of Hutu men to rape and kill Tutsi women and children. 2. ... A primary force in solidifying justice and ensuring that victims are protected from rape and sexual violence is its definition. ... When African nations adopt a policy that properly imputes national governments for their involvement or failure to act in the commission of such crimes, then the appropriate reparations can be made to bring another form of justice to victims of sexual violence. ... Having a body designed to protect the interests of the states in the region may ensure that states properly target perpetrators of sexual violence, while simultaneously making sure that victims are made whole again through a body that understands their various views. ... First, it allows various women's rights organizations', scholars', and victims' participation in the generating and drafting of the laws to stop discrimination and the abuse of women and children, particularly during wartime.

**TEXT:**

[\*334]

I. Introduction

"The honour of a community lies in the body of its women." <sup>n1</sup>

Imagine finally being outside the horrors of war, but your only wish is not for the war to end, but for the war to end your life. Common sense would lead many to believe that most people hope to survive armed conflict; thus, who would pray for death during the course of war? Those subjected to sexual violence pray for exactly that. <sup>n2</sup>

During the duration of war, the expectation exists that combatants employ "any tactics necessary as to secure the victory." <sup>n3</sup> However, many times soldiers and upper-level officials do not simply fight for victory, but utilize innocent women and children as "spoils of war." <sup>n4</sup>

Conflicts in Rwanda, the Congo, and Sudan reveal that sexual violence <sup>n5</sup> has become the rule rather than the exception. <sup>n6</sup> Sexual violence during war has gone unpunished, despite laws that have long been in existence recognizing its unlawfulness. <sup>n7</sup> Victims of war have been frequently targeted and underprotected. <sup>n8</sup> Sexual violence victims [\*335] receive little effective assistance from an international community whose concern arises only after the damage has occurred. <sup>n9</sup>

The aforementioned African nations faced ravaging intra-state conflict. <sup>n10</sup> United Nations' resolutions have a minimal effect on ceasing the violence and ending the abuse of the innocent victims occurring from these conflicts. <sup>n11</sup> Despite laws protecting women and children, <sup>n12</sup> women and children remain victimized and without proper recourse.

This comment will address one main question: whether victims of sexual violence on the African continent can secure proper reparations following armed conflict. Specifically, two main objectives will be addressed: (1) how the decisions issued in international tribunals have impacted the lives of sexual violence victims; and (2) whether the decisions of these tribunals have created a catalyst for state responsibility.

Part I of this comment will briefly document the nature and character of the conflicts in Rwanda, the Congo, and Sudan. Part II will examine the law and practice of international tribunals on the issue of sexual violence. In addition, this section will analyze how recent conflicts have unfortunately continued to reveal increasing numbers of victims of sexual violence due to the following: gender bias in the formulation and implementation of the law, war torn states promoting national interest rather than victims' interests, and internationalism and the perpetuation of the hegemony rather than the legal rules established. Part III will discuss widening the pool of relief for sexual violence victims by examining various untapped sources of aid. The [\*336] final part of the comment will conclude the paper and provide a brief discussion of real support for victims of sexual violence.

## II. Background

### A. A History of Sexual Violence

War has remained a normal occurrence between states throughout history. Due to this fact, armed conflict has been a major perpetrator of pain, as many have to suffer through its ramifications long after the violence stops. During war, women and children do not only suffer harm due to the loss of men as husbands, brothers, and friends, but they also suffer as innocent victims often utilized as a tool of war.<sup>n13</sup> This type of "warfare" on innocent victims has long been contrary to the general rules of war meant to protect combatants and non-combatants against unnecessary suffering.<sup>n14</sup> Women and children are often subject to sexual violence simply because combatants view them as legitimate prizes of war.<sup>n15</sup> Further, the commission of rape and other acts of sexual violence occur either to enhance "soldiers' aggression"<sup>n16</sup> prior to battle, or to provide a proper "reward"<sup>n17</sup> following battle. The history of sexual violence reaches far back into the history of mankind, and unless lessons are learned from it, this vile, discriminatory practice will continue as a normal course of procedure into future conflicts.

### B. International Criminal and Humanitarian Law

International humanitarian law governs the actions of those involved in war.<sup>n18</sup> This body of law seeks to ensure that civilians are not victimized during the course of war.<sup>n19</sup> The governing treaties and conventions for humanitarian law are the Hague Conventions,<sup>n20</sup> four Geneva Conventions and their annexes,<sup>n21</sup> and the two additional protocols to the Geneva Conventions.<sup>n22</sup> The laws enshrined in these conventions of humanitarian law are now solidly encompassed into customary international law.<sup>n23</sup> Though such laws exist and have for many years, the cessation of abuse toward women and children has not managed to gain much international attention.<sup>n24</sup> This is evidenced by the lack of recognition that women have received in prominent international documents that have been promulgated in international humanitarian treaty laws throughout the years.<sup>n25</sup> One commentator properly notes that given the concern for the protection of human rights, and in particular that of women's rights in current international dialogue, there is little acknowledgment in provisions and treaties relating to armed conflict about the occurrence of sexual violence or the need to end its proliferation in conflicts.<sup>n26</sup>

The laws of war have long since been established under the Hague Convention of 1899 and 1907 respectively.<sup>n27</sup> However, these laws often do not include or even mention that during the course of armed conflict, women and children are the ones scarred with more than war memories, but memories of assault and mutilation at the hands of soldiers. Within the four Geneva Conventions and its three additional protocols, only one article specifically addresses women [\*338] and their need for protection during the course of international armed conflict.<sup>n28</sup> Article 27 of the Fourth Geneva Convention declares:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.<sup>n29</sup>

It is plainly obvious that early codification of international law, upon which much, if not all, customary international law has been based, hardly considers women or their plight in relation to the sexual abuse faced during the course of war. While the conventions themselves may leave a large hole regarding the prosecution of rape, the second additional protocol to the conventions slightly fills the gap. Article four declares, "the following acts are and shall remain prohibited at any time and in any place whatsoever . . . outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."<sup>n30</sup>

Furthermore, the international human rights law that currently exists fails in all regard to recognize that, within their provisions, rape never amounts to a violation.<sup>n31</sup> This is exemplified perfectly by another women's rights commen-

tator, who indicates that ten of the most notable human rights documents currently in existence fail to explicitly state that rape constitutes a violation of the treaty.<sup>n32</sup> More dramatically, these treaties do not make mention of the word rape at all within their articles.<sup>n33</sup> However, out of these conventions, the commentator acknowledges that the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women does in fact mention rape, and that it notes rape must be [\*339] eradicated against women.<sup>n34</sup> While this sole document exists, codified human rights law stands a long way from protecting women during conflicts.

Beyond treaties and conventions, the UN Security Council and General Assembly has also repeatedly condemned the occurrence of rape during the course of armed conflicts.<sup>n35</sup> Security Council Resolution 1325 signified the international community's commitment to ensuring that women would no longer play second fiddle in the restoration process and ensuring that they no longer would be victimized during the course of war.<sup>n36</sup> This resolution resulted in reports suggesting that women need inclusion in the peace process as a way of ensuring that this impunity towards rape will cease, and thereby provide them with a greater ability to find true justice under international law.<sup>n37</sup> Such acknowledgment in the UN system provides victims with an excellent source to protect against future violence. Thus, an examination of events in Africa will address the frequency of rape and sexual violence during its conflicts.

### C. Conflicts in Africa: Rape at Center Stage

Throughout the past several decades, internal armed conflict has engulfed several African nations.<sup>n38</sup> These conflicts have ranged from the short in length to the extensive conflict.<sup>n39</sup> Despite the difference in length or the reasons for warfare, those not a part of the conflict have frequently been the subject of an extensive campaign of violence and sexual assault.<sup>n40</sup>

#### 1. Rwanda, 1994

The events of the early nineteen-nineties have been seared into the minds of all individuals, due to their brutality and blatant disregard for life. Few will say that the events transpiring in Rwanda did not warrant the protection of the international community, but nonetheless, many were slaughtered. And even less were provided the justice they deserved.

The conflict began long before the first shots were fired and the bodies were bludgeoned. For over two decades, President Juvenal Habyarimana of Rwanda, in a quest to maintain his power, sought to transfer the peoples' dislike and unpopularity toward him, to the minority Tutsi population.<sup>n41</sup> President Habyarimana did this by instigating early Tutsi propaganda in an effort to ensure his continued incumbency. While doing this, extremist Hutu groups' disdain for the Tutsi population continued to seethe.<sup>n42</sup> However, the President could no longer maintain a monopoly on power as various political factions began to rise which threatened his position.<sup>n43</sup> Thus, President Habyarimana began to use violence to take out his opponents, both Hutu and Tutsi alike. He even initiated training for youth groups, called Interahamwe, so that they could defend partisan interests.<sup>n44</sup>

The actual fighting could not be contained after President Habyarimana's plane was mysteriously shot down.<sup>n45</sup> This event incited radical Hutus, who were a part of the Interahamwe and Impuzamugambi. They acted by slaughtering between 800,000 and 1.2 million Tutsis and moderate Hutus during a short three-month period.<sup>n46</sup> In addition to the widespread killings that took place, women and children were also victimized based on one distinguishing factor: being Tutsi, or a friend thereof. The Hutus utilized systematic rape and sexual violence to destroy the Tutsi community, and to ensure that they would be wiped from the earth.<sup>n47</sup> The abuse inflicted upon Tutsi women and children did not occur in private, but rather happened in public in hopes of ensuring that the Tutsi community witnessed the violation of its women and thus the destruction of its ethnicity.<sup>n48</sup> [\*341]

The occurrence of rape was prevalent, but the Hutu militia did not end its atrocious violations there. They forced women into sexual slavery, where women were enslaved, routinely gang raped, and compelled at gunpoint into forced pregnancies and marriages.<sup>n49</sup> Hutu militia portrayed sexual violence victims as promiscuous women deserving of their vicious treatment.<sup>n50</sup> Hutu militias engaged in sexual propaganda as a means of dehumanizing and subjugating all Tutsis.<sup>n51</sup> The violence perpetrated against the women preceded their deaths, and, on occasion, involved mutilation of their sexual body parts and genitalia.<sup>n52</sup> While women and young girls begged for death, the perpetrators callously allowed them to live, not from mercy, but out of a desire to cause them to continue in their suffering.<sup>n53</sup> The Hutu violation of women was meant to penetrate the deepest level of the Tutsi population, the family, the community, and society in general.<sup>n54</sup>

The conflict in Rwanda was meant to wipe out the Tutsis. The Hutus decided that killing Tutsi men could not truly exterminate the Tutsi population. Thus, women were targeted as victims to perpetuate the Hutu population by forced

pregnancies and to eradicate the Tutsi population by murdering women and children, the symbols of the next generation.<sup>n55</sup> The way in which women and children were targeted during the conflict highlights the reckless disregard for life and blatant violations of international humanitarian law. An exami [\*342] nation of the Congo conflict will demonstrate that the events in Rwanda unfortunately would not be the last that the continent has seen, as the Rwandan conflict would create a tumultuous atmosphere in the nearby nation, then called Zaire.<sup>n56</sup>

## 2. Democratic Republic of Congo, 1996 - 2003

For seven years conflict ravaged the Congo region.<sup>n57</sup> The conflict arose as an offshoot of the neighboring Rwandan genocide, as much of the Hutu militia moved to the Congolese, then Zairian border.<sup>n58</sup> While along the border, many of these Rwandan Hutu rebels joined forces with the disenchanted Zairian people and began to rearm.<sup>n59</sup> Therefore, the conflict's violence stemmed from the marked disapproval of President Seko and the dissatisfaction that many of the Zairian people had with his leadership.<sup>n60</sup> The internal violence commenced with the overthrow of then Zairian President Mobutu Seko by rebels and rebel leader Laurent-Desire Kabila, who were backed by governments such as Uganda and Rwanda.<sup>n61</sup> Kabila declared himself president and renamed the country the Democratic Republic of Congo.<sup>n62</sup>

During the course of war, the economic situation declined rapidly leaving the country in extreme poverty.<sup>n63</sup> Thus, Congolese women had to go out into the fields, to the markets, and to the forests in order to sustain their families, fully aware that this increased their probability of becoming targets of sexual violence.<sup>n64</sup> Oftentimes, women and girls were kidnapped and forced into sexual slavery for extended periods of time during their trips to find sustenance for their families.<sup>n65</sup> Furthermore, during the course of war, the systematic use of rape as a tool of war, was often accompanied with cases of extreme brutality, such as "shooting victims in the vagina," and mutilation by knife.<sup>n66</sup> [\*343]

A Human Rights Watch report appropriately referred to the occurrence of sexual violence in the Congo during what has been termed the "African World War," as a "war within the war."<sup>n67</sup> The report explained that as the war ravaged the country and progressed, the incidence of rape and sexual violence significantly increased.<sup>n68</sup> The rape of women and children occurred primarily as a means of maintaining control of civilians and territory.<sup>n69</sup> The report further acknowledged that all kinds of rebel groups participated in sexually violating the women and children,<sup>n70</sup> and that oftentimes those committing the crimes also exposed their victims to the high probability of being infected with HIV/AIDS.<sup>n71</sup> To make matters worse, when these women and children managed to escape from areas frequently targeted by sexual assaulters, they were then subject to further rape by those soldiers and officers meant to protect them at the refugee camps.<sup>n72</sup> Thus, very few refugee camps truly existed for women during the violence.

Despite the prevalence of rape and sexual assault, few women can identify their attackers.<sup>n73</sup> Several reasons exist for this occurrence. One such reason includes the fact that many assaulters shone lights into their victims' eyes making them unable to see, or covered their faces with masks while committing the acts.<sup>n74</sup> Additionally, the victims of sexual assault had a hard time identifying their assaulters as they were often confused with other soldiers. Many of the assaulters wore army uniforms and were strangers to their victims.<sup>n75</sup> Though the conflict ended in July 2003 with the entrance of a transitional government, the region still remains unstable and riddled with violent outbreaks.<sup>n76</sup> [\*344]

## 3. Darfur, Sudan, 2003 - Present

The international community has repeatedly declared that genocide and unnecessary human suffering will not happen again, but unfortunately African nations are so easily disregarded when it is not in the economic interests of the dominating Western powers to protect them.<sup>n77</sup> Thus, "it" has happened again, and now with even more heinousness and disregard for human life. The Darfur region of Sudan is engrossed in an internal conflict reeking immense havoc on the people of the nation.<sup>n78</sup> The Janjaweed, an extremist military group, has taken countless lives of innocent Black Sudanese, in a conflict with the government in Khartoum.<sup>n79</sup>

The conflict arose as rebel groups deemed that the Khartoum government neglected the country.<sup>n80</sup> The primary rebel groups involved are known as the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), which consist of local ethnic groups.<sup>n81</sup> They are fighting against the Janjaweed forces, believed to be government supported.<sup>n82</sup> Despite a 2004 ceasefire agreement, all parties continue to be in breach of this agreement,<sup>n83</sup> and the violence committed throughout the region continues to occur without regard for the civilian population's security.

Janjaweed forces reportedly have consciously attacked the civilian populations from which the rebel groups hail, as a means of breaking down the rebel groups.<sup>n84</sup> There are reports, from men and women, that women and girls are often taken into remote areas, raped, and left for dead, if not killed.<sup>n85</sup> Moreover, Janjaweed forces keep the civilian population in great fear of their lives. Thus, individuals often resort to leaving their homes and villages, only to be vio-

lated again [\*345] while in refugee camps.<sup>n86</sup> Furthermore, the Sudanese government and Janjaweed forces, as a means of ensuring that the international community will not have evidence of the violence and abuses taking place, have stopped civilians from crossing into Chad for refuge.<sup>n87</sup> To make matters worse, Janjaweed forces set up checkpoints within Sudan leading out to Chad, using these checkpoints to tax and often rape women that are hoping to move away from the violence.<sup>n88</sup> Several cases reveal that the Janjaweed forces have raped and detained women and girls in "peace camps" as a means to ensure that the women will bring Muslim babies to term.<sup>n89</sup>

Despite repeated claims that the government will stop Janjaweed forces, the Khartoum government has done little to stop the spread of violence and the sexual assault on women and girls in the Darfur region. Early on, the Sudanese government acknowledged that they provided support to the Janjaweed and declared that these forces were not harmful but there to fight the rebel forces.<sup>n90</sup> However, as international criticism increased, the more the government denied its connection with Janjaweed forces.<sup>n91</sup> Further, the fact that the Janjaweed and government army share a nearly identical uniform suggests that the government hopes to confuse rebel forces and civilians in its attempt to quell any insurgency.<sup>n92</sup> Furthermore, the government has allowed criminals to lead Janjaweed forces.<sup>n93</sup> The government obviously has little concern for the civilian population during its at [\*346] tempts to stop rebel forces, as it has been noted that the government has assured Janjaweed militia that no criminal prosecution will be brought against it for acts committed against the ethnic groups that are deemed in alliance with the rebels.<sup>n94</sup> One former officer also declared that the government allowed the Janjaweed to act above the law,<sup>n95</sup> indicating that the Janjaweed are given government authorization to act in any way that they deem fit to rid the nation of the insurgent forces.

The Darfur crisis is another situation that allows a militia group to take advantage of the civilian population. The Janjaweed forces rape and pillage, with government support and impunity, leaving their victims little chance to report the violence and, thereby, making it well known that the government will likely overt its eyes to the actions committed by these militia forces.<sup>n96</sup> So where and how can these victims get the support they need?

### III. Analysis: The Inadequacies of Current Relief

The laws of armed conflict and international criminal law have brought sexual violence to the forefront of international prosecutions. Despite this new interest in granting greater protections to women and children from the abuses committed upon them during the course of war, much needs to be done. However, the necessary changes cannot be effectively instituted unless the proper analysis is employed discussing why so many have gone unpunished, and why victims so rarely have received justice. This section will address the issues that have been exhibited in the international promulgation of the rules and standards relating to sexual violence against women; it will then address how the domestic systems in the aforementioned African countries may pose a problem to the protection of victims rights; and, finally, it will examine how a variety of international issues pose a problem to the prosecution of sexual violence cases.

#### A. Gender Bias in the Rules/Standards

The rules governing rape in international law, as have been displayed, conveniently forget to include the terminology about the occurrence of sexual violence and the need to protect against, or to exclude women in general.<sup>n97</sup> Under international law standards, the law takes on a personality of its own, rather than always considering the [\*347] needs of the victims. Black's Law Dictionary defines paternalism as: "A government's policy or practice of taking responsibility for the individual affairs of its citizens, especially by supplying their needs or regulating their conduct in a heavy-handed manner."<sup>n98</sup> This paternalistic approach to the law creates numerous problems for victims trying to obtain justice.

First and foremost, international law has no equal consensus as to what goals it would like to achieve in protecting victims from sexual assault.<sup>n99</sup> One of the ways that has been pushed to protect rape victims has been through the utilization of prosecution.<sup>n100</sup> While prosecution may be an appropriate route for some victims to realize their goals of receiving justice and progressing through their lives, this "duty to prosecute" seems to compel the international community to assume that all victims feel the same way about their crimes.<sup>n101</sup> However, such an assumption is incorrect; thus, the same type of "justice" may be inappropriate for some victims.<sup>n102</sup> This duty-bound approach leaves the international law system at risk of being accused of "stealing conflicts" from those involved by ignoring the needs and desires of victims.<sup>n103</sup> This type of uniform "fix" for victims of sexual violence may only harm victims more, as some victims do not want to relive the events of their trauma again in front of a court.<sup>n104</sup> Some argue that, with extreme human rights abuses, nations must seek to move past the violence that occurred and toward a proper transition to a peaceful [\*348] society.<sup>n105</sup> Thus, a post-conflict society must reflect the needs of that victimized society while simultaneously taking into consideration the international community's right to intervention.<sup>n106</sup> However, a nation's desire to quickly dress its wounds may subject the victim to further damage, as an easy transition for them will nearly be impossible to make.<sup>n107</sup>

Second, the rules that ought to protect victims of sexual violence do not even mention the victims and therefore are easily overlooked.<sup>n108</sup> International law and humanitarian law promulgate that women should have protection, but nothing in international law seems to adopt the victim's point of view.<sup>n109</sup> For instance, early on in the recognition that rape and sexual violence were prohibited under the laws of war, nothing in those laws compelled commanders and soldiers to abide by those laws, as the mentality that women only existed as property of men had yet to be eliminated.<sup>n110</sup> Due to the lack of prominence given to the victims in codified international humanitarian law, combatants increasingly target vulnerable individuals, such as women.<sup>n111</sup>

Third, the gender bias exhibited in the rules pushes the concerns of the victims to the back burner.<sup>n112</sup> This is evident as the rules typically seek a retributivist theory of punishment.<sup>n113</sup> A primary problem with retributivism is that it seeks to punish those deserving punishment, but it hardly examines ways that can be employed to prevent the recurrence of these crimes.<sup>n114</sup> Thus, it leaves victims open to possible re-victimization as a means of ensuring that criminals are punished, even though it may not stop them or other potential criminals from committing these crimes. While punishment is required to ensure that the perpetrators of mass human rights violations are brought [\*349] to justice, there also need to be rules that seek not just to punish, but to ensure that the victims will not be subjected to the same violence as before.

International law has every right to protect all of its citizens. But how it is done may not be as effective and may actually serve to marginalize victims from the process of bringing their perpetrators to justice. The creation of the rules and standards seemingly only reflect the views of protecting society as a whole against mass atrocity.<sup>n115</sup> While society does in fact need protection from perpetrators of mass atrocity, the rules must first consider the needs of those already victimized so as to ensure that the sought after prosecutorial system does not merely punish but also restores.<sup>n116</sup>

The United Nations system often has condemned rape and other acts of sexual violence against women and children. However, despite the issues facing women, protection simply did not exist and, thus, no formal documents existed to eliminate the violence against women within the UN system until 1994.<sup>n117</sup> The UN General Assembly then adopted the Declaration on the Elimination of Violence against Women.<sup>n118</sup> Prior to this adoption, most governments and the international community considered the violence against women to be a private matter that does not warrant state attention or intervention.<sup>n119</sup> The international delay in responding to the needs of women through an international instrument reflects that, despite repeated rhetoric, the plight of women had not yet reached a level that warranted international attention.<sup>n120</sup> This translates into women not attaining the requisite importance to receive international attention, the attention of a male dominated international system.

However, the gender bias that exists in the UN comes forth in the action of the forces meant to bring and maintain peace and security to violence-stricken nations. The mandate of peacekeeping forces is simple - to achieve or maintain the peace. Since the UN does not [\*350] maintain forces for its peacekeeping objectives, it must look to member states to supply these forces. These soldiers, while acting under UN authority, may not always act with morality or in a non-discriminatory manner, thus threatening any sort of peacekeeping progress.<sup>n121</sup> There have been numerous occasions where UN "peacekeepers" have actually contributed to continuing violence towards women, thus creating yet another obstacle for these victims seeking justice.<sup>n122</sup>

When peacekeepers adopt the view that the protected should be grateful for the services rendered they can fall into a pattern of committing atrocities against those that they are meant to aid. For instance, UN peacekeeping forces violated the trust and weaknesses of its African protectorates when they raped and sexually assaulted women and young girls.<sup>n123</sup> Belgian forces in Somalia were accused of committing all sorts of atrocities against Somali citizens.<sup>n124</sup> These Belgium soldiers committed various acts of torture, sexual violence and even murdered the citizens of the nation, despite their purported objective of being a force that shields these citizens from abuse and violence.<sup>n125</sup> In addition to Belgian troops committing atrocities, reports also tell of Italian forces sexually abusing and publicly raping young Somali girls.<sup>n126</sup> These instances of violence demonstrate that individuals in their peacekeeping capacities can behave in any way they please, as they are the "good guys."<sup>n127</sup> Convinced that their sporadic misbehavior is nothing compared to what has already occurred to a war-torn nation, peacekeeping forces' gender bias amounts to added suffering for traumatized sexual violence victims.<sup>n128</sup> This complete disregard for the worth and the value of the lives of Africans makes [\*351] the realization of justice nearly impossible for those suffering from war and rape.<sup>n129</sup>

Though Somali peacekeeping troops behaved atrociously, the behavior of UN soldiers during the Rwandan conflict also showcase that paternalistic attitudes only make matters worse for women sexually brutalized. Under the tenure of Secretary General Boutros-Boutros Ghali, he facilitated an arms deal that resulted in the Hutus being supplied with weapons utilized to carry out its genocide against the Tutsi population.<sup>n130</sup> This strong link between UN leadership and

those responsible for the Rwandan genocide makes it difficult for victims, Rwandan Tutsis in particular, to believe that this organization will provide justice.<sup>n131</sup>

Finally, UN forces have also been involved in committing atrocities in the Democratic Republic of the Congo. In the Congo, UN forces reportedly engaged in various acts of sexual violence and rape, with little being done to correct or punish these wrongs.<sup>n132</sup> Given their paternalistic view, soldiers have reportedly raped women and girls, and, to avoid negative publicity, have provided food and supplies to them so that it seems as if they simply had sex with a prostitute.<sup>n133</sup> The raping of women and girls by peacekeeping forces remains so rampant in the Congo that many women are impregnated by the forces with little being done to bring those individuals to justice.<sup>n134</sup> UN forces abused women and girls so frequently that the people of the Congo likely will not remember the peacekeepers for peacekeeping, but instead "for running after little girls."<sup>n135</sup> **[\*352]**

Gender bias, engrained in the minds of those serving on the behalf of the UN, creates additional problems for sexually violated women. Women are seen as helpless and in need of saving from "good shepherds." This mentality in the creation, enactment, and enforcement of rules, makes it easy for those charged with protecting women to overlook their needs, and to perpetuate additional crimes against them.

#### B. Failures in Domestic Legal Systems

The prospects of war for combatants range from military might to economic prowess, but no such happiness exists for civilians subjected to sexual assault.<sup>n136</sup> In addition to the troubles faced during the conflict, once at an end, the prospects do not improve for non-combatants.<sup>n137</sup> The trouble of being denied justice exists not merely with the notion of war and the blatant disregard for the laws of war meant to protect civilians. It also exists with the national systems on the African Continent that, once out of a violent conflict, they do not provide a proper avenue for rehabilitation or acceptance of victims of sexual violence.<sup>n138</sup> This then makes it nearly impossible for victims of rape and other sexual assaults to achieve justice.<sup>n139</sup>

Victims of sexual violence face serious hurdles to justice in their domestic systems due to the obviously weakened infrastructure remaining within the country in post-conflict situations. This is due to the fact that receiving justice in a system where there exists no system to protect them, is unfathomable.<sup>n140</sup> For instance, Rwandans attempted to restore their system through the implementation of a "community conflict resolution" system that would be able to handle the plethora of cases filed to bring those involved in the genocide to justice.<sup>n141</sup> Further, when the domestic systems have to train and make **[\*353]** structural changes prior to commencing trials against the accused, it may cause victims to lose faith in the potential justice provided by the system.<sup>n142</sup> Though the national court systems may be engaged in prosecuting criminals responsible for the heinous crimes during the course of conflict, these may not be the persons that committed acts of sexual violence. Thus, the system fails to appropriately address victims' needs.<sup>n143</sup> Finally, where domestic systems do not offer the necessary protection to victims, so that they may safely come forward and provide sufficient evidence, then there is no system at all.<sup>n144</sup> With such hurdles in place, it remains difficult, if not impossible, for those seeking justice through their domestic systems to receive any meaningful aid in their quest for restoration.

The biggest problem with the domestic sphere in the protection against sexual assault does not exist in the law, but rather in the cultural divide between life and the law.<sup>n145</sup> Victims of sexual assault, women and children, believe that they cannot continue to live due to the ongoing shame they feel and the inability for their communities to accept them after rape.<sup>n146</sup> It is well documented that the women subjected to sexual assault, particularly in the presence of family members, often run away as they cannot live with themselves amongst their relatives.<sup>n147</sup> This unfortunately stems from the history of sexual violence during armed conflict. Since women were seen as property of males in society, those women that were violated were viewed as **[\*354]** damaged goods, property not worth retaining.<sup>n148</sup> Thus, these victims, these "damaged goods," never receive the necessary support that will allow them to move outside of their victim-hood. The stigmatization branded on victims of sexual assault forces fewer of these women to come forward about what happened to them. This makes it nearly impossible to bring the individual perpetrators to justice.

Another major problem that exists for victims at home stems from the fact that the nation often hopes to move on from the conflict mentality.<sup>n149</sup> This means that the nation looks beyond the plethora of crimes committed during the course of war, as a means of ensuring that progressive redevelopment can take place.<sup>n150</sup> Though nations must ensure that the victims do not become the perpetrators, the fact that national development necessarily comes before the needs of victim restoration showcases a problem in and of itself.<sup>n151</sup> This reveals that victims may never truly achieve "justice" in the post-conflict sense, as the primary focus of a nation emerging from the conflict will not be to correct the wrongs committed against victims of sexual violence, but to repair the state.<sup>n152</sup>

The national interest in prosecuting gender violence is not viable for states emerging from an extended conflict. Rape victims seemingly do not have the necessary protections against their perpetrators.<sup>n153</sup> War-torn African nations have to emerge not only from conflict, but also from a conflict that has caused economic devastation.<sup>n154</sup> Therefore, once that conflict ends, their major concern quickly returns to ensuring that the conflict has not crippled the economic infrastructure beyond repair.<sup>n155</sup> Every nation must concern itself with self-perpetuation, and, unfortunately, it seems to come at the expense of the victims. The economic national interest requires that leadership [\*355] focus on ways that will bring money back into the country after the cessation of violence.<sup>n156</sup>

One other problem faced by victims in the domestic sphere is the development of police forces. Police forces are usually comprised from the pool of men who served in the military and are the same men who may be perceived to have been involved in committing some of the atrocities against the civilian population.<sup>n157</sup> The new police forces may not be readily distinguishable by victims; thus, it may pose another problem for those victims attempting to receive justice.<sup>n158</sup> This problem can also be seen when government officials do not push to prosecute or bring to justice former military and police forces that may have been acting in the "heat of the conflict."<sup>n159</sup> Justice for victims requires that the post-conflict police force exercise independent decision-making that will not favor former military counterparts, but will seek to bring those individuals to justice that have sexually assaulted civilians during the course of the conflict.

Finally, another defeat for victims exists in the codification of the laws. For instance, the 1972 Congolese Military Justice Code does not specifically refer to sexual violence.<sup>n160</sup> Furthermore, the 2002 Military Code does not have a provision regarding the protection against sexual violence,<sup>n161</sup> indicating that, despite the rampant occurrence of sexual violence, the Congolese military does not think much of ensuring that its soldiers do not commit sexually violent acts against its civilian population.<sup>n162</sup> While the criminal code of Congo may be brought against civilians and military personnel,<sup>n163</sup> without the law being set forth in the military code, the Congolese have not given much credence to penalizing military personnel for committing acts of sexual violence.<sup>n164</sup> [\*356]

These problems make evident that victims of sexual violence during armed conflict scarcely can receive justice in their domestic homelands. Though such hurdles may exist in this situation, it is up to the state to ensure that these are not the dominant factors that will cause the re-victimization of individuals already shunned by a society that refuses to open a dialogue about sexual assault. Nations diligently seek to aid victims, but they are overly concerned with correcting the woes inflicted upon the state. Thus, the interests of victims are often left to seethe within them, as the possibility for corrective state action dwindles away, and the state progresses beyond conflict.

### C. The Impact of International Tribunals on Rape

#### 1. International Criminal Tribunal for Rwanda (ICTR)

The International Criminal Tribunal for Rwanda (ICTR) Statute sets forth the rules and jurisdiction under which the body acts to prosecute the crimes that were committed during the Rwandan conflict of 1994.<sup>n165</sup> The second article of the ICTR Statute declares "The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph two of this article or of committing any of the other acts enumerated in paragraph three of this article."<sup>n166</sup> The ICTR Statute goes on to define what genocide means and explicitly provides that genocide shall include the phrase, "causing serious bodily or mental harm to members of the group."<sup>n167</sup> Additionally, the ICTR Statute explicitly declares rape as a crime against humanity, when it is committed in a widespread or systematic attack against a civilian population.<sup>n168</sup> Finally, article four of the ICTR Statute is identical to common Article Three of the Geneva Conventions, which includes the right to prosecute "outrages upon personal dignity," and treatment that is cruel, such as torture and mutilation, are prosecutorial offenses.<sup>n169</sup>

The ICTR Statute does what few international legal instruments have done by allowing rape victims to stand before the court not [\*357] based upon another crime, but due to the explicit right for the court to prosecute rape as crime against humanity. Given the ICTR Statute's new approach, the tribunal has initiated a number of cases that have and will change international law and the legal status of rape in international law.

a. Akayesu Trial. Jean Paul Akayesu served as a "mayor" of the Taba Commune; his trial marked a significant change in the protection against genocide and the prosecution of rape.<sup>n170</sup> Akayesu was accused of being responsible for the death of several individuals serving in influential positions and campaigns throughout the area that resulted in the burning of homes and the killing of civilians along the way.<sup>n171</sup> During his trial, it was discovered that acts of sexual violence occurred under his authority with his implicit approval.<sup>n172</sup> In issuing a judgment against Akayesu, the tribunal found his guilt stemmed from his encouragement of acts of rape committed by soldiers under his authority.<sup>n173</sup> The court further explained that rape constituted an integral part of the genocide committed in the Taba commune.<sup>n174</sup> Addition-

ally, Akayesu was found guilty of crimes against humanity for rape.<sup>n175</sup> His guilty verdict marked the first time an individual was convicted for rape and sexual violence committed as an act of genocide in an international tribunal.<sup>n176</sup>

In its decision, the tribunal found that sexual violence was linked to torture and cruel treatment.<sup>n177</sup> The court in the Akayesu trial defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."<sup>n178</sup> The tribunal's findings of guilt marked a significant development in the prosecution of sexual violence. The tribunal's decision placed rape and sexual violence on a landscape with other heinous crimes and gave it the credence that few international tribunals have been able to provide.<sup>n179</sup> The definition set forth by the court allows a broad reading of rape, in order to prosecute those individuals not traditionally seen as conducting rape, as a means of ensuring that rape victims will see their perpetrators, and their commanding officers, brought to justice.<sup>n180</sup> Although Akayesu sought an appeal of his conviction of a life sentence,<sup>n181</sup> his appeal failed.<sup>n182</sup>

b. *Prosecutor v. Semanza*. Mr. Laurent Semanza was brought to trial through a referral from the Office of the Prosecutor.<sup>n183</sup> Among the charges brought against him, the prosecutor accused him of instigating and encouraging the militia to rape Tutsi women in several communes.<sup>n184</sup> In addition to these charges, Semanza also stood accused of rape and outrages upon personal dignity.<sup>n185</sup>

During the course of the trial, the tribunal acquitted Semanza on one count of rape, not due to lack of evidence, but due to inadequate notice to the accused.<sup>n186</sup> However, Semanza was convicted on a rape charge included in the tenth count brought against him.<sup>n187</sup> The court found that, due to his verbal authorizations and physical presence during the course of rapes and sexual assaults, Semanza constituted a principal perpetrator of rape during the course of the violence.<sup>n188</sup> Further, the trial court found that the accused's instigation of rape and torture constituted crimes against humanity.<sup>n189</sup>

The tribunal's decision in this case once again revealed that those guilty of initiating and instigating crimes against humanity will not be allowed to escape prosecution. Though Semanza was not convicted on all the rape charges, the court nonetheless examined the entire charges brought against him and deemed that his actions warranted conviction as a crime against humanity.<sup>n190</sup>

c. *Prosecutor v. Gacumbitsi*. In a similar trial to the Akayesu case, the ICTR examined whether Gacumbitsi's actions constituted a crime against humanity.<sup>n191</sup> Sylvestre Gacumbitsi served as a bourgmestre (mayor), of the Rusomo commune until April 1994.<sup>n192</sup> Gacumbitsi stood accused of instigating a crime against humanity by compelling [\*359] soldiers to rape and condoning the commission of rape against Tutsi women and girls.<sup>n193</sup>

In the decision of the tribunal, the court used the precedent of the Akayesu trial in order to establish whether Gacumbitsi's conduct satisfied their previous definition of rape.<sup>n194</sup> In reaching its conclusion, the court clarified that "any penetration of the victim's vagina by the rapist with his genitals or with any object constitutes rape."<sup>n195</sup> The trial chamber held that Gacumbitsi authorized and condoned the systematic rape of Tutsi women and girls.<sup>n196</sup> Specifically, the court found that Gacumbitsi had sent a message over the radio waves that advised the soldiers that Tutsi women and girls should be raped and that, shortly thereafter, seven Tutsi women and girls were raped, making him liable for the occurrences of those rapes.<sup>n197</sup> However, though Gacumbitsi was accused of being individually involved in the raping of three different women, the trial chamber did not find him guilty for those crimes; it did, however, recognize that the rapes of these women had in fact occurred.<sup>n198</sup> The trial court sentenced Gacumbitsi to a single sentence of thirty years imprisonment.<sup>n199</sup>

d. *Other ICTR Cases*. The ICTR has continued to rule on a variety of cases against individuals responsible for the heinous crimes of the 1994 Rwandan genocide, and the court continues to make advancements through its decisions.<sup>n200</sup> However, in its quest to bring the Rwandan people back together, the court's goal is to bring as many individuals to justice as possible, which occasionally means that sexual assaulters may be overlooked for those guilty of other crimes.

In the case of *Prosecutor v. Omar Serushago*, the trial chamber charged Serushago with several counts of genocide, murder, torture and rape as crimes against humanity.<sup>n201</sup> The court accepted the accused's plea of guilty on four out of the five counts,<sup>n202</sup> and the accused plead not guilty for the crime against humanity of rape, which was the [\*360] fourth out of the five counts.<sup>n203</sup> Due to his not guilty pleading, the tribunal was authorized, under Rules 51 and 73 of the court, to drop the charge against him.<sup>n204</sup> The sentence for his violence committed during the Rwandan conflict was a single term for fifteen years of imprisonment.<sup>n205</sup>

Additionally, in the case of *Jean de Dieu Kamuhanda*, the tribunal found him guilty of a crime against humanity for his instigation and perpetuation of rape.<sup>n206</sup> In this decision, the trial chamber adopted the definition for rape given in the Kunarac judgment.<sup>n207</sup> The court defined rape as:

The actus reus of the crime of rape in international law is constituted by: 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 sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.<sup>n208</sup>

The court properly addressed Kamuhanda's role in his brutal transgressions of the women and children of Rwanda and brought him to justice for the necessity of the country.<sup>n209</sup>

The tribunal in Arusha has rendered twenty-five decisions since its inception, with six of those convictions on appeal, nine individuals still awaiting trial, and twenty-eight cases currently before the court.<sup>n210</sup> In its decisions, the ICTR has been a force ensuring that those guilty of sexual violence will be brought to justice.<sup>n211</sup> The ICTR did not look solely at traditional forms of sexual violence, but noted that acts - such as forced marriages, pregnancies and mutilation - amounted to genocide and crimes against humanity.<sup>n212</sup> Also, the ICTR is currently trying its first female defendant, Pauline Nyiramasuhuko for rape as a **[\*361]** war crime, for her incitement of Hutu men to rape and kill Tutsi women and children.<sup>n213</sup>

## 2. International Criminal Tribunal for the Former Yugoslavia (ICTY)

The International Criminal Tribunal for the Former Yugoslavia (ICTY) came into existence after the conflict in the former Yugoslavia in 1991.<sup>n214</sup> The Security Council passed Resolution number 827 to establish the court due to the international and humanitarian law violations that occurred during the conflict.<sup>n215</sup>

The case law from this tribunal has also been progressive in the protection of rape and sexual violence in international armed conflict.<sup>n216</sup> The ICTY Statute, in article two, declares that it has the jurisdiction over grave breaches to the Geneva Conventions.<sup>n217</sup> The ICTY Statute has strong similarities to the ICTR Statute and, in articles four and five, discusses that it has the ability to prosecute genocide and crimes against humanity, and explicitly includes rape as a war crime.<sup>n218</sup>

In cases of the most significant relevance to the protection against sexual violence, the ICTY jurisprudence seems to diminish some of the power of the ICTR jurisprudence on the subject.<sup>n219</sup> In the Dusko-Tadic trial, Tadic stood accused of thirty-six counts of violating international criminal law.<sup>n220</sup> The tribunal found Tadic guilty of eleven of the thirty-one charges against him.<sup>n221</sup> Though some of the charges relating to sexual violence were dropped,<sup>n222</sup> due to the fear of the witness, the trial chamber still found him guilty of aiding and abetting in crimes involving sexual mutilation.<sup>n223</sup> Tadic was subsequently sentenced for each count to serve between six and twenty years concurrently.<sup>n224</sup> **[\*362]**

In the Anto Furundzija trial, Furundzija served as a local commander of a special military unit and stood accused of violating the laws and customs of war, which included the act of rape.<sup>n225</sup> The facts of the case state that Furundzija did nothing while another soldier forced a woman to engage in oral and vaginal sex.<sup>n226</sup> The court thus found him guilty of the violation of the laws and customs of war.<sup>n227</sup> The court re-opened the case to examine the credibility of a witness declared to have Post-Traumatic Stress Disorder.<sup>n228</sup> In its decision to determine whether the witness' testimony should be thrown out, the court declared that the Post-Traumatic Stress Disorder did not render the witness non-credible, but rather a person with such a disease that could be a "perfectly reliable witness";<sup>n229</sup> the court refused to vacate the conviction.

## 3. International Criminal Court (ICC)

The ICC came into being in 2002 under the Rome Statute.<sup>n230</sup> The Rome Statute is the instrument that provides the ICC with the power of authority to hear cases.<sup>n231</sup> The Rome Statute authorizes the jurisdiction of the court in the same or similar areas as the tribunals for Rwanda and the former Yugoslavia, such as genocide,<sup>n232</sup> crimes against humanity,<sup>n233</sup> and war crimes.<sup>n234</sup> Additionally, the statute allows jurisdiction for crimes of aggression, but explains that it will provide a definition for what it means by this at a later date.<sup>n235</sup>

In addition to prosecuting war criminals, the ICC has done something no other international tribunal or court has done to date. The ICC has established an independent fund that will provide victims of armed conflict with funds to assist in rebuilding their lives.<sup>n236</sup> The purpose of the ICC Victim Trust Fund is to ensure that victims of war **[\*363]** have a means to repair their lives by channeling money to victims.<sup>n237</sup> The fund exists and may be given to an individual or a collective unit on behalf of victims.<sup>n238</sup> Further, when the court requires a convict to pay and the funds are unavailable, the court may seek the funds through external sources.<sup>n239</sup> These sources include governments, international orga-

nizations, and individuals. <sup>n240</sup> Additional funding may come from voluntary contributions, but the Trust Board must first approve such contributions. <sup>n241</sup>

The history of sexual violence in armed conflict extends beyond the conventional laws of war. <sup>n242</sup> Often looked upon as merely "collateral damage," the victims of rape are only recently getting the acknowledgement necessary to stop the rampant occurrence of sexual violence during the course of armed conflict. <sup>n243</sup> Rape victims may now be the individuals receiving the necessary attention under international law, but what happens if the international criminal law forgets or when the law simply refuses to acknowledge these perpetrators of sexual violence? These questions, quite likely, may only have theoretical answers.

#### D. International Dimensions

The international community has been at the forefront of protecting the rights of sexual violence victims and seeking to correct the issues associated with achieving justice for them. <sup>n244</sup> However, for those seeking justice in a system overlooking sexual assault for its own designs, international law offers the greatest pitfalls. <sup>n245</sup> An examination of the progress in the international system will reveal that international courts and tribunals are at the forefront of changing how the world views rape. Then, it will examine potential problems in each of the tribunals; the problem with making rape illegal under interna [\*364] tional law; and, finally, how the type of conflict that often occurs on the continent has made it difficult to bring true justice to sexual assault victims after the conflict has ended.

##### 1. Trouble in the Tribunal System

International criminal law has been greatly advanced with the developments of international tribunals and courts. Their examinations of grave breaches to the peace have brought individuals responsible for the war crime of rape to justice. <sup>n246</sup> However, not all that glitters is gold. These tribunals, like all court systems, face difficulties, and these difficulties lend to the reason that victims of sexual violence during the course of armed conflict may never actually receive the justice owed to them. <sup>n247</sup> The UN Commission on Human Rights (UNCHR) has declared that while the progress of the international tribunals has been a success, there still remains a gap in justice as victims, more often than not, rarely have the opportunity to see their perpetrators brought to trials. <sup>n248</sup>

a. ICTR. Despite the immense progress that the ICTR has had over the years, there still exist significant hurdles to ensuring that victims of sexual violence are protected. <sup>n249</sup> In the decision of *Jean de Dieu Kamuhanda*, the court's adoption of the *Kunarac/Furundzija* definition of rape reflects that its decisions would take on the narrower, less victim-centered definition of rape adopted by the ICTY. <sup>n250</sup>

Another major hurdle associated with the ICTR was the insensitivity of the staff, which resulted in many victims not coming forward to share their experiences. This disabled many victims from receiving the justice owed to them. <sup>n251</sup> This insensitivity grew out of the mistaken belief that Rwandan rape victims would not share their tragedies, coupled with the lack of professionalism in investigation and inter [\*365] viewing techniques. <sup>n252</sup> Finally, the ICTR has had numerous problems bringing charges for acts against sexual violence, due to the poor gathering and protecting of the evidence to prove that such acts occurred. <sup>n253</sup>

Beyond this difficulty, the ICTR has increasingly diminished bringing cases against sexual violence. <sup>n254</sup> Typically a drop in caseload would not normally be negative, but this decline does not arise because all criminals have been brought to justice. Rather, the court is seeking to prosecute as many cases as possible. <sup>n255</sup> This diminishing number of prosecutions on sexual violence may indicate to victims that attempting to pursue or continue with a new prosecution is futile and without merit. <sup>n256</sup> Furthermore, the reduction in caseload serves as an indicator that the tribunal may be abandoning the idea that prosecuting sexual offenders may not bring Rwanda out of its tattered past, thus leaving victims underserved.

Another problem that exists in this tribunal lies in the expiration date of trials. The ICTR is supposed to cease hearing cases in December, 2008. <sup>n257</sup> While the tribunal is not meant to last forever, these arbitrary dates may do more to impede the issuance of justice rather than help it. <sup>n258</sup> When the tribunal is required to stop hearing cases, there may be limited options for victims that have not seen their perpetrators brought to justice to ever receive that chance. <sup>n259</sup> The specific [\*366] nature of these tribunals aided in bringing sexual assaulters to justice primarily because their main goal was to focus on bringing justice to the formerly war torn area. <sup>n260</sup> With the cessation of trials quickly approaching and the tribunal's primary concern of ensuring that the Rwandans have a fresh start, the likelihood of victims receiving justice from sexual assaulters diminishes as the tribunal closing date nears. <sup>n261</sup>

Other ICTR institutional problems also amount to a roadblock for those seeking justice. During its duration, the ICTR's infrastructure has progressively advanced, but, with the number of cases pending, it makes it difficult to handle the caseload.<sup>n262</sup> When this occurs, it creates yet another barricade to justice, as the inability to handle cases amounts to delays in trials.<sup>n263</sup> With this, already reluctant victims are required to wait extended periods of time to get their violators to pay for their conduct.<sup>n264</sup> Though some may not mind waiting, some may be unable to take off from work to afford the extensive travel or to continue to harbor the "need to prosecute."<sup>n265</sup> Furthermore, the court's original structure did not properly accommodate witnesses and victims thus failing to provide the necessary privacy and discretion to allow them to feel comfortable in an unfamiliar environment.<sup>n266</sup>

These problems and more showcase to victims that even the "good guys" have difficulty ensuring that they receive justice. The ICTR tenure soon will expire, and if it has not always properly protected these victims, the question remains: who else will?

b. ICTY. The ICTY Kunarac decision adopted the tightened Furundzija case definition of rape making this the new standard upon which rape will be judged rather than the broader one set forth in the Akayesu decision.<sup>n267</sup> This is problematic as the new definition requires the victim to show there was no consent.<sup>n268</sup> This means that prosecutors and defense attorneys will be turning toward the victim and questioning her as to whether she consented to various forms of sexual penetration.<sup>n269</sup> This type of inquiry likely will only cause fewer victims to come forward about their tragedy, and once again leave numerous culprits outside of the law.<sup>n270</sup> While both tribunals have made headway in the prosecution of rape jurisprudence, the ICTY seems to have done less in making victims of armed conflict whole again.<sup>n271</sup>

While the ICTY may have little to say about how the ICTR and other African tribunals hand out justice to its victims, its rulings may hold persuasive force, thus having a direct impact on the justice granted to African women and children. For African nations, adopting the rape standard from Furundzija may translate into supporting a system that ignores the cultural needs of its victims.

c. ICC. One major hurdle to victims of sexual violence in the ICC is that it exercises prospective jurisdiction, which allows the prosecution of crimes after the Rome Statute was entered into force.<sup>n272</sup> This feature, though logical, remains problematic due to the fact that the crimes of the past, which have not been delegated to a specific tribunal, likely will go unpunished.<sup>n273</sup> Without the ability to prosecute for the criminal activity of those events that occurred prior to 2002, those that have been responsible for some of the heinous crimes of the twentieth century will likely escape with impunity.

An additional problematic avenue that exists within the ICC surrounds how the cases arrive before the court. The court can and will only hear cases that have been referred to the court by a state party to the statute, or through one referred by the Court's Office of the Prosecutor (OTP).<sup>n274</sup> This approach leaves many cases unreported. Furthermore, this type of discretion unfortunately may leave victims' justice at the hand of political forces.<sup>n275</sup> It is problematic to expect individuals, who have barely escaped with their lives from a conflict that has torn their communities and their souls apart, to approach [\*368] their governments that usually have little regard for "loose" women and report their experiences of rape and sexual mutilation.<sup>n276</sup> The shame involved is intense, and the ICC system seems to disregard how the victims feel; the victims who so often want to forget the horrible violence inflicted upon them during the course of war. However, the statute declares that non-state parties can fall under the court's jurisdiction so long as the non-state party accepts the court's jurisdiction.<sup>n277</sup> This does not resolve the issue of how the victim's story will be heard by the court. The court's objective asserts to stop the impunity in international criminal law and to ensure that human rights and international criminal law violators will be brought to justice.<sup>n278</sup> Thus, if no state, party to the Statute or non-state party, refers the case to the court, or if the Office of the Prosecutor fails to bring a case, where does that leave the victim? It leaves her naked, raped, and alone without any legal relief.

Finally, another problem with the ICC and its ability to bring true justice to victims subject to sexual violence during the course of war is that the court's jurisdiction remains concurrent, rather than superior, to that of the national courts of states.<sup>n279</sup> While this is true, if the state fails to act in the face of blatant violations of international criminal law, and the court establishes that no other state has the ability or the willingness to act, then it may act independently to determine if an issue exists.<sup>n280</sup> If this safeguard against states fails, there are few if any options left for victims to pursue, as the difficulty of determining the identity of the perpetrator increases incrementally as time progresses.<sup>n281</sup> Furthermore, because of state sovereignty, not allowing this court to have superior jurisdiction over the national court systems<sup>n282</sup> seems to signal to both the states and victims that the court has little, if any power, to truly correct the wrong that was done to them.

Despite the problems that may arise within the ICC, the recognition that the court has given to the fact that victims of international crime suffer not mere physical harm, but also mental and financial harm, remains unprecedented. Nothing destroys a family more than when the sole economic provider can no longer work. Not to mention when the provider is unable to provide for her children and this [\*369] causes her shame to increase, compelling her to abandon them becomes an additional burden to an already crippled society. War costs. While it is true that it costs with lives, it is has great financial cost to victims under its indiscriminate hand.

## 2. The Problem of Illegality

If only the trouble faced by victims of sexual violence only stemmed from external actors unaware of what it means to be "raped." But these women and girls do not have the luxury of such simple hurdles. A primary force in solidifying justice and ensuring that victims are protected from rape and sexual violence is its definition. However, there currently exists no uniform "international" definition as to what rape means and who has committed rape.

a. Defining Rape? As described previously, the ICTR and ICTY have each established how it will rule on whether or not rape has in fact occurred. Though the Akayesu trial "definition" for rape provides a more victim-centered approach, it nevertheless does not traverse the realms of the tribunal. Furthermore, the rape "definition" offered from the Yugoslavia tribunal, turns away from the Akayesu definition, indicating that the meaning of rape can and will change over time. Though it may be appropriate to apply different standards depending on jurisdiction, without an international standard for rape, then those seeking justice can only hope that they are guarded by a jurisdiction that will take into consideration their needs.

This definitional problem also extends further into how the international community addresses the conventions that it passes for women.<sup>n283</sup> While ninety percent of states recognize the "importance" of protecting women from abuses through their adoption of the Convention on the Elimination of Discrimination Against Women (CEDAW), many of them have cut down the impact of such an international instrument by adopting reservations.<sup>n284</sup> When states take sweeping reservations to the crux of an international convention, such as CEDAW, it leaves victims in a system full of rhetoric but little action.<sup>n285</sup> The CEDAW committee has pushed for a universalistic approach for women's rights so that states can no longer claim that religious or cultural practices prohibit their full respect for women.<sup>n286</sup> [\*370] Where international instruments, and the committees responsible for interpreting them, have indicated that the document is meant to be broad and far reaching, states' continued reservations amount to a discord in meaning that diminishes the protection of women.<sup>n287</sup>

b. What Standard Applies? The easy part about bringing justice to victims of sexual violence is that all agree that these victims should be afforded the protection of either national or international law. So how will international law protect victims? The law must first determine what standard will be applied in looking at victims and suspects. Though this seems painstakingly easy, the simplicity makes it dangerously evasive primarily due to the definitional elusiveness of rape.

Even if we knew what definition to use in order to identify when rape has or has not occurred, the question still remains as to who decides what definition will be appropriate to meet the needs of African rape victims. A standard designed to punish may not necessarily provide the justice needed for women. Thus, the standard may need to take into account the needs and desires of its victims in order to determine how best to secure justice.

1) Western Standard. An examination of how the United States defines rape may provide insight into how African courts look at rape and its victims. It is important to recognize that this is merely a definition, but it will help to understand how the American culture views rape, thus ultimately providing insight into how it will prosecute such perpetrators.

The western standard for rape has been altered over time, indicating that some of the original limiting terminology did not sufficiently protect victims from rape. At common law, rape was defined as, "unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will."<sup>n288</sup> This definition later evolved into a definition of rape that speaks more broadly to the nature of the crime thus encompassing more perpetrators of rape and sexual violence.<sup>n289</sup> This translates into providing women and girls the [\*371] ability to prove sexual assault against more perpetrators, and having an easier time doing it.

2) Cultural standard. Even though the American system is unparalleled in terms of development and jurisprudential vigor, is this the systematic approach that Africans want to adopt? The evolution in what a widely utilized law dictionary espouses on the meaning of rape indicates that Americans realize that broader definitions of rape aid victims. The U.S. system, however, leaves the nature in which rapes are prosecuted up to each individual state, and each state can

adopt what rape definition and standard it will use to bring those accused to justice. However, Africans may need more than a disparate system that allows local jurisdictions to define rape as they see fit. A cultural standard may be most appropriate for ensuring that African victims receive the justice they deserve. <sup>n290</sup>

This standard may amount to a broad sweep, but its necessity cannot be understated. First, a standard of rape that looks at bringing justice to victims through their eyes will enable more violators to be brought to justice. <sup>n291</sup> Secondly, this standard will accommodate victims by not subjecting them to re-victimization during the trial process. <sup>n292</sup> Finally, such a standard would likely generate within victims the type of perception needed to ensure that they do not feel as if they are worthless, but rather properly place the shame and ridicule on the perpetrators of such heinous crimes.

The definition of rape must not allow those committing those acts any leeway. The victims of these crimes were not afforded this indulgence. A standard appreciation of the trauma and the heinous actions of the criminal's intent must be promulgated and accepted by the international community as one adamant about bringing justice to victims of sexual violence. The standard must and should send a message: that such crime will not be tolerated and that the law will no longer protect perpetrators over victims. [\*372]

i. Conflict Classification. Victims rarely get the necessary justice they deserve as often times the conflicts that have wreaked havoc on their psyches do not occur on an international basis, and thus the conflict falls below the international spectrum. However, these conflicts, though they are meant to trigger the international radar, often fall just below that line, causing the often necessary international support to go unachieved.

With intrastate conflict, they are often conducted upon ethnic lines or perceived ethnic divides. <sup>n293</sup> For instance, the conflict in Rwanda occurred between the Hutu and Tutsis, and, since they shared many common cultural features, they did not technically constitute separate ethnic groups. <sup>n294</sup> While the Trial Chamber found that they were separate and distinct groups due to decades of discrimination, <sup>n295</sup> this may not be the case for other similar situations. Without the definition of a distinct ethnic group, genocide cannot occur, and, thus, the victims that have been targeted indiscriminately are left with no proper remedy under international law. <sup>n296</sup> Furthermore, when the conflict can hardly be identified as to whether it exists between two separate ethnic groups or a single ethnic group, the international community may not realize the seriousness in the conflict. <sup>n297</sup>

The blessing and the curse of international law is that it is constantly changing. This constant change amounts to development in certain areas, while it may be lacking in regards to others. <sup>n298</sup> When international law has not yet promulgated sufficient rules to protect those victims from the atrocities of war, then those victimized remain open to continued abandonment. The devastated nations of Rwanda, Democratic Republic of the Congo, and Sudan, can attribute many of their victims of sexual violence to civil war. Though the international community intends to protect all, those that fight among themselves often are the last to receive any recognition, and thus any help. [\*373]

#### IV. Commentary

The recent advancement in bringing those that have been heinously taking women and children as spoils of war to justice will necessarily have some drawbacks. These drawbacks do not necessarily incapacitate the system from bringing justice, but it just does not accomplish what the victims of sexual violence need. Their needs go far beyond seeing their violators brought to "justice," by placing them in prison cells for arbitrary periods of time. The time has come for the international community to embrace a new approach that focuses on the victim first.

##### A. Rape: Not Just Criminal

A victim of sexual violence will rarely discuss how she hopes to see her perpetrator brought to justice. Though she does in fact want this to happen, what she really wants is her life back--the life that was stolen, violated, and left to rot in a society that attempts to cover her stench. She does not want him to go to jail, she wants him to pay. She wants to make him feel destroyed, as his penetration destroyed her. She desires both civil and criminal justice. So why has the international community not come forward to do this? Why do they just chain them, and allow them to laugh in their cells, or recollect how they took her pride, her dignity, while she is left to explain away her pains, fears, and wounds to a husband that is disgraced by her, a child that is shamed by her, and a society that no longer sees her?

The time has come for the international community to require those that commit heinous crimes to pay. Rape and sexual assault cannot be only criminal, but must be coupled with a civil penalty as well. The reasons for this are plenty, as civil penalties achieve what criminal penalties can never do; they offer a way to financially compensate the victim for what was stolen from them. <sup>n299</sup> Some believe that money cannot cure the ills of the past, but it may still cause perpetra-

tors to recognize that they have not shamed the victims; they are the ones that have done something shameful, and they must give back as a way for making up for that shame.

Civil payments are necessary because oftentimes soldiers and rebel military groups typically target civilians as a process in the war. They seek out civilians and expect that they will not have to pay for their actions. Due to their disregard for the law, these individuals should have to pay fines. States are often required to make reparations [\*374] for abuses that have been committed toward other states, as when Germany had to compensate the international community after its atrocities in WWII, so too must the criminals that bring havoc to economically deficient communities and states pay.<sup>n300</sup>

The law should also allow for possible state imputation, as sometimes there may be no other way for the victims to collect. Placing the blame upon any and everyone may cause problems in achieving justice for women who have specific perpetrators whom they would like to see brought to justice. However, victims oftentimes feel cheated and destroyed not simply due to the actions of their abusers, but rather they may perceive the states to be at fault for allowing such heinous activities to occur.<sup>n301</sup>

A good example of state imputation of criminal activity involves the Japanese "comfort" women utilized as sex slaves during World War II.<sup>n302</sup> These victims sought to pressure the Japanese government decades after the creation of the "ianfu system" <sup>n303</sup> by asking for the government to pay reparations for their subjugation under the Japanese military.<sup>n304</sup> Furthermore, the international community recognized in the early nineteen-nineties that the Japanese government had legal obligations to the former military sex slaves.<sup>n305</sup> Though "comfort" women have faced numerous difficulties in filing suit in the Japanese system,<sup>n306</sup> these women reveal that victims of sexual battery can ask their respective nations for due compensation. Furthermore, these comfort women, when blocked from their national court systems due to various loopholes, sought and achieved the ability to make their national government pay for the crimes promulgated against them, and ultimately the international community.<sup>n307</sup>

This national imputation can and should be employed by African victims against African nations. Though it may be difficult for poverty-stricken and war-riddled countries to adequately compensate victims for their turmoil, these nations should not receive a "pass." The national system failed, and while sometimes the national government may not have promoted the actions of violators, the national government has not done enough to protect prime targets during the course of war.<sup>n308</sup> When African nations adopt a policy that properly imputes national governments for their involvement or failure to act in the commission of such crimes, then the appropriate reparations can be made to bring another form of justice to victims of sexual violence. Furthermore, under international human rights law, an obligation already exists for states to provide reparations for their victims.<sup>n309</sup> This makes it evident that an obvious and legitimate route for victims to pursue their quest for justice involves making national governments repay victims for their tragedy.

This imputation process need not cease at the national level. Victims of sexual violence, if unable to succeed in achieving a civil penalty, should be able to turn to the international community to make up for this gap. When nations and international organizations avoid their obligations by misapplying the legal rules and obligations, victims deserve not only apologies, but should demand payment. The wealth of the free world has grown on the backs of victims. Those aware of atrocities behaving with willful blindness cannot escape their responsibilities. International law requires that nations step in and protect against instability and the interruption of peace, thus allowing nations to stand idly by while women and children are vilified and victimized stands in stark contrast to the laws of nations.

The time has come to change the voice of victims. No longer should women shamed by sexual assault be left to cry on criminal stands, while their abusers simply await the words guilty or not. These victims deserve more. As discussed previously, victimization costs much more than the punishment bestowed. Not even death would suffice, because these women oftentimes would have hoped for [\*376] death, but since their requests were un-accommodated, the time has come to cause those responsible for this subjection to pay for their insolence. Criminal prosecution remains one-sided as it seeks to incapacitate and punish, but victims of rape care more about justice than punishment; justice for them, for their families, for their communities. Therefore, the justice they seek is unattainable through ad hoc tribunals, in a haste to criminalize in order to show international organizations their willingness to fulfill Western standards. Justice can only be achieved in their way, in their style, through their vaginas.

#### B. Restorative Justice: Where Can Victims Turn?

As children, fights and squabbles were natural, as was retaliation. This type of behavior seems only right, in a "kill or be killed" world, but international law changed that. The UN and its member states have committed themselves to ensuring peace and security through organizational limits and mechanisms.<sup>n310</sup> Victims, however, have not received that

peace and security through the plurality of existing tribunals and laws that are designed to protect them. The question still lingers as to what can be done.

While many options exist for victims, this comment will address two that will be of great importance to victims. First, regional organizations because, while the world continues to grow bigger, connections remain regionalized; thus, these organizations can provide a more realistic framework to achieve justice. Secondly, women have often been the guinea pigs of the international community, where testing of new laws and the adoption of broad provisions seemingly aid them, when in fact they never address the primary problem: their lack of inclusion in the peace process.

### 1. Regional Organizations

Regional systems have begun to operate to ensure state actors can carry out their obligations toward their communities. When that cannot happen, regional organizations provide a mechanism unlike any other; they allow for quick response and specific knowledge of the circumstances surrounding the region and will allow for better protection of victims not after, but prior to heinous acts occurring.

First, a regional security system can provide a more localized response to potential threats in an area, and offer an immediate response. For example, Dr. Jeremy I. Levitt addresses the Peace and Security Council of the African Union (AUPSC), and notes that due to the conflicts and threats on the continent, the AUPSC's charter offers a clearer statement of the functions and powers of the organization.<sup>n311</sup> This seemingly will allow this regional organization the ability to respond more appropriately to threats and breaches of the peace which will likely keep certain conflicts to a minimum, and afford victims of sexual violence a faster route to justice. Furthermore, as Dr. Levitt aptly describes with the AUPSC, with a regional security system, the body will likely seek to engage other regional organizations in keeping violence and threats to the peace at a minimum via the investment of time and resources on making that happen for an area of particularized interest.<sup>n312</sup> Having a body designed to protect the interests of the states in the region may ensure that states properly target perpetrators of sexual violence, while simultaneously making sure that victims are made whole again through a body that understands their various views.

Second, a regional security system will "untie" the hands of the often tangled UN Security Council (UNSC). The UNSC, while it must maintain the international peace and security, has been authorized under the UN Charter that it may seek the assistance of regional organizations. Thus, Article 53(1) declares:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.<sup>n313</sup>

A regional organization can take up the charge of ensuring that actual peace and security exists because it can authorize the use of force where necessary to protect regional security. Dr. Levitt notes that the AUPSC has "reserved the right to authorize interventions in Africa" only to seek UN involvement where necessary, though the UNSC charges itself as the primary protector of international peace and security.<sup>n314</sup> Dr. Levitt is correct in noting that it seems at odds with each other, but it does not at all seem to be against the rules of law for two reasons. First, with a regional Security Council declaring primary responsibility in protecting the region from breaches of peace and security, it has not eliminated the Security Council's right to have the same responsibility. Second, the regional Security Council's declaration of "primary responsibility" merely refers to that region, and so long as the council accords with the higher law of the land, the UN Charter, and reports all actions prior to commencement, where the Security Council fails to act, there should be no problems. Primarily because if the UNSC cannot or will not act, and another organization has expressed a willingness to ensure that the region remains peaceful and victims are accorded justice, then it is highly unlikely that the UNSC or the international community will take offense to such a provision in any charter of the regional security system.

Another reason for regional organizations being an appropriate avenue for victims of sexual violence is linked to the economic and social rights often tied with such organizations. These organizations, unlike the UN, can, without abatement, link legal and economic goals together, thus properly tying in the necessary legal prohibitions of sexual violence with economic development in the areas where the crimes occur.<sup>n315</sup> Furthermore, regional organizations cannot only bring criminals to justice, but they can also provide a means to cope with the violence and promote societal values that respect women's rights.<sup>n316</sup> Finally, regional organizations can provide a typically unchartered route for victims of

sexual violence. It can allow them to bypass often unresponsive domestic systems, and avoid the rejection of the international community.<sup>n317</sup>

The proliferation of regional systems for economic and political purposes abound. Therefore, the time has come for African nations to follow in the footsteps of the European Union, in ensuring that women's rights are at the forefront of their regional work.<sup>n318</sup> The time has arisen for regional security to protect those that are often disregarded in the international context, and left as matters for the "home" in the domestic contexts. [\*379]

## 2. Inclusion in the Peace Process

The guinea pigs of the free world: women and children. As stated earlier, women and children have long been subjugated in national and international law. How can victims receive any form of justice when the law designed for their protection has consistently excluded their participation?

In order to change what "justice" means for victims of sexual violence, the law no longer can eliminate women's point of view from the discussion.<sup>n319</sup> The laws and standards created must recognize that these women are victimized and remain so because often times these women believe that they never had a voice in the situation, in the rape, in the law and in bringing the individual to justice.<sup>n320</sup> Where women are included in the process to bring peace and achieve justice, these women assuredly are made whole again, not because they can take the damage they suffered away, but because they are aware that they had a hand in protecting the rights and interests of other women and girls.

Inclusion in the peace process means several things. First, it allows various women's rights organizations', scholars', and victims' participation in the generating and drafting of the laws to stop discrimination and the abuse of women and children, particularly during wartime.<sup>n321</sup> Second, it requires women's participation in strong leadership positions, both nationally, regionally and internationally to ensure that the voice of women and children continues to resonate in the hearts and minds of the international community.<sup>n322</sup> Finally, inclusiveness requires women to be a part of the jurisprudential force that determines when in fact a violation has occurred.

When women are a part of the system in this way, whether the victims themselves get to directly participate or not, things will begin to change. This does not mean to contend that men have not properly attempted to address the needs and concerns of women, but a woman sexually assaulted with various objects--not to mention a penis--can perceive justice being done more readily when it is done through someone who could and may have shared her similar experience. Through regional organizations and wide-scale female participation in the law making process, victims of sexual violence can receive justice [\*380] that will not only criminalize the acts, but slowly restore to them the lives that were so recklessly taken from them.

## V. Conclusion

This comment never sought to solve the problem of whether sexual assault would continue during the course of war, nor was it designed to penalize the international legal system regarding its approach to internal conflicts. However, its main goal has been satisfied. It only hoped to bring forward a new avenue for those that have been violated and ignored to get the necessary recognition they deserve as a means of bringing true justice into their lives. The international law is constantly evolving but that does not mean that the prohibition on rape and other acts of sexual violence cannot advance to customary law or jus cogens norms.<sup>n323</sup> What is truly important is that now, unlike before, the law recognizes that women have been violated and not receiving their just deserts, and this comment suggests that the attempts that have been made at correcting that may in fact fall short. Therefore, the time likely has arisen to examine national and international laws and determine what more can occur to protect victims of sexual violence. Some believe that retributivism is the route that best achieves justice, but the concern there is to incapacitate and punish. What is needed--what should be required--is to give back to women and young girls what they have lost, and the way that can be achieved is by restoring them, not physically, but emotionally and socially.

## Legal Topics:

For related research and practice materials, see the following legal topics:  
 Criminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of AdultsGeneral OverviewCriminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultRapeElementsInternational LawSovereign States & IndividualsHuman RightsGenocide

## FOOTNOTES:

n1 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Aug. 31-Sept. 7, 2001, UN Special Rapporteur on Violence against Women, P 5, U.N. GAOR, at 5-27, U.N. Doc. A/CONF.189/12 (2002), available at <http://www.un.org/WCAR/statements/violencewomenE.htm>.

n2 See Patricia H. Davis, Comment, The Politics of Prosecuting Rape as a War Crime, 34 INT'L LAW 1223, 1223 (2000). An Albanian girl raped by Serb soldiers explained, "I don't want to live, I wish someone would take my soul away." Id.

n3 YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 12 (Cambridge Univ. Press 4th ed. 2005) (1988). Where states are interested in total victory, this consists of "the capitulation of the enemy, following the overall defeat of its armed forces and/or the conquest of its territory, and if this is accomplished the victor is capable of dictating peace terms to the vanquished." Id.

n4 Davis, *supra* note 2, at 1227.

n5 "Sexual violence" will be used throughout this comment to indicate various forms of sexual attacks on women and children. It will be used interchangeably with sexual assault, rape, and sexual battery. It will further serve to encompass such acts as forced pregnancies and marriages, sexual slavery and forced prostitution.

n6 See Kelly D. Askin, The Quest for Post-Conflict Gender Justice, 41 COLUM. J. TRANSNAT'L. L. 509, 509-11 (2003) (describing the sexual violence that has occurred as a part of the following conflicts: Sierra Leone, East Timor, Colombia, Afghanistan, Kosovo, Peru, Mozambique, Bangladesh, Congo, Somalia, Guatemala, Angola, Argentina, Ethiopia, Iraq and Cambodia).

n7 Eileen Meier, Prosecuting Sexual Violence Crimes during War and Conflict: New Possibilities for Progress, 10 INT'L LEGAL THEORY 83, 89 (2004) ("The Lieber Code of 1863 promulgated rules of engagement for United States soldiers during the Civil War. It prohibited rape or other abuse of women under penalty of death.").

n8 Meier, *supra* note 7, at 83. The author explains that crimes against sexual violence during wars and conflict have existed since records have been created and that these crimes have not been considered or prosecuted as war crimes. Id.

n9 See generally Memorandum from Prudence Bushnell, Principal Deputy Assistant Secretary, Bureau of African Affairs, through Peter Tarnoff, Under Secretary for Political Affairs, to Secretary of State Warrant Christopher, "Death of Rwandan and Burundian Presidents in Plane Crash Outside Kigali," (Apr. 6, 1994) (on file with The National Security Archive at George Washington University), available at <http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB53/rw040694.pdf>.

n10 Anup Shah, Conflicts in Africa, <http://www.globalissues.org/Geopolitics/Africa/Intro.asp#ManyConflictsThroughoutAfrica> (last visited Feb. 4, 2007). The conflicts that have taken place on the African continent in various countries, including Angola, Algeria, Burundi, Congo, The Democratic Republic of Congo, Cote d'Ivoire, Eritrea/Ethiopia, Liberia, Nigeria, Rwanda, Sierra Leone, Sudan, Uganda, and Zimbabwe. See also id21.org, Poverty vs. Conflict: Understanding Africa's Wars, <http://www.id21.org/society/s10br11g2.html> (last visited Feb. 4, 2007) (stating that no less than 28 Sub-Saharan African states have been in war since 1980).

n11 See generally HUMAN RIGHTS WATCH, HUMAN RIGHTS NEWS, UN: Support African Action on Conflicts, July 29, 2004, <http://hrw.org/english/docs/2004/07/28/africa9161txt.htm> (discussing the need for the UN to do more to end current conflicts in Africa).

n12 See generally Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

n13 See generally Stephanie N. Sackellares, From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict, 20 WIS. WOMEN'S L.J. 137, 140 (2005). As Serb soldiers thrust into their rape victims, they forced them to sing patriotic songs in order to convince themselves and their victims that they were doing it for their country. *Id.*

n14 See Kelly D. Askin, Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles, 21 BERKELEY J. INT'L L. 288, 289 (2003).

n15 Sackellares, *supra* note 13, at 139.

n16 Askin, *supra* note 14, at 296.

n17 *Id.*

n18 See Askin, *supra* note 14, at 289; see also BLACK'S LAW DICTIONARY 758 (8th ed. 2004).

n19 *Id.*

n20 *Id.* at 290 (citing Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil 461 [hereinafter Hague Convention IV]).

n21 *Id.* at 289, n. 6 ("The Conventions signed at Geneva on August 12, 1949, consist of the following: Geneva Convention (I) for the amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. The 1949 Geneva Conventions supersede the 1864, 1906, and 1929 Geneva Conventions.").

n22 *Id.* at n. 7 ("Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1331 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].").

n23 YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 10 (Cambridge Univ. Press 2004) (2004). These rules, when enacted, were regarded as being declaratory of the laws and customs of war. *Id.*

n24 See David Mitchell, The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine, 15 DUKE J. COMP. & INT'L L. 219, 223-24 (2005).

n25 Askin, *supra* note 14, at 295-96.

n26 *Id.* at 295.

n27 See Geneva Conventions, *supra* note 21.

n28 See *id.*; see also Geneva Protocols, *supra* note 22.

n29 Geneva Convention IV, *supra* note 21, art. 27.

n30 Additional Protocol II, *supra* note 22, art. 4(2)(e).

n31 See Patricia Viseur Sellers, Sexual Violence and Peremptory Norms: The Legal Value of Rape, 34 CASE W. RES. J. INT'L. L. 287, 301 (2002).

n32 *Id.* These treaties include: The Universal Declaration of Human Rights, The International Covenant for Civil and Political Rights (ICCPR), The International Covenant of Economic and Social Rights (ICESR), and the Convention for Elimination and Discrimination Against Women (CEDAW). *Id.*

n33 *Id.* Despite this acknowledgment, the convention only focuses on when rape occurs within the family or the community, thus neglecting those victims of rape during the course of armed conflict. See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, 33 I.L.M. 1534.

n34 See Sellers, *supra* note 31, at 301 (quoting the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women).

n35 S.C. Res. 1502, U.N. SCOR, 58th Sess., 4814th mtg., U.N. Doc. S/RES/1502 (Aug. 26, 2003), available at <http://www.un.org/News/Press/docs/2003/sc7856.doc.htm>. But see Human Rights Watch, World Report: Women's Human Rights 6 (2001) (discussing that, while the international community has recognized the violence against women, they have done little more beyond this rhetoric, thus leaving these women to continue to suffer during conflicts).

n36 See S.C. Res. 1325, U.N. Doc S/RES/1325 (Oct. 31, 2000).

n37 Askin, *supra* note 6, at 516-17.

n38 Shah, *supra* note 10.

n39 See generally *id.* The Rwanda conflict lasted a few short months, though it took the lives of hundreds of thousands, and displaced millions. In comparison, the Congolese conflict has raged on for nearly a decade inflicting death, destruction and devastation on countless Africans.

n40 *Id.*

n41 See ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA*, Introduction: The Genocide (1999).

n42 *Id.*

n43 *Id.*

n44 *Id.*

n45 *Id.* Some reports suggest that the plane carrying the Presidents in fact crashed, and with this opportunity Hutus seized control of radio stations and removed Tutsi friendly forces prior to beginning the onslaught of terror for the next three months. See Memorandum from Prudence Bushnell to Warren Christopher, *supra* note 10.

n46 See DES FORGES, *supra* note 41, at Introduction.

n47 *Id.*

n48 See Allison Milne, Note, Prosecuting Cases of Gender Violence in the International Criminal Tribunal for Rwanda, 11 *BUFF. HUM. RTS. L. REV.* 107, 109-10 (2005). The public nature of the rapes showcased to other Hutus that the use of sexual violence was an acceptable form of punishment to be used against the Tutsi, and that when done in public it caused more destruction than what was possible with guns, as those raped were stigmatized due to it. *Id.*

n49 *Id.* at 109-10. These women forced into sexual slavery, were advised that their forced "marriages" were necessary to protect them. Some of these "marriages" lasted anywhere from a few days to the entire genocide.

n50 See *id.* at 111-12. The stories of rape survivors reveal that soldiers did all they could in order to humiliate and dehumanize their victims. One survivor explained, "they said that they were raping me to see if Tutsi women were like Hutu women." *Id.* at 111. Another survivor stated that a soldier told her that "he wanted to check if Tutsi women were like other women before he took me back to the church to be burnt." *Id.*

n51 *Id.* at 111. A Rwandan newspaper, *Kangura*, published the Hutu Ten Commandments, and four of those commandments specifically referenced Tutsi women. These commandments served as propaganda against the entire Tutsi population, but when referring to women, it discusses how Tutsi women use their sexual nature to infiltrate Hutu inner circles.

n52 See *id.* at 109. Many women reported not simply being brutalized, but having had objects such as sharpened sticks, bottles or guns shoved into their vaginas. Further, women reported having had their vaginas, pelvic regions and breasts mutilated with machetes, knives, sticks, acid and boiling water subsequent to their rape. *Id.*

n53 See Milne, *supra* note 48, at 110. A rape victim is "allowed" to live so that she would "die of sadness." *Id.*

n54 See Askin, *supra* note 14, at 298.

n55 See Kimi King and James Meernick, *Bringing Her Out of the Shadows: An Empirical Analysis of Sentences in Rape Cases Before the International Criminal Tribunal for the Former Yugoslavia*, in *COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY* 187 (Mary Volcansek & John Stack, Jr., eds., 2005) ("Women in any given group hold the key to the group's future reproductive capacities.").

n56 HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO* 11 (Human Rights Watch 2002).

n57 The War in the Congo began in 1998, involved nine African nations and directly affected the lives of 50 million Congolese citizens.

n58 Human Rights Watch, *supra* note 56, at 1.

n59 *Id.*

n60 *Id.*

n61 *Id.* at 12.

n62 *Id.*

n63 *Id.* at 17-18.

n64 *Id.* at 1.

n65 *Id.* These women and girls were forced during the course of war to subject themselves either to starvation or sexual assault. *Id.*

n66 *Id.* at 2.

n67 *Id.* at 23.

n68 Id.

n69 Id. at 23. A sixteen year rape survivor informed Human Rights Watch that "there is no way to protect girls from these things . . . there are many girls who live in these conditions." Id.

n70 Human Rights Watch, *supra* note 56, at 23. Rape and sexual crimes are committed by those in positions of authority and power which usually include the police, but petty thieves and bandits take advantage of the "climate of impunity and culture of violence" to violate women and young girls. Id. Victims also reported being raped when soldiers and robbers stole their earthly possession, or because they did not have goods worth stealing. Id. at 24.

n71 Id. at 1. Experts in the area estimated that sixty percent of the soldiers were infected with HIV/AIDS, and with the prevalence of rape, women were often exposed to AIDS and various other STDs. Id.

n72 Id. at 24.

n73 Id.

n74 Id. One victim testified that "there was no light. We didn't even have petrol to light a lamp, and the only light was when they shined the flashlight in our eyes." Id.

n75 Id.

n76 Id. at 24.

n77 Maya Tobias, Op-Ed., Time to take action on Darfur Genocide, *STUDENT LIFE*, Oct. 11, 2006, at 7, available at <http://www.studlife.com/media/paper337/documents/d111g814.pdf> (discussing that it seems like the statement "never again" only applies to the extermination of Jews by Germans).

n78 HUMAN RIGHTS WATCH, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan 1* (2004).

n79 Id.

n80 Id.

n81 HUMAN RIGHTS WATCH REPORT, *If We Return, We Will Be Killed: Consolidation of Ethnic Cleansing in Darfur, Sudan 1* (2004). The Sudan Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM) are comprised of the Fur, Masalit and Zaghawa ethnic groups, and demanded the government end economic marginalization, and the abuses of their rivals, Arab pastoralists.

The Sudanese government has responded in kind by targeting the civilian populations of the ethnic groups that make up the rebel groups, through Janjaweed forces to which they have provided effective immunity for their actions.

n82 Id.

n83 Id.

n84 Id.

n85 Id. at 34.

n86 Darfur, supra note 78, at 10. Men explained that Janjaweed forces "took girls into the grass and raped them," one such girl was thirteen years old. When girls resisted, as was the case of a seventeen year old Janjaweed killed her and left her naked body in the street. A displaced Fur woman was attacked by Janjaweed who attempted to rape her, and was beaten so badly that she died. Id.

n87 Id. at 37. In attempts to quell international attention at atrocities a local Masalit leader received a letter sent by government officials advising them to "come back to Sudan with all your people." However days prior to the letter's receipt, Janjaweed leader Hamid Dawai called a meeting with local leaders asking them to "organize security" to stop their people from going into Chad, and promised large payments. When they refused the money, Damai responded with, "If you don't make security, I will kill all your civilians." Id.

n88 Id. at 38.

n89 Sackelleres, supra note 13, at 156-57.

n90 Darfur, supra note 78, at 43. President Bashir declared that it would defeat the SLA/JEM movement and said the horsemen Janjaweed would be one of the weapons utilized alongside the army. The Sudanese government prefers the Janjaweed forces because the army consists of many Masalit forces, and it does not trust the loyalties of these forces; thus, the government turns to a nomadic force that suits their needs. Id. at 44.

n91 Id. at 43.

n92 Id. at 45. The only difference in the uniform of the Janjaweed and government forces is the existence of a badge with an armed horseman located on the breast front pocket. They drive the same Land cruisers as the army with bodyguard accompaniment and carry the same satellite phones as senior army officers. Id.

n93 Darfur, supra note 78, at 48.

n94 Id. at 49.

n95 *Id.*

n96 *Id.*

n97 See Sellers, *supra* note 31.

n98 BLACK'S LAW DICTIONARY 1163 (8th ed. 2004).

n99 See Chandra Lekha Sriram, Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone, 29 FORDHAM INT'L L.J. 472, 472 (2006) (discussing the difficulties of determining which type of justice is appropriate in order to respond to past atrocities). See also, Aukerman, *infra* note 103, at 39 (acknowledging that some commentators push for national and international prosecutions, while others think it futile in the wake of human rights catastrophes).

n100 Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L.J. 2537, 2547-48 (1991) ("Although numerous countries have begun transitions from repressive rule to democracy in recent years, relatively few successor governments have attempted prosecutions.").

n101 Many victims of sexual violence and subordination are often victims long after the crime as these women and children are subjected to the memories of the crime though many would be happy simply to forget that it ever happened to them. Davis, *supra* note 2, at 1223. However, some women want their perpetrators to be held accountable for the acts they committed against their victims.

n102 Sriram, *supra* note 99, at 473.

n103 See Miriam Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, 15 HARV. HUM. RTS. J. 39, 46 (2002).

n104 The trauma of being raped and then having to confront the accused in court re-subjects women and children to a kind of torture that they would seek to avoid. STERLING JOHNSON, PEACE WITHOUT JUSTICE, 185-86 (2003). Furthermore, many women and girls, due to fear of stigmatization, choose not to tell their stories because they simply want to try and reclaim their former lives. Darfur, *supra* note 78, at 33.

n105 See generally Aukerman, *supra* note 103.

n106 *Id.* at 46-47.

n107 See generally Katrina Anderson, Turning Reconciliation on Its Head: Responding to Sexual Violence Under the Khmer Rouge, 3 SEATTLE J. FOR SOC. JUST. 785, 785 (2005) ("I wonder how both sides can reconcile if one side is the victim and the other is the perpetrator. And the perpetrators have not accepted their mistakes . . . I almost died but they have only compensated my loss with the word "sorry.").

n108 See Sellers, *supra* note 31, at 301.

n109 The laws that have been promulgated for women take an overall human rights approach and have never been drafted with the assistance of victims, thus making it impossible to truly gather the way in which the victim feels as it relates to the law.

n110 Askin, *supra* note 14, at 296.

n111 *Id.* at 297.

n112 Mullally, *infra* note 120, at 105 (discussing that when states make reservations to the CEDAW they are putting the importance of certain religious communities before the international human rights standards of gender equality).

n113 See Aukerman, *supra* note 103, at 53.

n114 *Id.* at 53-54.

n115 See Askin, *supra* note 14, at 294-95.

n116 See generally Aukerman, *supra* note 103.

n117 See Sellers, *supra* note 31, at 301.

n118 Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/Res/48/104 (Feb. 23, 1994).

n119 See Christine Chinkin, Rape and Sexual Abuse of Women in International Law, 5 EUR. J. INT'L. L. 326, 326 (1994).

n120 Oftentimes international actors got away with not bringing perpetrators of sexual violence to justice as they often deemed that such activity amounted to a domestic, family issue that did not warrant international attention. *Id.* Violence against women has rarely been viewed as torture or as imputable to the state because of the widespread commission by private actors, thus ignoring those rapes that occur by public authorities during the course of war. *Id.* See also SIOBHAN MULLALLY, GENDER, CULTURE AND HUMAN RIGHTS 89 (Colin Harvey ed., Hart Publ'g 2006).

n121 See Elizabeth Abraham, The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo, 52 AM. U. L. REV. 1291, 1306 (2003).

n122 Chinkin, *supra* note 119, at n.1 (citing E. Van den Haag, The War in Katanga, Report of a Mission 10 (1962)).

n123 See generally UN Sexual Allegations Double, BBC NEWS, May 6, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4521481.stm>.

n124 Id.

n125 Id.

n126 Abraham, *supra* note 121, at n.91 (discussing that UN Italian peacekeepers committed atrocities against Somali citizens).

n127 Id.

n128 UN Office of Internal Oversight Serv., *Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, P 11, U.N. Doc. A/59/661 (Jan. 5, 2005) (prepared by Dileep Nair). When peacekeepers sexually exploit young girls that have recently been sexually violated the victims are unable to properly recount due to their age and the trauma of the wartime rape and the peacetime sexual violations by peacekeepers. Id.

n129 Joseph Farrah, *Those UN Peacekeeping Atrocities* (June 25, 1997), <http://www.worldnetdaily.com/news/article.asp?ARTICLEID=14271>. Italian peacekeeping soldier responding to reports of violence stated: "What's the big deal? They are just niggers anyway."

n130 World Net Daily, *UN Peacekeepers Rape Women, Children*, <http://www.worldnetdaily.com/news/article.asp?ARTICLEID=42088> (Dec. 24, 2004, 01:00 EST).

n131 Victims do not feel protected since the UN cannot protect them from their own forces since it is left up to individual member states to prosecute peacekeepers that commit sexual assault, an act unlikely to occur. Abraham, *supra* note 121, at 1308.

n132 Michael Fleshman, *Tough UN Line on Peacekeeper Abuses: Action Initiated to end Sexual Misdeeds in Peacekeeping Missions*, *AFRICA RENEWAL*, April 2005, at 16.

n133 Id.

n134 Id. Peacekeeping soldiers committed rapes against women and impregnated them. When attempts were made to capture UN forces accused of rape and sexual assault, other UN forces hid and protected these soldiers to guard them against punishment. Though the UN has a zero tolerance policy on peacekeepers not committing such behavior, there currently exists no means of enforcing this policy. Id. This, therefore, amounted to "zero compliance with zero tolerance." Id.

n135 Id.

n136 As they are the victims of vile treatment and subject to attack in "conflicts across the globe" be men of all religions, nationalities and colors. Chinkin, *supra* note 120, at 231.

n137 See generally HUMAN RIGHTS WATCH, *STRUGGLING TO SURVIVE: BARRIERS TO JUSTICE FOR RAPE VICTIMS IN RWANDA* (2004).

n138 *Id.*

n139 This is true because the ad hoc tribunals only have a limited duration to bring cases. The International Criminal Court does not currently accept direct individual participation, and, when the national court systems have yet to rebuild, it leaves women who seek prosecution to heal their wounds with little prospect of seeing justice done. *STRUGGLING TO SURVIVE*, supra note 137, at 13.

n140 *Id.*

n141 *Id.* at 15. The system is known as the "gacaca" system. The Gacaca law of 2001 replaced the Genocide law, and expanded the serious crimes category to include rape. *Id.* These courts take up genocide cases that were not transferred to the higher tribunals. *Id.* However, during the nation's pilot "gacaca" program, it did not return promising remarks as their was inadequate participation, lack of commitment by gacaca judges, and reluctance of witnesses to come forward due to the fear of retaliation. *Id.* at 17

n142 *Id.* at 17.

n143 *Id.* at 18-19. The gacaca tribunals have tried thousands of cases in various parts of the country, yet only 32 include charges of rape or sexual abuse. When women were brave enough to come forward to report rapes, they often still have not seen their perpetrators tried, as they still remain in jails throughout their respective regions. *Id.* at 19. It should be noted that the Rwandan domestic system has created another hurdle for victims because they required renewal accusations after 2001. *Id.* at 21-22.

n144 *Id.* at 23. The system requires physical evidence to go through with prosecutions, and because many women do not know their attackers, and thus they are left without recourse within the systems. One woman explained, "My greatest sorrow is that I don't know who they were...If would have had the courage to accuse them."

n145 *STRUGGLING TO SURVIVE*, supra note 137, at 11. For instance, Rwanda has adopted new inheritance laws to make it easier for women to gain the land of their families, [this is extremely important as they are an agriculturally based people] but women and girls are still denied equal access to land due to strong rooted customary law. See *id.*

n146 *Id.* From the interview of one rape victim, who had not disclosed her rape to her husband due to the shame and stigmatization she felt, she stated, "I don't think that talking about it would achieve anything." Thus revealing the trauma that rape victims have to deal with in their post-conflict societies. *Id.*

n147 *Id.* at 17.

n148 This is so engrained in African culture that one woman raped by and forced to marry an RPA soldier said that she did not blame him for the abuse because he acted out of "love" and did not abandon her. *STRUGGLING TO SURVIVE*, supra note 136, at 25.

n149 In hopes to rebuild their war-torn nations, nations forget about the well-being of those traumatized by rape and look only to their national desires to become a viable nation again. *Id.* at 185-186. ("Politics often takes precedent over justice . . . The criminal justice process itself is perceived as disturbing the peace.").

n150 *Id.* at 185-186.

n151 STERLING, *supra* note 104, at 203. After the genocide and the departure of the rebel regime, Rwanda's judicial system was left decimated. "Not a single desk, chair, telephone, calendar, pen or paper clip was left behind." *Id.* This need to rebuild placed victims slightly on the back burner, even though the new Rwandan government contended that its most important task would be "to arrest and try the accused" to end the impunity. *Id.*

n152 *Id.* In efforts to try and rebuild, the genocide in Rwanda left so few professionally trained that it was difficult to respond to the special needs of the situation. *Id.*

n153 *Id.*

n154 *Id.* Rwanda is one of the world's poorest countries. *Id.*

n155 *Id.* at 207.

n156 Due to International Monetary Fund structural development programs, and the RPF invasion, Rwanda's economy deteriorated. *Id.*

n157 In a case such as Darfur, victims may never trust the police or military forces again because these are the individuals committing the atrocities against them. See *If We Return*, *supra* note 81, at 20-21.

n158 Oftentimes due to the trauma and the fear that victims face they may have trouble readjusting to life, and while the nation rebuilds in post-conflict circumstances, victims may find it difficult to distinguish between good and bad as it relates to public officials. *Id.*

n159 *Id.* at 26. The government leaders stood by and allowed the atrocities to go on unpunished. One man requesting that his brother, who was executed extrajudicially, be given a proper burial from the police, was told that they would send military, and the military never came. *Id.*

n160 See Meier, *supra* note 7, at 117.

n161 *Id.*

n162 *Id.*

n163 *Id.* at 117-18.

n164 *Id.*

n165 International Criminal Tribunal for Rwanda Statute, S.C. Res. 955, Annex, art. 1, U.N. Doc. S/RES/955/Annex (Nov. 8, 1994) [hereinafter ICTR Statute].

n166 *Id.* at art. 2(1).

n167 *Id.* at art. 2(2)(b).

n168 *Id.* at art. 3(g).

n169 Geneva Conventions, *supra* note 21, at art. 3. This article is included in each of the four Geneva Conventions as well as in the ICTR Statute. It requires that humane treatment be given to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause." It explicitly prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment."

n170 Prosecutor v. Akayesu, Case No. ICTR-96-4-1, Indictment (Sep. 2, 1998).

n171 *Id.*

n172 *Id.* at Judgment, PP 557, 687.

n173 *Id.* at PP133-134.

n174 *Id.* at PP131-132.

n175 *Id.*

n176 See Alex Obote-Odora, Rape and Sexual Violence in International Law: ICTR Contribution, 12 NEW ENG. J. INT'L & COMP. L. 135, 137 (2005).

n177 Akayesu, Case No. ICTR-96-4-1, at P 132.

n178 *Id.* at P 598.

n179 Rape is rarely prosecuted as a separate crime, but rather individuals are normally prosecuted for other crimes, thus never really bringing justice to those victims of rape. Obote-Odora, *supra* note 176, at 136.

n180 Akayesu, Case No. ICTR-96-4-1, at Sentencing.

n181 Id.

n182 Id. at. Appeal.

n183 Prosecutor v. Semanza, Case No. ICTR-97-20-T, Third Amended Indictment, P 1 (Oct. 10, 1999).

n184 Id. at Judgment and Sentencing, P 12.

n185 Id. P 536(b).

n186 Id. P 474.

n187 Id. PP 475-79.

n188 See Obote-Odora, *supra* note 176, at 153.

n189 See *id.*

n190 Semanza, Case No. ICTR-97-20-T, at Judgment and Sentence, P 477.

n191 Prosecutor v. Gacumbitsi Case No. ICTR-2001-64-T, Judgment, P 330 (June 17, 2004).

n192 Id. P 6.

n193 Id. P 326.

n194 Id., P 321.

n195 Id. (emphasis added).

n196 Id. P 328.

n197 Id.

n198 Id. P 329.

n199 Id. at Sentencing, P 356.

n200 See L.J. VAN DEN HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 278 (2005) (discussing that during its tenure the ICTR has influenced the evolution of international law, particularly the area of international criminal law, by developing a trend to hold individuals responsible for serious international crimes, and to combat impunity).

n201 Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, P 4 (Feb. 5, 1999).

n202 Id.

n203 Id.

n204 Id. Rule 51 deals with the withdrawal of indictment and Rule 73 governs the pre-defense conference.

n205 Id. at Verdict.

n206 Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment and Sentence, P 703 (Jan. 22, 2004).

n207 Id. P 707.

n208 Id.

n209 See Kamuhanda, Case No. ICTR-95-54A-T, P 707.

n210 See generally International Criminal Tribunal for Rwanda, available at <http://69.94.11.53/default.htm> (last visited Feb. 4, 2006).

n211 Id.

n212 Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment (May 21, 1999).

n213 Prosecutor v. Nyiramasuhuko, Case No. ICTR-97-21, Indictment (Feb. 3, 2001).

n214 International Criminal Tribunal for the Former Yugoslavia Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

n215 Id.

n216 See Askin, *supra* note 14, at 317 (discussing the five most influential cases as it relates to the prosecution of perpetrators of sexual violence, and five of those cases have come out of the jurisprudence of the ICTY).

n217 ICTY Statute, art. 2.

n218 Id. at art. 4, 5.

n219 This can be seen in the adoption of a narrower rape definition in the Kunarac case than that pronounced in the Akayesu case.

n220 Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, P 17 (May 7, 1997).

n221 Id. at Judgment, P 2.

n222 Id., P 27.

n223 Id., at PP 45, 719, 726, 730.

n224 Id., at Sentencing Judgment (July 14, 1997), P 74; Judgment in Sentencing Appeals (Jan. 26, 2000), P 76.

n225 Prosecutor v. Furundzija, Case No. IT 95-17/1, Judgment, P 2 (Dec. 7, 1998).

n226 Id. PP 40-41. Posttraumatic stress disorder is defined as "development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience; symptoms include numbed responsiveness to environmental stimuli, a variety of autonomic and cognitive dysfunctions, and dysphoria." Id.

n227 Id. at Disposition.

n228 Id. P 122.

n229 Id.

n230 See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, available at <http://www.un.org/law/icc/> [hereinafter Rome Statute].

n231 Id.

n232 Id. art. 6.

n233 Id. art. 7.

n234 Id. art. 8.

n235 Id. art. 5(2).

n236 Id. art. 79.

n237 Id.

n238 See International Criminal Court, Victim Trust Fund, <http://www.icc-cpi.int/vtf.html> (last visited February 24, 2007).

n239 Id.

n240 Id.

n241 Id.

n242 See King and Meernick, *supra* note 55, at 184 (discussing that the occurrence of sexual violence is as timeless as war itself, and that in nearly all accounts of war there has been some type of sexual violence that has occurred).

n243 Id.

n244 See *id.* at 183 (discussing that gender justice has been advanced in the decisions issued by the ICTR and ICTY in the past decade).

n245 The international tribunals rely on state cooperation to achieve their goals in bringing international criminals to justice; however, some states refuse to comply due to political reason or national security objectives. This ultimately increases the difficulty of achieving complete gender justice for victims of sexual violence. JOHNSON, *supra* note 104, at 185.

n246 King and Meernick, *supra* note 55, at 183.

n247 See Kingsley Chiedu Maoghalu, *The International Criminal Tribunal For Rwanda and Universal Jurisdiction*, in *AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* 161, 165 (Evelyn A. Ankumah & Edward K. Kwakwa, eds., 2005) (discussing that difficulties exist in bringing individuals to justice under the principal of universal jurisdiction because of the absence of enabling legislation in many countries, and that problems exist in the areas of standards and judicial capacity).

n248 See Commission on Human Rights, *Preliminary Report Submitted by Special Rapporteur on Violence Against Women, Its Causes and Consequences*, 50th Sess. at 64, U.N. Doc. E/CN.4/1995/42 (1994).

n249 See Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 *NEW. ENG. J. INT'L. & COMP. L.* 119,127 (2005).

n250 Kamuhanda, *supra* note 206, P 707.

n251 See Oosterveld, *supra* note 249, at 126.

n252 *Id.*

n253 *Id.* at 127-28.

n254 Letter from Human Rights Watch to U.N. Security Council Members, *Rwanda and the Security Council: Changing the International Tribunal* (Aug. 1, 2003), available at <http://hrw.org/press/2003/08/rwanda080103ltr.htm> (last visited March 11, 2007).

n255 See Stephanie K. Wood, *A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 *COLUM. J. GENDER & L.* 274, 300 (2004) (discussing that the tribunal has implemented strategies to quickly move prosecutions through the court, but that these strategies only address the procedural and not the substantive problems faced by the court).

n256 See Victor Peskin, *The Promise and Pitfalls of the ICTR Outreach Programme*, 3 *J. INT'L CRIM. JUST.* 950, 951 (2005) (discussing that the tribunal has had difficulties bringing criminals to justice on the occasion that the Rwandan government has hindered victims from leaving the country to testify in Arusha).

n257 S.C. Res. 1503, Preamble, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

n258 These dates may make it difficult for judges to finish the caseload currently before them, thus leaving some victims without any true relief. See Wood, *supra* note 255, at 325. (discussing that in the past the trial chambers had to increase the number of judges in order to deal with the extensive caseload before them).

n259 See Olivia Lin, *Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context*, 12 *ILSA J. INT'L & COMP. L.* 41, 74 (2005). Rwanda has established a Gacaca system to prosecute those responsible for sex crimes against women, but these trials have been slow in progress due to the lack of mass implementation throughout the country. *Id.*

n260 See generally ICTR Statute, *supra* note 165.

n261 See Lin, *supra* note 259, at 74-75 (discussing that the gacaca systems are not yet fully implemented as well as the economic situation facing Rwanda upon the national system taking complete control over trials which will necessarily translate into politics, and not justice).

n262 Wood, *supra* note 255, at 325.

n263 *Id.* at 276.

n264 *Id.* at 278, 301 (discussing that the delay in trials makes victims feel like the work of the tribunal is illegitimate).

n265 *Id.* at 314-15 (addressing that the delays in the tribunal while recognized they persist, and many individuals have simply given up on justice).

n266 *Id.* at 300 (discussing improvements are necessary for the ICTR to continue to legitimately bring perpetrators to justice as it relates to witness protection and privacy).

n267 See Judge Ines Monica Weinberg De Roca, *Ten Years and Counting: The Development of International Law at the ICTR*, 12 *NEW ENG. J. INT'L & COMP. L.* 69, 75 (2005).

n268 This requirement of consent places a greater burden on the victim, thus causing her to disprove that the attack was non-consensual, something that is typically difficult if not impossible to prove, as the incidents likely occurred between the victim and the perpetrator. Kunarac, IT-96-23 & IT-96-23/1-A, Judgment, P127.

n269 *Id.*

n270 See Milne, *supra* note 48, at 127.

n271 The definition set forth in the Kunarac case makes it harder for victims to see their perpetrators brought to justice.

n272 Rome Statute, *supra* note 230, art. 11 & 126(1).

n273 *Id.* The court cannot hear cases that it has no jurisdiction over.

n274 Rome Statute, *supra* note 230, art. 14-15.

n275 States and the OTP may seek to bring those individuals that they deem have committed the more heinous crimes - which usually includes rape, but due to the every prevalent mentality that sexual crimes are private matters extensive prosecutions in these areas may be limited. See generally Askin, *supra* note 14.

n276 STRUGGLING TO SURVIVE, *supra* note 137, at 11.

n277 Rome Statute, *supra* note 230, art. 12(3).

n278 *Id.* at Preamble.

n279 Rome Statute, *supra* note 230, art. 1.

n280 *Id.* art. 17.

n281 The increase in time makes it difficult for a victim to retain any physical evidence from the perpetrator in order to prosecute.

n282 See Michael J. Struett, *The Transformation of State Sovereign Rights and Responsibilities Under the Rome Statute for the International Criminal Court*, 8 CHAP. L. REV. 179, 190-91 (2005).

n283 See Mullally, *supra* note 120, at 89.

n284 *Id.*

n285 *Id.*

n286 See Statement on Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the Committee on the Elimination of Discrimination Against Women, Report of the Committee on the Elimination of Discrimination Against Women (18th and 19th session) GAOR, Supplement No. 38 (A/53/38/Rev. 1) ch.1.

n287 See Mullally, *supra* note 120, at 100-01.

n288 BLACK'S LAW DICTIONARY 1288 (8th ed. 2004). The common law crime of rape required at least a slight penetration of the penis into the vagina. Also at common law, a husband could not be convicted of raping his wife. *Id.*

n289 Unlawful sexual activity (esp. intercourse) with a person (usually a female) without consent and usually by force or threat of injury. BLACK'S LAW DICTIONARY 1288 (8th ed. 2004). Rape includes unlawful sexual intercourse without consent after the perpetrator has substantially impaired his victim by administering, without the victim's knowledge or consent, drugs or intoxicants for the purpose of preventing resistance. It also includes unlawful sexual intercourse with a person who is unconscious. Marital status is now usually irrelevant, and sometimes so is the victim's gender. *Id.*

n290 This standard does not translate into looking at the cultural aspects of why perpetrators of sexual violence did what they did, but rather a cultural standard that addresses the needs of victims of sexual violence.

n291 Akayesu, Case No. ICTR-96-4-1, at P 132. The Akayesu definition was deemed a great progress because it did not limit what it considered rape which thus allowed an ease in bringing sexual violators to justice.

n292 A definition that looks at the cultural aspects of victims, such as the one adopted in the Akayesu decision, takes into account the reality of wartime conflict and shifts the attention of the prosecution to the harm the assailant inflicts upon the victim. See Obote-Odora, *supra* note 176, at 151.

n293 See Diane F. Orentlicher, Separation Anxiety: International Responses to Ethno-Separatist Claims, 23 YALE J. INT'L L. 1, 61 (1998).

n294 De Roca, *supra* note 267, at 71.

n295 *Id.*

n296 DINSTEN, *supra* note 3, at 10. (discussing that internal conflicts were not originally given extensive international law regulation); but see *id.* at 11 (discussing that, given the ferocious nature of internal conflicts in recent years, international law codification currently extends to the internal as well as external conflicts).

n297 For instance, UN failure to recognize that the events in Sudan constituted genocide due to an inability to distinguish warring groups.

n298 This is not a dispute I will take up here, but it is significant as it translates into who receives justice and when.

n299 Victims are robbed of their pride, their ability to defend themselves, and often times their ability to live. Davis, *supra* note 2, at 1227.

n300 See Justin H. Roy, Strengthening Human Rights Protection: Why the Holocaust Slave Labor Claims Should be Litigated, 1 SCHOLAR 153, 177 (1999).

n301 See generally Susan Vanderweert, Comment, Seeking Justice for "Comfort" Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese Army May Find Their Best Hope of Success in U.S. Federal Courts, 27 N.C.J. Int'l L. & COM. REG. 141 (2001).

n302 Id. at 149. The Japanese military sex slave system was strictly employed for the pleasures of Japanese soldiers. It was systematic and controlled by the Imperial government of Japan, and women were taken into this system by force and treated as military necessities. Id.

n303 Id.

n304 Id.

n305 Id. The United States specifically made this statement. It came after Japanese Prime Minister Tomiichi Murayama announced that the government would not pay reparations but requested that private citizens atone from the victims' troubles. Id.

n306 Id. at 172.

n307 Id. at 173.

n308 Struggling to Survive, supra note 137, at 7-8. A report by Human Rights Watch indicates that the Rwanda government recognizes that it is at least in part responsible for the crimes that occurred and thus have created a fund that would come not only from the national budget, but from various other sources that would properly compensate the innocent victims of war. Id. at 40.

n309 ICCPR provides that states provide an "effective remedy" for violations of rights. International Covenant on Civil and Political Rights art. 2(3), Mar. 23, 1976, 999 U.N.T.S. 171. The committee responsible for monitoring the implementation of the ICCPR has also confirmed that states have an obligation to offer reparations for victims of heinous crimes. U.N. Human Rights Comm., General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, P 16, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (Mar. 29, 2004).

n310 U.N. Charter pmbl.

n311 Jeremy I. Levitt, The Peace and Security Council of the African Union: The Known Unknowns, 13 TRANSNAT'L L. & CONTEMP. PROBS. 109, 118-19 (2003).

n312 Id. at 124 (discussing the AU's commitment to working with regional mechanisms to achieve peace).

n313 UN Charter art. 53, P 1.

n314 See Levitt, supra note 311, at 125-26.

n315 See Scott Splittgerber, Comment, The Need for Greater Regional Protection for the Human Rights of Women: The Cases of Rape in Bosnia and Guatemala, 15 WIS. INT'L L.J. 185, 205 (1996).

n316 Id. at 221.

n317 Id. at 187.

n318 Id. at 204-05.

n319 Id. at 227 (discussing that women are not typically included in the discussions that establish the vocabulary involved in human rights protection).

n320 See Splittgerber, *supra* note 313, at 201 (addressing the problems of women typically being viewed unequally and their exclusion during the process of ensuring equal protection).

n321 Id. at 201-02.

n322 Id.

n323 Jus cogens is defined as a mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted. BLACK'S LAW DICTIONARY 876 (8th ed. 2004). Some authors contend that rape is in fact jus cogens. See Mitchell, *supra* note 24, at 254.