**Women, War and Darfur: Implementing and Expanding Gender Violence Justice**

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Citation  

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**RESUME**

This paper contends that sexual assault of civilian women in conflict is an unabated and ongoing humanitarian and legal issue, and there is still insufficient legal redress for women victimized by gender violence in war. This paper will explore the war on civilian women in armed conflict and the responses of the international community and international law. Its main tenets are that (1) despite the great strides at the Yugoslavia and Rwanda Tribunals and in the Statute of the International Criminal Court, there is still insufficient access to justice for women victimized by gender violence in conflict, (2) to combat impunity for gender violence it is necessary to use international strategies, tools and pressures, not only to prosecute perpetrators, but to also create national justice systems that can and will address gender violence, and (3) the means of impacting the overall problem and underlying causes of gender violence are not being adequately addressed. This paper spotlights the ongoing conflict in Darfur as an example of continuing gender violence against women. It examines what measures can be taken, including international criminal prosecution and practical tactics, to both expand the scope of justice for Darfur’s sexual violence victims, and to alleviate their continued suffering. The paper also suggests practical international steps to eliminate, rather than just litigate, gender violence atrocities.
I. Introduction

Since World War II, some 250 conflicts of an international and non-international character have occurred which, along with tyrannical regime victimizations, produced an estimated one hundred seventy million casualties and other extensive harmful consequences.[1] It is estimated that close to ninety percent of current war victims are civilians, mostly women and children, compared to a century ago when ninety percent of those who died were military personnel.[2] Among the continuing horrors of war are many atrocities which happen to both men and women. Both are taken hostage, executed, shot, burned, bayoneted, hung, beaten, bombed, tortured, and forced into various forms of slavery. There is an overlay of additional brutality, however, that occurs with greater violence and frequency to women. Male civilians are killed, female civilians typically raped, then killed. In interrogations, males are savagely beaten. Females are savagely beaten and raped.[3]


Sexual torture of women is also used to cause terror sufficient to drive whole populations out of an area, or to deter male activists from revolutionary activity. “In this respect, the gender division of violence acts to keep repressive regimes in power.”[26]


Cases of sexual violence in conflict may arise from deliberate and planned war tactics, opportunity, retribution, ordinary criminal behavior or misogyny. It most often involves rape. Rape is about power and contempt, and the effect of rape is humiliation,
degradation, subordination, and severe physical and/or psychological injury. In conflict, the perpetrator nearly always goes unpunished. In whatever form, whether committed during the course of armed conflict and whether committed by or against a combatant or civilian, each and every instance of sexual assault needs to be recognized as a serious crime, prosecuted, and punished. Grimly, however, impunity is still rampant. Sexual violence in war continues today, and may be escalating in its viciousness. The United Nations’ top relief official said in June 2005 that although sexual violence is repeatedly condemned, it persists virtually unchallenged. “Far from making progress, we have regressed. More and more women are being attacked, younger and yet younger children are victims of these atrocities.” In Africa, he said, organized, premeditated sexual attack has become a preferred weapon of war, with rapists going unpunished and victims of rape shunned by their communities. Local governments, he added, were resisting international efforts to intervene, suppressing evidence of the violence and sometimes charging the victims with crimes related to becoming pregnant outside of marriage.

In Darfur, Sudan, between October 2004 and mid-February 2005, Doctors Without Borders/Medecins Sans Frontieres treated almost 500 rape victims in just two of the three regions, South and West Darfur, but indicated that because of pressures not to report sexual violence this number was likely only a fraction of the total cases. Almost a third of the victims were raped multiple times and eighty-one percent reported their rapists were military or militia who used their weapons to force the assault. Local authorities will not acknowledge the magnitude of the problem, and for documenting the magnitude of rape in Darfur, humanitarian workers have been castigated and jailed.

This paper contends that sexual assault of civilian women in conflict is an unabated and ongoing humanitarian and legal issue, and there is still insufficient legal redress for women victimized by gender violence in war. This paper will explore the war on civilian women in armed conflict and the responses of the international community and international law. Its main tenets are that (1) despite the great strides at the Yugoslavia and Rwanda Tribunals and in the Statute of the International Criminal Court, there is still insufficient access to justice for women victimized by gender violence in conflict, (2) to combat impunity for gender violence it is necessary to use international strategies, tools and pressures, not only to prosecute perpetrators, but to also create national justice systems that can and will address gender violence, and (3) the means of impacting the overall problem and underlying causes of gender violence are not being adequately addressed.

This paper spotlights the ongoing conflict in Darfur as an example of continuing gender violence against women. It examines what measures can be taken, including international criminal prosecution and practical tactics, to both expand the scope of justice for Darfur’s sexual violence victims, and to alleviate their continued suffering. The paper also suggests practical international steps to eliminate, rather than just litigate, gender violence atrocities.
II. Gender Violence in History

The ancient Greeks viewed rape as socially acceptable behavior well within the rules of warfare. [70] Women were “legitimate booty, useful as wives, concubines, slave labor or battle-camp trophy.” [71] Women were included as part of the “spoils of warfare” in the common axiom “to the victor go the spoils.” [72]

During the middle ages in Europe, if a city refused to surrender upon the victor’s demand for surrender, the rules of combat allowed soldiers to rape women occupants. [73] Throughout the ages, triumph over women by rape became a way to measure victory, part of a soldier’s proof of masculinity and success, a tangible reward for services rendered…and an actual reward of war.” [74]

Women were considered the property of men, under the lawful ownership of a father, husband, slave master, or guardian. [75] Rape, then, became a property crime, or a crime against a man’s honor. Sexual assault was paired with property crimes when sexual assault was reported prior to World War II, as in, “There was much looting and rape” or “there were many instances of rape and pillage.” [76] While modern times may be somewhat more enlightened [77] it is easy to see how, historically, sexual violence against women was a message between men:

Rape by a conqueror is compelling evidence of the conqueror’s status of masculine potency. Defense of women has long been a hallmark of masculine success. Rape by a conquering soldier destroys all remaining illusions of power and property for men of the defeated side. The body of a raped woman becomes a ceremonial battlefield; a parade ground for the victor’s trooping of the colors. The act that is played out upon her is a message passed between men – vivid proof of victory for one and loss and defeat for the other. [78]

In the middle ages, access to vanquished women was used as an incentive to capture a town. [79] Even as gender violence was prohibited by customary law, crimes were largely ignored or tolerated by superiors, some of whom believed sexual violence before battle enhanced the soldiers’ aggression or power cravings, and that post-battle rape was a well-deserved reward, a chance for soldiers to release tensions and relax. It was not a priority to enforce prohibitions against rape, as rapes were considered incidental by-products of conflict. [80] Prior to the mid-1800s, custom, domestic military codes, and religious instruction constituted the laws of war. Before international humanitarian law was codified, rape crimes were prohibited by custom. [81] Italian lawyer Lucas de Penna urged in the 1300s that wartime rape be punished as severely as peacetime rape. [82] Sir Peter Hagenbach was sentenced to death in 1474 for war crimes which included rapes that were committed by his troops. [83] It was determined in the 1500s by respected jurist Alberico Gentili’s survey of the literature on wartime rape that it was unlawful to rape women, including combatants, in wartime. [84] Hugo Grotius also determined in the 1600s that sexual violence in wartime and peacetime must be punished alike. [85]
The Lieber Code which codified the customary laws of war into U.S. army regulations in 1863, clearly listed rape as one of the most serious war crimes, contrary to later documents which used language which tended to trivialize the sexual violence. Article 44 of the Code declared that “all rape is prohibited under the penalty of death,” and Article 47 stated “crimes punishable by all penal codes, such as . . . rape . . . are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.” [86]

The 1907 Hague Conventions [87] and regulations indicated “family honour and rights must be respected,” a phrase which has caused some concern with its vagueness, but which is commonly understood to prohibit sexual assault. [88] The 1919 War Crimes Commission established a response to ruthless atrocities committed during World War I, including “rape” and “abduction of girls and women for the purpose of forced prostitution” among the listed offenses deemed punishable. [89]

There is a sense among all cultures and peoples that it is not right: assaulting or killing an enemy soldier and assaulting or “killing women and children because they belong to the enemy are not equivalent acts.” [90] But still gender violence persists. As codified protections afforded to civilians evolved, and society purportedly advanced, protection against gender violence was an exception. “A free hand with a girl seems always to have been a basic component of what the common soldier hopes for, believes he deserves, and feels entitled [to receive.]. . . The literature of war is full of evidence of this disagreeable dark edge to military behavior.” [91] Protection did not improve for women during the 20th Century, the bloodiest in history. [92] Women’s situations during armed conflict even appear to have worsened. [93] Despite the impermissibility of rape in war throughout centuries, and despite treaties, laws and prosecutions, gender violence continues to be standard operating procedure in war. [94]
III. International Humanitarian Law and Gender Violence

The Treatment of Women in International Humanitarian Law and Documents

The chief international humanitarian law documents that regulate contemporary armed conflicts are the 1907 Hague Conventions [95] and Regulations, the four 1949 Geneva Conventions along with annexes to the Conventions, [96] and the two [97] 1977 Additional Protocols [98] to the Geneva Conventions. [99] All or parts of these instruments are now recognized as comprising customary international law. [100] The four Geneva Conventions are binding universally, regardless of whether States are parties to the treaties or not. [101] The Conventions dictate the treatment of the sick, wounded, and shipwrecked combatants, civilians, and prisoners of war during periods of armed conflict. [102]

Although international humanitarian law instruments provide general and detailed instruction on the treatment of protected persons during armed conflict, protections for women are strangely minimal and weak in light of the detail given other issues. [103] For example, humanitarian instruments delineate conditions in which sports and games are allowed prisoners (GC III), how many cards and letters prisoners should be allowed to receive (GC III), and the maximum number of belligerent warships which can be in the ports of a neutral party (Article 15 of the Hague Convention IV). There is no such exhaustive detail, however, and very little mention, of either female combatants or civilians. [104]

There is also almost nothing documenting regulations for the treatment of women in the World War II war crimes trial collections either. For example: [105] “In the entirety of the Hague Conventions and Regulations, one single article (IV, Art. 46) vaguely and indirectly prohibits sexual violence as a violation of ‘family honour.’ The forty-two-volume set of transcripts of the Nuremberg trial contains a 732-page index. Neither ‘rape’ nor ‘women’ is included in any heading or subheading in this index, despite the fact that crimes of sexual violence committed against women were extensively documented in the transcripts. [106]

In the five supplementary indexes to the twenty-two-volume set documenting the Tokyo trial, ‘rape’ is only included under the subheading ‘atrocities.’ Even then, a mere four references are cited, representing but a minuscule portion of the number of times rape and other forms of sexual violence were included within the International Military Tribunal for the Far East (IMTFE) transcripts. [107]

The four 1949 Geneva Conventions came after the Second World War and the Nuremberg and Tokyo war crimes trials. Within the 429 articles that comprise the four 1949 Geneva Conventions, only one sentence of one article (IV, art. 27) explicitly protects women against ‘rape’ and ‘enforced prostitution,’ and only a few other provisions can be interpreted as prohibiting sexual violence.

The 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict omits any reference to sexual violence. [108] An obvious place for the inclusion of explicit prohibitions of sexual violence would have been paragraph 5, which
All forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal."

One article in the Fourth Geneva Convention and in each of the two 1977 additional Protocols explicitly prohibits rape and enforced prostitution. [109] Article 27 of the Fourth Geneva Convention states what protected persons are entitled to: [110]

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 honour, in particular against rape, enforced prostitution, or any form of indecent assault. [111]

Article 76(1) of Protocol I states: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution, and any other form of indecent assault.” [112] Article 4(2)(e) of Protocol II prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution and any form of indecent assault.” International humanitarian law instruments approach sexual violence as an affront to personal honor, rather than as criminal violence against women, perhaps reflecting past historic attitudes in turn reflected in many domestic criminal systems. Even though the Conventions and Protocols link rape with crimes of honor or dignity instead of crimes of violence, rape and forced prostitution are at least included. While the phrasing mischaracterizes the character of the offence, minimizing the violent nature of the crime, it at least arguably provides potential protection. [113]

It is generally held that serious violations of the Geneva Conventions can be criminally punished as crimes of war. The Nuremberg trials recognized that it “is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty, if it is made a crime that international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations recognize generally.” [114] Customs of war have played an important part in reinforcing and supplementing the humanitarian law and documents of The Hague and Geneva Conventions. The post World War II international war crimes tribunals, and more recently the Yugoslav and Rwandan Tribunals further expanded this area of law. [115]

B. The World War II International Military Tribunals and Gender Violence

The world was shocked by the intentional extermination and unfathomable cruelty towards millions of innocent civilians during World War II. Indiscriminately, men, women, and children were brutalized, murdered, tortured, starved, and forced into slave labor and deplorable prison camp conditions. Besides these horrific crimes, women and girls were also subject to rape, sexual slavery, and other forms of sexual violence and persecution. [116] With the Nuremberg International Military Tribunal (IMT) and Tokyo
Tribunal (IMTFE) focus was on those responsible for waging aggressive war, and they largely ignored sexual violence. [117] The IMT Charter did not include sexual violence, and the Tribunal didn’t directly prosecute such crimes, perhaps because of Allied abuses also, despite that gender violence crimes were extensively documented. [118] Gender-related crimes, however, were included as evidence of the atrocities which were prosecuted during the trial, and can be considered subsumed within the IMT Judgment. [119]

The Nuremberg Tribunal recognized sexual violence as torture: Many women and girls in their teens were separated from the rest of the internees . . . and locked in separate cells, where the unfortunate creatures were subjected to particularly outrageous forms of torture. They were raped, their breasts cut off. . . [120] Women were subjected to the same treatment as men. The physical pain, the sadism of the torturers added the moral anguish, especially mortifying for a woman or a young girl, of being stripped nude by torturers. Pregnancy did not save them from the lashes. When brutality brought about a miscarriage, they were left without any care, exposed to all the hazards and complications of these criminal abortions. [121]

Later Nuremberg trials held by the Allied Forces under the auspices of Control Council Law No. 10 (CCL 10), [122] which listed rape as a crime against humanity, [123] still gave gender crimes only minimal attention, most often for sterilization, forced abortion, and sexual mutilation arising in the trial of prison camp medical doctors. [124] The Tokyo Charter did not specifically list any sex crime. The Tokyo Indictment, however, did include raping of civilians as “inhumane treatment,” “mistreatment,” “ill-treatment,” and a “failure to respect family honour and rights.” [125] Rape crimes, therefore, were expressly prosecuted, even though the extent was limited and they were grouped with other war crimes. [126] The IMTFE held General Iwane Matsui, Commander Shunroku Hata, and Foreign Minister Hrota criminally responsible for a number of crimes committed by their subordinates, including rape. [127] War crime trials in Jakarta held some Japanese defendants guilty of enforced prostitution for selling Dutch women into sexual servitude to the Japanese military. [128] When the U.S. Military Commission tried General Tomoyuki Yamashita, for failing to exercise command control of his troops who committed atrocities in Manila, referred to as the “Rape of Manila”, it was for failing to prevent, halt, or punish the gender violence of his troops. Although Yamashita insisted that he did not know of the behavior of his men because there were communications breakdowns, he was busy with strategy-planning, and he had no direct notice, he was held criminally responsible, sentenced to death, and executed. [129] While women and girls have been subjected to often extreme sexual violence during wartime, even in the twenty-first century, the humanitarian documents regulating armed conflict either minimally incorporate, ignore, inappropriately characterize, or simply fail to mention these crimes. Because men did the drafting and enforcing of humanitarian law provisions, it primarily fell upon men to enumerate, condemn, and prosecute these crimes. They neglected to do so. [130]
IV. Progress in Gender Violence Definition, Delineation and Enforcement at the Tribunals and International Criminal Court

Laws prohibiting wartime sexual violence languished largely ignored for centuries, and treaties and customary practices overwhelmingly failed to take women and girls, and crimes committed against them, into account. [131] There have been enormous recent gender justice advancements, however, with the new international criminal law applicable to armed conflict through the International Criminal Court (ICC), and the jurisprudence of the Yugoslav and Rwandan Tribunals. Major leaps forward in just a little over the last decade have been fuelled by these three entities. [132] The recent and rapid “progress in prosecuting various forms of gender-related crimes is unparalleled in history and has an established critical precedential authority for redressing these crimes in other fora and conflicts.” [133] Where the laws of warfare have, for centuries, both implicitly and explicitly prohibited rape of combatants and non-combatants, those prohibitions were enlarged by the Rome Statute and the Tribunals to include other forms of sexual violence, including sexual slavery, forced impregnation, forced maternity, forced abortion, forced sterilization, forced marriage, forced nudity, sexual molestation, sexual mutilation, sexual humiliation, and sex trafficking. [134] Beyond that broadening, the ICC and Tribunals also expanded definitions, principles of accountability, criminal liability and victim protection. It is perhaps not surprising then, that they were born in an era of conflicts noted for gender violence. As the result of findings of widespread and systematic rape, and “ethnic cleansing,” from a commission of experts established by the United Nations Security Council, [135] the International Criminal Tribunal for the former Yugoslavia (ICTY) was created with the mandate to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” [136] When violent genocide erupted in Rwanda the following year, the UN both appointed a special rapporteur for Rwanda and a commission of experts to investigate serious crimes committed during the armed conflict, including massive gender violence. [137] In the hundred-day period when 600,000 or more people were slaughtered in Rwanda, “Rape was the rule and its absence the exception.” [138] The International Criminal Tribunal for Rwanda (ICTR) was subsequently created, and both Tribunals were authorized to prosecute war crimes, crimes against humanity and genocide. “Rape” and “sexual violence” are included in Article 5 of the ICTY Statute and Article 3 of the ICTR Statute. Rape is most often prosecuted successfully as a crime against humanity, which is included in both provisions when it is committed in a widespread and systematic attack against a civilian population. [139] The new International Criminal Court (ICC) with its jurisdiction over the most serious crimes of concern to the international community holds much promise for enforcement of humanitarian law principles and criminal law prohibitions related to gender violence. Throughout both the Preparatory Committee negotiations and the subsequent Rome Conference, gender issues were contentious and the source of numerous debates. [140] Women’s organizations and their supporters established the Women’s Caucus for Gender Justice in the ICC to advance women’s issues and to ensure that the ICC Statute included provisions addressing gender violence concerns. [141] The Rome conference produced a final draft of the ICC Statute incorporating gender-based crimes in progressive and
previously uncharted ways. [142] War crimes, crimes against humanity, genocide, and aggression are the general categories of crimes which fall under ICC jurisdiction, and include gender violence. [143] The ICTY, the ICTR, and the ICC, and the ways they have contemporaneously developed, created the perfect legal storm that spawned major changes in the definition, scope and enforcement of gender violence justice.

Sexual Violence as Torture

In the 1998 Furundzija case the ICTY determined rape and sexual threat and coercion to be torture, and underscored the importance of a single victim in violations of humanitarian law. a broader definition. [144]

Sexual Violence as a Campaign of Terror

In an early landmark case involving sexual violence, Tadic. [145] the ICTY in 1997 held a low-level member of the Bosnian Serb forces operating in Prijedor at the notorious Omarska detention camp guilty for his participation, generally, in a widespread and systematic campaign of terror that included beatings, torture, sexual assaults, and other physical and psychological abuse of the most heinous nature. He was also found guilty for aiding and abetting the sexual mutilation of a male prisoner. [146] Female victims would not testify against him out of fear, so male victims were the subjects of the case. Among the many precedent-setting features of the case were making rape and sexual violence constituent elements of a widespread campaign of terror, and not just a soldier’s random outlet for sexual energy. It also clarified that the “widespread and systematic” requirement of crimes against humanity, meant just that rape must be part of a widespread campaign that might include many crimes, and that it was not necessary that the raping be widespread. [147]

3. Rape as Sexual Enslavement

Greatly contributing to the law of sexual slavery, the 2001 Kunarac [148] case was the first conviction of rape as a crime against humanity in the Yugoslav Tribunal and first ever conviction of an accused for enslavement involving rape. Besides those milestones, the case articulated the elements of rape and torture under international law, and made extensive holdings regarding the indicia of enslavement. [149] Also referred to as the Foca trial with its earlier version, Gagovic, et al., it has been applauded for making it clear that resistance per se, or non-consent, or even physical force are not required in order to find the crime of rape. [150]

Rape as Genocide

The ICTY Statute at Article 4 and the Rwandan Tribunal Statute at Article 2 make acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and complicity in genocide, punishable as acts of genocide. The Statutes mirror the Genocide Convention’s definition:
Any one of the following acts, when committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. [151]

In Rwanda between April 7 and mid-July 1994, some 600,000 to 700,000 men, women and children were systematically slaughtered and hundreds of thousands of others were tortured, raped, sexually enslaved and otherwise abused after Hutu leaders incited militia and the Hutu public to hunt down and quash their Tutsi neighbors and Tutsi sympathizers, culminating in the swiftest raping and killing spree in recorded history. [152] It is not surprising, in light of such atrocity, that Akayesu presented the first ever conviction for sexual violence based on genocide.

The Akayesu judgment recognized sexual violence as causing extensive harm and that it is intentionally used during periods of mass violence to subjugate and devastate a collective enemy group. [153] The decision found rape part of the genocidal regime carried out by Hutus, “an integral part of the process of destruction.” [154] “Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.” [155]

5. Command Responsibility for Gender Violence

The ability to hold military superiors responsible for the sexually violent actions of their men is particularly important in eliminating the encouragement, acceptance, or tacit approval which has historically resulted in widespread rape in war. The ICTY Celebici decision importantly clarifies command responsibility for sexual crimes. In determining whether superiors could be criminally responsible for unlawful sexual assaults and other conduct of their subordinates, the Trial Chamber found that was a “well-established norm” of international customary and conventional law. [156] Essential elements are: the existence of a superior-subordinate relationship; the superior knew or had reason to know that the criminal act was about to be or had been committed; and the superior failed to take the necessary and reasonable measure to prevent the criminal act or punish the perpetrator thereof. [157]

Sexual Violence as Joint Criminal Enterprise

The ICTY also expanded notions of joint responsibility for gender violence. The Kvocka [158] case is one such example. For three months in 1992, Bosnian Serbs in Prijedor imprisoned over 3,000 men and approximately 36 women in Omarska Camp. Its conditions were vile, and mistreatment was pervasive. The Trial Chamber found that “female detainees were subjected to various forms of sexual violence.” [159] In referring to sexual violence, the Chamber pointed out that term covers a broad continuum of crimes such as rape, molestation, sexual slavery, sexual mutilation, forced marriage, forced abortion, enforced prostitution, forced pregnancy, and forced sterilization. [160] Five accused who either worked in, or visited often, the Omarska prison camp, were charged with sexual violence as persecution. Only one of the five, Mlado Radic, was
charged with physically committing the sexual violence. The case developed the common purpose doctrine/joint criminal enterprise theory from the Tadic Appeals Chamber Judgment. The Trial Chamber set out when a joint criminal enterprise may exist, and said it could be for the purposes of rape or forced impregnation. [161] It also held joint criminal enterprise liability could possibly be incurred by knowingly working in the criminal environment of Omarska. Sexual violence was not only foreseeable, but inevitable at Omarska: in Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity… [162]

V. Ongoing Gender Violence Despite Legal Progress

A. The Case of Darfur

Despite progress made by the Tribunals in combating impunity for major perpetrators of gender violence, women continue to be victimized at alarming rates in armed conflict today. Darfur is only one of the ongoing conflicts where sexual violence is inherent. Since the situation in Darfur has already been referred to the International Criminal Court (ICC), and will be scrutinized as the first Security Council referral there, its sexual violence aspects may also receive heightened attention, making it an appropriate case study.

1. The Setting: Sudan and Darfur

The Sudan is located in the northeastern part of the African continent. In its 967,498 square miles, there are 570 tribes. The Sudan is considered a Least Developed Country, and ranks 139 in the 2004 UNDP’s Human Development Index. [163] The discovery of oil holds promise for the future of the economy, but may be exacerbating the conflict. Currently, however, 66 percent of the population is employed in agricultural activities. [164] Among its 39 million inhabitants, Islam is the predominant religion, particularly in the north, while Christianity and animist traditional African religions are more prevalent in the south. [165] The World Bank estimates the literacy rate for those over age 15 at 60 percent, 69 percent for males and 46 percent for females. [166] Sudan was a colony of Great Britain from 1821 until it became an independent state on January 1, 1956. [167] Since independence, Sudan has had ten years of intermittent democracy, the latest period between 1985 and 1989. During the rest of its independence, Sudan has been ruled by military regimes, which came to power through coups d’état. Since 1989, General Omar Hassan El-Bashir has governed, following a military coup d’état organized with the Muslim Brotherhood. After an internal power struggle in 1999, President El-Bashir declared a state of emergency, dissolving the Parliament and suspending important provisions of the Constitution. [168] That state of emergency continues today.

Darfur, in the western part of the Sudan is approximately 250,000 square kilometers with an estimated population of six million persons. Darfur borders Libya, Chad and the Central African Republic. Its three states of North, South, and West Darfur have only a
few major towns, and the majority of the population lives in small villages and hamlets, often of only a few hundred families. Subsistence and limited industrial farming and cattle herding comprise the bulk of the economy. The tribes of Darfur share the same religion (Islam) and generally speak Arabic, sometimes in addition to their own language. Land-ownership in Darfur has been traditionally communal, with “dar” meaning homeland. Because Darfur is part of the Great Sahara region, most land remains arid, and there has been a progressive fight for scarce resources, causing tensions between agriculturalists and cattle herders. [169] Movement of cattle and nomadic shifts, formerly tolerated, have aggravated tensions as water and pasture become more scarce. [170]

2. The Conflict

Gender violence is a prominent feature of the current conflict in Darfur, which has complex roots. Contributing factors include the intentional weakening of tribal government and traditional law by the central government, desertification, the availability of modern weapons from civil war in Sudan and from its neighbors, and the emergence of multiple rebel groups which cite the reasons for their rebellion as including socio-economic and political marginalization of Darfur and its people. [171] The rebels, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) began their first military activities in late 2002. The government, still preoccupied with civil war in the south, called upon local tribes to assist in fighting the rebels, aggravating tensions between different tribes. Mostly Arab nomadic tribes without a traditional homeland, and wishing to settle because of encroaching desertification, responded to the recruitment. The new recruits were called “Janjaweed”, a traditional Darfurian term the civil population uses to denote an armed bandit or outlaw on a horse or camel. Victims of attacks say “Janjaweed” have the support, complicity or tolerance of the Sudanese State authorities, and who benefit from immunity for their actions.” [172] Sudanese state authorities claim that any violations committed by the Janjaweed have no relationship to state actors. [173] The most significant characteristic of the conflict has been “Arab African” attacks on “Black African” civilians, leading to widespread death, the destruction by aerial assault and burning of entire villages, hideous sexual violence, and the displacement of large parts of the civilian population. [174] Hundreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages. [175] It has been often cited that 180,000 people have died in the hostilities and about 10,000 people a month are dying as a result of the conflict, although there is not universal agreement on the figures. [176] No one knows for certain the number of deaths in Darfur, and mercurial estimates range from 50,000 to as high as 400,000. [177] Many authorities agree on a more conservative number of deaths than the highest estimates.” [178] All agree the massive numbers of refugees and displaced people who have fled the conflict continue to suffer untold hardship, sexual violence and death.
International human rights law, international humanitarian law, and international criminal law apply to the Darfur situation. All provide for the protection of women and would prohibit sexual and gender violence. Human rights law protects at all times, in both conflict and peace, creating duties between the State and individuals. International humanitarian law applies only in situations of armed conflict. All the parties to the conflict recognize it as an internal armed conflict. That designation determines which law to apply. In the past, impunity often resulted from internal conflicts with non-state actors, but that is no longer necessarily the case. The Geneva Conventions, including grave breaches provisions, are not broadly applicable to internal armed conflict (except to the extent their provisions have become customary law which would then apply to both international and internal conflict); common Article 3 of the Geneva Conventions and Additional Protocol II apply to non-international armed conflict. The International Court of Justice has indicated that common Article 3 provisions “constitute a minimum yardstick applicable to any armed conflict as they are ‘elementary considerations of humanity.’” It has also been held in the Tadic case (interlocutory appeal) that the main body of international humanitarian law also applies to internal conflicts as a matter of customary law. Such customary rules applicable to the current armed conflict in Darfur and protection of women there from gender violence include:

1. the protection of civilians against violence to life and person
2. the prohibition on deliberate attacks on civilians
3. the prohibition on indiscriminate attacks on civilians, even if there may be a few armed elements among civilians
4. the prohibition of attacks aimed at terrorizing civilians
5. the prohibition on the forcible transfer of civilians
6. the prohibition on torture and any inhuman or cruel treatment or punishment
and
7. the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence.

In the area of human rights, Sudan has ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). It has signed, but not yet ratified, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the...

While these treaties cover a broad base of human rights, some of the particularly relevant provisions as applied to women and gender violence are: (1) the right to life, and to not be “arbitrarily deprived” of it; [194] (2) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; [195] (3) the right to freedom of movement, to choose one’s own residence and hence not to be displaced arbitrarily; [196] (4) the right to health; [197] (5) the right to an effective remedy for serious violations of human rights; [198] (6) the right to reparations for violations of human rights; [199] (7) the obligation to bring to justice the perpetrators of human rights violations [200] and the right to liberty. [201] These provisions apply to women at all levels of society, in times of peace and war.

Although Sudan has signed the Rome Statute establishing the International Criminal Court (ICC), it has not yet ratified the Statute, but is bound to refrain, as a signatory, from “acts which would defeat the object and purpose” of the Statute. [202] The situation in Darfur, referred to the ICC by the UN Security Council, is likely to result in criminal actions being initiated. [203] ICC definitions for crimes against humanity and war crime provisions applying to conflicts of a non-international nature, [204] previously discussed, will be applied in any gender violence cases that come before the ICC. Genocide may also be a consideration, although the United Nations Darfur Commission did not find genocide being committed generally and would leave it to a court to decide specific cases. [205]

4. Atrocities Against Women Civilians in Darfur

In Darfur, women have been summarily and indiscriminately killed, bombed, tortured, abducted, forcibly displaced and sexually abused. [206] There is story after story of mind-numbing violence, of gang-rapes of women and girls, and children being torn away and beheaded or thrown onto a fire alive. [207] NGOs have documented in detail hundreds of cases of rape and other forms of sexual violence in Darfur. [208] There has been retribution against entities speaking out about the nature and extent of gender violence. One NGO Director was arrested and the organization’s Darfur coordinator jailed after disclosure of the large number of sexual violence victims presenting in their clinics. [209]

Rape and sexual assault have been used by government forces and government-backed Janjaweed militia as a deliberate strategy with the aim of terrorizing the population, ensuring its movement and perpetuating its displacement. [210] While there are many pressures for women not to report victimization, [211] the numbers of sexual assaults are thought to be in the thousands or tens of thousands. [212] Rapists and sexual abusers operate with impunity and the support of government entities. Some examples:

In Krolly village, South Darfur, residents gathered in the police station, seeking protection from Janjaweed attacks. Police held the civilians there several days while the militia selected young women for rape. Treatment of men who protested included being shot in
both legs and hung naked from a tree. If a woman protested she might be beaten and then raped in front of the group. [213]

In Goz Baggar, North Darfur, fifty Janjaweed militia on October 18, 2004, attacked the village women. “The men didn’t just rape them but afterwards they cut off their sexual parts and sewed them up,” one witness said. [214]

Girls as young as seven and eight have been raped; [215] one 12-year-old taken by soldiers and raped for two days now isolates herself, believing she is khasrana (damaged). [216] Another 12-year-old was captured by Janjaweed on horseback after her father was killed, and raped in the open in front of others by six men, and then taken away and held by the military and Janjaweed for ten days. [217]

In Tawila, a girl’s school was targeted while the children were sleeping, with 41 of the children and teachers who tried to protect them gang-raped by up to 14 militia and soldiers, resulting in many civilian killings. [218]

Pregnancy is no protection: a woman from Muray was raped and subsequently lost her baby; another from Disa was raped by a soldier and delivered her baby alive; Aziza, an 18-year-old woman, had her stomach slit as a soldier said, “It is the child of an enemy.” She died. [219]

Sexual slavery is enhanced by breaking women’s and girl’s legs to keep them from escaping. [220]

Reaching the “safety” of refugee camps offers no guarantee of protection. Of almost 500 women and girls treated by one medical group in a 5-month period in 2004-2005, 82 percent of the rapes occurred when they had to leave camps in search of water, firewood or grass for animal fodder. A third of these women and girls were raped by multiple perpetrators. [221]

Cultural and religious taboos placing a high premium on chastity and so-called purity, dictating that women are “spoiled goods” if they have sex voluntarily or involuntarily outside of marriage [222] are socially, psychologically, and economically devastating to Darfur women. [223] There are also severe medical consequences to the sexual violence: internal bleeding, fistulas, incontinence; the risk of contracting sexually transmitted infections including HIV/AIDS, STIs and hepatitis; complications of pregnancy; and the exacerbating effects of not having access to healthcare. [224] Female genital mutilation and circumcision, practiced in Sudan, increase the risk of injuries during rape and consequently the likelihood of getting sexually transmitted infections. [225] Psychologically, effects can be lifelong and crippling, including depression, isolation and suicidal ideation. [226]

B. Darfur and the ICC: Gender Violence in the First Security Council Referral

1. Darfur’s Path to the ICC

The very creation of the ICC may be seen as a global response to the extreme atrocities perpetrated in the last century, including gender violence. Unfortunately, in all too many cases, terrible crimes went unpunished and a perceived culture of impunity protected the perpetrators. National courts often did not investigate the crimes adequately, or at all. [227] The situation in Darfur, according to findings in the Darfur Commission Report, fits that category. [228] Although it is not the first case with serious gender
violence features at the ICC, it is the first such non-consensual case, giving it both added scrutiny and importance.

The Security Council’s power to trigger proceedings before the Court based on Chapter VII of the Charter of the United Nations was an early feature of the developing ICC. The Security Council’s referral would make the Court’s jurisdiction in such actions binding and legally enforceable on all States, even non-parties to the Rome Statute like Sudan. In Security Council referrals under Chapter VII, the Rome Statute applies to all the human beings of the world. On March 31, 2005, the Security Council, in a historic first, referred the situation in Darfur since July 1, 2002, to the Prosecutor of the International Criminal Court. Since then, the Prosecutor has reviewed voluminous information and “determined, on June 1, 2005, the existence of sufficient information to believe that there are cases that would be admissible in relation to the Darfur situation” and initiated an investigation.

As has been a common step preceding a Security Council decision on whether to establish an accountability mechanism, UN Secretary-General Kofi Annan, on September 18, 2004, commissioned a report on the situation in Darfur under Chapter VII of the UN Charter, after the Security Council adopted Resolution 1564 requesting he do so. The Commission’s January 25, 2005 Report urged referral to the ICC, finding the likelihood that heinous crimes constituting war crimes and crimes against humanity, including rape and sexual violence, and torture.

In its Resolution 1593 referral of the Darfur situation to the ICC, the Security Council previously made aware of the judicial conditions and limitations through the Darfur Commission Report, nevertheless indicated its desire to have the Court work with Sudan. The Resolution encourages the Court “to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur.” It also encourages “the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary.” The Security Council further urged the ICC to include “the possibility of conducting proceedings in the region, and the Prosecutor has recently acknowledged the referral recommendations.” Those three “encouragements” provide a broad invitation to the Court and Prosecutor to look at the state of national justice as part of its international mission, if not mandate, for Darfur. Long term, that could provide more expansive and extensive access to justice for Darfur’s gender violence victims than any prosecutions of sexual violence perpetrators at the ICC.

C. Justice Begins at Home: Bringing International Accomplishments to Bear on National Justice for Gender Violence Victims

1. The ICC and Darfur: The Need for International Help at the National Level

The commitment to constructing effective national justice was built into the very beginning of the ICC Statute. “While the ICC must be able to act when national systems fail to provide justice from mass atrocity, its success will also be measured by its
ability to bolster domestic judicial systems.” [240] For the many gender violence victims who will never be able to make the trip from Darfur to The Hague to testify against their persecutors, and for their many perpetrators who will never be indicted there, the ICC can provide two great benefits with impact outside of, and beyond, the Court: (1) pressure to move Sudan toward a workable, responsible, and legitimate justice system with laws and procedures modeled on the ICC’s gender violence protections, and (2) meaningful reparations for victims. The fact that most of the alleged perpetrators still live in their home areas, many wielding “power as politicians, municipal officials, police officers and businessmen” even though charged at the international level, has been cited by both Bosnian and Rwandan women as reason for great fear, and silence. [241] Unless the local and national levels of Darfur justice function justly, victims will be at risk, and in fear, of those who sexually persecuted and assaulted them, even though the crimes against them fall within “the most serious crimes of concern to the international community” contemplated by ICC Article 5.

2. The Challenges of Promoting Improvements in Sudan’s National Justice System

In Darfur’s current situation the ICC may have major challenges working with government officials on national court issues. The world has reason to question their commitment and credibility. Sudan’s Foreign Minister recently said, “The Sudanese judiciary is, and always has been, willing and capable of assuming its responsibilities.” Last fall the UN-appointed Commission on Darfur reviewed the Sudanese justice system and its actions involving the current conflict:

The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur. Very few victims have launched official complaints regarding crimes committed against them or their families due to a lack of confidence in the justice system. Of the few cases where complaints have been made, most have not been properly pursued. Furthermore, procedural hurdles limit the victim’s access to justice. [242]

The Darfur Commission provided an extensive overview of the Sudanese judicial system, applicable Sudanese laws, and actions taken by the Sudanese government and its quasi-judicial bodies. [243] It found that “in view of the impunity which reigns in Darfur today, the judicial system has demonstrated that it lacks adequate structures, authority, credibility, and willingness to effectively prosecute and punish the perpetrators of the alleged crimes that continue to exist in Darfur.” [244] Restrictive laws that give broad powers to the executive have undermined the effectiveness of the judiciary and many of the laws in force contravene basic human rights standards. Sudanese criminal laws do not sufficiently proscribe war crimes and crimes against humanity, such as those carried out in Darfur. The Criminal Procedure Code has provisions that prevent the effective prosecution of these. Victims do not have confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. Many have feared
reprisals in the event that they resort to the national justice system. [245]

One example directly regarding gender violence involves the Sudanese National Commission finding that “crimes had not been systematic or widespread constituting a crime against humanity as mentioned in the allegations.” [246] The National Commission contended that the word “rape” with its legal and linguistic meanings, was not known to the women of Darfur in general, and that they believed the meaning of the word “rape” was to use violence to compel a person to do something against that person’s will, and not specifically to rape. [247]

Regarding scenes of a group rape that were shot within Darfur and shown outside the Sudan, the National Commission found “some of the persons who took part in this confessed that they were given sums of money as an incitement to play roles in those scenes” and that the video was fictitious. [248]

The Minister of Justice indicated he had lifted the normal immunity military forces and officials have, to try ten members of the regular forces on rape charges. [249] Thirteen people, however, were tried and convicted for producing fake video implicating the military in the commission of rape. [250]

In response to United Nations pressures, in July 2004 the government of Sudan committed to undertake measures to end impunity for human rights violations in Darfur. Because of the widespread allegations of rape and other incidents of sexual abuse of women, the Minister of Justice agreed to establish Rape Committees for the three Darfur states. The Committees were composed of three female members, a judge, a legal counsel from the Ministry of Justice, and a police officer. The mandate of the Committees, however, was “to investigate the crimes of rape in the three states of Darfur” making the investigatory mandate too narrow to address the serious allegations of violence against women. [251] Means of redress or reparation for the victims was not brought within the scope of the mandate, limiting the effectiveness of the initiative. [252] International law not only requires States to address human rights violations, it must take measures to prevent their occurrence, and provide an effective remedy for violations. [253]

The Committees were not given sufficient time, adequate guidelines, and criteria for selection of cases for investigation and prosecution, or guidance as to the proper methods for investigating crimes constituting serious human rights violations. Government actions indicated a lack of any serious commitment on the part of the government to investigate the allegations of widespread rape and to end impunity for the crimes. [254] The Sudanese investigation committees, after a three-week visit to Darfur’s regions, registered 50 rape cases, 35 of which were against unknown perpetrators. In cases where the perpetrators were unnamed or unknown, no further investigation was conducted. [255]

The Rape Committees had severe constraints because of the lack of resources and technical assistance, and because the approach adopted could not be conducive to achieving the objectives for which they were established. [256] The Committees: (1) placed undue burden on the affected population to produce evidence, (2) lacked sufficient commitment to achieving their goals, (3) could not mitigate distrust by the population, (4) rejected too many cases, (5) confined themselves to the crime of rape (6) did not process any other forms of sexual abuse, and (7) failed to record information on cases which could be further investigated. [257]
The Darfur Commission found “the work of the Rape Committees does not provide a sound basis for any conclusions with regard to the incidence of rape in Darfur nor does it satisfy the requirement of state responsibility to investigate cases of serious violations of human rights and the accountability of those responsible.” [258] “According to the Commission’s findings, it is unlikely that the legal and judicial systems in Sudan in their present form are capable of addressing the serious challenges resulting from the crisis in Darfur. Victims often express lack of confidence in the ability of the judiciary to act independent and in an impartial manner.” [259] If there is to be justice for gender violence victims at the national level, there will need to be willingness by Sudan to change, and major assistance from the international community. Hopefully, the ICC will play an important role in national justice development. The Prosecutor has already met Sudanese officials in the Netherlands and received information about the country’s legal system. [260] Obtaining national justice likely has little chance of success in light of the current political realities in Sudan, even though officials there formed its specialized court to work on prosecutions [261] and in June 2005 initiated trials of 160 alleged suspects. [262] Among the names of persons responsible for abuses in Darfur given to the ICC Prosecutor [263] may be those within, or responsible for, the Sudanese justice system. No high officials are among those being tried—current trials are not the most serious cases. [264] These actors may be resistant to their responsibilities to have a properly functioning national justice system because they are complicit with the perpetrators themselves. Even if not necessarily an element of the major offenses where atrocities are present — genocide, torture, and so on – they almost invariably imply State policy and involvement or, at the very least, tolerance. [265]

The justice system in the Sudan was one of the causes of the recently concluded north-south civil war, in part because Islamic justice was being imposed on the south. That area is primarily composed of those who practice traditional African or Christian religions. [266] Non-Muslim minorities continue to have an inferior legal and political status. [267] While delegations from Islamic law traditions, including much of the Arab world, participated in the drafting of the Rome Statute [268] the penalties under the form of Shari’ah law practiced in Sudan are extreme, and do not comport with world views of human rights. The death penalty is common, as are amputations. Women may be publicly flogged or stoned to death for sexual behavior such as adultery. [269] Sudan’s classical interpretation of Shari’ah also mandates constitutional bias against non-Muslims. [270] At some point in the future, however, with sufficient international pressures, there may be opportunities for the ICC and others on the world’s justice team to prompt, assist or require national justice changes that will truly impact the current impunity of Darfur’s sexual violence perpetrators.

While the Rome Statute does not dictate when it might make sense to establish alternative justice entities in countries recovering from savage conflict, the Prosecutor can and will play an important role in shaping public expectations and diplomatic positions concerning the appropriate forum(s) for prosecution, and has said he will analyze any national proceedings. [271]
3. Transitional Justice Assistance Needed

Perhaps one of the new breeds of justice components, constructed out of national and international elements, or truth commissions, as mentioned by the Security Council in its ICC referral may be helpful in dealing with the situation in Darfur. There are a variety of components in a new architecture of transnational justice that have been evolving, especially in the last decade. Advantages include, (1) they operate on location making justice visible and accessible to its primary audience; (2) they allow for a greater sense of local ownership; (3) they contribute to capacity-building of local justice, and (4) they are inexpensive by international standards. “The proliferation of institutions newly able and willing to seek justice for atrocious crimes presents a challenge that long seemed unimaginable – the need to craft principled guidelines for choosing among a diverse range of courts empowered to bring wrongdoers to account. There is no one correct legal response to mass atrocity, and there may be a number of options. “Failure to discern the varieties of local conditions and diverse historical circumstances has often resulted in the replication of ‘one-size-fits-all’ strategies to deal with violence against women, and advocacy strategies that respond to circumstances in the West are often distorted when introduced into countries where the significance of certain abuses and the methods of their resolution are very different.”

It is widely accepted that “criminal prosecutions, when appropriate, hardly exhaust the needs of societies emerging from mass atrocity. Thus, for example, truth commissions and reparation programs are rarely seen today as mutually exclusive alternatives to prosecutions.” Concepts may combine, or new ideas emerge. Neil Kritz maintains, with more work than it can do, the ICC would be set up for failure and subject to its critics charges of futility with the limited number of prosecutions it can hope to conduct, unless it explores and supports alternatives sources of national justice. He suggests the ICC Prosecutor “consider the existence or contemplation of such mechanisms as truth commissions, hybrid tribunals, traditional justice, or non-criminal sanctions, and the impact of the ICC on these processes.” He outlines the benefits and examples of mixed justice models like East Timor and Sierra Leone, and innovations in Rwanda and elsewhere new approaches are being tried. There is room, too, for concepts of traditional rituals or tribal law. The Rwandans maintain that their gacaca program of local, justice, will engage local villages in the process, return and reintegrate perpetrators into their home communities, and empty the prisons of untried cases within a relatively short time. Tribal discipline and tradition in Africa once made acts of sexual violence unacceptable, “but,” according to the United Nations Under Secretary-General for Humanitarian Affairs, “there has been such a deterioration in the social and moral fabric that sexual violence has become a method of war, and not just soldiers do it, many civilians do, too; it’s like there are no barriers anymore.” Due regard should be given to informal traditions since where these are ignored or overridden the result can be the exclusion of large sectors of society from accessible justice. Darfur has local tribal models of justice, and the Prosecutor has expressed a commitment to such traditions. One commentator has suggested the use of a woman’s truth commission for gender
violence issues which are otherwise often neglected in general truth commissions. [286]
Such a vehicle would have to be structured to comport with the cultural, social and legal
barriers to admitting rape for Darfur’s victims.

When peace comes to Darfur, it cannot fully be achieved or maintained “unless the
population is confident that redress for grievances can be obtained through legitimate
structures for the peaceful settlement of disputes and the fair administration of
justice.” [287] There is an element of urgency to the imperative restoration of the rule of
law because of the heightened vulnerability of women in particular. [288] In Darfur, as
elsewhere, it will not be easy:
Helping war-torn societies re-establish the rule of law and come to terms with large-scale
past abuses, all within a context marked by devastated institutions, exhausted resources,
diminished security and a traumatized and divided population, is a daunting, often
overwhelming, task. It requires attention to myriad deficits, among which are a lack of
political will for reform, a lack of institutional independence within the justice sector, a
lack of domestic technical capacity, a lack of material and financial resources, a lack of
public confidence in Government, a lack of official respect for human rights and, more
generally, a lack of peace and security. [289]

It will be particularly hard in Darfur, since inadequacies in the justice system have been
clearly denied. It is possible then that the ICC and the United Nations will need to
combine their pressures to strengthen the national courts through transitional justice.
“Transitional justice” comprises:
the full range of processes and mechanisms associated with a society’s attempts to come
to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve
justice and achieve reconciliation. These may include both judicial and non-judicial
mechanisms, with differing levels of international involvement (or none at all) and
individual prosecutions, reparations, truth-seeking, institutional reform, vetting and
dismissals, or a combination thereof. [290]

An effective program for combating impunity requires a comprehensive strategy
comprising mutually enforcing measures at various levels, and includes broad
participation of citizens and victims, with effective measures of truth, justice, reparations
and guarantees of non-recurrence. [291] Each component plays a necessary, but only
partial,
role. [292]
The United Nations, in the past, has incorporated in peace missions operations programs
to train national justice sector officials, support local judicial reform bodies and advise
host country rule of law institutions, strengthen domestic law enforcement and justice
institutions, facilitate national consultations on justice reform, coordinate international
rule of law assistance, monitor and report on court proceedings. It can promote the
participation of women, help vet and select national police, judges and prosecutors, draft
constitutions or constitutional provisions, revise legislation, inform and educate the
public, develop ombudsman institutions and human rights commissions, strengthen
associations of criminal defense lawyers, establish legal aid, set up legal-training
institutes and build the capacity of civil society to monitor the justice sector. [293]
Any transitional justice system must assess and respect the interest of victims in the
design and operation. “Victims and the organizations that advocate on their behalf deserve the greatest attention from the international community.”

Effective strategies for building domestic justice systems will give due attention to laws, processes (both formal and informal) and institutions (both official and non-official). Legislation that is in conformity with international human rights law and that responds to the country’s current needs and realities is fundamental. At the institutional core of systems based on the rule of law is a strong judiciary, which is independent and adequately empowered, financed, equipped and trained to uphold human rights in the administration of justice. Equally important are the other services, fair prosecutions and capable associations of criminal defense lawyers (oft-forgotten but vital institutions). Justice sector institutions must be gender sensitive and women must be included and empowered by the reform of the sector.

Special challenges for victims of sexual assault can be addressed by encouraging implementation at the national level of the protections for victims the ICC so carefully included in the Statute, particularly (1) professional staff with specialized training in dealing with victims of sexual violence or traumatized victims, and (2) witness protection mechanisms.

But will there be an opportunity to implement such transitional justice options in Darfur? The ICC, with the help of the UN and its Security Council mandates from Resolution 1593 has the power to promote such measures as a means to strengthen the national courts—and improve the likelihood that gender violence victims will find justice.

**Practical Progress: Reparations as a Way of Achieving Justice**

Most individuals who suffer loss and damage as a result of armed conflict do not receive compensation. When compensation for war-related loss has been awarded, it has usually been provided in a lump sum as part of an agreement between belligerent states, rather than awarded directly to victims. The recent report of the U.N. Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies has confirmed the growing importance of reparations to societies in transition. In terms of global legal instruments, the principle is embodied in the Universal Declaration of Human Rights, in the work of the United Nations, where specific but widely ratified treaties incorporate the principle unambiguously. The victim compensation principle is enshrined in both civil and common law systems. It can be found in the Islamic world, the African human rights system, the Inter-American system, and the European one, and in the Rome Statute of the ICC. At the beginning of the Rome Conference in June 1998, the proposal to include victims’ reparations in the Statute did not garner universal support. There were concerns that (1) awards might be made against States, (2) a criminal court might have difficulty with determining the form and extent of reparations, particularly with judges from different legal traditions, and (3) legal systems that did not recognize the concept might have problems with it.

What prevailed, however, was a belief that victims had an interest in restorative justice,
and that individual and societal reconciliation and restoration could be enhanced by the availability of reparations, whether in the form of restitution, compensation, or something else. [312]

Provisions for reparations and principles relating to them are set out in Article 75 of the Rome Statute, and Article 109 deals with enforcement. ICC Article 75 requires the Court to establish principles relating to reparations including restitution, compensation and rehabilitation. ICC Procedural Rules on reparations include 93-99, and 212, 217-19, 221 and 222.

The Court may respond to a request for reparations, or raise the issue on its own motion in exceptional circumstances, determining the scope and extent of damage, loss and injury to, or in respect of, victims. [313]

Reparation orders may be made directly against a convicted person or through the Trust Fund provided for in the Statute. The Court may order money or other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund. The Fund can be used for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims. [314]

Victims of sexual violence in Darfur may have serious lasting consequences and injuries. They may not be able to get the rehabilitation they need—the medical and psychological care, the financial assistance—because resources are lacking within their communities. They likely have lost their homes, possessions and livelihoods. The ICC drafters understood the need to provide compensation for true restorative justice, and fashioned the ICC provisions on reparations in a way that assistance could be directed as needed. It is just necessary that whatever forms the reparations might take they must be sufficiently practicable, clear and precise to be capable of enforcement in the courts, or by the other relevant national authorities of States. [315]

In the Security Council Resolution referring the situation in Darfur to the ICC, the Council encouraged states to contribute to the ICC Trust Fund for victims. [316] Darfur victims seeking reparations may be dependent upon the Trust Fund contributions from States Parties, since Sudan, despite its improving economy and oil revenue potential, is still one of the poorest countries in the world. Also, for enforcement of fines and forfeiture measures, Article 109 refers only to States Parties, and Sudan is not one—although voluntary cooperation may be possible at some future time.

There is considerable need for assistance, however, for Darfur victims, many of whom are desperately poor, displaced, and in refugee status. Fashioning relief may require creative alternatives and solutions, [317] but it could have an enormous effect on victims who will otherwise not have the experience of courtroom justice at The Hague. Reparations provide a clear opportunity for the ICC to impact societies recovering from mass atrocity, and specifically Darfur’s gender violence victims. Individuals who have endured sexual violence may be in need a full range of subsistence, and medical, psychological, and long term financial help. It will take considerable creativity and effort to provide such services in much of the ravaged areas of Darfur, but the possibility of using group awards could provide important capacity-building, or otherwise make needed recovery services available. Besides compensation for injuries, reparations could be particularly used to help women progress economically. They also could be used to eradicate domestic violence through education of both sexes, since education has been shown to have a direct connection to violence reduction on the domestic level. [318] The
ICC can both use its Trust Fund to have a considerable impact on victims of sexual violence, and use its leadership to encourage national resources to be made available.

**Sudan’s Duty to Provide Reparations Under UN Policy**

Reparations are a fundamental tenet of United Nations policy, explicitly recognized in every comprehensive human rights treaty. Principle 33 of the Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity is a manifestation of that policy, and it is given practical effect as international criminal law through Article 75 of the Rome Statute. Principle 36 reflects the scope of the right to reparations under international law as further elaborated in draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. The Basic Principles on the Right to a Remedy and Reparations, authored by M. Cherif Bassiouni and Theo van Boven, were 15 years in the making when they were adopted by the Commission on Human Rights April 13, 2005. The Commission sent them on to the Economic and Social Council with a draft recommendation of adoption and further recommendation of adoption to the General Assembly. The Principles and Guidelines, the resolution states, “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.” States must, however, implement international human rights law and humanitarian law that emanates from treaties and domestic law “including reparations” by “implementing them in their domestic legal system.” The scope of that obligation includes the duty to “Provide effective remedies to victims, including reparation.” If the Economic and Social Council and General Assembly adopt the Basic Principles on the Right to a Remedy and Reparations, Sudan would clearly be reminded of its “duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her.” Where injuries are attributable to a State, as alleged gender violence by government troops and militia in Darfur, Sudan would be required pay reparations. States are also encouraged to establish reparations programs for third party liability situations where the party liable for the harm is unable or unwilling to compensate the victim. If not a substitute for critical funding needed by the victim, reparations may also be symbolic where an individual should, but cannot pay, as that, too, can, in itself, be a significant contribution to justice.

The U.N. Basic Principles on the Right to a Remedy and Reparations would, for gender violence victims, require that they “be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.” Some of the things
specifying include compensation for physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services; return to one’s place of residence, restoration of employment and return of property; rehabilitation and various forms of “satisfaction” such as public apologies, official declarations or judicial decisions restoring dignity and reputation; and victim commemorations or tributes. [333]

VI. Steps to Gender Violence Extinction in Armed Conflict

A. Guidelines for Moving Forward: Eleventh Anniversary of the Beijing Platform

Much progress has been made in spotlighting war-related gender violence, and in developing the appropriate law to address its effects in armed conflict. Expectations are high for the new International Criminal Court and its gender-sensitive dimensions. The Tribunals have broken new ground in the jurisprudence of humanitarian law and sexual violence, and there is no reason to doubt the ICC will continue to expand those traditions. It is critical, however, that States recognize their responsibility to enforce humanitarian law principles, and have the capacity to enforce law, end impunity, prosecute perpetrators of violence and provide redress and compensation to survivors of gender-based violence. [334] It is also critically important to ameliorate, or at least impact, the overall problem and its causes.

In 1995, United Nations world leaders of 180 governments and hundreds of NGOs met in Beijing, China, for United Nations conferences on the status of women. These meetings gave rise to the Beijing Platform of Action—one major area of which was Women and Armed Conflict (Critical Area E). [335] It said, “An environment that maintains world peace and promotes and protects human rights, democracy and a peaceful settlement of disputes…is an important factor for the advancement of women. Peace is inextricably linked with equality between women and men and development.” [336] The international governments’ conference found humanitarian law to be systematically ignored in current forms of armed conflict, with massive violations of human rights, including planned rape of women. The Beijing Declaration found these and other conflict atrocities impacting women “abhorrent practices that are strongly condemned and must be stopped immediately, while perpetrators of such crimes must be punished.” [337] It said, “violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including, in particular, murder, rape, including systematic rape, sexual slavery and forced pregnancy require a particularly effective response.” [338] The Platform locked on the importance of women’s participation in the processes of preventing war, protecting civilians, resolving conflict and making and keeping the peace: The equal access and full participation of women in power structures and their full involvement in all efforts for the prevention and resolution of conflicts are essential for the maintenance and promotion of peace and security. Although women have begun to play an important role in conflict resolution, peace-keeping and defence and foreign
affairs mechanisms, they are still underrepresented in decision-making positions. If women are to play an equal part in securing and maintaining peace, they must be empowered politically and economically and represented adequately at all levels of decision-making. [339]

That equal access and participation is far from reality. “While symbolic gestures have been made, women remain significantly underrepresented in conflict resolution processes.” [340] Despite an estimated 50,000 rapes in the Balkan conflicts, not one woman participated in the regional delegations of the Dayton Peace Accords on Bosnia and Herzegovina. At the Rambouillet Interim Agreement for Peace and Self-Government in Kosovo, there was only one Kosovar woman, and at the first Arusha peace talks on Burundi, only two of the 126 delegates were women. [341] The overall assessment on implementation of the Beijing Platform is similar: “very little in real terms has been achieved in addressing the affects of armed conflict on women.” [342]

B. The Unrealized Promise of Resolution 1325

Follow-up from the Beijing world conference did result in women victims of armed conflict and gender violence actually getting to meet with Security Council members on what they had endured. The meeting prompted Security Council Resolution 1325. [343] That document sets out a list of recommendations which, if implemented, would mean considerable progress in impacting the suffering of women in war. Eliminating armed conflict entirely may be the only true guarantee that wartime gender violence will end, and establishing equality between men and women in economic, social, and political spheres is needed to truly eradicate the root causes and effects of violence toward women. But Resolution 1325 addresses many promising avenues for positive change. It looks at a full continuum of measures from prevention of conflict to behavior in conflict, and also to improvements of the behavior of non-combat military [344] and peacekeepers involved in sexual crimes. [345] Among recommendations, it:
calls upon all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence and situations of armed conflict;
emphasizes the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes, including those relating to sexual and other violence against women and girls;
calls upon all parties to armed conflict to respect the civilian and humanitarian character of refugee camps in settlements, and to take into account the particular needs of women and girls;
reaffirms that consideration must be given to potential impact on the civilian population, bearing in mind the special needs of women and girls, when UN missions are undertaken;
invites a Secretary-General study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimensions of peace processes and conflict resolution;
calls for incorporating women and a gender perspective in negotiating and implementing
peace agreements;
icorporates gender perspectives into peacekeeping operations;
expands the role and contribution of women in United Nations field-based operations,
and especially among military observers, civilian police, human rights and humanitarian personnel;
urges the Secretary-General to appoint more women as special representatives and envoys;
calls for an increase in participation of women at decision-making levels in conflict resolution and peace processes;

urges Member States to ensure increased representation of women at all decision-making levels in national, regional, and international institutions, in mechanisms for the prevention, management, and resolution of conflict;
calls for all parties to armed conflict to respect fully, international law applicable to the rights and protection of women and girls, especially as civilians[346] and recommends training and education of all parties dealing with gender violence in war and peacekeeping.

Overall, despite good intentions, clear recommendations and increased resolutions and expressions of concern for the topic, very little in real terms has been achieved in addressing the affects of armed conflict on women.[347] Near the end of 2004, the Secretary-General reported on the implementation of Resolution 1325 in “Women and Peace and Security.”[348] While the report is most notable for its unfulfilled hopes and unmet goals, it reviews progress which has been made, and urges a redoubling of effort and implementation of further ideas. It finds the protection and promotion of the human rights of women and girls in armed conflict a pressing challenge.[349] “The reality on the ground is that humanitarian and human rights law are blatantly disregarded by parties to conflicts, and that women and girls continue to be subject to sexual and gender-based violence and other human rights violations. Much more sustained commitment and effort, including partnerships with men and boys, are required to stop the violence, end impunity and bring perpetrators to justice.”[350]
The report notes inadequate resource allocations have contributed to the slow progress in implementing resolution 1325. But the Secretary-General reiterates: Resolution 1325 holds out a promise to women across the globe that their rights will be protected and that barriers to their equal participation and full involvement in the maintenance and promotion of sustainable peace will be removed. We must uphold this promise. To achieve the goals set out in the resolution, political will, concerted action and accountability on the part of the entire international community are required.[351]

With the eleventh anniversary of the Beijing Platform for Action in 2006, and centuries of gender violence in armed conflict to eradicate, it is not too soon to take on the challenge.

C. Sudanese Women’s Priorities

Nothing is more essential in planning the war on violence against women than asking
women what they need and listening to what they say. The April 2005 Symposium on Women’s Rights and Leadership in Post-Conflict (southern) Sudan, held in Oslo April 10, 2005, did just that. Resulting recommendations were grouped into broad areas: governance and rule of law, gender-based violence, capacity building and institutional development, economic policy and management, livelihoods and productive sectors, basic social services, and education. While the women of Darfur may have more to add when peace there is finally implemented there, suggestions for change address underlying causation as well as symptoms, manifestation, and remediation. Recommendations on gender-based violence are to:

- Ensure the protection of women and girls in terms of safety from sexual and gender-based violence, especially in war-affected areas.
- Create and strengthen institutional mechanisms so that women and girls can report acts of violence against them in a safe and confidential environment.
- Enact legislation to protect women from sexual and gender-based violence and to end impunity for perpetrators thereof.
- Increase ease of access to support services for survivors, including psychosocial counseling and ready availability of post-exposure prophylaxis kits.
- Collect and consolidate research and data on the impact of gender-based violence on women and girls, including as a result of armed conflict.

In drafting the Oslo document Sudanese women articulated their recognition of the major impact of war on women and women’s human rights, the erosion of capacities of women and the fundamental divisions the war creates. They supported equal citizenship rights, urgent legislative reform in the area of political and family rights, and programmes for addressing negative customs and practices which continue to foster women’s marginalization and exclusion. The role of women in peace-building, peacemaking, reconstruction and sustaining families and communities amidst the ravages of war, poverty and HIV/AIDS, and their fundamental human right to be full and equal partners in all sectors and levels of society and its institutions, were recognized by the symposium participants. The Oslo participants called upon the donor conference to commit to principles of gender responsive resource allocation to reduce gender inequalities in law, policy and practice. If the Sudanese women’s comprehensive recommendations were implemented they would dramatically impact gender violence both in war and peace, serving as models for other societies ending conflict, in conflict, or at risk of conflict.

**VIII. Concluding Comments**

Women generally do not start wars. They do not commonly perpetuate them, nor do they predominate in fighting them. Women are underutilized in the prevention of wars, and underrepresented in planning to end them. Therefore, it is a particularly cruel injustice that women should be deliberately targeted for such suffering in war.
Gender violence has been accepted for centuries as an inevitable consequence of war, and even a reward for its military participants. But violence towards women in armed conflict causes untold damage to individuals, families, communities and society [357] that lasts far beyond the conflict. [358] Despite the positive work of the Tribunals and the promise of the ICC, violence against women in war is not abating and may be escalating, so further action is needed to address this persistent, pernicious and lethal problem. There have been remedies proposed, but little implementation effort. The world has done its duty in establishing the ICC which, despite the imperfections of political compromise, is well-equipped to deal with the most heinous of crimes, and their primary perpetrators. Those who took the lead and united to fight for the inclusion of law, procedures and programs to protect and serve victims of gender violence should be justly proud. If gender violence is properly charged and prosecuted, the ICC has the power to make enormous inroads into the elimination of violence against women. It will be clear that the world considers rape and sexual violence to be militarily, legally, and personally reprehensible, whether the purpose is to harm women, to message men, or to excise masculinity. In bringing the “big fish” to justice, it will signal the little piranhas that immunity may not always be possible for them. It will put blame for the destruction of lives and community where it belongs – on those who commit and permit sexual violence.

But will that bring justice to the gender violence victims of Darfur, the women who have been physically, emotionally and psychologically devastated by sexual violence? For every person who commits or condones rape and sexual violence in war convicted at high levels, there are hundreds or thousands of perpetrators who are not brought to any type of justice. The women of Darfur will be living beside them, seeking civil protection from them, depending upon them for the basics of existence and the workings of government. If the national and local justice systems aren’t willing or able to provide protection and prosecution, there will be no security. Also, if women remain unequal to men in law and life because of political purpose, prejudice, and poverty, sexual violence survivors will continue to be at risk regardless of the achievements of the ICC. It will gain a woman little to have assisted in the conviction of military rapists if she returns to a village which would have her flogged or stoned for perceived sexual indecency because of her victimization. If she can’t feed her children or heal her body or mind from the debilitation of the violence against her, she may not feel as benefited from international justice as the world would want. That is why it is critically important that the ICC not only prosecute offenders, but also use its powers, particularly those arising from complementarity and reparations, to impact justice and incorporate international standards at the national level. The ICC, with the UN and the international community, must partner in a powerful global justice team to assist Sudan in improving its national court systems and access to justice for gender violence victims. As attention is focused on Darfur in the first Security Council referral and non-consensual case before the ICC, there should be no doubt that women’s bodies are not permissible war weapons, that their beings are not battlefields. Gender violence in conflict is a damaging, deadly and devastating global problem, which requires comprehensive international attention and resolution. There should be no question that the international community is committed to eliminating gender violence and its root causes. The pressure is not just on the ICC, it is also on women. The means to prevent and
eliminate gender violence in conflict have been articulated and are capable of implementation. Because they have languished, however, it would behoove women to take a leadership role in actualizing change. Women of all countries, colors and creeds truly understand the deepest meanings of gender violence and its cruel effects on women, children, culture, families and society. If there is hope of change, it will start and end with the empowerment of women—women who will work for the prevention and elimination of gender violence, and bring with them their personal and political male partners.


[8] Laura Pitter & Alexandra Stiglemeyer, Will the World Remember ? Can the Women Forget ?, Ms., Mar./Apr. 1993, at 19 (detailing the practice in the Bosnian conflict of detaining women made pregnant as a result of rape until abortion was not possible).


[16] See, e.g., Coomaraswamy Rwanda Report, supra note 6, at p. 209 (describing soldiers kidnaping refugee children and demanding sex from their mothers as ransom).


See, e.g., Binaifer Nowrojee, Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath (Human Rights Watch & Federation Internationale, 1996) (reporting stories of women who were “rescued” only to become sexual slaves or “wives” of their captures during the 1994 conflict in Rwanda).

Gardam & Jarvis, supra note 4, at 12-13.


Gardam & Jarvis, supra note 4, see list at 13-14.

Coomaraswamy Violence Against Women Report, supra note 22, ¶ 44.

Id.

V. SPIKE PETERSON & ANNE SISSON RUNYAN, GLOBAL GENDER ISSUES 87 (1993).


[34] Women’s Comm’n of the Human Rights League of Chad & the Editors, Women Denounce Their Treatment in Chad, in WHAT WOMEN DO IN WARTIME, supra note 7, at 118.


[36] See, e.g., Pitter & Stiglemeyer, supra note 8 at 144-46.

[37] See, e.g., Roussou, War in Cyprus : Patriarchy and the Penelope Myth, in CAUGHT UP IN CONFLICT, WOMEN’S RESPONSES TO POLITICAL STRIFE, 32-34 (Rosemary Ridd & Helen Callaway, eds., 1986).


[40] See, e.g., Int'l Fed’n Terre des Hommes, supra note 30, at 22.

[41] See, e.g., id. ; Coomaraswamy Violence Against Women Report, supra note 22, at 28-29.

[42] AMNESTY INTERNATIONAL, supra note 39, at 44.


[46] Id. at 99-110.


[49] See, e.g., Ass’n of Female Lawyers of Liberia (AFELL) & the Editors, Hundreds of Victims Silently Grieving, in WHAT WOMEN DO IN WARTIME, supra note 7, at 129.

[50] See, e.g., Alcinda Antonio de Abreu, Mozambican Women Experiencing Violence, in WHAT WOMEN DO IN WARTIME, supra note 7, at 73.

[51] See, e.g., AMNESTY INTERNATIONAL, supra note 39, at 45.

[52] See, e.g., Teckla Shikola, We Left our Shoes Behind, in WHAT WOMEN DO IN WARTIME, supra note 7, at 138.


[56] See, e.g., AFRICAN RIGHTS, supra note 17.


[59] See, e.g., Goldblatt & Meintjes, South African Women Demand the Truth, in WHAT WOMEN DO IN WARTIME, supra note 7, at 37.

[60] See, e.g., Halim, supra note 7, at 85.


[62] Hoge, supra note 38 at 1. In Gulu in northern Uganda, at least 60% of women in a displaced persons camp were found to be victims of sexual violence. See, e.g., Nora Matovu, Wartime Abduction and Sexual Abuse in Uganda: The Story of Agnes, in, WITHOUT RESERVATION, supra note 29, at 35-36.


[65] Hoge, supra note 38, at 1.
[66] Id.


[69] Hoge, supra note 38 at 1.

[70] BROWN MILLER, supra note 3, at 33.

[71] Id.


[76] ASKIN, WAR CRIMES, supra note 3 at 51.

[77] In the new ICC Statute, however, rape is actually listed after pillage in Article 8.

[78] BROWN MILLER, supra note 3, at 38.


[80] Id. at 296-297. For a detailed historical analysis, see also ASKIN, WAR CRIMES, supra, note 3, at 1-48.

[81] Askin, Prosecuting Wartime Rape, supra note 79, at 299.


[86] Instructions for the Government of the United States in the Field by Order of the Secretary of War, Washington, D.C. (Apr. 24, 1863) ; Rules of Land Warfare, War Dept. Doc. No. 467, Office of the Chief of Staff (G.P.O. 1917) (approved Apr. 25, 1914) [hereinafter Lieber code]. The Lieber code is also known as General Orders No. 100.


[88] Askin, Prosecuting Wartime Rape, supra note 79, at 299.


[91] Geoffrey Best, Restraints on War by Land Before 1945, in RESTRAINTS ON WAR : STUDIES IN THE LIMITATION OF ARMED CONFLICT 26 (Michael Howard ed., 1979). See also, KARSTEN, supra note 5, at 6 (reporting on ancient Greek battles, the crusades, and rape crimes in major wars since).


[93] Askin, Prosecuting Wartime Rape, supra note 79, at 297.


[99] The Geneva Conventions, supra note 96.


[101] Id.

[102] The First Geneva Convention, supra, note 95, protects wounded and sick armed forces on land; the Second Geneva Convention, supra, note 95, protects wounded and sick armed forces at sea; the third Geneva Convention, supra, note 95, protects prisoners of war; and the Fourth Geneva Convention, supra, note 95, protects civilians.

[103] Askin, Prosecuting Wartime Rape, supra note 79, at 294.

[104] Id.

[105] Id., this partial list of examples at 295.

[106] The official documents of the Nuremberg Trial are contained in Trial of War Criminals Before the International Military Tribunal, Nov. 14, 1945 to Oct. 1, 1946 (1947) [hereinafter IMT Docs]. For examples of documentation of sexual violence by the Tribunal see e.g., vol. 2, transcript at 139; vol. 6, transcript at 211-14, 404-07; vol. 7, transcript at 449-67; vol. 10, transcript at 381.


[109] Fourth Geneva Convention, supra note 96, art. 27; Protocol II, supra, note 96, art. 4; Protocol I, supra, note 97, art. 76.


[111] Fourth Geneva Convention, supra, note 95, at art. 27.

[112] The language in Protocol I is changed from enforced prostitution to forced prostitution in both protocols.


[116] ASKIN, WAR CRIMES, supra note 3, at 49-95.

[117] Askin, Prosecuting Wartime Rape, supra note 79 at 300-301.

[118] In the advance on Germany, an estimated two million women were sexually abused by Russian troops with Stalin’s blessing that, “The boys are entitled to their fun.” GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY, THE STRUGGLE FOR GLOBAL JUSTICE 306 (1999).
Askin, Prosecuting Wartime Rape, supra note 79, at 301. See, e.g., IMT Docs. supra, note 105, vol. 2, transcript at 139; vol. 6, transcript at 211-14, 404-07; vol. 7, transcript at 449-67; vol. 10, transcript at 381.

IMT Docs, supra note 106, vol. 7, transcript at 494.

IMT Docs, supra note 106 vol. 6, transcript at 170. Askin, Prosecuting Wartime Rape, supra note 79, at 301.

Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Allied Control Counsel Law No. 10, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3 (Jan. 31, 1946) [hereinafter CCL 10].

Id. at art. II(1)(c).

See, Goldenberg and WOMEN IN THE HOLOCAUST, supra note 9.

IMTFE Docs, supra note 107, at 31, and vol. 1 at 111-17.

Askin, Prosecuting Wartime Rape, supra note 79, at 302.


See, e.g., Trial of Washio Awochi, 13 Law Reports of Trials of War Criminals 122-25 (1949).

In Re : Yamashita, 327 U.S. 1 (1946).

Askin, Prosecuting Wartime Rape, supra note 79, at 295. See also, Christine M. Chinkin, Peace and Force and International Law, in PRECONCEIVING REALITY : WOMEN AND INTERNATIONAL LAW 212 (Dorinda G. Dallmeier ed., 1993) “Despite the far-reaching consequences of conflict upon women, their voices are silenced in all levels of decision-making about war . . . The whole area of the use of force is the one from which women’s exclusion is most absolute.”

Askin, Prosecuting Wartime Rape, supra note 79, at 289-90.

Id. at 289.

Id. at 288.

Askin, Prosecuting Wartime Rape, supra note 79, at 305. See also, ASKIN, WAR CRIMES, supra note 2, at 12-13.


[142] Moshan, supra note 356 at 176-79 (discussing both victories and failure for women’s advocates).

[143] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 26 (2d ed. 2004).

[144] Prosecutor v. Furundzija, Judgment, IT-95-17/1-T, 10 Dec. 1998 [hereinafter Furundzija Trial Chamber Judgment], ¶ 184 ; McDonald, supra note 153, at 477. Arguably, the added specificity and addition of body parts narrows the Akayesu definition.


[146] Id., ¶45.

[147] Id.; see also, Coomaraswamy Violence Against Women Report, supra note 22.


Askin, Prosecuting Wartime Rape, supra note 79, at 320.

Akayesu Trial Chamber Judgment, supra note 155, ¶ 731.

Id. ¶ 732.

Celebici Trial Chamber Judgement, supra note 161, at ¶ 333.

Id. ¶ 346.


Id. ¶ 108.

Id. ¶ 180 & n.343.

Id. ¶ 307.

Id. ¶ 327.


HRI/CORE/1/Add. 99/Rev. 1, Core Document Forming Part of the Reports of States Parties, Sudan (10 Nov. 1999). While attempts were made to use demographic statistics from Sudan, its census information was only accurate as of 1992, and other information required updating from 1999, its most recent United Nations core document submission.


[168] Id. at 18-19; Library of Congress, supra note 300, at 11.

[169] Id. at 20-21.


[173] Id. at 31.

[174] Id. at 22-25.

[175] Id. at 54.


[179] SASSOLI & BOUVIER, supra note 90, at 67.

[180] Id. at 27.

[182] Id. at 918.


[187] Id.

[188] Tadic Trial Chamber Judgment, supra note 169, at § 638.


[195] Id. Art. 7, AC Art. 5.

[196] Id. Art. 12, AC Art. 12(1).


[198] ICCPR, supra note 330, Art. 2(3), AC Art. 7(1)(a).
ICCPR, supra note 330, Arts. 2(3), 9(5) and 14(6). UN Human Rights Committee General Comment 31, (26 May 2004) requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals who Covenant rights have been violated, the obligation to provide an effective remedy, central to the efficacy of Art. 2(3), is not discharged. U.N. Doc. CCPR/C/21/Rev. 1/Add. 13, at § 16.

ICCPR, supra note 330, Art. 2(3). Human Rights Committee General Comment 31 states “a failure by a state party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy” (at §15). See also, “Where the investigations reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with the failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (Art. 7), summary and arbitrary killing (Art. 6) and enforced disappearance (Arts. 7 and 9 and, frequently, 6)” (at § 18).

ICCPR, supra note 330, Art. 10.


S/RES/1593 (2005) ; see also, Rome Statute, supra note 173, Arts. 17, 58.

Rome Statute, supra note 173, Art. 8.

Darfur Commission Report, supra note 307, at 53. For findings on genocide, see also, 4, 124-132.


Don Cheadle and John Prendergast, ‘Never again’—again, USA.com, http://www.usatoday.com/news/opinion...


[211] See Amnesty International, Lives Blown Apart, supra note 344 at Chapter 3 (“Survivors of rape and their children are likely to be ostracized by their community. Married women may be ‘disowned’ by their husbands. Unmarried women may never be able to marry because their communities consider them ‘spoiled’. Raped women who are not able to marry or who have been abandoned are deprived of the ‘protection’ and economic support that men are traditionally expected to provide in Sudan”). Amnesty International, Darfur : Rape as a weapon of war supra note 342 at 4.1 (stigma attaches to both rape victims and their children of the rape) ; Human Rights Watch, Sexual Violence in Darfur, supra note 64, at 10-12 (forced marriage to minimize shame ; pregnancy is thought to only result from consensual sex, causing ostracism when becoming rape-impregnated).

[212] Id.


[214] Id. at 4-5.

[215] Id. at 4.

[216] Id. at 10.


[223] See note 344, supra ; Amnesty International, Darfur : Rape as a weapon of war, supra note 342 at 4.1 and 7.


[226] Id. labels effects “serious psychological problems”.


[231] SADAT, supra note 184, at 113-114. See acceptance of the common belief that the U.N. Charter is a constitution of the international community which “every State is bound to observe irrespective of its own will” citing Bardo Fassbender, The United Nations Charter as Constitution of the International Community, 36 Colum. J. Transnat’l. L. 529 at Id., n.43.


[235] Id.


[237] Id. ¶ 5.


[243] Id. 111-123.

[244] Id. at 115.

[245] Zagaris, supra note 368.


[247] Id.

[248] Id.

[249] Id.

[250] Id.

[251] Id. at 119-120.

[252] Id. at 120.

[253] ICCPR, supra note 330, Art. 2. (Sudan is a Party to the Covenant).


[255] Id. at 121.

[256] Id.

[257] Id. at 122-123.

[258] Id. at 123.

[259] Id. at 110.


[262] Leopold, supra note 472, at 2.


[268] SADAT, supra note 184, at 81.


[270] el-Gaili, supra note 433, at 546.


[273] Kritz, supra note 137, at 75. Kritz urges a comprehensive approach to post-conflict justice and attention to the disconnect between retrospective and prospective justice, questioning the disparity in resource allocations (an estimated $2 billion for the ICTY and ICTR when a such fraction of funds for prospective reform would have had a dramatic effect) at 84-85.

[274] Orentlicher, supra, note 392, at 5.


[277] Orentlicher, supra note 392, at n.40.

[278] Kritz, supra note 137, at 83.

[279] Id. at 84.

[280] Id. At 70-80.


[282] Kritz, supra note 137 at 78.

[283] Hoge, supra note 38, at 1.


[288] Id.

[289] Id.

[290] Id. at 4.

[291] Impunity Study, supra note 398, at 12.

[292] Id. at 5.

[293] Id. at 5-6.

[294] Id. at 7.

[295] Id. at 12.

[296] Impunity Study, supra note 398, at 15.

[297] GARDAM and JARVIS, supra note 130 at 230.


See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2(2), S. Treaty, Doc. No. 100-20, 1465, U.N.T.S. 85, 114, Art. 14. The right to a remedy is embodied also in the Universal Declaration of Human Rights at Article 8, the International Covenant of Civil and Political Rights at Article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at Article 6, the Convention on the Rights of the Child at Article 39, and in international humanitarian law as found in Article 3 of the Hague Convention of 18 October 1907, Article 91 of Protocol Additional to the Geneva Conventions of August 12, 1949 (Protocol I) and Articles 68 and 75 of the Rome Statute.


See Rome Statute, supra note 173, Art. 79.


Id.
[310] Id. at 263-4.

[311] Id. at 264.

[312] Id.

[313] Rome Statute, supra note 173, Art. 75.


[315] Id. at 167.


[318] Fawzy, supra note 435, at 55 (study showed 25 percent of Muslim males with higher education surveyed accepted a man’s right to physically punish his wife, while 100 percent of illiterate males accepted it, with 75.8 percent accepting the idea of severe physical punishment; 19.5 percent of all females surveyed accepted the notion of severe punishment and 23 percent light physical punishment by their spouses).

[319] Impunity Study, supra note 398, at 19.


[323] Id. at 2.

[324] Id. at 2-3.

[325] Id. at 4.

[326] Id. at 5-6, I.1., and 2(c).

[327] Id. at 6, II.3.(d).

[328] Id. at III.4.
[329] Id. at 9-10, IX. 15. Since the Basic Principles do not create new obligations, arguably Sudan already has that responsibility.

[330] Id. at 10, IX. 16.

[331] Muttukumaru, supra note 474, at 263.

[332] Id at 10, IX. 18.

[333] Id at 10-11, IX. 18-23.

[334] Id. at 17.


[336] Id.

[337] Id.

[338] Id. at E133.

[339] Id. at E134.


[341] Id. at 4.


[346] Id. at 2-3.


[349] Id. at 24.

[350] Id. at 24-25.

[351] Id. at 25.


[353] Id. at 2-5.

[354] Id. at 3.

[355] Id. at 2.

[356] Id at 5. The recommendations, while recognizing the principle of 50% representation for women, but “cognizant of the context, situation and issues at stake,” recommended 30% as a minimum threshold for women’s representation (p.2).
