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Creating International Responsibility: The Non-Prosecution of Sexual Violence Post Conflict as a Violation of Women's Rights*

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Abstract
After a historical reconstruction of the crime of sexual assault in conflict and of its evolution in international criminal law, done by exploring the definition of sexual violence and the conditions and rules for prosecuting the crime, this article adds another vantage point to the thorny issue of tying the effects of sexual assault to human rights. By arguing that the non-prosecution of sexual violence results in a violation of women's rights, the author proposes another level of protection under international law invoking the *Convention on the Elimination of All Forms of Discrimination against Women* (*hereinafter: CEDAW*). First, as the author has narrowed the focus of her article to female victims, the sexual assault can be considered a gender based crime of which non-prosecution may be discriminatory; the author examines whether this hypothesis is a violation of women's freedom from discrimination under Article 1 of CEDAW. Second, as sexual assault in conflicts often leaves women with very serious health problems, this paper examines whether these effects of the crime are a violation of women's right to health under Article 12 of CEDAW. This author will now use CEDAW to prove another level of violation on the part of the international community. If one can prove that non-prosecution of sexual violence is a violation of CEDAW - under international human rights law - States will have a further obligation to cease this internationally wrongful act.

Keywords
sexual assault; sexual violence; human rights; women's rights; CEDAW; international criminal law; prosecution

1. Introduction

> An environment that maintains world peace and that promotes and protects human rights (…) is an important factor for the advancement of women.

* This paper is a modified version of the author's thesis written for her LLM in International and European Public Law at Tilburg University, The Netherlands.

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> Peace is inextricably linked with equality between women and men and developments (…) violations of the human rights of women in situations of armed conflict are violations of the fundamental principle of international human rights and humanitarian law.[1]

Instances of sexual violence, on all sides of the copious number of battles, can be found in every conflict – major or minor – since man started fighting wars. Despite this fact, the very serious crime of sexual violence has rarely been prosecuted. Sexual violence occurring during conflicts, unfortunately, has been largely ignored, as it has traditionally been considered a less serious crime than murder. Sexual assault has been considered a bounty for soldiers, an unfortunate, but necessary, part of the violence of conflict. It is the imperceptible crime of conflicts, a crime of little consideration for those who commit it and, as a consequence, little consideration is given to those whom are affected.

Although this article focuses on sexual violence against women, as its major victims, the aim of the research's choice is not meant to ignore the issue of sexual violence against men, but to assist in narrowing the scope of the study.

Regardless of whom sexual assaults are committed against, scholarship on the issue, as will be demonstrated throughout the article, has been primarily done through the lens of international criminal law via prosecutions. Academics have not extensively attempted to link sexual violence to a violation of an individual's human rights. More importantly, no academic has attempted to link this violation of human rights to the United Nations (hereinafter: UN) *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter: CEDAW), as this paper will now do in an attempt to prove that sexual violence should be prosecuted by either States or the international community, since the effects of sexual violence result in a violation of women's rights.

Particularly in post-conflict nations, sexual assault has very serious side-effects on women, like HIV and AIDS for which little assistance is available. These effects are worse than murder - as the physical, emotional and psychological consequences of sexual assault can make the victims' inevitable death considerably more painful than traditional murder. Women who experience sexual assault have long-term emotional effects, such as the ones caused by unwanted pregnancies, which are often left unaddressed

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[1] UN Population Fund, 'Working to Empower Women', as quoted in Wilson Kari Njita, *Sexual Violence against Women in Situations of Armed Conflict: Sexual Violence against Women and Girls* (Lambert Academic Publishing 2010) 1.

and which affect their survival in a non-reversible way. Women who, for reasons outside their control, are subjected to sexual violence during conflicts have long-term psychological effects that are exasperated when the individual originates from a male-dominated society where prejudice prevents women from talking about their experiences.

The author would argue that the non-prosecution of sexual assault is a violation of women's rights to freedom from discrimination and access to health services, as per Article 1 and Article 12 CEDAW.[2] Sexual violence in conflict zones is a form of gender discrimination and an enumerated ground of genocide and crimes against humanity, as it is used to destroy women for the sole reason of their gender's role in the propagation of the group's identity. Further, sexual assault destroys these women's right to a healthy life.

Not prosecuting sexual assaults creates an atmosphere of impunity, which perpetuates further human rights violations. For this reason, the aforementioned CEDAW Articles (1, 12) could offer an answer to the international community in undertaking further prosecutions of sexual violence crimes, as it would create a first and third State obligation to prosecute.

2. Methodology

This study connects two distinct areas of the law, with the intent to make links between international criminal law and international human rights law, through a desk study analysis of available literature, available interviews conducted with victims of sexual assault and a textual analysis of legal documents to formulate a legal obligation to prosecute sexual violence crimes. It is unusual to connect these two areas of the law, as they are typically seen to carry different duties and responsibilities. As will be seen in this article though, international human rights law can be used to read different duties (i.e. another set of first and third State obligations derived under international human rights law, which, though the same as that derived under international criminal law, would create another level of duty) into international criminal law in a way which has never been done before.

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[2] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) Article 1, Article 12.

Within the text, this author makes reference to both the phrases of *sexual violence* and *sexual assault*. For the purpose of this study, both phrases are used, despite the fact that there are slight legal differences between the two phrases. Nonetheless, they both refer to the violation of a woman's body during a conflict situation and, as such, will be used interchangeably, where appropriate, in the context of this paper.

Finally, within the text, the term *victim* will be used over *survivor* because, although *survivor* has a very powerful connotation, not all those who suffer from sexual violence in fact survive. More importantly, victim is a legal term which is more appropriate for the topic at hand.

3. The History of Sexual Violence Occurring in Conflict Situations

The history of sexual assault occurring during conflict situations is widely accounted for; however, its prosecution is not. Sexual violence and conflict go so ably in hand that one author has gone as far as saying that reading about a conflict which did not involve sexual violence would be the rare exception, instead of the other way around.[3] Despite the fact that it has occurred in nearly every conflict throughout history, women have never been eager to come forward and speak. This is due, in part, to the fact that sexual violence has always been considered a private issue. Sexual assaults committed during conflicts were considered, and to some degree still are, as collateral damage. Some continue to consider sexual assault to be a gift for combatants fighting a long and hard war against the enemy.[4]

The following is a brief synopsis of the history of sexual violence occurring during conflicts from World War I to present-day. Where available and appropriate, references are made to victim accounts so as to present the reader with a more complete picture of the way women suffer during conflicts. Also, where appropriate, the author makes reference to the prosecution of the said crimes, though this will be elaborated upon further in the paper.

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[3] Kelly Dawn Askin, 'Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur' (2006) 1 Genocide Studies and Prevention 14. For an interesting perspective about the prevalence of sexual violence in armed conflicts, with a few very notable exceptions, see: Elisabeth Jean Wood, 'Armed Groups and Sexual Violence: When is Wartime Rape Rare?' (2009) 37 Politics Society 131.

[4] Anne-Marie de Brouwer and Sandra Ka Hon Chu (eds), *The Men Who Killed Me: Rwandan Survivors of Sexual Violence* (Douglas & McIntyre, 2009) 18.

3.1. World War I

There are numerous reports that sexual violence was perpetrated against women during World War I, between 1914 and 1918. Women, primarily in Belgium and France, were sexually assaulted and forced into prostitution. Exact numbers are unknown, and most of the evidence is now likely lost.[5] Unfortunately, while there were attempts at prosecuting the non-Allies for war crimes, no such attempts were made to prosecute sexual violence.[6]

3.2. World War II

Sexual violence during World War II occurred in both Europe and Asia, between 1939 and 1945. In Europe, women were sexually assaulted and forced into prostitution in large numbers. Forced sterilization of women was performed on a massive scale.[7] It is estimated that nearly two million German women alone were sexually assaulted, just by the Soviet army.[8] This number does not include the sexual assaults committed by the German military, or the Allied forces. Given the scale of violence during World War II, one can reasonably assume that as many sexual assaults resulted from both sides, if not more, though this is just conjecture.

In Asia, the Rape of Nanjing resulted in nearly 80 000 women being sexual violated. There were also accounts of sexual mutilation and violence, in addition to the nearly 200 000 women forced into prostitution for the Japanese military.[9] What is perhaps more disturbing however is the type of women affected. It should be noted that the women attacked in the Rape of Nanjing were generally the most vulnerable of society: pre-pubescent girls,

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[5] Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers, 1997) 42.

[6] For a short discussion about the prosecution of war crimes prior to Nuremburg and Tokyo, see: James R McHenry III, 'The Prosecution of Rape under International Law: Justice that is Long Overdue' (2002) 35 Vanderbilt Journal of Transnational Law 1269.

[7] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 24. See also: Kelly Dawn Askin (n 6) 52-61, 71-73, 88-91.

[8] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 24. See also: Antony Beevor, 'They Raped Every German Female from Eight to 80' *The Guardian* (London, 1 May 2002) <http://www.guardian.co.uk/books/2002/may/01/news.features11> accessed 28 February 2012.

[9] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 23. See also: Ustinia Dolgopol and Snehal Parajape, *Comfort Women: An Unfinished Ordeal: Report of a Mission* (Geneva: International Commission of Jurists, 1994).

pregnant women, elderly women and Buddhist nuns. Further, most of the comfort women were between the ages of 14 and 18.[10]

Only two prosecutions with regards to sexual violence during World War II were ever achieved. At the Tokyo Tribunal, prosecutors were able to convict Japanese military leaders for the Rape of Nanking in 1937,[11] and a Dutch military court in Indonesia prosecuted a further 12 Japanese military officials for sexual violence against 35 Dutch women in 1948.[12]

3.3. Bangladesh

In 1971, Pakistan invaded Bangladesh, where its military committed nearly 200 000 sexual assaults. These sexual assaults resulted in thousands of births, qualifying as a crime against humanity under the enumerated ground of forced pregnancy.[13] No prosecutions resulted from these events.

3.4. Sierra Leone

The conflict in Sierra Leone resulted in the internal displacement of massive amounts of people. It is estimated that approximately 64 000 internally displaced women were sexual assaulted between 1991 and 2001.[14] In one survey, 9% of women interviewed had been sexually assaulted, suggesting that the numbers were probably higher. Of these assaults, 33% were conducted by multiple perpetrators, which would increase the chances of physical side-effects. Sexual violence was committed by both sides, and was particularly brutal when committed against young girls. There are even accounts of female rebels checking women for virginity so that they could be handed over to male rebels for sexual violation.[15] The involvement of female perpetrators makes Sierra Leone unique, though this certainly does not diminish the situations in other States.

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[10] Elisabeth Jean Wood, 'Variation in Sexual Violence during War' (2006) 34 Politics Society 307.

[11] The Tokyo Judgement, International Military Tribunal for the Far East, 29 April 1946.

[12] Kelly Dawn Askin (n 6) 85.

[13] Gendercide Watch, 'Case Study: Genocide in Bangladesh' <http://www.gendercide.org/case_bangladesh.html> accessed 28 February 2012.

[14] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 23. See also: Marie Vlachova and Lea Biason (eds), *Women in an Insecure World* (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005).

[15] Elisabeth Jean Wood (n 11) 314-315.

3.5. The Former Yugoslavia

The exact number of women who were sexually assaulted during the break-up of the Former Yugoslavia, between 1992 and 1995, is unknown. The numbers could be as high as 100 000 and, despite the fact that there were a few prosecutions of sexual violence, the response was woefully inadequate.[16] Victims have testified about rape camps that were established to maximize the impact of the mass and systemic sexual violation of Muslim women. These women were trapped inside the camps with little regard paid to their needs; their only function was to serve the sadistic sexual pleasure of the Serbian forces. One woman, just 16, was brutally gang-raped for months on end after her capture in such a camp.[17]

A number of women were also forcibly impregnated to destroy the integrity of the Muslim community; 40 women in one rape camp became pregnant as a result of repeated sexual violations. This guaranteed their ostracization post-conflict, another intended effect.[18]

3.6. Rwanda

It is estimated that between 250 000 and 500 000 women may have been sexually assaulted during the Rwandan genocide that took place between April and July of 1994.[19] Some of these sexual violence crimes were prosecuted, though the numbers were insufficient. In addition to the brutal attacks, the bodies of violated women were left publicly exposed in humiliating positions to further demonstrate the discriminatory actions and power struggle between men and women.[20]

3.7. Liberia

During five years of the civil war in Liberia, between 1989 and 1994, it is reported that 49% of women between the ages of 15 and 70 described at

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[16] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 25. See also: Human Rights Watch, *Federal Republic of Yugoslavia – Kosovo: Rape as a Weapon of "Ethnic Cleansing"* (New York, 2000).

[17] Joanne Barkan, 'Rape Is Often Used as a Weapon of War', in Karen Balkin (ed), *Violence against Women Current Controversies* (Greenhaven Press, 2004).

[18] ibid.

[19] Organization of African Unity, *Rwanda: The Preventable Genocide* (OAU, 2000), paras 16-20.

[20] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 17.

least one act of sexual violence by a soldier.[21] A *Truth and Reconciliation Commission* was established.[22]

3.8. Central African Republic

After the attempted coup in the Central African Republic of 2002, the UN estimated that over 15% of women were victims of sexual violence,[23] with perpetrators on both sides of the conflict.[24] The ICC has laid charges based on the facts of this particular situation.

3.9. Democratic Republic of Congo

During the conflict in the Democratic Republic of Congo (hereinafter: DRC), between 1998 and 2007, tens of thousands of women were sexually violated. Between 2005 and 2007 alone, 32 000 sexual assault cases were registered in just one of the DRC's southern provinces. Considering the widespread nature of the violence and the underreporting of sexual assaults, the numbers are likely much higher.[25]

In fact, there is such a high level of sexual violence in the DRC that it has been called the rape capital of the world, hardly an auspicious title.[26] In just

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[21] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 25. See also: Shana Swiss and others, 'Violence against women during the Liberian civil conflict' (1998) 279 Journal of the American Medical Association 625.

[22] This author suggests, for those further interested in the work of the Commission, to refer to its website, provided below: Truth and Reconciliation Commission of Liberia, <http://www.trcofliberia.org/> accessed 28 February 2012.

[23] Phephelaphi Dube, 'An End to Impunity? The International Criminal Court and Women in Africa' (16 July 2010) <http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=482:an-end-to-impunity-the-international-criminal-court-and-women-in-africa&catid=59:gender-issues-discussion-papers&Itemid=267> accessed 28 February 2012.

[24] Alexis Arieff, *Sexual Violence in African Conflicts* (Congressional Research Service, 2009) 5.

[25] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 25. See also: Phephelaphi Dube (n 24) and John Holmes, 'Congo's Rape War' *Los Angeles Times* (Los Angeles, 11 October 2007).

[26] Phephelaphi Dube (n 24) See also the following commentary given on the situation in the DRC: Major General Patrick Cammaert, former Deputy Force Commander of the Netherlands, Military Advisor in the UN Department of Peacekeeping Operations, quoted in United Nations Development Fund for Women and the United Nations Department of Peacekeeping Operations, 'Women targeted or affected by armed conflict: what role for military peacekeepers?', (Wilton Park Conference, Sussex, United Kingdom, 27-30 May 2008), <http://www.unifem.org/news_events/event_detail.php?EventID = 175> accessed 28 February 2012.

the southern province of South Kivu alone, it is estimated that 40 women are raped each day. Of these women, 13% are under the age of 14, 3% die as a result of the sexual violence, and nearly 12% are subsequently infected with HIV and AIDS.[27] Unfortunately, little is currently being done about this situation, particularly in terms of holding perpetrators accountable for their actions.

3.10. Uganda

Many internally displaced women, as a result of the ongoing conflict within Uganda and against the DRC, have experienced sexual violations. In the Pabbo camp, approximately 60% of women reported having experienced some sort of sexual violence.[28] There have also been accusations that young girls have been enslaved as wives for leaders of the Lord's Resistance Army.[29] Due to the ongoing violence and danger, little has been done yet to protect these women, although the ICC has issued a few warrants.

3.11. Kenya

While sexual violence has always been a problem in Kenya, following the election violence of June 2008, there was a 7500% increase in incidents of sexual violence. Not only has this resulted in further acts of wide spreading violence, but it has also resulted in a breakdown of the health services available for victims, which was already inadequate.[30] The situation has recently been looked at by the ICC though, with charges being laid.

3.12. Darfur

In Darfur, sexual violence has been used deliberately to terrorize civilians. In Southern Darfur, at one aid camp, over a five week period, workers reported that over 200 women were sexually violated. These sexual assaults

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[27] Wilson Kari Njita (n 1) 2.

[28] Akumu Christine Okot, Amony Isabella and Otim Gerald, *Suffering in Silence: A Study of Sexual and Gender Based Violence (SGBV) in Pabbo Camp, Gulu District, Northern Uganda* (New York: UNICEF, 2005) 9.

[29] Phephelaphi Dube (n 24).

[30] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 25. See also: Kyle Kinner, 'A Paradigm Shift in Prevention', (2008) 13 Caucus for Evidence-Based Prevention Newsletter 1. See also: Alexis Arieff (n 25) 4-7.

are occurring on all sides of the conflict, and the violence has been escalating, not reducing, despite the fact that the ICC has issued warrants for leaders encouraging the use of sexual violence.[31] Unfortunately, as this is an ongoing conflict, it is impossible to note or predict the number of women that will be sexually violated.

3.13. Other Conflicts

These are just a few of the conflicts, which feature sexual violence that this author could have addressed. Some more examples of sexual violence, which might have been expanded upon were there sufficient space, are: the Korean War; the Vietnam War; Cambodia; the civil wars in Haiti, Angola, Latin America, Mozambique, Somalia, East Timor, Sri Lanka, Burma, India, Afghanistan, Turkey, Kuwait and Georgia.[32] This list does not go that far back into history either. One can look at instances of sexual violence in the books of the Romans and Greeks, in the history portrayed by the Bible and Koran, or the treatment of Aboriginals in North America.

As stated above, for whatever reason, sexual violence and conflict go hand-in-hand. This makes the prosecution of sexual violence that much more necessary. For all the history, little has yet to be done, and anything which might encourage the prosecution of sexual violence should be given an appropriate amount of attention. Although legal impediments are proposed for the prosecution of sexual violence both domestically and internationally, none actually explain or justify this situation. Arguments can also be made regarding cultural impediments to the prosecution of sexual violence, which will be addressed later in the paper, but this too does not fully explain why there have been so few prosecutions of sexual violence post-conflict.

4. Prosecution of Sexual Assault

Having set out the history of sexual violence occurring during conflicts, at this time it is appropriate to begin addressing the few instances that the

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[31] Amnesty International, *Five Years on: No Justice for Sexual Violence in Darfur* (Amnesty International Publications, 2008) 161.

[32] Janie L Leatherman, *Sexual Violence and Armed Conflict* (Polity Press, 2011) 2, 37-42.

crime has been prosecuted. This author will examine the definitions created by the various international tribunals, namely the International Criminal Tribunal for Rwanda (hereinafter: ICTR), International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY) and ICC, below to set out as concisely as possible the legal framework that the international community should be using to prosecute sexual violence crimes post-conflict. As will become clearer when this author examines the effects of sexual assault further in this paper, sexual violence has a profound physical, emotional and psychological impact upon women which cannot be compared to that of murder.[33] Some have gone so far as to say that sexual violence in war times is so beyond the scope of imagination that it is, in fact, beyond being a criminal act.[34] This is not to mean that it carries a more severe penalty, but that it tends to manifest as a more extreme act than murder during conflicts. It is certainly true that acts of sexual violence during conflict tend to be extremely brutal and often results in a death sentence for women. Regardless of whether one considers it to be a more serious crime than murder, it is - at the very least - as important a crime which should be prosecuted under international criminal law and examined through the lens of first and third State obligations under international human rights law.

Nevertheless, let us start by saying that after World War II there were no prosecutions of sexual violence crimes – despite the fact that there were numerous instances of sexual violence – for nearly 50 years.[35] Although sexual violence was not prosecuted, it was available to be used, were the international community inclined to prosecute the crime. Sexual assault as an enumerated ground of crimes against humanity was first defined following World War II in the *Control Council Law No. 10*, though it was not at the time considered to be an enumerated ground under genocide.[36] There are

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[33] Victims often indicate that the long-term effects of sexual violence make it worse than death, see Deborah S Rose, 'Worse than death: Psychodynamics of Rape Victims and the Need for Psychotherapy' (1986) 143 American Psychiatric Association 817.

[34] Gary Jonathan Bass, 'War Crimes and the Limits of Legalism' (1999) 97 (6) Michigan Law Review 2103.

[35] From the Dutch Military Case referenced at Kelly Dawn Askin (n 6) 85. Until *Akayesu*, referenced at: *The Prosecutor v. Jean-Paul Akayesu* (*Judgement*) ICTR-96-4-T, T Ch I (2 September 1998).

[36] Control Council Law No 10, (1946) 3 Official Gazette Control Council for Germany 50, Art II(1)(c).

of course more modern definitions of sexual assault which are utilized now, which will be addressed as we explore the prosecution of sexual assault post-conflict. The point is that there were certainly mechanisms, and a definition, in place by which the above instances of sexual assault could have been prosecuted had the international community been willing.

4.1. The Prosecution of Sexual Assault at the UN Tribunals

The first decision prosecuting sexual violence post-conflict took place in the late 1990's at the ICTR, in the infamous case of *The Prosecutor v. Jean-Paul Akayesu* (hereinafter: *Akayesu*). This was also the first time that sexual violence, and rape, was considered to be an enumerated ground of genocide, instead of only crimes against humanity, another crime punishable under international criminal law that does not carry the same level of intent as genocide. Nevertheless, the definitions under genocide and crimes against humanity are not affected by the level of intent for the crime, just the scope or range under which the crime was committed i.e. the fact that genocide carries with it the intent to destroy in whole or in part the targeted group, which will be explored further below.

Sexual assault was also finally given a full definition by the ICTR's judgement in *Akayesu*. There, the Court defined sexual assault as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.'[37] This definition was later confirmed in other judgements.[38] While the definition in *Akayesu* recognized that sexual violence during conflicts occurred under coercive circumstances, there were a few grey areas. Physical invasion was undefined, as was coercive circumstances. While it was an important step, it was clear that the definition needed to be altered a bit if sexual violence was going to be prosecuted.

As followed, the *Akayesu* definition of sexual violence was explored and expanded. At the ICTY in *The Prosecutor v. Anto Furundzija* (*Furundzija*), the Trial Chamber carefully created a more specific definition of sexual assault:

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[37] *Akayesu* (n36) para 688.

[38] *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic* (*Judgement*) IT-96-21-T (16 November 1998), paras 478-479.

i. the sexual penetration, however slight:
   a. of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
   b. of the mouth of the victim by the penis of the perpetrator;
ii. by coercion or force or threat of force against the victim or a third person..[39]

The Trial Chamber in *Furundzija* further confirmed that 'the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.'[40] This definition covered a number of different circumstances which might constitute sexual violence, and should be lauded for its delineation of what constitutes coercive circumstances.

The definition of the Trial Chamber in *Furundzija* was also confirmed by the ICTY in *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (*Kunarac*), although the Trial Chamber there felt it necessary to clarify the fact that the act must be committed through coercion, force or threat of force. The Trial Chamber in *Kunarac* stated that:

> [T]he Furundzija definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundzija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which (...) is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.[41]

In broadening the definition of sexual assault, the Trial Chamber further established that the common element - found in examining other definitions of sexual assault - was that the violation of the sexual autonomy of the victim was of the utmost importance, though not necessarily in terms of exactly how the violation occurred but in the circumstances of which it occurred.[42] As such, like the Trial Chamber in *Furundzija*, *Kunarac* sets out

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[39] *Prosecutor v. Anto Furundzija* (*Judgement*) IT-95-17/1-T (10 December 1998) para 185.

[40] ibid para 186.

[41] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (*Judgment*) IT-96-23-T & IT-96-23/1-T (22 February 2001) para 438.

[42] ibid para 440.

three types of circumstances which could constitute sexual violence during conflict:

i. the sexual activity is accompanied by force or threat of force to the victim or a third party;
ii. the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
iii. the sexual activity occurs without the consent of the victim.[43]

This is clearly a more precise definition of coercion, though perhaps limiting as such. While this was an improvement in some ways to *Furundzija*, this author feels that a happy ground between the two definitions would have been the most appropriate scenario.

More recently, the ICTR in *The Prosecutor v. Muhimana* (hereinafter: *Muhimana*) found that coercion was implicit in the conditions of sexual assault during conflicts. Therefore, the prosecutor is no longer required to prove coercion under international criminal law.[44] This also implies that consent is a non-issue in general. If coercion is inferred, it would be left to the accused to prove that consent existed on the facts. This should result in more successful sexual assault prosecutions, as proving coercion has always been a difficult element for the prosecution. Further, placing the burden of proving consent on the defendant could theoretically result in fewer traumas for women who have to testify.

Implying coercion is also an important recognition for victims of sexual violence during conflicts. The ICTR was essentially clarifying what human rights workers have been saying for some time, that sexual violence in conflict is an anomaly from what occurs during peace time. Women have no opportunity to resist these violent acts, since it would result in their death. Having only been six years since the *Muhimana* decision, it is too early to say that it will definitively result in more prosecutions, but in theory it should.

Nevertheless, coercion was not the only problematic legal element facing the prosecutors at the UN Tribunals. The *mens rea* of the accused is an essential element for meeting the requirements of genocide or a crime against humanity, which consists of attempting to destruct, in part or in

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[43] ibid para 442.

[44] *The Prosecutor v. Mikaeli Muhimana* (*Judgement and Sentence*) ICTR- 95-1B-T (28 April 2005).

whole, the group to meet the level required for the crime of genocide. This may be inferred from the circumstances of the actions.[45] In so far as this applies to sexual violence, it must be shown that the action caused death, serious bodily or mental harm, that it was the deliberate infliction of a condition of life on the group, or that it was intended to prevent births within the group. If this can be done, consent naturally becomes moot.[46]

Intent is the most difficult aspect of convicting an accused of sexual violence as an enumerated ground of genocide. Since it must be shown that the accused intended their actions to constitute this larger plan, the prosecutor is forced to find and provide massive amounts of damning evidence to prove the villainous nature of the accused above and beyond the sexual assault. This is a feat which most prosecutors are often unable to meet due to the limitations of investigations. As a result, sexual violence is more likely to be successfully prosecuted as an enumerated ground of crimes against humanity. Given that crimes against humanity holds as high a penalty, this should not necessarily be a concern to human rights advocates or victims.

As for crimes against humanity, the conduct itself need not have been widespread or systematic. However, the act must be linked to the larger attacks or policy to injure the targeted group.[47] All other elements of the crime remain the same as genocide. One must still prove deliberate intention to inflict pain and suffering, of course, but need only prove that the perpetrator was aware of the larger policy to attack the targeted group. Note that this larger policy need not have the intention to destroy in whole or in part the targeted group, as this higher level of intent qualifies the action as genocide. The lower level of intent required for crimes against humanity is simply just that there is a widespread and systemic plan against a targeted group, which does make it easier for prosecutors to convict perpetrators of sexual violence under crimes against humanity.

If one cannot prove the intention necessary for crimes against humanity, then an accused can also be prosecuted for war crimes, whereby one need only prove that an illegal act – sexual violence is an enumerated ground –

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[45] For more details, *see*: *Guenael* Mettraux, *International Crimes and the Ad Hoc Tribunals*, (Oxford University Press, 2005) 233.

[46] Adrienne Kalosieh, 'Note, Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca' (2003) 24 Women's Rights Law Reporter 121.

[47] *Kunarac* (n 42) para 418.

was committed during conflict.[48] Sexual assaults are still illegal during war; they are not a part of the acceptable conduct allowed during conflict.

Given the number of options available for prosecuting sexual assault, one might expect more than the few prosecutions listed above to have occurred.[49] Despite the fact that a number of different definitions were explored above, this author does not wish to emphasize the elements of such definitions, or to make a further distinction between sexual violence and sexual assault. What is intended by this section of the article is to emphasize the fact that there have been options available for prosecutors to charge individuals for committing crimes of sexual violence.

What is also important is that the number of prosecutions clearly does not reflect the numbers listed above as to the women who were sexually assaulted. Further, charges of sexual violence are being dropped in order to secure convictions. *The Prosecutor v. Kajelijeli* at the ICTR dealt with an accused originally charged with conspiracy to commit genocide, with sexual assault being one of the enumerated grounds.[50] While Kajelijeli was eventually convicted of genocide, he was acquitted of all sexual assault charges despite ample evidence.[51]

In order to secure a conviction, the prosecutor sacrificed the victims of sexual assault. Although this author is happy a conviction was secured, the fact that it was done at such a high cost negates some of the elation. These convictions cannot be considered simply in terms of numbers – they must also be considered in terms of their reflection of the crimes committed during the genocide. If entire crimes are being ignored, then the ICTR or the ICTY cannot consider itself to have achieved justice.

Nonetheless, there has been a movement within the ICTR Prosecutions Office to encourage the prosecution of sexual violence crimes. *Muhimana*,

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[48] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Art 8.

[49] Please note that while there were a few other cases of sexual violence being prosecuted, they did not add any value to the particular topic of this thesis.

[50] For the reasoning given by the Trial Chamber, consult the following: *The Prosecutor v. Juvénal Kajelijeli* (*Judgment and Sentence*), ICTR-98-44A-T (1 December 2003).

[51] It has been suggested that under joint criminal enterprise, given the ample evidence that Kajelijeli was inciting extermination and sexual violence, the Trial Chamber should have found him guilty on sexual violence, see: Rebecca L Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory' (2006) 29 Harvard Journal of Law & Gender 201.

as briefly discussed above, was recently decided whereby the Trial Chamber convicted the accused of sexual assault as an enumerated ground of genocide, with the intention of degrading women and therefore the Tutsi as an ethnic group.[52] This is certainly a step in the right direction, but again it is insufficient.

With the ICTR entering its final stages of operations, the number of prosecutions compared to the number of sexual assaults committed is frankly atrocious. The international community has failed to protect or provide support to the Rwandan women who suffered sexual assaults during that genocide. The ICTY has not done much better either.

4.2. The Prosecution of Sexual Assault at the ICC

More recently, sexual assault has been included as an enumerated ground under genocide, crimes against humanity and war crimes at the ICC. In the decade following the creation of the ICC, despite the fact that a few indictments have come down with regards to sexual assault prosecutions, little has actually been done. The *Rome Statute of the International Criminal Court* (hereinafter: *Rome Statute*), it should be noted, was already implemented nine years ago.

The creation of the *Rome Statute* saw the inclusion of sexual violence as part of international criminal law.[53] The crime is described as any invasive act on the part of the perpetrator, which includes a threat or other forms of psychological manipulation.[54] The word invasive is also used in an attempt to achieve gender neutrality. Granted, while the previous definitions of sexual violence were clearly geared towards the invasion of a women's body, there was certainly room for interpreting the provisions in order to prosecute an act of sexual violence against men. Further, the vague wording could create a number of problems down the line, though again, given the fact that sexual violence has yet to be successfully prosecuted at the ICC, this remains to be seen.

Nevertheless, the ICC is perfectly established to ensure the prosecution of gender-based violence. The ICC has the means and ability to prosecute sexual violence crimes, having created a specific gender team to investigate

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[52] *Muhimana* (n 45).
[53] Rome Statute (n 49) Arts 6-8.
[54] Rome Statute (n 49) Art 9.

and prosecute sexual violence crimes.[55] If these means were utilized, the ICC has amazing potential to ensure the protection of women's rights.

As stated above, the ICC has issued warrants for individuals believed to be responsible for sexual violence crimes in a number of countries,[56] including the Central African Republic, who has referred a case of sexual violence against Jean-Pierre Bemba Gombo, whose trial is in the very early stages.[57] Subsequent charges have also been laid with regards to the situation in Uganda, though again this has yet to result in any action.[58] It is however far too early to make a judgment about these cases.

The ICC has taken their time in carefully selecting situations which it feels are likely to garner convictions. While one cannot altogether blame them for being cautious and wanting a win – so to speak – with their first case, the delay has resulted in a lack of justice. It is certainly too early to declare whether the ICC has been or will be effective in prosecuting sexual violence crimes. All the necessary elements are there though.

5. Stepping in: The Prosecution of Sexual Violence Crimes by the International Community

Setting aside the UN Tribunals, and the potential of the ICC, even less has been done outside the international community in terms of prosecuting sexual violence crimes. This is in spite of the fact that all States, provided they have a sufficiently capable legal system, can prosecute sexual violence

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[55] See the following article which sets out quite well the various aspects of the gender-based focus of the ICC: D Luping, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court' (2009) 17 American University Journal of Gender, Social Policy & the Law 431. See also the following source: Barbara Bedont and Katherine Hall Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' (2009) 6 (1) The Brown Journal of World Affairs 65.

[56] *The Prosecutor v. Ahmad Muhammad Harun* (*"Ahmad Harun"*) *and Ali Muhammad Ali Abd-Al-Rahman* (*"Ali Kushayb"*) (2007) ICC-02/05-01/07.

[57] The Prosecutor v. Jean-Pierre Bemba Gombo (2008) ICC-01/05 -01/08. See the following source which raises a number of concerns which have been expressed with regards to the charging of Jean-Pierre Bemba Gombo. This is simply used to illustrate the point that laying charges of sexual assault is not sufficient. The charges must be genuine, based upon evidence, and correctly done from a procedural point of view. Otherwise, one risks belittling the pain and torture of the victims, see: Kai Ambos, 'Critical Issues in the Bemba Confirmation Decision' (2009) 22 Leiden Journal of International Law 715.

[58] The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (2005) ICC-02/04-01/05.

crimes post-conflict, regardless of where the crime was committed. In theory, it would not be beyond the realm of possibility for all States to take the initiative and prosecute where the UN bodies have been unable or unwilling, and particularly where the post-conflict nation is unable or unwilling.

In the DRC, where sexual violence crimes are rampant, only a handful of cases have been prosecuted by the military or local courts, which can be excused by the fact that the DRC does not have a fully functioning legal system capable of carrying out such prosecutions. This is a clear instance where other States could step in. Further, the UN has not done enough to encourage the prosecution of accused peacekeepers of sexual assault in the DRC. Unfortunately, the normal course of action would be for peacekeepers to be punished under the laws of their home State, and if such a State is not willing to prosecute the peacekeepers, little can be done.[59]

This is not to say that all countries are unwilling to prosecute those accused of sexual violence in the DRC. In Bunia, a European Commission-supported court has prosecuted over 10 individuals accused of sexual violence. However, this is the only known court to perform such an act.[60] Regardless, it is an important step forward.

6. Why is Sexual Violence Not Prosecuted

Sexual assaults have not been widely prosecuted post-conflict. This has occurred for a number of reasons, most of which only feed the atmosphere of impunity. One reason is that a number of States suffering from conflicts have discriminatory policies towards women. Second, sexual assaults are often seen as a necessary side-effect of conflict. Thirdly, prosecutors have made decisions to not prosecute sexual violence offences for a number of reasons, whether consciously or unconsciously. The list is hardly exhaustive. For the limited purposes of this paper however, the listed reasons are sufficient for proving the author's hypothesis.

As stated, a number of States have discriminatory policies towards women. Where such an atmosphere exists, sexual violence is often allowed to run unchecked. In the DRC, women are considered to be second-class citizens. Despite the fact that sexual assault is outlawed in the DRC women

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[59] Nicole Itano, 'Sex-Assault Continues Unchecked in Congo' *WeNews Correspondent* (13 March 2005) <http://www.womensenews.org/story/the-world/050313/sex-assault-continues-unchecked-congo> accessed 28 February 2012.

[60] ibid.

are thought inferior to men, whereby sexual violence prosecutions are simply not considered to be a priority for the government.[61] This is hardly an exclusive attitude, and stems from traditional values.

When one examines the history of sexual violence offences, a disturbing pattern begins to emerge. Gender issues have traditionally been considered to be private problems. If a woman has been violated, it is up to the family to either punish her or the offender, depending on where the blame is placed. Government intervention rarely occurs, and when it does, the situation is often twisted to blame the victim. As men tend to be the police officers and judiciary, it is easy for them to say that the victim incited the incident through some sort of action that told the accused that the sexual violence was either desired or warranted as punishment. When these pronouncements are supported with twisted versions of cultural or religious beliefs, the situation becomes even direr. With such attitudes, victims can hardly be blamed for not wishing to come forward with their stories.[62]

There is also an inherent fear of sexual violence which prevents its prosecution. People, male or female, fear hearing things that scare them. No one wishes to see sexual assaults occur, and hearing about them in court forces one to address the reality that the crime exists in a non-abstract manner. This is particularly true when sexual violence has been brutal, as is more often than not the case during conflicts. This author suggests that this simply fits the idea that 'normal people (by definition) cannot understand cruel acts.'[63] Unfortunately, if we do not listen to testimony, we will neither understand the events nor be able to prevent them in the future. While it may be understandable to desire to protect oneself from something they fear, we cannot stop something we do not understand.

Where the laws are designed to protect men to the detriment of women, one cannot expect sexual assault prosecutions to be fulfilled. These States are allowed to practice discriminatory practices without regard for human consequences. Further, such States often have laws specifically created to further the unequal relationship between the genders, for example laws which allow a rapist to marry their victim in order to escape punishment.[64]

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[61] Phephelaphi Dube (n 24).

[62] Kelly Dawn Askin (n 6) 216-223.

[63] Janie L Leatherman (33) 3.

[64] LaShawn R Jefferson, 'War as in Peace: Sexual Violence and Women's. Status' [2004] Human Rights Watch World Report 325- 337 <http://www.hrw.org/legacy/wr2k4/download/wr2k4.pdf> accessed 28 February 2012. See also the following source: Catharine A MacKinnon, *Are Women Human?* (Cambridge: Harvard University Press, 2006) 209-233.

Unfortunately, nations which suffer from conflicts are often in this undesirable situation, whereby traditional inequalities existing prior to the conflict are unaltered, leaving women traumatized before and after the conflict.

Moving to the second reason, evidence shows us that sexual violence is often seen as a consequence of conflicts, which is considered to be insufficiently serious to be prosecuted as a separate crime. This is certainly reflected in the history of sexual violence crimes,[65] and is clear evidence of discrimination against women as they are often specifically targeted with sexual violence.

Sexual assault has traditionally been used in two ways during conflicts: as intimidation of the enemy and as a reward for soldiers. The end result is the same: wartime rape is collateral damage.[66] Stalin was reported as saying the following about sexual violence during conflict 'can't you understand it if a soldier who has crossed thousands of kilometres through blood and fire has fun with a woman or takes a trifle?'[67] This is a particularly disturbing attitude, and one which this author wishes could say has dramatically changed in the past 50 years. Unfortunately, as recently as Darfur, this is an attitude which prevails.

Women are therefore considered to be a spoil of war, a legitimate object or chattel to be taken and plundered. There has been a suggestion that women are so sex-starved with men gone to war that they welcome the attention.[68] Attempts to justify these actions by suggesting woman want to be attacked is a feeble effort by men to frame their terrible actions in a way that could be seen as legitimate. Sexual assault has also been used as a tool for getting revenge against the enemy.[69] Targeting women is an effective means of harming the opposition. Post-conflict, as the prosecution of sexual assault tends to lie in the hands of the victor, there is little incentive to prosecute one's own actions. Unless the actions of the opposition are

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[65] Joanne Barkan (n 18) and Catharine A MacKinnon (n 65) 209-233. For an interesting overview of how sexual violence can be used as a weapon of war, consider the following source: Inger Skjelsbaek, 'The Elephant in the Room: An Overview of How Sexual Violence came to be Seen as a Weapon of War: Report to the Norwegian Ministry of Foreign Affairs' [2010] Peace Research Institute Oslo 1.

[66] Janie L Leatherman (n 33) 138-147.

[67] Cornelius Ryan, *The Last Battle* (New English Library, 1980) 367.

[68] Kirsten Campbell, 'The Spoils of War' (2005) 34 (3) Economy and Society 495. See also the following source for an interesting examination of how sexual violence can be twisted and justified by the perpetrator: Elisabeth Jean Wood (n 10) 327-328.

[69] Elisabeth Jean Wood (n 11) 325. See also the following source: Catharine A MacKinnon (n 65) 209-233.

horrendous, there is also little chance of those sexual assaults being prosecuted.[70]

This brings us to the final listed reason as to why sexual violence crimes are not prosecuted post-conflict. A number of considerations are taken into account when deciding whether or not to prosecute sexual assault crimes under international criminal law. Prosecutors must first ensure that a sufficient amount of information is available on the facts. This evidence is collected by the investigative department, as per the common law element of the judicial system. The problem however is not that there is an insufficient amount of information being collected, though it can be difficult to convince some of these women to come forward with their stories. The problem is that prosecutors are simply not laying charges of sexual violence against perpetrators.[71]

Some prosecutors claim that sexual violence crimes are too difficult to convict, or that they are a lesser charge which can simply be dropped in order to secure a more important conviction of murder.[72] One of the most common arguments put forward is that consent is far too difficult to prove in sexual assault cases. Under domestic law, consent is an essential element of a determination of the legality of sexual assault. Consent however is necessary under international criminal law.[73] Under the ICTR and ICTY, consent can be used as a defence,[74] though it would be difficult to prove that

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[70] See, in particular, the Nuremberg Tribunal and Tokyo Tribunal.

[71] For an interesting discussion on the role and the fallacy of the prosecutors at the international tribunals and courts, see the following source: Binaifer Nowrojee, 'We Can Do Better Investigating and Prosecuting International Crimes of Sexual Violence' (*Coalition for Women's Human Rights in Conflict Situations,* 25-27 November 2004) <http://www.womensrightscoalition.org/site/publications/papers/doBetter_en.php> accessed 28 February 2012. For a more technical view of the role of the prosecutor at the ICC however, see the following: Kai Ambos, 'The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports' (2000) 8 (2) European Journal of Crime, Criminal Law and Criminal Justice 89.

[72] Binaifer Nowrojee (n 72).

[73] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia, 2005) 117-124. See also: Adrienne Kalosieh (n 47) and Wolfgang Schomburg, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101(1) American Journal of International Law.

[74] ICTR Rules of Procedure and Evidence (entered into force 29 June 1995) UN Doc ITR/3/REV 1, Rule 96. Rule 96 of the Rules of Procedure and Evidence of the ICTY is basically the same: ICTY Rules of Procedure and Evidence (entered into force 14 March 1994) UN Doc IT/32/Rev 39, Rule 96. For an interesting discussion of the use of consent with regards to sexual violence, please consult the following source: Patricia Viseur Sellers, 'The Prosecution

consent existed on the facts. To cite consent as an excuse for not prosecuting sexual violence crimes, therefore, has no basis in fact or law.[75]

Prosecutors have also been forced to streamline their prosecutions in the face of looming deadlines for both the ICTR and ICTY, which have been operating much longer than originally projected. Sexual violence crimes, thanks to their unfortunate reputation and the wariness of prosecutors, are seen as unimportant compared to other charges before the court. As a result, sexual assault charges are not being laid or are being dropped in an attempt to create efficiency.[76] This too is not a valid excuse for not prosecuting sexual violence crimes.

Sexual prosecutions must be consistent and made a priority in order to end impunity. This would be assisted by ensuring proper training for investigators and prosecutors. This would also be assisted by the creation of a prosecutorial strategy which places sexual violence crimes at the forefront of the agenda, which recognizes its importance and prioritizes its investigation and prosecution.[77]

Regardless, the aforementioned clearly shows two very important pieces of information. First, it shows that sexual violence exists against women as a result of a discriminatory atmosphere, which perpetuates traditional attitudes and results in a lack of equality. Second, the above shows that the prosecutions are also not occurring as a result of discriminatory attitudes and actions. Crimes which primarily concern men (death of combatants) are given priority over crimes which primarily concern women (sexual violence). We are now one step closer to proving that not prosecuting sexual violence crimes is a demonstration of discrimination against women.

7. Effect of Sexual Assault

In order to show the reader why it is that these sexual assaults must be prosecuted, the effects of the sexual assaults must be explored in order to

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of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' 18-31, <http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf> accessed 28 February 2012.

[75] Still, one cannot rule out the possibility that sexual relationships cannot form in conflict situations. This author, for the purposes of this thesis, is not concerned with such relationships though; for the purpose of this thesis, it is not necessary to consider the lines of consent with regards to sexual assault. It does however illustrate some of the issues which must be deliberated when considering the prosecution of sexual assault post-conflict.

[76] Binaifer Nowrojee (n 72).

[77] ibid.

prove that their absence constitutes a violation of women's access to a healthy lifestyle. Let us start by stating that there are numerous studies which have shown that, in post-conflict situations, those who were sexually assaulted face the greatest hardships.[78] This is due to a number of different reasons. The first reason stems from the discrimination that women face living in a traditional culture that does not allow them to reveal what happened without judgement, and the second reason stems from the health problems victims have post-conflict. The third main effect of sexual violence is the monetary consequences on victims.

As stated, the first reason is the discrimination which faces women who come forward with information about their assault. The UN has reported that the number of women being sexually assaulted in Darfur may never be known, as the stigma is so extreme that victims are unlikely to report them.[79] Stigma is so entrenched within some of these societies that women become enrobed in their guilt. Women who come forward will be shunned, preventing them and their families from having an acceptable standard of living. Not telling their story however leads to cycles of violence and shame, which further trap women within poverty and self-loathing.

The second main reason, and perhaps the most serious, is the health effect on women. Women are often unable to access competent and regular health services to heal from the physical and psychological effects of sexual assault. In order to truly heal these women, access to health services means more than a superficial visit to the doctor to heal a broken bone. Although addressing the short term effects of health services is important,[80] the long-term effects of sexual violence can be just as damaging, if not more so.

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[78] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 11. See also: UNGA, 'Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence' Resolution 59/137 (10 December 2004) A/RES/59/137.

[79] In the case of Sudan, as the judicial system has provided immunity to military officials and police officers who are charged with sexual assault, reporting becomes a moot point for women wishing to see justice served. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to *Security Council Resolution 1564* of 18 September 2004 (2005) <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf> paras 451-455 accessed 28 February 2012. The following source contains a number of testimonials from officials who expressed concerns about the unwillingness of women following the conflict in the Former Yugoslavia to come forward with their stories, and the subsequent fallout if women do not come forward with their stories: Karen Engle, 'Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 (4) The American Journal of International Law 778.

[80] Short-term side effects which should be addressed include the following: tears, bruising, abrasions, swelling, litigations, genital trauma, etc. See: World Health Organization,

One of most serious effects of sexual assault is the exposure to HIV and AIDS. In Rwanda, only about half of those affected with HIV and AIDS have access to necessary medicines to assist with the disease.[81] HIV is the best way to inflict as much pain as possible on a group that you are trying to destroy. There are a number of witnesses who have stated that genociders who were aware of their infected status told their victims that they were going to give them the ultimate punishment guaranteed to promise long-term suffering, torment and death. Some have gone so far as to say that as long as a victim is still suffering from HIV and AIDS, genocide continues until the last victim and all those they subsequently infected die.[82]

An interesting dilemma faces those wishing to treat infected victims. Post-conflict, victims need medication to stall the spread of the disease and to help manage their symptoms. This medication is not readily available for much of the world, let alone nations post-conflict. For most victims of sexual violence who need these drugs, it is simply not an option. Genociders with HIV and AIDS however, even those that used their status to deliberately infect their victims, are given food, shelter and access to such drugs by the international criminal courts. The inequity of this situation raises a number of human rights concerns.[83] The issue is not that the genociders are receiving the drugs, as this is guaranteed under the *Standard Minimum Rules for the Treatment of Prisoners*[84] and the *Basic Principles for the Treatment of Prisoners*.[85] The problem is that the victims are infinitely more damaged, left to struggle without the same benefits. One solution obviously is to provide access to medication for victims who agree to testify.[86]

Another side-effect of sexual assault is pregnancy. Pregnancy is often intentionally inflicted upon women as a way to destroy the efficacy of the ethnic group. As there are no social services available to help these women,

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Guidelines for medico-legal care for victims of sexual violence (World Health Organization, 2003) 12-13.

[81] Republic of Rwanda, *UNGASS Country Progress Report: Republic of Rwanda, Reporting Period: January 2006 to December 2007*, Draft (Kigali, 2008) 7.

[82] Paula Donovan, 'Rape and HIV/AIDS in Rwanda' (2002) 360 The Lancet 17. See also: Brian A Kritz, 'The Case for an International Criminal Court Prosecution for the Knowing and Intentional Spread of HIV/AIDS through Sexual Assault during Conflict' (2010) <http://works.bepress.com/brian_kritz/1> accessed 28 February 2012.

[83] Binaifer Nowrojee (n 72).

[84] OHCHR, 'Standard Minimum Rules for the Treatment of Prisoners' (30 August 1955) UN Doc A/CONF/611, Arts 9-26.

[85] OHCHR, 'Basic Principles for the Treatment of Prisoners' (14 December 1990) UN Doc A/RES/45/111.

[86] Binaifer Nowrojee (n 72).

they are left with unwanted children reflecting the faces of their rapists who they are expected to raise on their own, while already poverty stricken.[87] In Rwanda, it is estimated that between 2000-5000 children were born to women who had been repeatedly violated during the genocide.[88]

Another problem is the lack of access to counselling for women. A number of these women become suicidal or suffer from depression.[89] Counselling would need to occur in a meaningful and long-term basis to be effective however, and there are currently not enough resources to ensure this occurs.

Women who are sexual assaulted are also more likely to turn to alcohol and drug abuse. They are more likely to display hostility and other antisocial behaviour. They are less able to form emotional connections with others and their relationships with family and friends suffer; this is particularly important for women who have children as a result of sexual assault, as they may be unable to bond with the child.[90]

Women who experience sexual violence are more likely to live in poverty, have less employment opportunities and weaker community ties. They are more likely to suffer from eating disorders and sleep disturbances. Women post-conflict often suffer from post-traumatic stress disorder and cognitive distortions. All of these things can be addressed through proper prosecutions, community support and counselling.[91] Without appropriate help though, these women will remain traumatized till their dying days, which will be particularly painful given their exposure to HIV and AIDS, extreme poverty and excess children.

Turning to the final effect of sexual violence, we see monetary consequences. Women who have been sexually assaulted become marginalized from their friends and family. If they had a husband prior to the conflict, they are unlikely to have one post-conflict, either due to their partner's death, or rejection. This results in women being left as the head of their household, factoring in children, which must then be fed, sheltered and clothed. Most countries pre-conflict do not have economies conductive to working mothers; post-conflict women are even less likely to be able to earn

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[87] See, for example, the story of Gloriose Mushimiyimana: Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 105-110. See also the story of Hyacintha Nirere: Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 117-123.

[88] Paula Donovan (n 83).

[89] James R McHenry III (n 7).

[90] World Health Organization (n 81).

[91] ibid.

a sufficient living to care for their family without risking their health and lives.[92]

Unfortunately, post-conflict States are unable to assist women who find themselves in this type of situation. Post-conflict States cannot provide a welfare system or work programs. There are no housing programs or food banks to assist these women. There are no Salvation Armys' to provide children with clothing. Although NGO's have certainly tried to assist, the numbers are far too high to do so reasonably. The sad and unfortunate fact is that there is no one to comfort these women; they are left completely on their own after already experiencing an unforgivable violation of their bodily integrity, irreversibly altering the very course of their lives.

8. The Prosecution of Sexual Assault Connected to CEDAW

The purpose of this paper was to prove that not prosecuting sexual violence post-conflict is a violation of women's rights to freedom from discrimination under CEDAW Article 1 and access to health services under CEDAW Article 12. War always exasperates gender inequalities, sexual assault in particular; this inequality results in human rights violations against women.[93]

As stated, sexual violence is a particularly effective way during conflict to ensure the damage and destruction of the female gender. In the Rwandan genocide, perpetrators admitted that women were targeted, 'the killers track down everyone, in particular babies, girls, and women, because they represent the future.'[94] This selection was thorough and systematic; women were to be eliminated in order to destroy the Tutsi ethnicity. Further, sexual violence was used as a means to degrade and subjugate Tutsi women.[95]

Despite the fact that these examples are specific to Rwanda, they are not limited to this particular conflict. Historically, women have been set apart through violence, systematically and systemically.[96] This takes the specific form of prevention of access to human rights guaranteed under CEDAW.

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[92] Wilson Kari Njita (n 1) 29-30.

[93] Judith Gardam, 'Women and Armed Conflict' (1998) 324 International Review of the Red Cross 421. See also the following source: Catharine A MacKinnon (n 65) 209-233. See also the following source for a further discussion of this structural discrimination against women: Janie L Leatherman (n 33) 63-88.

[94] Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak* (Farrar, Straus and Giroux, 2003) 96.

[95] Anne-Marie de Brouwer and Sandra Ka Hon Chu (n 5) 14-15. See also: *Muhimana* (n 45).

[96] Catharine A MacKinnon (n 65) 28-33, 209-233. See also: Janie L Leatherman (n 33) 15.

This author had the option of choosing a number of different treaties or conventions to prove this hypothesis. CEDAW was chosen for one very specific reason – it is the women's convention. CEDAW was created with the rights of women in mind, and, in the opinion of this author, it has thus far been underutilized. Using CEDAW therefore presents an interesting opportunity to make use of an important piece of international legislation for its original purpose - assisting women to protect their own human rights.

Each article will be addressed in turn, followed by a brief discussion about the specific use of CEDAW for the purpose of this paper. Before this author can begin to examine CEDAW, we must first establish that States have a responsibility and obligation to uphold potential violations of international human rights law, in the specific form of carrying out prosecutions.

8.1. State Responsibility to Act

There are two sources of law in international law. First, there is international treaty law; secondly, there is international customary law. The idea that States have a responsibility to intervene or act derives primarily from international customary law.[97]

There are two different levels of State responsibility to be considered in this paper. First, there is the responsibility of the State, which has suffered as a result of the conflict to carry out the prosecutions. Second, there is the responsibility of the international community – or third State – to carry out the prosecutions.

8.2. First State Responsibility

State responsibility is essentially the principle regarding when and how a State is to be held responsible in the event of a breach of their international obligations. Breach of an international obligation is found in the committing of an international wrongful act, either by action or omission.[98]

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[97] However, in 2001, state responsibility was also codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, an important and well-received document created by the international community. This document has been referenced and upheld by the International Court of Justice, as will be detailed later in this paper.

[98] Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) 2 Yearbook of the International Law Commission [DARS], Art 2.

This internationally wrongful act is governed by international law.[99] Sexual violence is an illegal act under international law as an enumerated ground of genocide, crimes against humanity and war crimes.[100] Whether a State gives consent to the committing of sexual violence crimes or allows agents to do so through omission, the State is responsible for the prosecution of such crimes post-conflict.

The responsibility of a first State is also derived from its territorial jurisdiction, or sovereignty, over the events which occur. In essence, this means that post-conflict, nations have an obligation to try crimes that occur within their borders, including sexual violence crimes. Therefore, if the crime is committed within the border of the first State – by action or omission – or if the action was committed by a national of the first State outside of its border, the first State is required to carry out a prosecution.[101]

8.3. Third State Responsibility

Third State responsibility comes from the concept of universal jurisdiction. Genocide, crimes against humanity and war crimes are considered to be the gravest breaches of international criminal law and are subject to obligatory prosecution as such.[102] Universal jurisdiction is also the idea that some things are so permeated within the mind of the international community as being offensive that they create a duty to the whole world, or *jus cogens*.[103] Sexual violence crimes are part of treaty law, they are considered to be grave crimes. It is therefore necessary for all States to prosecute sexual violence crimes under genocide, crimes against humanity and war crimes.

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[99] ibid Art 3.

[100] Rome Statute (n 49) Art 6-8 respectively.

[101] See the following source for a more full discussion on first state sovereignty: Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 2003). See also the following article for a shorter discussion on the subject regarding the lines between first state and third state jurisdiction: Bartram S Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 Yale Journal of International Law 383.

[102] See Article 146 of the Fourth Geneva Convention, which states that nations have an obligation to bring those who commit grave breaches of international law before their own courts regardless of nationality: Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Art 147.

[103] See the following book, which is one of many which explains universal jurisdiction: Lyal S Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Martinus Nijhoff Publishers, 1992).

As such, we know that not prosecuting sexual violence crimes occurring during conflict is a violation of international criminal law. However, this has not been sufficient for the international community to act. This author will now use CEDAW to prove another level of violation on the part of the international community. If one can prove that non-prosecution of sexual violence is a violation of CEDAW - under international human rights law - States will have a further obligation to cease this internationally wrongful act.[104]

This author would also note that the finding of an internationally wrongful act immediately creates a level of responsibility upon the violating State.[105] This obligation includes the investigation – and prosecution – of all human rights obligations, which would include a violation under CEDAW.[106] The prosecution of sexual violence perpetrators must be done in order to create deterrence. States are obligated to carry out these prosecutions by either creating a court or extraditing the perpetrator as soon as reasonably possible.[107]

This author would further note that while human rights may be derogated from, during times of conflict, after the cessation of a conflict there is no justification for breaches of human rights obligations. Prosecuting sexual violence crimes, as will now be established, is a human rights obligation.

8.4. Article 1

Most countries explicitly recognize equality between men and women. Whether this means treating individual's alike or unalike, equality still results in a setting of one gender over another.[108] This in itself constitutes discrimination against women. Nonetheless, the lack of prosecution of sexual violence post-conflict is the issue at hand.

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[104] DARS (n 99) Art 30.

[105] *Case Concerning the Factory at Chorzów* (*Germany v Poland*) (Merits) PCIJ Rep Series A No 17. See also: *Corfu Channel case* (*UK v Albania*) (Merits) [1949], ICJ Rep 4, 23.

[106] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (adopted 9 December 1975, entered into force 26 June 1987) 1465 UNTS 85, Art 12. See also the following cases: *McCann and Others v. UK* (1995), 21 EHRR 97, para 161; *Estamirov and Others v. Russia* (2006), 46 EHRR 33, paras 85-87; *Silih v Slovenia* (2009), 49 ECHR 37, para 159.

[107] This is also supported by Protocol I, Art 80.

[108] See the following source for an interesting discussion about the origins of equality: Catharine A MacKinnon (n 65) 105-111.

Crimes that are committed against both men and women are prosecuted in spades. Sexual violence is committed primarily against women and is not prosecuted; not prosecuting sexual violence crimes post-conflict therefore is a discriminatory action against women.

This may appear to be a circular argument, but let us examine the definition of discrimination against women before jumping to such a conclusion. Under CEDAW Article 1, discrimination against women is defined as:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[109]

Whether the international community means to restrict women's rights post-conflict is irrelevant, the result is what is important.

Let us examine Article 1's relevance word by word. When interpreting the meaning of treaties such as CEDAW, the *Vienna Convention on the Laws of the Treaty* tells us that we must use the ordinary meaning of the words for interpretation.[110] Discrimination under Article 1 is on the basis of sex (easily determined based on the evidence in this situation) on the basis of any distinction, exclusion and restriction. *Distinction* is defined as a 'difference or contrast between similar things or people.'[111] This author has already made it clear that prosecutions of international crimes, which affect a number of different genders and those that affect primarily males are prosecuted. Crimes such as sexual violence, which primarily affect women, are not widely prosecuted. This author contends that this is a case of making a distinction to prosecute on the grounds of sex.

Exclusion is defined as 'the process of excluding or the State of being excluded.'[112] Non-prosecution of crimes that primarily affect women is the exclusion of women from the process. Finally, *restriction* is defined as 'the limitation or control of someone or something.'[113] Limiting prosecutions to crimes which primarily affect males is a limitation of women's access to human rights protection.

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[109] CEDAW (n 3) Art 1.

[110] Vienna Convention on the Laws of the Treaty (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 31.

[111] Oxford English Dictionary, <http://oxforddictionaries.com/view/entry/m_en_gb0233130#m_en_gb0233130>, [Oxford English Dictionary] accessed 28 February 2012.

[112] ibid.

[113] ibid.

Let us turn to the next section of Article 1 that the effect or purpose is the impairment or nullification of the women's recognition, enjoyment and/or exercise of women's rights. *Nullify* is defined as 'make of no use or value;'[114] *impair* is defined as 'weaken or damage.'[115] Non-prosecution of sexual violence crimes restricts the ability of women to have their rights recognized. For example, non-prosecution restricts women's rights of access to health services, which will be addressed below. Non-prosecution weakens women's rights to participate in the civil process, as the message sent is that women are not equal to men. These are just two very quick examples, but it is clear that non-prosecution has the potential to impair the right of women to recognize, enjoy and exercise their guaranteed human rights.

This author will now briefly address the fact that this discrimination must be on the basis of equality between men and women. It has already been made quite clear that crimes against men are prosecuted. Crimes which effect women are not being prosecuted for all of the reasons already addressed. This is a situation of discrimination creating an inequality between men and women. On a further note, equality does not necessarily mean that there has to be the same number of prosecutions performed, nor does it simply mean that the same reflection – percentage-wise – of male and female crimes should be echoed in the amount of prosecutions. In fact, equality means neither of those things. Equality, as a whole, means that the end result must show a level of equivalence between the two sexes. Given the specific physical, emotional and psychological effects of sexual violence, this may very well mean that more sexual violence prosecutions need to be carried out in order to reach a State of equilibrium.

This discrimination must also be on the basis of human rights and fundamental freedoms. This may appear circular, but women have the right to be free from discrimination. Discrimination in and of itself is a restriction on basic human rights and fundamental freedoms.

Finally, this discrimination must nullify or impair women's rights in the political, economic, social, cultural, civil or other fields. This has been alluded to throughout the paper, so here it will be succinctly stated. Non-prosecution of sexual assaults impedes women's access to human rights. When prosecutions of sexual violence do not occur post-conflict, it sends a message to their perpetrators and future perpetrators that sexual violence is normalized, that it is acceptable conduct. Encouraging sexual violence

[114] ibid.
[115] ibid.

through omission also has the result of re-victimization. Victims of sexual violence are being told that not only are they not worthy of protection, but they do not have equality to men. When crimes committed primarily against women are not prosecuted, we are restricting the recognition of women's rights culturally and socially.

In societies that are already structured against women, telling men that they are superior to women, that they can use their bodies against women during conflicts without consequence, perpetuates the view that women are objects.[116] Yes, this is an instance of indirect discrimination, but this hardly excuses the international community from lack of action. There is certainly room for women who have been sexually violated to turn to CEDAW post-conflict looking for justice.

Not only does non-prosecution result in the message that discriminatory actions against women are acceptable, it also sends the message that social stratification is acceptable. This author suspects that the international community does not intend for this to be the message. Unfortunately, in a world where women's rights are already tentatively protected in developing countries, neglecting to prosecute sexual violence crimes post-conflict creates an inaccurate impression.

Most of the reasons discussed above for the lack of prosecution of sexual assaults post-conflict are not because prosecutors do not believe in women's rights, or that they do not respect women's rights. However, when prosecutors drop sexual violence charges for more 'important' charges, they send the message that sexual violence is tolerable. Telling individuals that it is acceptable to violate the bodies of unwilling women prevents these women from experiencing their inalienable human rights.

This position has been confirmed by the *Committee on the Elimination of Discrimination against Women* in its *General Recommendations No. 19*. According to the committee, gender-based violence nullifies the enjoyment of women to their fundamental rights, including their rights to life, protection from torture, liberty and security, equal protection under the law, and humanitarian protection during conflict.[117] Not prosecuting these crimes perpetuates the cycle, resulting in more gender-based violence. There is therefore a violation under CEDAW Article 1.

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[116] Catharine A MacKinnon (n 65).

[117] CEDAW, Committee on the Elimination of Discrimination against Women General Recommendation No. 19 (1992) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> accessed 28 February 2012.

8.5. Article 12

CEDAW Article 12 was created to ensure that women are given equal access to health care services. An examination of the effects of sexual violence clearly shows that there are health barriers for these women post-conflict. Such problems tend not to exist for men, particularly those who committed sexual violence crimes. This in itself is a discriminatory action, an instance of punishing the victim for no reason other than being a victim. Article 12 of CEDAW states:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.[118]

The issue at hand is not family planning. What is at issue is whether women post-conflict are getting unequal access to health care services as a result of non-prosecutions.

It is not necessary to perform as in-depth an analysis of the words of CEDAW Article 12. There are however several key phrases which must be addressed. First, let us examine the idea that appropriate measures are to be taken to eliminate discrimination against women in the field of health care. The ordinary reading of appropriate means 'suitable or proper in the circumstances.[119] The suitableness of these health services is, as mentioned above, intimately tied to the prosecution of perpetrators.

Perpetrators currently have access to health care services through the international criminal courts, most importantly anti-viral medication, as was addressed above. This is not a right which has been extended to victims of these perpetrators, not even those that agree to speak to the courts or to testify. Now, some might suggest that this is not directly connected to the issue of prosecution, but that would be a mistaken interpretation of the issue. Not prosecuting perpetuates gender inequality and equality barriers in a broader sense, which includes access to health services.

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[118] CEDAW (n 3) Art 12.

[119] Oxford English Dictionary (n 112).

We know that sexual assaults occur during conflict. Post-conflict, when prosecutions do go forward, the fact that sexual violence charges are not pursued is not evidence of a lack of sexual violence. It is instead evidence of a lack of willingness and determination on the part of the international community. Not providing or ensuring health services post-conflict for those who are affected by violence is discrimination, as this is provided as part of prosecutions for perpetrators. Not providing or ensuring health services post-conflict for those who are affected by violence is not appropriate, as this is provided as part of prosecutions for perpetrators. Were the international community to pursue sexual violence crimes as a priority, the protection of victims from unnecessary harm due to a lack of health services would certainly be part of that equation. This could include providing health care for victims who agree to participate in the legal process, or as part of the restorative justice function of the international criminal courts within the post-conflict country.

Next, we need to look at whether the health services are provided to ensure equality in terms of access. The specific effects of sexual violence crimes require that women be given more health services than men. Further, prioritizing male access to health services over female access would be a discriminatory practice, whether by design or accident is irrelevant.

So, if not prosecuting sexual violence crimes is a reflection of gender inequality, providing health services to perpetrators and not victims is also a reflection of this same gender inequality. Perpetrators are generally male, victims are female. This author does not dispute that the perpetrators should have access to health care services. However, choosing to provide this type of service for perpetrators, but not their victims, does result in gender discrimination.

This argument could be excused as being highly feminist, however, this would ignore the bare facts at hand. The international community chooses to prosecute crimes which affect all genders, but ignores those affecting only women. Men who have performed sexual assaults against women for the purpose of spreading HIV and AIDS are provided with health care[120]; their victims are instead suffering needlessly. The facts show us that women are not having their rights upheld, and this can be linked to a lack of prosecution on the part of the international community.

Further, as confirmed by CEDAW General Recommendation No. 12, States have an obligation to ensure that violence does not occur against women,

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[120] Binaifer Nowrojee (n 72).

including the prevention of violence under Article 12's obligation to ensure equal access to health services.[121] This author previously referenced a writer who stated that genocide does not end until all those who were infected with HIV and AIDS have died, as well as those who they have infected. Perpetrators of sexual violence are often HIV and AIDS positive, as evidenced by the horrific spread of the disease during conflict. Further, these perpetrators often purposively infect their victims to increase the level of harm or violence.

One could characterize a lack of providing anti-viral medication to victims of sexual violence post-conflict a furtherance of violence then. Not ensuring equal access to health services in the face of such a connection is the furtherance of violence, in direct conflict with the intent and purpose of CEDAW, as outlined by the General Recommendation. This author would therefore strongly encourage the international community to fulfill its legal obligations and provide equal access to necessary health services post-conflict to both perpetrators and their victims.

The connection between ensuring that sexual violence does not occur (through prosecution) and access to health services has been established for CEDAW Article 12.

8.6. Utilizing CEDAW

Regardless of the nobility of choosing CEDAW to enforce women's rights post-conflict, there are a few problems with the scenario. CEDAW's enforcement mechanisms have been criticised[122]; however, they are not without redemption. Further, even if one considers the enforcement mechanism to be weak, using CEDAW in this manner still creates a framework whereby women wishing to have their rights enforced have created a window to be heard. If one can say definitively that discrimination has occurred under any of the articles in CEDAW, but there is an enforcement issue, one can instead use the *International Covenant on Economic, Social and Cultural*

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[121] CEDAW, Committee on the Elimination of Discrimination against Women General Recommendation No. 12 (1989) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> accessed 28 February 2012.

[122] This is generally based on the argument that, under CEDAW Article 17, the Committee on the Elimination of Discrimination against Women can only make recommendations, not issue sanctions against offending states. CEDAW (n 2) Art 17.

Rights[123] or *International Covenant on Civil and Political Rights*[124] to get the same level of justice with better enforcement.

Another problem facing women who wish to have their rights enforced under CEDAW is the lack of an individual complaints mechanism. Currently under CEDAW, only groups can submit complaints. However, there is currently an *Optional Protocol* to CEDAW open for ratification, which would allow for individual complaints.[125] Granted, as a group, women could go forward now as an oppressed and violated group of women. However, more opportunities would certainly be open for women when individual complaints are allowed. Given the systemic nature of sexual violence during conflict though there is certainly room for women to create and submit complaints about sexual violence. Insofar as problems go, this is certainly not a substantial one.

The issue does not end with this paper; further evaluations could be performed as to the position of women seeking justice for sexual violence against other articles of CEDAW or alternative human rights documents. Were there room, this author may have examined each and every article in CEDAW to show that non-prosecution of sexual violence crimes is a violation of international human rights law.[126]

Thus, despite some potential issues with utilizing CEDAW for this endeavour, the scholarship of this paper is not affected by the choice of legislation. Proving that UN legislation can be used to force the international community to finally prosecute sexual violence crimes in an appropriate manner was the purpose of the paper, using CEDAW was simply one of the options available.

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[123] International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[124] International Covenant on Civil and Political Rights (adopted 10 December 1948, entered into force 23 March 1976) 999 UNTS 171.

[125] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83, Art 2. See the following for an excellent commentary on the importance of ratifying the Optional Protocol to CEDAW: Catharine A MacKinnon (n 65) 64-67.

[126] Nonetheless, there are other articles within CEDAW to support the position of this paper. CEDAW Article 5(a), for example, states that the international community is obligated to dispel with discriminatory practices and ensure the equality of women to men. This includes discriminatory practices like those stated above whereby sexual offenders are allowed to marry their victims in order to correct the situation. The articles outlined above are simply a reflection of two specific choices on the part of this author. As seen, many other ones could have been chosen had the inclination existed.

9. Moving Forward: How Can We Oblige States to Prosecute Sexual Assault

Having shown that prosecuting sexual violence crimes should be prosecuted under CEDAW Articles 1 and 12, how do we obligate States to prosecute these crimes? Despite the fact that an obligation exists, this author suspects that the international community may be hesitant to follow through on prosecutions.

The importance of prosecuting sexual assault has been recognized by the international community, specifically by the Security Council (hereinafter: SC) in Resolution 1820.[127] In this resolution, the SC stated that all parties to conflicts must stop using sexual violence as a means of war, as well as acknowledging that it has a responsibility to address methods of stopping sexual violence; the SC has a further obligation to take a leadership role in the prosecution of sexual assault.[128] This was also stated by the UN Economic and Social Council *Final Report on Contemporary Forms of Slavery*.[129]

SC Resolution 1820 has since been followed up with SC Resolution 1888, whereby the UN Secretary-General appointed a Special Representative on sexual violence in conflict. This included the creation of a team of experts to work with governments post-conflict to prevent and address the problems of sexual violence.[130] These SC Resolutions further support the position that an obligation upon States to prosecute sexual violence crimes exists under international law. Such an obligation creates a duty, which can be upheld under international criminal law.

The ideal situation would be for domestic courts to prosecute sexual violence. However, when this does not occur, the international community has an obligation to intervene. If the international community is unable or unwilling to intervene, then it must be persuaded as to the importance of prosecuting sexual violence crimes.[131]

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[127] The following was the predecessor of UNSC Res 1820, which created a number of initiatives to address violence against women in armed conflict. UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325.

[128] UNSC Res 1820 (19 June 2008) UN Doc S/*RES*/*1820*.

[129] UN Economic and Social Council, 'Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-like Practices during Armed Conflict' (22 June 1998) E/CN4/Sub2/1998/13, para 85.

[130] UNSC Res 1888 (30 September 2009) UN Doc S/RES/1888.

[131] Some scholars suggest that simply prosecuting is not enough, that the prosecutions must also be genderized themselves. This includes, among other things, having female

Another reason for the international community to take a role in the prosecution of sexual assault crimes is that the domestic courts are often one of the first casualties in the breakdown of a nation post-conflict. This is assuming of course that the State had a functioning judicial system prior to the conflict, which unfortunately is often not the case in States which suffer from conflicts. There are numerous reports that sexual assault cases are dropped domestically as a result of bribed police officials and judges.[132] As stated in the *Rome Statute*, the ICC has complementarity when a State is unable or unwilling to pursue the ends of justice themselves.[133] As this is a common situation in post-conflict nations, the ICC should have a large role in the pursuance of international justice.

Despite the fact that not all States have signed on to the ICC, there is no excuse for the international community to ignore those States without the ability to sign the *Rome Statute*. For example, Myanmar has not signed on to the ICC. However, the rampant use of sexual violence in Myanmar by the Burmese military is horrifying.[134] Should we allow such a situation to occur without regard, or should we as an international community be willing to step forward and see that sexual violence prosecutions occur?

Unfortunately, despite the best of intentions, little has occurred yet. It is estimated that less than 5% of sexual assault prosecutions globally result in convictions. This is due in large part to the fact that most courts place an

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prosecutors, investigators, and specific assigned departments for the investigation of gender-based violence. This also includes ensuring that the prosecutions themselves reflect gender equality. This may mean the investigation of sexual violence against both sexes, including that of same-sex sexual assault. For an interesting article on the subject, consider the following, as this was unfortunately outside the scope of this thesis: Kirsten Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1 The International Journal of Transitional Justice 411.

[132] IRIN Humanitarian News and Analysis, 'AFRICA-ASIA: Impunity and gender-based violence: The second wound of rape' (1 September 2004) <http://irinnews.org/InDepthMain.aspx?InDepthId=20&ReportId=62823> accessed 28 February 2012.

[133] Rome Statute (n 49) Art 17(1).

[134] For a further description of the situation in Myanmar, see the following source: Shan Human Rights Foundation and Shan Women's Action Network, 'License to Rape: The Burmese Military Regime's Use of Sexual Violence in the Ongoing War in Shan State' (May 2002) <http://www.shanland.org/resources/bookspub/humanrights/LtoR> accessed 28 February 2012. See also the following source: Karen Women's Organization, 'Shattering Silences: Karen Women Speak Out about the Burmese Military Regime's Use of Rape as a Strategy of War in Karen State' (April 2004) <http://www.burmalibrary.org/docs/Shattering_Silences.htm> accessed 28 February 2012.

emphasis on the conduct of women.[135] In Canada, for example, the courts are forced to put into place very stringent guidelines about the information the court can examine about the character of the victim, so as to not influence a jury that the victim somehow deserved the sexual attack.[136]

More importantly, it has been proven that not prosecuting sexual assault crimes during conflicts results in higher rates of sexual assaults post-conflict. Lack of prosecution sends the message that sexual violence against women is unimportant. It sends the message that women are not important. It sends the message that gender-discrimination is acceptable and tolerated. We cannot allow such a message to be continuously sent to the international community. It is necessary and obligatory for the international community to ensure that sexual assaults are prosecuted post-conflict.

Prosecuting sexual violence crimes also creates an atmosphere of deterrence. Ending impunity is a form of deterrence. The international community has an obligation to show that sexual violence will not be tolerated. Prosecuting perpetrators of sexual violence sends the right message. Further, if those during a conflict know that they will be prosecuted, they will in theory be less likely to commit sexual violence crimes.[137] This follows the idea that certainty of punishment will make potential offenders think twice before committing a crime. While deterrence has not always been found effective in domestic courts, this author would suggest that the different atmosphere created by conflict would change the effect of deterrence. If combatants know that post-conflict they can and will be prosecuted under international human rights law, and therefore international criminal law, hopefully they would think twice before committing sexual violence crimes.[138]

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[135] OHCHR, 'Fact Sheet Impunity and the Prosecution of Sexual Violence' (8 March 2007) <http://www.wunrn.com/news/2007/03_07/03_05_07/031107_impunity2.htm> accessed 28 February 2012.

[136] *R. v. Seaboyer* [1991] 83 DLR (4th) 193, which was upheld by the Supreme Court of Canada, and resulted in a number of changes to the legislation which provided that evidence the complainant has engaged in sexual activity with either the defendant or any other person is inadmissible if presented to support the interpretation that the complainant was more likely to engage in the sexual activity in question, or to show that the complainant is lying.

[137] Colm Campbell, 'Peace and the Laws of War: 'The Role of International Humanitarian Law in the Post-Conflict Environment' (2000) 839 International Review of the Red Cross.

[138] Valerie Wright, 'Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment' [2010] The Sentencing Project: Research and Advocacy for Reform.

10. Conclusion

In conclusion, sexual violence occurs when there is a breakdown of the rule of law; this cannot be allowed to continue. Impunity creates an atmosphere whereby sexual assaults are allowed to occur unchecked. Victims of such a gross violation of human rights are entitled to justice. Victims are entitled to face their violators. Victims are entitled to get reparations to assist them with their unwanted children and medical services for emotional, mental and physical effects of sexual violence. We must guarantee justice for these victims in order to protect women's human rights. Of course, none of this can occur in a vacuum. The rights of the accused must also be upheld and trails must be performed in a just and fair manner. However, we cannot consider procedural fairness to have been accomplished when we continue to ignore the rights of the accused.

States must ensure that sexual violence crimes are prosecuted post-conflict. This is both a moral and legal obligation formed under international human rights law, in the case of this paper utilizing CEDAW. Such an obligation creates a duty to prosecute sexual violence crimes post-conflict. If States do not undertake such prosecutions, the international community has an obligation to step in and control the situation. If we do not ensure that these obligations are upheld and the duties fulfilled, there will be no deterrence for future perpetrators to refrain from committing acts of sexual violence. We know that a lack of deterrence will result in more sexual assaults occurring, a hardly desirable situation.

Is this a picture of what is to come following future genocides? If one is to judge the international community based on their responses to past atrocities, it would be easy to conclude that following future conflicts, women cannot and should not expect to be protected from those who would violate them in such a brutal and intimate way. Nonetheless, it does not have to be this way. The international community should step forward and do what is appropriate - what it must do - to convict those who would use sexual violence as a tool of war. The international community must ensure that sexual assaults are charged and prosecuted. We have an obligation and a duty to do so, under international human rights law and international criminal law.