



Final Dissertation

In partial fulfillment of the requirements for the degree of
LLM in Criminology, Law and Society

THE IMPORTANCE OF REPARATIONS FOR VICTIMS OF CONFLICT- RELATED SEXUAL VIOLENCE: CHALLENGES FACING THE INTERNATIONAL CRIMINAL COURT

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DECLARATION

This research dissertation is presented for the approval of Senate in fulfilment of part of the requirements for the LLM in Criminology, Law and Society in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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ABSTRACT

Sexual violence perpetrated during armed conflict is a notoriously prolific, yet oft neglected phenomenon. It used to merely be considered an inevitable by-product of war, yet recently sexual violence has come to be described as a ‘weapon of war’. This refers to the deliberate and tactical intentions of the perpetrators, and alludes to the fact that sexual violence has been and continues to be an inherent aspect of conflicts. Fortunately, with increased global attention on this issue, there have been numerous developments in international humanitarian law as well as the field of criminal justice, which serve to recognise and condemn the prevalence of wartime sexual violence. That is, rape and other forms of sexual violence have been categorised as international crimes falling within the jurisdiction of international criminal tribunals and courts dealing with conflict situations. Furthermore, there have been several convictions of persons indicted for such crimes. These advances must be applauded, yet there remains a troubling omission: the provision of reparations to the victims of wartime sexual violence. Though the international tribunals and courts are statutorily empowered to award such reparations, there seems to be lapse in this regard. This is critically problematic considering the many harmful consequences of conflict-related sexual violence, namely: physical and medical issues, emotional and psychological issues, social exclusion and stigmatisation, as well as resultant monetary issues. Without a concomitant award of reparations attached to the conviction of a perpetrator of wartime sexual violence, victims are not able to experience true justice. The focus of this paper therefore rests on the challenges of the official court system – specifically that of the ICC – in providing reparations to victims of conflict-related sexual violence. With these in mind, it is recommended that a separate forum be created to deal exclusively with the provision of reparations.

CHAPTER 1: INTRODUCTION

For decades the perpetration of sexual violence has been a notoriously prolific, and somewhat accepted, element of international and internal armed conflicts.¹ It is described as constituting a ‘weapon of war’; which signals its pervasiveness, deliberate and strategic utilisation, as well as its destructive nature. The increasing prevalence of this phenomenon of wartime sexual violence has been linked to the evolving nature of conflicts – historically, conflicts were fought between combating armies on the designated battlegrounds, yet today it is common for civilians to be directly exposed to the violence, even sometimes serving as the target of attacks.² Therefore not only has the commission of sexual violence during conflict refused to wane, it appears to be on the rise.

Nonetheless, the recognition of wartime sexual violence as a fundamental violation of (predominantly) women’s human rights has been at best trivialised, at worst ignored.³ Despite the astounding number of victims of conflict-related sexual violence – reported to be in the tens and hundreds of thousands per conflict – these crimes were simply accepted as an inevitable by-product of war. Yet in recent years, following the mass atrocities committed in the Yugoslav wars and Rwandan genocide, the perpetration of crimes of sexual violence has attracted much international concern.⁴ This has led to a global campaign for the prosecution of such crimes by domestic courts, *ad hoc* tribunals, and the International Criminal Court (ICC). Thus wartime sexual violence is beginning to receive acknowledgement within the criminal justice system.

Retributive/ punitive justice is an important and potentially effective means by which to hold perpetrators of crimes of sexual violence to account. Firstly, the

¹ Kerry F. Crawford 'From spoils to weapons: Framing wartime sexual violence' (2013) 21(3) *Gender & Development* 505.

² Evelyn W. Kamau 'Domestic adjudication of sexual and gender-based violence in armed conflict: Considerations for prosecutors and judges' (2011) 4(1) *African Journal of Legal Studies* 85 at 90.

³ Rhonda Copelon 'Gender crimes as war crimes: Integrating crimes against women into international criminal law' (2000) *McGill Law Journal* 217.

⁴ Crawford *supra* note 1 at 506.

failure to prosecute those responsible for such serious crimes could result in contempt for the rule of law and lead to future violations.⁵ Secondly, criminal trials can be incredibly effective in fact-finding and recording the truth of the situation.⁶ This is useful for restorative efforts, such as nation building and communal healing. Thirdly, prosecution can promote reconciliation, by displacing personal revenge and vigilantism.⁷ Fourthly, criminal prosecution can establish legitimacy for the new democratic government that displaces the old regime post conflict, by ensuring that there is a functioning judicial system.⁸ Fifthly, there may be a moral obligation on part of the state towards its citizens to denounce human rights violations and to reassert basic moral values.⁹ Finally, the fact that criminal prosecution can lead to incarceration is a major advantage, as this prevents the possibility of the perpetrators re-offending and gives victims some piece of mind.

Criminal prosecution is therefore a crucial element of justice for victims. The problem, however, is that punitive justice *alone* does not necessarily provide victims with effective relief from their suffering, and may actually inadvertently cause further harm to victims.¹⁰ What is needed, in addition, is restorative justice, specifically in the form of reparative schemes as ‘reparations are the most victim-centered justice mechanism available and the most significant means of making a difference in the lives of victims.’¹¹ It is vital for such reparative programs to reflect the harm suffered by the individual victims and the community as a whole. In the case of conflict-related sexual violence, such harms include: physical ailments that often require immediate medical attention; emotional and psychological suffering; social exclusion and isolation; and monetary issues. The harms suffered by victims of wartime sexual violence are thus numerous and interminable. Therefore it is crucial for the needs of these victims to be addressed simultaneously with the

⁵ Michael Scharf ‘The amnesty exception to the jurisdiction of the International Criminal Court’ (1999) 32 *Cornell International Law Journal* 507 at 512.

⁶ *Ibid* at 513.

⁷ Darryl Robinson ‘Serving the interests of justice: Amnesties, truth commissions and the International Criminal Court’ (2003) 14 *European Journal of International Law* 481 at 489.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ Noam Schimmel ‘The moral case for restorative justice as a corollary of the responsibility to protect: A Rwandan case study of the insufficiency of impact of retributive justice on the rights and well-being of genocide survivors’ (2012) 11(2) *Journal of Human Rights* 161 at 163.

¹¹ Ruth Rubio-Marín ‘Reparations for conflict-related sexual and reproductive violence: A decalogue’ (2012) 19(69) *William And Mary Journal Of Women And The Law* 69 at 73.

criminal prosecution of the perpetrators. With such a combination of both punitive and restorative justice, one can hope that post-conflict societies and its citizens can experience true transitional justice, which has been defined as ‘the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.’¹²

In recognition of this, relevant international courts have been legislatively empowered to award reparations to victims. However, the major issue arises from the fact that such reparations have seldom been ordered, such that hardly any of the victims of conflict-related sexual violence have received reparations in any form.¹³ This is critically problematic and needs to be addressed, as many of these victims are in need of urgent assistance. The primary question to be considered then is what are the challenges facing formal international courts, which serve to impede their ability or willingness to award reparations to victims of conflict-related sexual violence. In particular the focus rests on the ICC, for the following reasons: firstly it is a permanent court, which means that its efficacy will remain a pertinent issue; secondly the Court has extensive and explicit authorisation to order reparations; and thirdly the Court has been established relatively recently, thus the time is ripe to ensure that the provision of reparations form part of future precedent.

In endeavouring to provide a holistic answer to this key research question, this paper will engage in a in-depth analysis of relevant case law, statutes, as well as academic research and commentary. Chapter 2 serves as a preliminary definitional guide – giving substantive meaning to the phrase ‘victims of conflict-related sexual violence’ – which serves to outline the scope of this research paper. Chapter 3 provides a comprehensive examination of the phenomenon of sexual violence being used as a weapon of war, in both international and non-international armed conflicts. This gives the reader a grasp of the magnitude of the incidence of such

¹² International Center for Transitional Justice website. Available at: <https://www.ictj.org/about/transitional-justice> [accessed 28 March 2015].

¹³ Rubio-Marín *supra* note 11 at 72.

crimes, and a sense of its likely continuance in current and future conflicts. Chapter 4 outlines key aspects of international law that recognise and condemn such sexual violence committed during conflict. It focuses on international humanitarian law as well as relevant resolutions adopted by the United Nations. This brings to light the extent of global concern around the issue of wartime sexual violence. Furthermore, it illustrates the attempts by the international community to bring this sensation to an end. Chapter 5 considers the developments in criminal justice with regards to international crimes of a sexual nature. This relates to the advent and incidence of criminal prosecution of perpetrators of wartime sexual violence, as well as the opportunities for court-ordered reparation schemes. In recognition of the importance of reparations, which seem to have been neglected by the courts to date, chapter 6 identifies the consequences of conflict-related sexual violence and the concomitant reparative needs of its victims. Chapter 7 then discerns the shortcomings of the formal international court system, specifically the ICC, in providing such reparations. By identifying the challenges facing the ICC in deciding upon and ordering reparations, this paper will advance the argument that the formal court process may be the inappropriate vehicle for the creation and implementation of reparation schemes. This notion paves the way for the theoretical establishment of specialised tribunals or forums, dealing exclusively with the provision of reparations. The idea is that if the mechanisms for punitive justice and restorative justice are individualised, such that they can operate simultaneously albeit through separate initiatives, reparative schemes may be implemented more successfully and efficiently.

CHAPTER 2: DEFINITIONS

a. 'Victim'

Generally the definition of 'victim' and the identification of victimhood in the context of mass victimisation is not a simple feat. Firstly, war victimisation comprises a unique collective nature of harm, due to the fact that violence inflicted during wartime affects the whole community – its result is not just individual injury, but widespread destruction.¹⁴ Consequently, both direct and indirect victims suffer. That is, those individuals who have directly or physically been subjected to violence, as well as those who did not experience the crime personally/directly, yet suffer from consequences of the criminal act indirectly. Secondly, the acknowledgement of victim status in a post-conflict context may ultimately be a social construction, which is prompted by the media and politics. For instance, the media may deny that there were crimes committed against the 'bad' side of the conflict, and over-acknowledge the crimes that were supposedly committed against the 'good' side.¹⁵ In this regard, the media does not always portray victimisation accurately. This is further exacerbated by the fact that it is not always clear as to which side of the conflict is the 'right' or 'good' side, and consequently which side deserves sympathy and the label of victim. For example, during the conflict in Sierra Leone, both the government and the rebels caused mass suffering to the civilian population and both sides conscripted child soldiers.¹⁶

A third obstacle in identifying victims of conflict-related crimes is that one is confronted with a major overlap of victim-offender identity:

'Recognising who is a victim in the aftermath of mass violence and conflict can be politically controversial and polemic, owing to contested narratives of victimhood by different actors... individual identities in protracted armed conflicts and political

¹⁴ Vesna Nikolic-Ristanovic 'War and post-war victimization of women' (2002) 10(2) *European Journal of Crime, Criminal Law and Criminal Justice* 138.

¹⁵ Vesna Nikolic-Ristanovic 'Local conflicts and international interventions: Victimisation of civilians and possibilities for restorative global responses' (2008) 11(2) *Contemporary Justice Review* 101 at 107.

¹⁶ Michael Custer 'Punishing child soldiers: The Special Court For Sierra Leone And the lessons to be learned from The United States' juvenile justice system' (2005) 19(2) *Temple International & Competition Law Journal* 449 at 451.

violence can be more complex than the binary identities of victim and perpetrator, where individuals can be both victimised and victimiser over a period of time.’¹⁷

This leads one to question whether only completely blameless victims are deserving of the label ‘victim’, or whether it can/should be extended to so-called culpable victims.

Despite these complexities, the United Nations has endeavoured to provide guidance as to the determination of victimhood with regards to international crimes. In 2006, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (‘Basic Principles’) was created by the passing of a General Assembly Resolution.¹⁸ This UN document represents the first codification of the existing rights of victims of international crimes to redress and access to justice. The definition of ‘victim’, as contained in the Basic Principles, is as follows:

‘[8] Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

‘[9] A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.’¹⁹

The Basic Principles, being a General Assembly Resolution, is not an independent authoritative source of international law. However, it retains significant evidentiary value in terms of bringing critical issues (such as wartime sexual violence) to the forefront and drawing international attention thereupon. This is manifest in the reaffirmation of the Basic Principles’ definition of victimhood in the

¹⁷ Luke Moffett 'Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms' (2014) Queen’s University Belfast School of Law Research Paper No. 13.

¹⁸ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution A/RES/60/147, March 2006.

¹⁹ Ibid.

2014 Guidance Note of the Secretary General.²⁰ Furthermore, the definition has been invoked by the courts in various cases, such as the *Lubanga* case:

‘Using Principle 8 of the Basic Principles 39 as guidance, a victim is someone who experienced personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss.’²¹

Nevertheless, it would be prudent for an international treaty on victims to be adopted, in order to create certainty and concrete binding rights for victims.

Notably, there is no specific definition given to the term ‘victim’ in the Rome Statute of the International Criminal Court.²² However, the *travaux préparatoires* of the Rome Statute do provide some guidance as to the intentions of the drafters of the final Statute. For example, in a document prepared by the Commission of the ICC Victims’ Rights Working Group, the definition given to ‘victims’ is as follows:

‘(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’²³

Thus it is clear that war victimization is an affliction of both direct and indirect victims, including secondary victims such as family members and the broader community that is affected. Furthermore, the harm suffered can be in the form of physical, psychological, emotional, and economic injury. Hence the definition of ‘victim’ is relatively broad, which is important in order to recognize the ripple-effect of harmful consequences that arise from violations of human rights.

This paper will focus exclusively on the plight of *female* victims of conflict-related sexual violence. This is due to several reasons. Firstly, though contemporary

²⁰ Guidance note of the Secretary-General: Reparations For Conflict-Related Sexual Violence (2014), UN Security Council.

²¹ *The Prosecutor v Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute)*, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012 at para 14(ii).

²² Rome Statute of the International Criminal Court, 2002, opened for signature 17 July 1998, ATS 15 (entered into force 1 July 2002). Hereinafter referred to as the ‘Rome Statute’.

²³ ‘Comments on the role and needs for the Victims and Witness Unit and the Victims Participation and Reparations Unit in the first financial period of the court’ ICC Preparatory Works, 2002. Available at: <http://www.legal-tools.org/doc/923c37/> [accessed 18 Dec 2015].

research has begun to shed light on the incidence of sexual violence by men against men during conflict, the scope of this paper does not allow for an in-depth analysis on the sufferings of both male and female victims of sexual violence. Secondly, the prevalence of male sexual violence remains unknown, as the evidence is largely anecdotal at this stage.²⁴ Therefore it can be argued that sexual violence committed against women and girls during conflict is more prolific than it is against men. However, it is believed that the incidence of male sexual abuse during conflict is more numerous than is currently imagined; hence it remains a pertinent issue of enquiry that should form the subject of future research. Thirdly, reparations that should be made available to female victims of wartime sexual violence may arguably differ to those that should be afforded to male victims. This is especially so with regards to the gynecological and reproductive issues that are associated with sexual violence, as well as the lower social standing of women in many cultures.²⁵

b. 'Conflict-related'

This research paper is concerned with victims of acts of sexual violence that took place during an armed conflict situation, whether it is an international or internal conflict. That is, it relates to situations of armed conflict meeting the formal requirements of Article 2 common to the Four Geneva Conventions,²⁶ as well as those contained in the two Additional Protocols to the Geneva Conventions.²⁷ An armed conflict has been defined as existing 'when there is a resort to armed force between States or protracted armed violence between governmental authorities and

²⁴ Sandesh Sivakumaran 'Sexual violence against men in armed conflict' (2007) 18(2) *European Journal of International Law* 253.

²⁵ Fionnuala Aolain, et al. 'Transforming reparations for conflict-related sexual violence: Principles and practice' (2015) 28 *Harvard Human Rights Journal* 97 at 112.

²⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949.

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

organized armed groups or between such groups within a State.’²⁸ It must be noted that different rules of international humanitarian law apply to international and non-international conflicts respectively. However, the commission of sexual violence has proven to be prevalent in both types of conflicts. Therefore it is essential for such victims to be afforded reparations, regardless of the classification of the conflict.

The term ‘conflict-related’ sexual violence is used deliberately, in order to convey the fact that victims of sexual violence experience trauma and suffering during conflict as well as after the conflict has dissipated – the consequences are long-enduring and therefore cannot be confined to the period of the conflict itself. The scope of the paper is thus not only confined to instances of sexual violence that took place during the armed conflict, but relates to sexual violence that may be perpetrated post-conflict, yet which is closely associated with the after-effects of the conflict situation. This is based on the definition of ‘conflict-related’ in UN Security Council Resolution 1960, which states that ‘sexual violence can be considered conflict-related over the following time horizon: when it occurs in a context of instability that may escalate to armed conflict; when it occurs during armed conflict; when it occurs during a period of occupation or against persons deprived of their liberty in connection with conflict; and when it takes place in the aftermath of conflict but prior to the restoration of State capacity/authority.’²⁹

c. ‘Sexual violence’

Sexual violence has been identified as a crime in most national legal systems, constituting a violation of human rights (such as the right to privacy, bodily integrity, and human dignity). According to a WHO report, sexual violence (in general) is defined as:

²⁸ *The Prosecutor v Dusko Tadic (Jurisdiction)*, IT-94-1, International Criminal Tribunal for the Former Yugoslavia (ICTY), 2 October 1995 at para 70.

²⁹ UN Security Council Resolution 1960, 16 Dec 2010.

‘Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.’³⁰

In the international context, sexual violence has been found to constitute a material element of the core international crimes of genocide, crimes against humanity, and war crimes. The jurisprudence of the ad hoc tribunals – The International Criminal Tribunal of Rwanda (ICTR) and the International Criminal Tribunal of the Former Yugoslavia (ICTY) – has been seminal in this regard. For example, the landmark *Akayesu*³¹ case found that rape could fall within the crime of genocide, and the *Kunarac*³² case decided that rape could form part of crimes against humanity. The Rome Statute too recognizes that the commission of rape may be among the most serious crimes of concern to the international community; however the Statute significantly expands the scope of sexual and gender-based crimes to incorporate numerous forms of sexual violence, namely: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence of comparable gravity, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions.³³ Therefore the Rome Statute has positively expanded upon the jurisprudence of the ad hoc tribunals: it has extended the jurisdiction of the Court beyond the crime of rape *per se* to include various other sexual crimes; it recognizes crimes of sexual violence as constituting war crimes; and it allows for the prosecution of crimes of sexual violence that have been committed in either an international or non-international armed conflict.³⁴

These developments have been met with substantial approval. This is evident in the UN Security Council Resolution 2106, which ‘[recalls] the inclusion of a range of sexual violence offences in the Rome Statute of the International Criminal Court

³⁰ World Report on Violence and Health (2002) World Health Organisation at 149.

³¹ *The Prosecutor v Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998.

³² *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.

³³ Rome Statute *supra* note 22. Articles 7(1)(g) and 8(2)(b)(xxii).

³⁴ Policy Paper on Sexual and Gender-Based Crimes (June 2014) Office of the Prosecutor, International Criminal Court.

(ICC) and the statutes of the ad hoc international criminal tribunals’ and which ‘notes that that sexual violence can constitute a crime against humanity or a constitutive act with respect to genocide; further recalls that rape and other forms of serious sexual violence in armed conflict are war crimes.’³⁵

Thus when mention is made of ‘sexual violence’ in this paper, it is not simply referring to the crime of rape (though of course it does include rape). This entitles victims of various crimes of a sexual nature to claim reparations, rather than placing penetrative rape on the top of a hierarchy.

³⁵ UN Security Council Resolution 2106, 24 June 2013.

CHAPTER 3: RAPE AS A WEAPON OF WAR

a. Introduction

For several decades the incidence of war-related sexual violence was deemed virtually invisible.³⁶ However, in recent years there has been a radical shift towards the recognition of the pervasiveness of wartime sexual violence, which has resulted in a concerted effort on part of the international community to pursue transitional justice for the victims. Consequent research has revealed that sexual violence has and is being used as a strategic tactic of war; thus the phrase ‘rape as a weapon of war’ has received significant traction in recent years. When sexual violence is utilised as a weapon of war ‘the violation of female bodily integrity does not occur solely as a result of the chaotic state surrounding the war zone, but rather it is intentionally committed by combatants against civilians of the enemy side.’³⁷ This is confirmed by an article written by Gerald Schneider et al., in which it was found that rape is frequently ordered by commanders (and such orders are complied with due to a regime of incentives and punishments), as opposed to being perpetrated anarchically by soldiers.³⁸ Its prevalence can thus be considered not only a women’s issue, but also a concern of international security.

Janet Benshoof identifies wartime rape (used synonymously here with ‘sexual violence’) as being *sui generi*, in that it attracts specific characteristics which are rarely seen in other situations where sexual violence is perpetrated. The unique features of wartime rape is said to include the following:

‘Rape that deliberately aims to destroy or dominate specific anatomical reproductive and sexual organs and body functions, resulting in traumatic genitourinary injuries rarely, if ever, seen outside of this context; rape committed by multiple perpetrators...the routine use of objects, in addition to or instead of the penis, forced into the vagina or anus...rape that takes place in public to maximize its terrorizing effect, with family members forced to watch, or even participate in, the rapes; rape that focuses on girls; and rape that inflicts intergenerational harm.’³⁹

³⁶ Copelon supra note 3 at 220.

³⁷ Crawford supra note 1 at 510.

³⁸ Gerald Schneider, et al. ‘Ordered rape: A principal-agent analysis of wartime sexual violence in the DR Congo’ (2015) 21(11) *Violence Against Women* 1.

³⁹ Janet Benshoof ‘The other red line: The use of rape as an unlawful tactic of warfare’ (2014) 5(2) *Global Policy* 146 at 151-152.

Much has been written on the motivations for using sexual violence as a tactic of war. Though the exact reasons for widespread sexual violence being committed during wartime differ in different situations, Manuela Melandri finds that several key explanations have taken centre stage, namely: male bonding amongst the combatants (especially in the perpetration of gang rape); humiliating and dishonouring the women in society, which too reflects on their families; creating social and cultural adhesion; using forced impregnation to increase the number of babies belonging to the rapists' ethnic group; and generally exploiting the vulnerability of women during conflict.⁴⁰ Melandri concludes that 'large-scale sexual violence may be used during conflict with the specific aim of destroying a society by destroying its gender relations'.⁴¹ That is, strategic rape triggers a chain reaction that destroys not only the individual woman but also the collective spirit of the communities.⁴²

A further motivating factor is the inherent and perceived vulnerability of women. In this light, a guidance document created by the International Committee of the Red Cross identifies several features that highlight the intentional targeting of women as victims of sexual violence during conflict:

'(a) Women are often unaccompanied during times of armed conflict when their male relatives (who ordinarily comprise part of the social network of protection) have fled the area, are detained, missing or engaged in hostilities; (b) women are usually unarmed, which reduces their ability to resist; (c) in many cultures, women are viewed as symbolic representatives of caste, ethnic or national identity, hence an attack against a woman is seen as an assault on the entire community to which she belongs; (d) when the actual combatants are out of reach, sexual violence is a way of attacking the community of the enemy; (e) value systems, judicial mechanisms and social structures have broken down as a consequence of prolonged conflict; (f) widespread sexual violence can be used as a method of warfare to forcibly displace persons and destroy communities; (g) their poverty and lack of resources renders women vulnerable to exploitation in order to meet their basic material needs; (h) some household tasks typically undertaken by women, such as venturing to the forests for firewood or queuing for food, may expose them to risk.'⁴³

⁴⁰ Manuela Melandri 'Gender and reconciliation in post-conflict societies: The dilemmas of responding to large-scale sexual violence' (2009) 5(1) *International Public Policy Review* 4.

⁴¹ Ibid.

⁴² Donatilla Mukamana and Anthony Collins 'Rape survivors of the Rwandan genocide' (2006) 17 *International Journal of Critical Psychology* 140 at 144.

⁴³ Charlotte Lindsay-Curtet, et al. 'Addressing the Needs of Women Affected by Armed Conflict' (2004) International Committee of the Red Cross at 25-26.

In summation, Estelle Zinsstag categorizes sexual crimes during conflicts as follows: (a) spoils of war – that is, sexual violence being a regrettable but unavoidable part of conflict; (b) a means to dominate a population – through the exercise of superior masculinity and power, as well as humiliation via the common social stigma of sexual violence; (c) method of torture, both physically and emotionally; and (d) an integral part of ethnic cleansing and genocidal strategies.⁴⁴ Therefore it remains a pertinent and deeply concerning issue.

b. Examples of rape as a weapon of war

It is worth noting that Elizabeth Wood disagrees that widespread sexual violence is a wartime *strategy*, suggesting instead that it is merely an accepted practice of society based on skewed gender relations.⁴⁵ Yet her view appears to be largely in the minority, as much of the literature accepts sexual violence as a tactic and deliberate weapon of war. Furthermore, numerous examples exist in both international and non-international armed conflicts that illustrate the utilisation of the ideology of using rape as a weapon of war. Accounts thereof will henceforth be discussed, in order to demonstrate the pervasiveness of wartime rape and the resultant need for attention to be given to this issue.

(i) International armed conflicts

Pre-World War Two, in 1937, Japanese troops claimed occupation of China's capital city in a display of military superiority. This invasion was characterised by extreme widespread violence, yet so rampant was the soldiers' exercise of sexual violence that this period in history is referred to as the 'Rape of Nanking'.⁴⁶ The sexual assaults were directed against combatants as well as the civilian population of Nanking, with an estimated 20 000 to 80 000 women and girls (i.e. 8-32% of the

⁴⁴ Estelle Zinsstag 'Sexual violence against women in armed conflicts: Standard responses and new ideas' (2006) 5(1) *Social Policy and Society* 137 at 138.

⁴⁵ Elisabeth Wood 'Conflict-related sexual violence and the policy implications of recent research' (2014) 96(894) *International Review of the Red Cross* 457.

⁴⁶ Elisabeth Wood 'Variation in sexual violence during war' (2006) 34(3) *Politics & Society* 307 at 311.

female population of Nanking at the time) being raped and then summarily executed.⁴⁷ Though this exercise of brutality was not part of a deliberate military strategy, it was perpetrated as a means by which to humiliate the Chinese population. Furthermore, it serves as a useful example of the extent of sexual violence that was being perpetrated in the early 21st century.

Atrocities committed during the Second World War further reveal a magnitude of crimes of sexual violence. During this time, Japan conscripted Korean women into forced prostitution, who came to be known as ‘comfort women’, as they helped ‘boost the morale’ of the troops.⁴⁸ It is estimated that between 80 000 – 200 000 women were enslaved.⁴⁹ As such, ‘rape became an oppressive weapon that was used against both the female victims and the Korean nation.’⁵⁰ Comparable atrocities were committed by the Germans, as Nazi soldiers captured women and forced them to participate in brothels.⁵¹ In addition, there is evidence of mass rapes having been committed by the soldiers in retaliation for acts of the French Resistance.⁵² Similarly, it has been reported that Russian troops invading Germany raped approximately 2,000,000 German women as payback for what the Nazis had done to Russia.⁵³

The conflict in the former Yugoslavia in the early 1990s – determined to be an international armed conflict by the Appeal Court in *Prosecutor v Tadic*⁵⁴ – does not offer a better depiction of wartime practices. Although there is some controversy over this issue, it is estimated that 20 000 women and girls were raped in 1992 in Bosnia-Herzegovina alone.⁵⁵ A UN Commission, authorized to investigate the incidence of sexual violence in the former Yugoslavia, found that sexual violence was perpetrated as a means of shame and humiliation (as the victims were often

⁴⁷ Ibid.

⁴⁸ Darren Anne Nebesar 'Gender-based violence as a weapon of war' (1998) 4(2) *University of California Davis Journal of International Law* 147.

⁴⁹ Janet Tongsuthi "'Comfort Women' of World War II' (1993) 4 *UCLA Women's Law Journal* 413 at 415.

⁵⁰ Ibid at 413.

⁵¹ Nebesar supra note 48 at 149.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ *The Prosecutor v Dusko Tadic (Judgment)*, IT-94-1-A, International Criminal Tribunal for the Former Yugoslavia (ICTY) 15 July 1999 at para 162.

⁵⁵ Wood supra note 46 at 311.

assaulted in front of their families or in public), against young virgin girls as well as educated women, and often with the use of objects.⁵⁶ Darren Anne Nebesar, who interviewed several victims and perpetrators of the Yugoslav wars, states the following based on her research:

‘Serbian military officials soiled the souls of women and their communities in an effort to "purify" a heterogeneous nation. Here, rape was used as a weapon of war...Rape in the former Yugoslavia was intended to break down national, cultural and religious identities. It was part of a strategy of ethnic cleansing through the pollution of a culture's descendants.’⁵⁷

(ii) Internal armed conflicts

The 1994 Rwandan Genocide, where it is estimated that 800 000 lives were lost in merely 100 days, is no stranger to the practice of sexual violence. Mukamana and Collins observe that ‘in Rwanda, hundreds of thousands of Tutsi women were subjected to rape and sexual slavery during the genocide. Hutu leaders ordered their troops to rape Tutsi women as part of their genocidal campaign. Women and girls were subjected to brutal forms of sexual violence, including sexual mutilation, after which many of them were killed.’⁵⁸ The idea was essentially that the ethnic cleansing of a population could be forwarded by manipulating the procreative abilities of women in the targeted ethnic group.⁵⁹ Therefore rape was definitely used by the Hutus as a strategic tool during the Rwandan conflict.

Another example is the sexual violence that was prevalent in the Sierra Leonean conflict. It is reported that thousands of young women and girls were deliberately targeted by the armed forces, and that the sexual assaults were extremely brutal in that they often took the form of multiple gang rapes and long periods of sexual slavery.⁶⁰ In a study conducted by Physicians for Human Rights, it was estimated

⁵⁶ Ibid at 312.

⁵⁷ Nebesar supra note 48 at 148 and 154.

⁵⁸ Mukamana and Collins supra note 42 at 144.

⁵⁹ Inger Skjelsbaek 'Sexual violence and war: Mapping out a complex relationship' (2001) 7(2) *European Journal of International Relations* 211 at 222.

⁶⁰ Wood supra note 46 at 314-315.

that 215 500 to 257 000 Sierra Leonean women and girls were subjected to some form of sexual violence during the conflict.⁶¹

More recently, attention has been brought to the atrocities that are being committed by ISIS (Islamic State of Iraq and Syria) – a jihadist extremist terrorist group comprised primarily of Sunni Arabs from Iraq and Syria, who seek domination of Muslims worldwide. It has come to light that ISIS has implemented a policy of rape and sexual slavery as part of its official ideology.⁶² Not only is it using this policy to lure potential recruits, but also it seems that there is a reliance on Islamic scripture in an effort to justify the sexual violation of these women. The New York Times article exposing this ‘theology of rape’ revealed the following:

‘In the moments before he raped the 12-year-old girl, the Islamic State fighter took the time to explain that what he was about to do was not a sin. Because the pre-teen girl practiced a religion other than Islam, the Quran not only gave him the right to rape her — it condoned and encouraged it, he insisted.’⁶³

Furthermore, the report confirmed that ‘the trafficking of women has been used to reward fighters, and as a recruiting tool to lure men from deeply conservative Muslim societies, where casual sex is taboo and dating is forbidden.’⁶⁴

Boko Haram, another prolific terrorist group seeking to create an Islamic state, has been active in Nigeria since 2002. From 2013, Boko Haram’s tactics seemed to have taken a turn for the worse as they started targeting women and girls – ‘all these women were targeted for instrumental purposes, as none of those captured on either side had any direct involvement in the conflict.’⁶⁵ Though Boko Haram has abducted hundreds of women and girls, little has been relayed as to the perpetration of sexual violence. This may be due to the fact that sexual violence and rape are forbidden by Sharia law, which is implemented by Boko Haram.⁶⁶ However,

⁶¹ ‘“We’ll kill you if you cry”: Sexual Violence In The Sierra Leone Conflict’ (2003) Human Rights Watch at 25.

⁶² Rukmini Callimachi ‘ISIS Enshrines a Theology of Rape’ *The New York Times*, 13 Aug 2015. Available at: <http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html> [accessed 1 Sept 2015].

⁶³ Ibid.

⁶⁴ ‘The Islamic State Is Forcing Women to Be Sex Slaves’ *The New York Times*, 20 Aug 2015. Available at: <http://www.nytimes.com/2015/08/21/world/middleeast/the-islamic-state-is-forcing-women-to-be-sex-slaves.html> [accessed 1 Sept 2015].

⁶⁵ Jacob Zenn and Elizabeth Pearson ‘Women, gender and the evolving tactics of Boko Haram’ (2014) 5(1) *Journal of Terrorism Research* 46.

⁶⁶ Ibid.

numerous testimonies have recently surfaced relating to the sexual abuse of Boko Haram's female captives, which seems to mostly occur in secret by the group members or explicitly by the captives' new 'husbands' whom they were forced to marry. Victims reveal that they were raped daily by several men, in what has been described as a 'deliberate strategy to dominate rural residents and possibly even create a new generation of Islamist militants in Nigeria.'⁶⁷

Finally it is worth mentioning the atrocities that have been and continue to be committed in the Democratic Republic of Congo – 'the eastern provinces of the Democratic Republic of Congo (North Kivu, South Kivu, and Province Orientale) have since August 1996 been the scene of intense and unspeakable human tragedy as armed conflict has taken the lives of millions of Congolese in a war now widely recognized as the deadliest since World War II.'⁶⁸ During the conflict, the government and rebel forces have used sexual violence as a strategic weapon of war, with an estimated 1100 women raped every day.⁶⁹ As a result of the unprecedented mass scale of sexual violence, the DRC has come to be known as the rape capital of the world.

c. Conclusion

The prolific status of sexual violence being used as a strategic weapon of war is disturbing. Evidently it has transcended decades as well as the differing nature of conflicts, be it international or internal. Though it must be noted that the documentation of victimisation in the form of sexual violence is a notoriously complex and challenging endeavour, arguably even more so in a post-conflict context.⁷⁰ That is, there are inherent difficulties in obtaining accurate data via both quantitative and qualitative methods. Thus many of the reported estimates and

⁶⁷ Adam Nossiter 'Boko Haram Militants Raped Hundreds of Female Captives in Nigeria' *The New York Times*, 18 May 2015. Available at: <http://www.nytimes.com/2015/05/19/world/africa/boko-haram-militants-raped-hundreds-of-female-captives-in-nigeria.html> [accessed 1 Sept 2015].

⁶⁸ Dunia Prince Zongwe 'The new sexual violence legislation in the Congo: Dressing indelible scars on human dignity' (2013) 55(2) *African Studies Review* 37.

⁶⁹ Kas Wachala 'The tools to combat the war on women's bodies: Rape and sexual violence against women in armed conflict' (2012) 16(3) *The International Journal of Human Rights* 533 at 547.

⁷⁰ Ted Alcorn 'Responding to sexual violence in armed conflict' (2014) 383(9934) *The Lancet*.

numbers of victims abovementioned are likely flawed. Nevertheless, they give a useful indication of the extent and pattern of conflict-related sexual violence. Therefore it remains crucial to continue gathering such data, in order to understand the suffering and resultant needs of the victims. This reflects a need to pay attention to the past, present, and future, as the trends represent a consistent perpetration of sexual violence against females during conflicts. Consequently there is a necessity to provide these victims with assistance and redress.

CHAPTER 4: INTERNATIONAL RECOGNITION AND CONDEMNATION OF WARTIME SEXUAL VIOLENCE

Evidently, despite the difficulties in obtaining completely accurate accounts and numbers of victimisation, sexual violence committed during periods of armed conflict is of great concern to local communities as well as the international community as a whole. As such, wartime sexual violence has become a pertinent issue that has been adopted by various international bodies, resulting in the promulgation of numerous official condemnations of such criminal behaviour.

a. International Humanitarian Law

The primary treaties regulating armed conflicts are the 1907 Hague Conventions and Regulations,⁷¹ the four 1949 Geneva Conventions,⁷² as well as the two 1977 Additional Protocols to the Geneva Conventions.⁷³ The Hague Conventions forms part of Hague Law, which serves to restrict the means and methods of warfare that cause unnecessary suffering or which are particularly dangerous/atrocious. The Geneva Conventions and Protocols encompass Geneva Law, which protects those persons who are not taking part in the hostilities. The latter therefore provide the bulk of the relevant provisions when discussing sexual violence, as they are pertinent to the protection and treatment of civilians during armed conflicts.

It is notable that there is scant prohibitory provisions relating to sexual violence against women during conflict: it is only article 27 of the Fourth Geneva Convention, and articles 76 and 4 of the two Additional Protocols respectively that expressly prohibit such sexual violence. Furthermore, crimes of sexual violence are have been omitted as explicitly constituting grave breaches of the 1949 Geneva

⁷¹ Hague Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899. Hague Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907.

⁷² Geneva Conventions supra note 26.

⁷³ Additional Protocols to the Geneva Conventions supra note 27.

Conventions; instead they are merely characterized as an attack against a woman's honour.⁷⁴

Kelly Askin, in providing a comprehensive overview of the international humanitarian law relating to crimes of sexual violence, too exposes their lack of specific concern around the treatment of women and the crimes committed against them.⁷⁵ Specifically, she argues that the instruments of international humanitarian law abovementioned do not provide sufficient or acceptable protections for women:

‘Despite the fact that many regulations protecting either combatants or civilians are often described in minute and exhaustive detail, very little mention is made of female combatants or civilians...Women and girls have habitually been sexually violated during wartime, yet even in the twenty-first century, the documents regulating armed conflict either minimally incorporate, inappropriately characterize, or wholly fail to mention these crimes.’⁷⁶

However, there has been development within case law that reveals that crimes of a sexual nature are arguably covered by the Conventions' provisions. For instance, in the *Celebici* case, the Court found that sex crimes could be encompassed by the Conventions' proscriptions against torture, inhumane treatment, the willful causing of great suffering, and serious injury to body or health.⁷⁷ Thus with an increasing concern for wartime sexual violence, there may be room for improvement with regards to its recognition and protection in international humanitarian law instruments.

b. Rome Statute

Both the ICTY Statute⁷⁸ and ICTR Statute⁷⁹ fail to explicitly recognize sexual violence in its entirety as an international crime, merely referring to the crime of

⁷⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949. Article 46.

⁷⁵ Kelly Askin 'Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles' (2003) 21(2) *Berkeley Journal of International Law* 288.

⁷⁶ *Ibid* at 294-295.

⁷⁷ *The Prosecutor v. Zengin Delali (Judgement)* IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998.

⁷⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Security Council Resolution 827 (adopted 25 May 1993). Hereinafter referred to as the 'ICTY Statute'.

‘rape’, and thereby excluding other forms of sexual violence. Furthermore, rape is recognized only as a crime against humanity (articles 3 and 5 of the ICTR and ICTY Statutes respectively). Though rape is not categorized as a war crime in the ICTY Statute, it is in the ICTR Statute, yet only if it constitutes an ‘outrage on personal dignity’.⁸⁰ Therefore the Rome Statute represents a welcomed step towards overcoming the inadequate treatment of sexual violence crimes in international humanitarian law as well as by the comprising statutes of the ad hoc tribunals.

The Rome Statute came into effect on 1 July 2002, establishing the International Criminal Court (ICC). The ICC exercises jurisdiction over the ‘most serious crimes of concern to the international community’, namely: the crime of genocide (Article 6); crimes against humanity (Article 7); war crimes (Article 8); and potentially the crime of aggression.⁸¹ Provided that the relevant requirements are met, rape and other forms of sexual violence are expressly prohibited as a crime against humanity (Article 7(1)(g)) and a war crime (Article 8(2)(b)(xxii)), and implicitly prohibited as a crime of genocide (in terms of either Article 6(b) or (d)). The Rome Statute has thus been applauded for its inclusion of sexual crimes, considering the lack of recognition in the prior legislation:

‘The provisions on gender crimes under the definitional sections of the Rome Statute are a historic development under international law. Previous international humanitarian law treaties failed to properly address sexual and gender violence. Neither the Hague Conventions respecting the Laws and Customs of War nor the Nuremberg Charter contained in the Agreement for the Prosecution and Punishment of Major War Criminals after World War II included any mention of sexual violence.’⁸²

Anne-Marie De Brouwer, after a thorough scan of the relevant legislation, similarly determines that the ICC has much potential to benefit victims of sexual violence.⁸³ She praises the ICC for its increased attention to crimes of sexual violence, its inclusion of victim participation, its acceptance of reparations provisions and the realisation of certain reparation schemes through the Victims

⁷⁹ Statute of the International Criminal Tribunal for Rwanda, UN Security Council Resolution 955 (adopted 8 November 1994). Hereinafter referred to as the ‘ICTR Statute’.

⁸⁰ Ibid at Article 4(e).

⁸¹ Rome Statute supra note 22 at Article 5.

⁸² Barbara Bedont and Katherine Martinez ‘Ending impunity for gender crimes under the International Criminal Court’ (1999) 6(1) *The Brown Journal of World Affairs* 65 at 69.

⁸³ Anne-Marie De Brouwer ‘What the International Criminal Court has achieved and can achieve for victims/survivors of sexual violence’ (2009) 16 *International Review of Victimology* 183.

Trust Fund, as well as the requirement of considering whether members of the court have expertise in specific issues dealing with sexual and gender violence. However, on reflection of the cases that have come before the ICC, De Brouwer finds that perhaps these provisions, which look good on paper, do not in reality provide justice to victims of sexual violence. This is evident by the failure to bring charges of sexual violence against Thomas Lubanga Dyilo and Bosco Ntaganda (respectively the former president and senior militiaman of the main militia group operating in the DRC), despite significant documentation as to the perpetration of sexual violence by their organisation.⁸⁴ This has resulted in the inability for such victims to participate in the criminal proceedings against the accused. In addition, the Court has been criticized on the basis that the charges of sexual violence against certain accused persons have been inadequate.⁸⁵ That is, the charges fail to be all-inclusive, in that they do not reflect the magnitude and totality of sexual violence crimes committed. Therefore the practicalities and minutia of the official court proceedings may serve to undermine the efforts of the Rome Statute in actually providing relief to victims of sexual violence. Nonetheless De Brouwer concludes by acknowledging the great *potential* of the ICC in assisting these victims:

‘Nevertheless, all in all, especially when compared to the sparse legislation on sexual violence of previous international criminal tribunals as well as much national criminal legislation, the Court’s legislation concerning sexual violence crimes could be seen as adequate, even model legislation on sexual violence crimes.’⁸⁶

c. United Nations

In recent years, the United Nations (UN) has adopted several significant resolutions relating to international crimes of a sexual nature. These are important to consider, since they are adopted by the UN Security Council in terms of its Chapter VII powers; thus making the resolutions binding on all member States.

The UN Security Council Resolution 1325, which was passed unanimously in 2000, brought to the forefront the idea of sexual violence being a legitimate and

⁸⁴ Ibid at 194.

⁸⁵ Ibid at 198.

⁸⁶ Ibid at 187.

pressing peace and security issue, as women and girls are particularly adversely affected by armed conflict.⁸⁷ Some of the key aspects of the Resolution include: calls on parties to armed conflict to respect the international law applicable to the rights and protections of women and girls; calls on parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse; and calls on States to put an end to impunity and prosecute those responsible for crimes relating to sexual and other violence against women and children.⁸⁸ Notably, in October 2013, UN Security Council Resolution 2122 was adopted, which serves to address the implementation gaps of the Women Peace and Security agenda which was established by SC Resolution 1325. Namely: ‘protection from human rights abuses and violations; opportunities for women to exercise leadership; resources provided to address their needs and which will help them exercise their rights; and the capacities and commitment of all actors involved in the implementation of resolution 1325 (2000) and subsequent resolutions to advance women’s participation and protection.’⁸⁹

UN Security Council Resolution 1820 was adopted in 2008. The first operative paragraph explicitly addresses the problem of sexual violence being used as a weapon of war:

‘...Sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security...’⁹⁰

Thereafter the Resolution calls for the cessation and prohibition of all acts of sexual violence during armed conflict.⁹¹

UN Security Council Resolution 1888, adopted in 2009, recognises that sexual violence used as a tactic of war against a civilian population serves to impede international peace and security. Thus it demands parties to armed conflict to cease all acts of sexual violence. Furthermore, the Resolution calls for the establishment

⁸⁷ Paul Kirby 'Ending sexual violence in conflict: The Preventing Sexual Violence Initiative and its critics' (2015) 91(3) *International Affairs* 457.

⁸⁸ UN Security Council Resolution 1325, 31 Oct 2000.

⁸⁹ UN Security Council Resolution 2122, 18 Oct 2013.

⁹⁰ UN Security Council Resolution 1820, 19 June 2008. Article 1.

⁹¹ *Ibid* at Article 2.

of a team of experts, whose role will be to support national authorities in protecting and enforcing the rule of law and bringing an end to conflict-related sexual violence.⁹²

In December 2010, UN Security Council Resolution 1960 was passed. This resolution creates a monitoring, analysis and reporting system on conflict-related sexual violence.⁹³ It further requires parties to armed conflicts to prohibit and punish sexual violence.

More recently, in 2013, UN Security Council Resolution 2106 was adopted. It reiterates much of what is written in Resolution 1325 and 1820. Yet an important additional aspect is the inclusion of reparative concerns for victims of wartime sexual violence:

‘Recognizing the importance of providing timely assistance to survivors of sexual violence, urges United Nations entities and donors to provide non-discriminatory and comprehensive health services, including sexual and reproductive health, psychosocial, legal, and livelihood support and other multi-sectoral services for survivors of sexual violence...’⁹⁴

In accordance with the oversight provisions contained in Security Council Resolution 2106, in 2015 the Secretary General issued a report on conflict-related sexual violence. The report highlights several pressing concerns, namely: the proliferation of under-reporting of sexual violence, due to stigma and the risk of threats and further trauma; the use of sexual violence as an ideological tool by extremist terrorist groups; the prevalence of sexual violence in displacement camps, where many people have settled due to conflict in their countries; and the problem of formal and informal systemic gender-based discrimination, which ultimately paves the way towards sexual violence during a conflict situation.⁹⁵ The report concludes with a proposal of recommendations. One of the key recommendations urges the Security Council ‘to recognize that in addition to being employed as a tactic of war, as noted in resolution 1820 (2008), sexual violence can also constitute

⁹² UN Security Council Resolution 1888, 30 Sept 2009. Article 8.

⁹³ UN Security Council Resolution 1960, 16 Dec 2010. Article 8.

⁹⁴ UN Security Council Resolution 2106, 24 June 2013. Article 19.

⁹⁵ Report of the Secretary General: Conflict-Related Sexual Violence (2015) UN Security Council.

a tactic of terror. Accordingly, efforts to prevent and address sexual violence should be closely and strategically aligned with efforts to prevent violent extremism.’⁹⁶

There have been numerous other official condemnations of wartime sexual violence, including: UN Action Against Sexual Violence in Conflict; Convention on the Elimination of All Forms of Discrimination against Women of 1979; Declaration of Commitment to End Sexual Violence in Conflict; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and the Global Summit to End Sexual Violence in Conflict, held in London in June 2014. These serve much persuasive value, encouraging States all over the world to fight against sexual violence committed during armed conflict.

⁹⁶ Ibid at 28.

CHAPTER 5: CRIMINAL JUSTICE

a. Introduction

A criminal justice system essentially encompasses the various social processes and institutions that are responsible for the prevention, control, and punishment of criminal activity. The process of ensuring criminal justice therefore deals with issues such as operative law enforcement, the court system and judicial proceedings, as well as the effective sentencing of and imposition of penalties upon convicted criminals.

Arguably one of the most crucial components of criminal justice is judicial prosecution, otherwise known as punitive or retributive justice. An efficient criminal justice system ensures that crimes are not committed with impunity. This is key in order for perpetrators to be held accountable for their actions and for societal healing to commence. In this vein, Estelle Zinsstag identifies three purposive elements of criminal justice: accountability (whereby perpetrators of past atrocities publicly acknowledge their criminal responsibility); impunity (whereby action is taken to ensure that perpetrators are punished for their crimes through prosecution); and deterrence (i.e. the hope that prosecuting perpetrators will serve to deter others from committing similar crimes).⁹⁷ Therefore Zinsstag concludes that it is vital for the post-conflict successor government to reconstruct or resurrect a legitimate criminal justice system, in order to reassert the rule of law and publicly condemn past violence.⁹⁸ In addition, criminal justice in a post-conflict transitional setting will especially need to be concerned with the rights and interests of the victims, including the provision of appropriate reparations.

This chapter will focus on criminal justice in terms of wartime sexual violence. First, the development and extent of criminal prosecution of such crimes will be examined, drawing on jurisprudence from the ad hoc tribunals as well as the ICC. Second, the instances of court-order reparations for victims of conflict-related

⁹⁷ Zinsstag supra note 44 at 139.

⁹⁸ Ibid.

sexual violence will be determined. If true transitional justice is to be achieved, one will expect both of these aspects of criminal justice to be satisfied.

b. Punitive justice for international crimes of sexual violence

If one proceeds in chronological order, it is notable that the International Military Tribunals at Nuremberg and Tokyo both essentially ignored crimes of sexual violence. In the proceedings held in Nuremberg, the IMT Charter failed to include any form of sexual violence, and the Tribunal did not explicitly prosecute such crimes.⁹⁹ However, crimes of sexual violence were implicitly subsumed under the Nuremberg judgments by way of evidence.¹⁰⁰ That is, many transcripts from the trials contain records of gender-based and sexual crimes committed during the Holocaust; yet these crimes did not form the direct subject of the prosecutions. With regards to the post-World War II trials held in Tokyo, crimes of a sexual nature were expressly prosecuted, albeit to a limited extent and in conjunction with other crimes.¹⁰¹

On the other hand, recognition has been accorded to the advances made by the ICTY and ICTR in their acknowledgement of crimes of sexual violence. Significantly, such crimes were given the status as a crime against humanity as well as an instrument of genocide. This is evident in much of the jurisprudence, which shall henceforth be discussed.

Arguably one of the most significant cases before the ICTR was the *Akayesu* case.¹⁰² This is due to the fact that it contains a landmark decision with regard to the crime of rape – it was the first time in history that there was a conviction for the perpetration of sexual violence as a war crime, a crime against humanity, as well as an instrument of genocide: ‘Sexual violence falls within the scope of “other

⁹⁹ Askin supra note 75 at 301.

¹⁰⁰ Ibid.

¹⁰¹ Ibid at 302.

¹⁰² *The Prosecutor v Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998.

inhumane acts", set forth Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute.¹⁰³ In a subsequent case before the ICTR, Laurent Semanza was convicted for committing a crime against humanity, by virtue of his role in inciting and encouraging the rape of female victims:

‘The Chamber finds beyond a reasonable doubt that Victim A was raped by one of the assailants who heard the Accused encouraging the crowd to rape Tutsi women... The Chamber finds that this rape was part of the widespread attack against the civilian Tutsi population... The Chamber finds beyond a reasonable doubt that the Accused instigated the rape of Victim A as a crime against humanity.’¹⁰⁴

Similarly, in 2004 Sylvestre Gacumbitsi was convicted on charges of crimes against humanity and genocide, each of which included the perpetration of sexual violence.¹⁰⁵ The ICTR also set two major precedents: it was the first tribunal in history to hold the media responsible for inciting sexual crimes, and it was the first tribunal to charge a woman with genocide and rape.¹⁰⁶

The ICTY should also be given recognition for its prosecution of sexual violence. In *The Prosecutor v Furundzija*, the Tribunal expanded the definition of rape to include anal and oral penetration; thus expanding crimes against humanity to include other lesser forms of sexual violence:

‘International criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem 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.’¹⁰⁷

In addition, in the subsequent *Foca* cases, sexual violence formed the primary subject of the charge against the accused as a crime against humanity for the first time at the ICTY.¹⁰⁸

¹⁰³ Ibid at para 688.

¹⁰⁴ *The Prosecutor v Laurent Semanza (Judgment and Sentence)*, ICTR-97-20-T, International Tribunal for Rwanda (ICTR), 15 May 2003 at para 477-479.

¹⁰⁵ *The Prosecutor v Sylvestre Gacumbitsi (Judgment)*, ICTR-2001-64-T, International Criminal Tribunal for Rwanda (ICTR), 17 June 2004.

¹⁰⁶ Sita Balthaza 'Gender crimes and the international criminal tribunals' (2006) 10(1) *Gonzaga Journal of International Law* 43 at 46.

¹⁰⁷ *The Prosecutor v Anto Furundzija (Judgment)*, IT-95-17/1-T, International Criminal Tribunal for Rwanda (ICTR), 10 December 1998 at para 185.

¹⁰⁸ Shana Eaton 'Sierra Leone: The proving ground for prosecuting rape as a war crime' (2004) 35 *Georgetown Journal of International Law* 873 at 889-890.

Therefore it is clear that both the ICTR and ICTY were not only statutorily empowered to prosecute perpetrators of sexual violence, but did so relatively often. This impetus was taken into account during the negotiations for the establishment of the International Criminal Court. As a result, the Rome Statute contains several provisions relating to the perpetration of sexual violence, and numerous accused persons have been sentenced on such charges before the ICC.

The preamble of the Rome Statute, which enumerates the obligations to which State Parties must commit, reflects a general emphasis on punitive justice. For example, State Parties must:

‘[Affirm] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,’
‘[Be determined to] put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,’ and
‘[Recall] it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.’¹⁰⁹

Taking heed of the important jurisprudence established by the ad hoc tribunals, the Office of the Prosecutor of the ICC has been praised for its concerted effort to incorporate gender crimes into its strategy of criminal prosecution. Fatou Bensouda, the current Prosecutor of the ICC, has been seminal in this regard, in her effort to create prosecution strategies that are deliberately focused on the issue of gender and sexual violence.¹¹⁰ The court has issued 28 warrants of arrest to date, many of which include charges for rape (constituting a war crime, a crime against humanity, and an instrument of genocide), inducement to rape, and sexual slavery.¹¹¹ Several cases involving charges of sexual violence have come before the ICC. The relevant accused include: Jean-Pierre Bemba Gombo,¹¹² Omar Hassan Ahmad Al Bashir,¹¹³

¹⁰⁹ Rome Statute supra note 22.

¹¹⁰ Policy Paper on Sexual and Gender-Based Crimes supra note 34.

¹¹¹ See ICC website https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [accessed 2 Dec 2015].

¹¹² *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08, International Criminal Court (ICC).

¹¹³ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, International Criminal Court (ICC).

Ahmad Muhammed Harun and Ali Muhammad Ali Abd Al-Rahman,¹¹⁴ Germain Katanga,¹¹⁵ Mathieu Ngudjolo Chui,¹¹⁶ Joseph Kony and Vincent Otti,¹¹⁷ Bosco Ntaganda,¹¹⁸ Callixte Mbarushima,¹¹⁹ Sylvestre Mudacumura,¹²⁰ Dominic Ongwen,¹²¹ Abdel Raheem Muhammed Hussein,¹²² Uhuru Muigai Kenyatta,¹²³ Simone Gbagbo,¹²⁴ and Laurent Gbagbo.¹²⁵

In summation, criminal justice is essential not just in an effort to ensure accountability on part of the perpetrators, but also to assure victims that their assailants will not be free to commit further crimes. Hence the prosecution of those accused of committing crimes of sexual violence is an indispensable aspect of transitional justice, and represents an integral step towards justice for victims. However, it is critically important to recognize that punitive justice alone cannot guarantee complete transitional justice. What is required, in addition, is the provision of some form of reparations to victims.

c. Court-ordered reparations

Unfortunately, both the Nuremberg and Tokyo Charters failed to mention victims at all, thus the issue of reparations was not even on the agenda.¹²⁶ Consequently, the many victims of sexual violence perpetrated during the Second World War were not awarded reparations and did not receive adequate assistance from the courts.

¹¹⁴ *The Prosecutor v Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/07, International Criminal Court (ICC).

¹¹⁵ *The Prosecutor v Germain Katanga*, ICC-01/04-01/0, International Criminal Court (ICC).

¹¹⁶ *The Prosecutor v Mathieu Ngudjolo Chui*, ICC-01/04-02/12, International Criminal Court (ICC).

¹¹⁷ *The Prosecutor v Joseph Kony, Vincent Otti and Okot Odhiambo*, ICC-02/04-01/05, International Criminal Court (ICC).

¹¹⁸ *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, International Criminal Court (ICC).

¹¹⁹ *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10, International Criminal Court (ICC).

¹²⁰ *The Prosecutor v Sylvestre Mudacumura*, ICC-01/04-01/12, International Criminal Court (ICC).

¹²¹ *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, International Criminal Court (ICC).

¹²² *The Prosecutor v Abdel Raheem Muhammad Hussein*, ICC-02/05-01/12, International Criminal Court (ICC).

¹²³ *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11, International Criminal Court (ICC).

¹²⁴ *The Prosecutor v Simone Gbagbo*, ICC-02/11-01/12, International Criminal Court (ICC).

¹²⁵ *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15, International Criminal Court (ICC).

¹²⁶ Christine Evans *The Right To Reparation In International Law For Victims Of Armed Conflict* (2012) at 88.

In the constituting statutes of the ICTR and ICTY, victims are mentioned with regards to the protection of their rights during the trial (Articles 21 and 22 respectively). Yet the only inference to possible reparations is in Article 23(3) of the ICTR Statute and Article 24(3) of the ICTY Statute: *‘In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.’* Thus the ad hoc tribunals were empowered to make orders of restitution, yet were not expressly authorized to order compensation or rehabilitative measures. Regrettably, even their limited power to award forms of restitution has not been exercised, including cases where it was clear that victims’ property had been illegally taken.¹²⁷ Furthermore, it is evident that restitution in the form of restoration of property is unlikely to provide comprehensive redress to victims of sexual violence.

Though in terms of Rule 34 of the Rules of Procedure and Evidence (RPE), both ad hoc tribunals have set up Victims and Witness Support Units. These units function to provide support – which includes counseling in cases of rape and sexual assault – and protective measures to victims and witnesses.¹²⁸ Furthermore, the ICTR RPE has included ‘physical and psychological rehabilitation’ as part of the support to victims.¹²⁹ Therefore some initiative has been taken to ensure that victims of conflict-related violence receive effective assistance. However, the problem lies in the fact that such rehabilitative measures would only be available to those victims who provide testimony.¹³⁰ It is worth noting that Rule 106(B) of the RPE of both ad hoc tribunals states that a victim may approach the national courts in order to claim compensation. However very few, if any, of these domestic claims have been successful.¹³¹ In this light, a research report investigating reparations for wartime victims in the former Yugoslavia states that ‘the judicial route has not been able to offer effective access to reparations for the vast majority of victims of international

¹²⁷ Ibid at 91.

¹²⁸ ICTY Rules of Procedure and Evidence, ITR/3/Rev.1, 5 July 1995.

¹²⁹ ICTR Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015. Rule 34.

¹³⁰ Evans supra note 126 at 95.

¹³¹ Ibid at 92.

crimes in the former Yugoslavia, an experience that is common to many other post-conflict settings.¹³²

With numerous deficiencies plaguing the ICTR and ICTY in terms of providing assistance to victims, the Rome Statute has been hailed for inclusion of specific provisions dealing with reparations. Article 75 of the Rome Statute states the following:

1. *The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation...*
2. *The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.*

Additionally, in an effort to mitigate the likely occurrence of accused persons claiming indigence (and thus an inability to pay reparations to victims), Article 79 of the Rome Statute provides for the establishment of the Victims Trust Fund.

Both articles 75 and 79 became pertinent in the recent *Lubanga* appeals case, where the Court ordered reparations against Mr Lubanga. Specifically, the Court awarded reparations to direct and indirect victims of Lubanga's crimes, to be provided by the Victims Trust Fund (due to Lubanga's inadequate resources).¹³³ The problem, however, is that victims of sexual violence have been excluded as beneficiaries of these reparations, as the charges against Lubanga were primarily concerned with the conscription of child soldiers. Though the Court does urge the Board of Directors of the Trust Fund to consider the possibility of allowing victims of sexual and gender-based violence to be included in certain assistance activities and programmes.¹³⁴

Therefore, despite several legislative advances in providing redress to victims and recognising the plight of victims of sexual violence in particular, neither the ICC nor the ad hoc tribunals have to date awarded comprehensive reparations to

¹³² Peter van der Auweraert 'Reparations for Wartime Victims in the Former Yugoslavia: In Search of the Way Forward' (2013) International Organization for Migration, Geneva at 15.

¹³³ *The Prosecutor v Thomas Lubanga Dyilo (Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012)* with amended order for reparations (Annex A) and public annexes 1 and 2, Appeals Chamber, ICC-01/04-01/06 A A 2 A 3, 3 March 2015.

¹³⁴ *Ibid.* Annex A at para 64.

victims of conflict-related sexual violence. In this vein, Aroussi argues for the need for effective reparative justice:

‘Despite these noteworthy achievements in international law, the project of dispensing justice for victims of wartime sexual violence has remained largely unfulfilled (Nowrojee 2005; Melandri 2009). One of the shortcomings of the current strategies for transitional justice revolves around how justice for sexual violence is perceived and pursued. While the goal of holding the perpetrators accountable cannot be under-estimated, this on its own is not enough to fulfill women victims’ needs for a meaningful form of justice.’¹³⁵

d. Conclusion

The importance of criminal justice has been reflected in the jurisprudence of the various international courts and tribunals set up to deal with the perpetration of international crimes during armed conflicts. Numerous forms of sexual violence have come to be recognized as amounting to crimes of genocide, crimes against humanity, and war crimes. This is a novel and momentous development in international criminal law, as it allows the perpetration of such sexual crimes to be condemned and punished. Consequently, several accused persons have been charged with some form of sexual violence before the ad hoc tribunals as well as the ICC. The problem, however, is that despite these advances in punitive justice, there is little such development in the area of reparations. Despite the existence of legislative provisions enabling the courts and tribunals to award reparations to victims of sexual violence, little has come to fruition. In this regard, it can be argued that criminal justice in its entirety is not being achieved for victims of conflict-related sexual violence.

¹³⁵ Sahla Aroussi 'Women, Peace and Security: Addressing accountability for wartime sexual violence' (2011) 13(4) *International Feminist Journal of Politics* 576 at 579.

CHAPTER 6: REPARATIONS

a. The importance of reparations

As illustrated in the previous chapter, criminal prosecution undoubtedly plays a key role in the process of transitional justice. However, it is crucial to understand that victims will continue to suffer the consequences of conflict-related sexual violence even if the perpetrators are caught and punished. Therefore the conviction of perpetrators of crimes of sexual violence may not be a significant source of relief for victims:

‘When asked about the types of reparations that female victims prefer, responses across countries and cultures followed a similar pattern: they asked for services to meet their basic needs... victims appear to be primarily present and future oriented. Their needs are so immediate that they are less concerned with the justice of the past than survival in the present and future.’¹³⁶

Thus, whilst the developments in punitive justice concerning crimes of sexual violence are commendable, considerable attention needs to be paid to the formulation of effective reparation programmes as a simultaneous form of justice for victims.

In a study conducted by Roman David and Susanne Choi Yuk-ping, it was found that reparations are two-dimensional: they promote personal inner-healing, and they serve as a process for socio-political redress.¹³⁷ That is, reparations cannot just address suffering on an individual level, they have to foster positive developments at the communal/societal level too. Therefore, when reparations relate to a situation of mass victimisation (as in the case of widespread conflict-related sexual violence), it will be vital for the deciding body to consider ‘the cultural and social context of victims of conflict-related sexual violence, the harm suffered and their needs as well as the obstacles they could face when such reparations are awarded.’¹³⁸ In recognition of this, the UN has advocated for reparations to have a transformative

¹³⁶ Cybele Cochran 'Transitional justice: Responding to victims of wartime sexual violence in Africa' (2008) 9 *The Journal of International Policy Solutions* 33.

¹³⁷ Roman David and Susanne Choi Yuk-ping 'Victims on transitional justice: lessons from the reparation of human rights abuses in the Czech Republic' (2005) 27 *Human Rights Quarterly* 392 at 430.

¹³⁸ Guidance note of the Secretary-General: Reparations For Conflict-Related Sexual Violence supra note 20.

effect, rather than reinforcing the structural conditions within society that enabled the initial perpetration of widespread sexual violence.¹³⁹ This idea of reparations being transformative was echoed by the ICC in the *Lubanga* case:¹⁴⁰

‘Transformative reparations may serve not only as a form of reparative justice but also as an opportunity to overcome structural conditions of inequality and exclusion... Furthermore, transformative reparations may be particularly important when addressing harm suffered by women and girls... Hence, Trust Fund respectfully suggests that the transformative quality of reparations be explicitly addressed in the Court’s principles with a view to eliminating the pre-existing structural inequalities that have led to or encouraged the violence.’

In order for reparations to have this transformative effect, it is essential for the awarding body to have a comprehensive and holistic understanding of the harms suffered by victims of conflict-related sexual violence. Only once there is a grasp of such suffering, can an effective programme of reparations be recommended and established.

b. Consequences of conflict-related sexual violence

Reparations can come in various forms of redress, as enumerated by the UN Basic Principles. The predominant forms include: restitution (restoring the victim to her original situation before the offence occurred); compensation (awarded for any pecuniary assessable damage); rehabilitation (providing the victim with essential services, including medical and psychological care, plus legal and social services); satisfaction (often ordered in the form of public apologies, commemorations, and the building of monuments); and guarantees of non-repetition (which is usually designed on a case-by-case basis).¹⁴¹ Therefore it is evident that reparations can be material or symbolic, and can be awarded individually or on a collective basis.

It is crucial for reparations to reflect the myriad of consequences that are experienced by survivors of conflict-related sexual violence. Therefore, this section

¹³⁹ Ibid.

¹⁴⁰ *The Prosecutor v. Thomas Lubanga Dyilo (Observations on Reparations in Response to the Scheduling Order of 14 March 2012)*, ICC-01/04-01/06-2872, International Criminal Court (ICC), 25 April 2012 at para 72-77.

¹⁴¹ Guidance note of the Secretary-General: Reparations For Conflict-Related Sexual Violence' supra note 20.

will engage in an in-depth examination of the detrimental and enduring harm experienced by victims of conflict-related sexual violence, in an effort to understand the reparations that are required in order to make a tangible difference in their lives. Such harms include: physical/medical ailments, negative social impacts, emotional and psychological stress, as well as livelihood (monetary) issues. This is an essential exercise, as reparation programmes can only be effectively designed once there is an understanding of the needs of the affected victims.

(i) Physical/medical

One of the key consequences of sexual violence is physical/bodily harm to the victims and their subsequent need for medical assistance. Such harm can include: sexually transmitted infections and HIV, unwanted pregnancies (which can result in further physical harm due to abortions through non-sterilized and non-medical procedures), gynecological problems, physical injuries, and maternal mortality.¹⁴² Sexual assault victims have also complained of painful intercourse, prolapses, genital sores, swelling in the abdomen, chronic pelvic pain, fistula causing leaking of urine and faeces, and vaginal tears.¹⁴³ These types of harms require immediate assistance, as the absence thereof will have serious detrimental effects on the women's health and physical wellbeing. Additionally, some long-term effects of sexual violence include: partial or permanent disability, infertility and other reproductive health problems, as well as the possibility of suicide or infanticide.¹⁴⁴

With regards to the apparent widespread transmission of HIV/AIDS during conflict, an interesting article has been written negating this common belief. The authors assert that countries experiencing violent conflict tend to have lower levels of HIV infection compared to those countries experiencing relative peace.¹⁴⁵ Yet, there is evidence to show that in the post-conflict period levels of infection may

¹⁴² Wietse A Tol, et al. 'Sexual and gender-based violence in areas of armed conflict: A systematic review of mental health and psychosocial support interventions' (2013) 7(16) *Conflict and Health* 1.

¹⁴³ Helen Liebling-Kalifani, et al. 'Violence against women in Northern Uganda: The neglected health consequences of war' (2008) 9(3) *Journal of International Women's Studies* 174 at 180.

¹⁴⁴ Manuela Colombini 'Gender-based and sexual violence against women during armed conflict' (2002) 4(2) *Journal of Health Management* 167 at 171.

¹⁴⁵ Nancy Mock, et al. 'Conflict and HIV: A framework for risk assessment to prevent HIV in conflict-affected settings in Africa' (2004) 1(1) *Emerging Themes in Epidemiology* 1.

increase dramatically, due to a surge in exposure opportunities.¹⁴⁶ Therefore it could be argued that post-conflict medical services should focus on HIV *prevention* strategies. However, there have been numerous studies in which survey and interview participants have revealed becoming HIV positive after being raped during conflict:

‘Post et al. (2002) have found that factors such as vaginal tearing or other injuries which occur during rape increase the risk of transmission in cases where the perpetrator is HIV positive. AVEGA reported in its 2001 survey carried that 70 per cent of the rape survivors had tested positive for HIV (African Rights, 2004). The high rate of HIV could be explained by the fact that during the Rwandan genocide HIV was deliberate weapon to inflict pain and suffering (Donavan, 2002). The fact that a substantial number of women were raped more than once, and by different men, makes it inevitable that many contracted HIV (African Rights, 2004).’¹⁴⁷

Therefore the health clinics must not only implement HIV prevention strategies, but must also remain vigilant in testing and treating women for HIV.

Health clinics are also vital for women and girls who have become pregnant as a result of rape, as they can provide these victims with pre-natal care and regular check-ups. Alternatively, respecting the wishes of the informed victim, the clinic personnel should also be authorised to perform requested abortions and offer emergency contraceptives.

It should be mentioned that there have been writings on the problem of assessing the direct and indirect health problems associated with conflict.¹⁴⁸ Murray et al. state that ‘the fundamental challenge in quantifying the health impacts of conflict is that health information systems, particularly civil registration systems that record the event and cause of death, often cease to function in populations affected by conflict.’¹⁴⁹ Therefore it is argued that more reliable data on the health consequences of conflict is needed in order to establish effective prevention initiatives. In this vein, it has been recognised that health care workers are in a unique position, in that they are able to identify and document individual cases of sexual assault (even where the patient does not disclose that she has been raped), treat the victims’ physical ailments as well as contain their trauma, and attempt to

¹⁴⁶ Ibid.

¹⁴⁷ Mukamana and Collins supra note 42 at 153.

¹⁴⁸ C.J.L. Murray, et al. ‘Armed conflict as a public health problem’ (2002) 324 *British Medical Journal* 346.

¹⁴⁹ Ibid.

identify the perpetrator by the examination of medical specimens (e.g. sperm, blood samples, placental tissues from babies born of rape).¹⁵⁰ Therefore there is a great need for health workers to assist victims in post-conflict countries, as they can provide medical care as well as document the cases. One problem that has arisen in this regard, however, is that survivors of sexual violence tend to rely on traditional healing services as opposed to formal medical clinics; ‘therefore, the involvement of local staff when responding to sexual violence in armed conflict should be viewed as crucial.’¹⁵¹

In summation, with regards to the severe physical effects of sexual violence, it is of the utmost importance for reparative schemes to recognize such harms. This could materialize in the form of the establishment or refurbishment of medical clinics, with specially trained staff – preferably female, with a mixture of international and local personnel – who are sensitive to sexual and gender issues. It will be important for these clinics to be accessible and affordable to victims. In order to stress the importance of medical assistance, it is noteworthy that there has been an impetus towards the creation of mobile health clinics by aid organisations such as the International Committee of the Red Cross and CARE South Sudan. These mobile units are considered to be a transitional or temporary mechanism ‘to be used only as a last resort with the aim of providing health services to population groups which have *no access* to a health-care system.’¹⁵² Hence the emphasis remains on the establishment of permanent health care facilities.

(ii) Emotional/psychological

Sexual violence has profound emotional and psychological effects on those subjected to it. Associated mental disorders include: anxiety disorders, major depressive disorder, substance abuse, and suicidal tendencies.¹⁵³ Colombini reiterates and expands on these emotional effects of sexual abuse:

¹⁵⁰ Shana Swiss and Joan Giller 'Rape as a crime of war: A medical perspective' (1993) 270(5) *Journal of the American Medical Association* 612.

¹⁵¹ Colombini supra 144 at 175.

¹⁵² 'Mobile Health Units: Methodological Approach' (2006) International Committee of the Red Cross.

¹⁵³ Wietse A Tol, et al. supra note 142.

‘Psychological consequences can also be divided into short-term, such as feelings of shock, paralysing fear of death or injury, together with a deep sense of loss of control over one’s life (WHO 2000), and longer term consequences, such as profound feelings of shame, depression, anxiety and grief, as well as persistent fears, avoidance of situations that trigger memories of the violation, difficulty in remembering events, decreased ability to respond to life generally and difficulty establishing intimate relationships and increased self-destructive tendencies. In addition, a few women also develop feelings of guilt and self-blame, apathy, hypochondria, lack of confidence and lack of sexual desire (Swiss and Giller 1993). Headaches, and reports of vaginal discharge and pelvic pain can also be a manifestation of the psychological distress. Feeling dirty and infected is one of the common psychosomatic symptoms related to sexual violence (Heise et al. 1994).’¹⁵⁴

Thus it is evident that sexual violence has deeply traumatic, and sometimes even debilitating, psychological effects on its victims. This is arguably exacerbated in a conflict situation, where sexual violence is rampant and continuous.

In a study conducted on survivors of the Rwandan Genocide, female participants voiced their experiences of being raped and sexually violated. The women expressed their absolute humiliation, especially in cases where they were raped in public or by children.¹⁵⁵ In addition, the participants revealed that being raped during the genocide changed the way in which they viewed themselves as women, particularly in their resultant aversion to men and sexual intimacy.¹⁵⁶ Finally, the participants also exhibited emotional distress with regard to the feeling that no one would believe the horrors that they were subjected to.¹⁵⁷

Therefore there is a clear need for some form of psychological and emotional assistance to be provided to the women and girls who have been subjected to sexual violence during conflict. Interestingly, Bracken et al. raise the question of appropriateness when it comes to implementing psychological interventions in developing and under-developed countries in helping those experiencing post-conflict trauma.¹⁵⁸ They argue that psychology and psychiatry are Western concepts, and thus their mirrored application in these post-conflict settings may be misplaced. Watts et al. echo these sentiments, by questioning the feasibility of transferring Western models of post-rape counselling to low-resource conflict-affected

¹⁵⁴ Colombini supra note 144 at 171-172.

¹⁵⁵ Mukamana and Collins supra note 42 at 149.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid at 159.

¹⁵⁸ Patrick Bracken, et al. 'Rethinking mental health work with survivors of wartime violence and refugees' (1997) 10(4) *Journal of Refugee Studies* 431.

countries. They state that ‘social and cultural influences, low literacy levels, scarcity of trained mental health specialists, and the limitations of health systems in war-torn areas are only a few of the many challenges associated with meeting the widespread mental health needs of conflict-affected populations.’¹⁵⁹ However, recently Bass et al. conducted a study in the DRC measuring the effectiveness of psychotherapy for survivors of conflict-related sexual violence, and their results lend positively towards the use of therapy for these victims.¹⁶⁰ Additionally, Wietse Tol et al. conclude, based on a thorough document analysis, that mental health and psychosocial interventions could be beneficial to populations that have experienced widespread sexual violence.¹⁶¹

Yet it should be mentioned that Kelly et al. found that victims of sexual violence face significant obstacles in seeking services – not only are the available services inadequate, but stigma and fear of reprisal attacks prevent the women from seeking out the services that are available.¹⁶² Therefore there is a need to provide effective, easily-accessible mental health services, whilst taking cognizance of the potential stigmatizing effect of the clinic’s existence.

Finally, it is of crucial importance to note that widespread sexual violence not only produces direct victims, but also a magnitude of indirect victims. The latter includes members of the community or close relatives who failed to prevent acts of sexual violence or who may even have been forced to witness such acts.¹⁶³ In this respect the notion of collective reparations becomes pertinent, as secondary victims will too be in serious need of emotional and psychological assistance.

¹⁵⁹ Charlotte Watts, et al. 'War and sexual violence — mental health care for survivors' (2013) 368(23) *New England Journal of Medicine* 2152.

¹⁶⁰ Judith Bass, et al. 'Controlled trial of psychotherapy for Congolese survivors of sexual violence' (2013) 368(23) *The New England Journal of Medicine* 2182.

¹⁶¹ Wietse A Tol, et al. *supra* note 142 at 7.

¹⁶² J. T. Kelly, et al. 'Experiences of female survivors of sexual violence in Eastern Democratic Republic of the Congo: a mixed-methods study' (2011) 5(25) *Conflict and Health* 1.

¹⁶³ Lindsay-Curtet, et al. *supra* note 43.

(iii) Social/cultural

Victims of conflict-related sexual violence report experiencing severe negative social effects, which ultimately creates secondary victimisation. This is especially so in war-torn communities that hold virginity and sexual purity as being particularly sacred.¹⁶⁴ Therefore when women and girls are sexually violated during conflict, the repercussion is often familial and community rejection and ostracism.

Girls who were victims of wartime sexual violence are deemed unfit for marriage as they are no longer virgins, and they struggle to find a sense of belonging.¹⁶⁵ Married women too face serious challenges, as there is often considerable strain on their marital relations. Many victims have cited ‘fear of contamination’ as a reason for their husbands’ abandonment. One woman shared that ‘*even if your husband is not looking for other women [after the rape], he won’t take care of you any more; even your own children can start thinking that you have been contaminated.*’¹⁶⁶ In addition, survivors of sexual violence are assumed to be HIV positive, which further contributes to their social isolation.¹⁶⁷

Besides the women and girls who have been subjected to sexual violence, another sector of society that is ostracized is children that are born of rape. These children are deemed to be secondary victims of rape, and could either be an unintentional product of forcible rape or be part of an intentional strategy by the perpetrators to create more children of his race (i.e. forced impregnation). It is estimated that over ten thousand children have been born of wartime rape in the last decade alone.¹⁶⁸ Usually these children suffer terrible fates. Often they are completely rejected by their mothers and/or face stigmatization and ostracism from the community, as they are considered to be “children of the enemy”, “monster babies”, “devil’s children”, and “children of shame”.¹⁶⁹ Sometimes mothers are unable to care for the children, as they either lack the resources for adequate

¹⁶⁴ Colombini supra note 144 at 172.

¹⁶⁵ Mukamana and Collins supra note 42 at 153.

¹⁶⁶ Kelly, et al. supra note 162 at 5.

¹⁶⁷ Ibid.

¹⁶⁸ R. Charli Carpenter *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (2007) at 2.

¹⁶⁹ Ibid at 6.

childcare or they are simply too emotionally scarred from their experiences of the conflict. Occasionally children will be taken to orphanages, however many children are never adopted and thus they become a burden of the state.¹⁷⁰ Worst of all, there have been many reports of infanticide.

In light of the adverse social and cultural impact experienced by victims of conflict-related sexual violence, there has been a call to focus on restorative justice, which aims to restore society and facilitate social healing – ‘social peace and national reconciliation require not only the healing of individuals but also the healing of society as a whole.’¹⁷¹

(iv) Livelihood

One of the prevalent consequences of wartime violence is the economic difficulty experienced by the post-conflict country and the victims in particular. This is due to several factors, including: change in household composition (due to killings, injuries, and recruitment of fighters); change in household economic status (due to destruction of assets); changes in access to or destruction of existing markets; lack of social cohesion; redistribution of resources from productive activities to the military; and reinforcement and introduction of structural poverty.¹⁷²

Conflict-related sexual violence in particular has been found to have a negative influence on the productivity of post-conflict societies. According to Paul Collier,

‘An econometric study finds that during civil war countries tend to grow around 2.2 percentage points more slowly than during peace (Collier, 1999). Hence after a typical civil war of seven years duration, incomes would be around 15 percent lower than had the war not happened, implying an approximately 30 percent increase in the incidence of absolute poverty.’¹⁷³

This decline has been attributed to the severe emotional and psychological damage caused as a result of being a victim of conflict-related sexual violence (directly or

¹⁷⁰ Cassandra Clifford 'Rape as a Weapon of War and it's Long-term Effects on Victims and Society' (2008) Paper presented at 7th Global Conference on Violence and the Contexts of Hostility, Budapest, Hungary.

¹⁷¹ Mina Rauschenbach and Damien Scalia 'Victims and international criminal justice: A vexed question?' (2008) 90(870) *International Review of the Red Cross* 441 at 453.

¹⁷² Patricia Justino 'The Impact of Armed Civil Conflict on Household Welfare and Policy Responses' (2009) MICROCON Research Working Paper 12.

¹⁷³ Paul Collier, et al. *Breaking the Conflict Trap: Civil War and Development Policy* (2003) at 17.

indirectly): women are reluctant to leave their homes, such that their daily tasks of collecting food and water does not get done, which contributes to the malnutrition of the family and ultimately the wider community; and children are afraid to walk to school, which has a long-term effect on the literacy levels and education of the population.¹⁷⁴ These consequences may even have a ripple effect on those communities that were not touched by conflict, as trade relations may collapse due to the lack of productivity in the war-torn country.¹⁷⁵

In an effort to rectify the resultant monetary problems of victims and economic issues of war-affected communities, compensation should be given as part of reparative schemes. Yet this should only be done where necessary, since it appears that monetary issues are often a symptom of the broader social, psychological and physical harms suffered by victims.

c. Conclusion

In order for the victims of conflict-related sexual violence to experience tangible transitional justice, not only must criminal prosecution remain an indispensable aspect of justice, but reparation programmes must additionally be ordered and implemented.

It is evident that victims of conflict-related sexual violence suffer diverse yet equally injurious harms during and post conflict, and it will be vital for reparative schemes to reflect and address the victims' trauma. Thus, when reparations are ordered cognisance must be had of the victims' medical, psychological/emotional, social, and monetary needs. Colombini reiterates this sentiment by concluding that:

‘...A multidimensional approach is needed to integrate medical, psychological, spiritual, social, economic, political and legal services (WHO 2000). This approach promotes both individual and community healing, and involves different responses, such as coordination with local institutions, training of health providers, psychological support, protection of human rights, and linking medical and community-based responses.’¹⁷⁶

¹⁷⁴ Clifford supra note 170.

¹⁷⁵ Ibid.

¹⁷⁶ Colombini supra note 144 at 173.

The essential idea, therefore, is that there is an imperative to identify the direct harms and consequences of sexual violence perpetrated during conflict, in an effort to provide reparative assistance to the victims.

CHAPTER 7: CHALLENGES FACING THE ICC IN PROVIDING REPARATIONS

As discussed in great detail in the previous chapter, victims of conflict-related sexual violence are in desperate need of reparations. Upon examination of the constituting statutes of the International Military Tribunals as well as the ad hoc tribunals it has been revealed that they lack adequate provisions relating to reparations for victims. However, the Rome Statute appears to be more nuanced in this regard, as it contains provisions expressly authorising the Court to award reparations to victims of crimes falling within its jurisdiction. Yet, despite these legislative advancements, female victims of conflict-related sexual violence have hardly received any form of reparative justice.¹⁷⁷ This leads one to question the efficacy of the ICC in deciding upon and awarding reparations.

a. Challenges facing the ICC

(i) Victim participation

In the past, victims were traditionally excluded from participating in international criminal trials.¹⁷⁸ The statutes of the ad hoc tribunals omit any reference to the participation of victims in the trial process, with the exception of providing certain protective services when they assist as witnesses. This has been reported as a major concern for victims before the ad hoc tribunals, as they felt a deep sense of disappointment and frustration in not being able to participate and contribute in a meaningful way.¹⁷⁹ Consequently, recognizing the global trend towards incorporating the needs and interests of victims, the Rome Statute distinguished itself by explicitly providing for the participation of victims in

¹⁷⁷ Anne-Marie De Brouwer 'Reparation to victims of sexual violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families' (2007) 20(1) *Leiden Journal of International Law* 207.

¹⁷⁸ Mariana Pena and Gaelle Carayon 'Is the ICC making the most of victim participation?' (2013) 7(3) *International Journal of Transitional Justice* 518.

¹⁷⁹ *Ibid* at 521.

criminal proceedings before the Court.¹⁸⁰ However, the effective implementation and beneficial nature of victim participation has become a controversial issue.

Firstly, although victim participation is expressly provided for in the Rome Statute, access to the courts has proven to be a difficult endeavour for many victims. This is due to the fact that victims are required to go through a lengthy and complicated application process in order to participate in ICC proceedings.¹⁸¹ According to Rule 89(1) of the ICC Rules of Procedure and Evidence,¹⁸² victims are required to make a written application to the Registrar. This application must contain detailed information about the victim, namely: the identity and address of the victim; a description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court; a description of the incident, including its location and date and, to the extent possible, the identity of the person the victim believes to be responsible for the harm; any information as to why the victim's personal interests have been affected; and information on the stage of the proceedings in which the victim wishes to participate, and, if applicable, on the relief sought.¹⁸³ Upon receipt of the application form, the Registrar refers the application to the relevant Chamber of the Court. The latter may decide to reject the application on the basis of the definition of 'victim' as provided in Rule 85, or if it determines that the victim's personal interests are not affected (as required by Article 68(3) of the Rome Statute).¹⁸⁴ This whole process has proven to be cumbersome for both the applicants and the Court. Consequently, victims are discouraged from applying, and thus are not able to participate in court proceedings. However, in several cases the Court has made concessions in order to mitigate the negative consequences of the formal application process. For example, in the *Bosco Ntaganda* case¹⁸⁵ the Pre-Trial Chamber introduced a simplified one-page individual application form, and in the *Laurent Gbagbo* case¹⁸⁶ the Chamber allowed for the submission of party-collective application forms. Yet, these developments appear to

¹⁸⁰ Rome Statute supra note 22. Article 68.

¹⁸¹ Pena and Carayon supra note 178 at 527.

¹⁸² ICC Rules of Procedure and Evidence, ICC-ASP/1/3 (Part.II-A), 9 September 2002.

¹⁸³ ICC Regulations of the Court, ICC-BD/01-01-04, 26 May 2004.. Regulation 86(2).

¹⁸⁴ ICC Rules of Procedure and Evidence, supra note 187. Rule 89(2).

¹⁸⁵ *The Prosecutor v Bosco Ntaganda (Decision Establishing Principles on the Victims' Application Process)*, ICC-01/04-02/06, International Criminal Court (ICC), 28 May 2013.

¹⁸⁶ *The Prosecutor v Laurent Gbagbo (Second Decision on Issues Related to the Victims' Application Process)*, ICC-02/11-01/11, International Criminal Court (ICC), 5 April 2012.

have been created solely on a casuistic basis, such that the original application forms for victim participation generally remain.

Furthermore, even where victims have successfully applied to participate in ICC proceedings, it may be challenging for them to actually reach the location of the Court, which has been established in the Netherlands. This has resulted in certain legitimacy concerns: 'locating the tribunal in another country often results in a feeling of alienation and even resentment. Citizens do not feel vested in the accountability process and, consequently, are mostly oblivious to the relevance of the tribunal.'¹⁸⁷

Secondly, victims are often disappointed by the reality that their involvement has little impact on the scope of the case.¹⁸⁸ That is, their views are not taken into account at the point when the prosecution decides on the charges to be held against the accused. In addition, it appears that victims are not able to engage in meaningful participation, as they are rarely invited to be part of a proper consultation process.¹⁸⁹ Consequently, the Court often does not adhere to victims' views and interests when it is making important decisions that affect them. Thus victims can experience a sense of powerlessness and lack of control over the court process.¹⁹⁰ A similar outcome also arises from the fact that often victims fail to understand (and are not properly explained) complex legal concepts and processes, which can result in a low understanding of their role in the court proceedings.¹⁹¹ Therefore although the Rome Statute represents an important step forward in giving victims a voice, it seems that victims find themselves disappointment by the level of autonomy and influence that the relevant provisions afford them in reality.

Thirdly, there is the real risk of victims suffering secondary victimisation as a result of their involvement in the court process. With regards to victims giving

¹⁸⁷ Oko, Okechukwu 'The challenges of international criminal prosecutions in Africa' (2007) 31(2) *Fordham International Law Journal* 343 at 372.

¹⁸⁸ Pena and Carayon *supra* note 178 at 527.

¹⁸⁹ *Ibid* at 531.

¹⁹⁰ Nicola Henry 'Witness to rape: The limits and potential of international war crimes trials for victims of wartime sexual violence' (2008) 3(1) *International Journal of Transitional Justice* 114 at 120.

¹⁹¹ Elisa Hoven and Saskia Scheibel 'Justice for victims' in trials of mass crimes: Symbolism or substance?' (2015) 21(2) *International Review of Victimology* 161 At 172.

testimony, there is some debate as to the therapeutic effects of verbalizing traumatic experiences. Some believe that ‘disclosing traumatic details through public or private testimony can serve to condemn the injustice of violence and to relieve pain and suffering’,¹⁹² whilst others condemn it for its capability of re-traumatizing the victim. The latter is confirmed by Rauschenbach and Scalia, who conclude from their study that ‘experiencing the criminal justice system can be a further source of suffering for victims rather than an opportunity for them to overcome their trauma, and that the symbolic restorative powers attributed to the system might be questioned as not being sufficiently well founded.’¹⁹³ In cases of sexual crimes, the process of giving testimony and being cross-examined has been found to be especially traumatic. In this regard Nicola Henry identifies three main challenges for victims giving testimony of sexual violence: firstly it is incredibly difficult to provide details of sexual abuse, especially in a court setting where witnesses are required to describe the assault using language that confirms facts rather than expresses emotions; secondly witnesses testify according to the direction and questions of the advocates, such that they are unable to engage in story-telling; thirdly cross-examination of witnesses can often be hostile and manipulative.¹⁹⁴ Additionally, victims may be re-traumatized by way of their face-to-face engagement with their offenders, who may show no remorse or may refuse to acknowledge responsibility for the harm caused.¹⁹⁵

In order to mitigate the issue of possible secondary traumatization, Article 68 of the Rome Statute and Rules 70-72 of the ICC RPE do provide certain safeguards regarding giving evidence in cases of sexual violence. For example, victims of sexual violence are, in certain cases, entitled to have some of the proceedings conducted *in camera*. In addition, Article 43(6) of the Rome Statute creates the Victims and Witnesses Unit, which provides protective measures, counseling services, and security arrangements for victims and witnesses. However, some criticisms have been mounted against the effectiveness of these provisions. These are mainly based not on the protections expressly provided for, but rather on what

¹⁹² Henry supra note 190 at 123.

¹⁹³ Rauschenbach and Scalia supra note 171 at 448.

¹⁹⁴ Henry supra note 190 at 125-126.

¹⁹⁵ Rauschenbach and Scalia supra note 171 at 446.

has been omitted from the provisions.¹⁹⁶ For example, there are not adequate mechanisms in place to deal with violations of the provisions – if there is no penalty for breaching the rules, then they are essentially ineffective. Nevertheless, it must be recognized that the attempt by the Rome Statute to curtail the traumatic effects of victim participation in criminal proceedings before the Court is commendable.

Another critical issue regarding victim participation, closely related to the concept of secondary victimisation, is that victims may experience marginalization as a consequence of giving testimony in court.¹⁹⁷ This is due to several factors: victims, especially those who have suffered sexual violence, may be deemed to lack credibility and be untrustworthy due to an absence of available evidence (as the reality is that harms inflicted during wartime are often not accompanied by admissible evidence or documentation); victims may find it difficult to express themselves – in terms of language barriers and in terms of the sensitive and traumatic nature of the offence – which may be perceived as unreliability; and victims who do reveal their harms through testimony may face serious social consequences such as isolation, stigmatization, and rejection.¹⁹⁸

A final concern relates to the substance and presentation of evidence before the court. Some have taken issue with the fact that ‘the *nature of evidence* relied upon for gender-based violence as international crimes will differ as compared to that of gender-based violence at the national level.’¹⁹⁹ This is due to the unique context of armed conflicts, during which victims may have difficulties in reaching hospitals and doctors or may deliberately refuse to do so out of fear of stigmatization and rejection. Consequently reports are not filed and the extent of the sexual violence is not documented. The absence of such evidence at a criminal trial could result in the victims not being believed and the acceptance of a lower standard of evidence. Nevertheless, even when such evidence is available, its admission before the court may be seriously detrimental to the victim. For example, in the *Furundzija* case

¹⁹⁶ Sarah Steele 'Victim-witnesses in the International Criminal Court: Justice for trauma, or the trauma of justice?' (2005) 12 *Australian International Law Journal* 99.

¹⁹⁷ Nicola Henry 'The impossibility of bearing witness: Wartime rape and the promise of justice' (2010) 16(10) *Violence Against Women* 1098.

¹⁹⁸ *Ibid* at 1106-1107.

¹⁹⁹ Kamau *supra* note 2 at 105.

before the ICTY, the court made an order to disclose a victim's medical and therapy records.²⁰⁰ Not only did this violate the victim's right to privacy, it acts as a deterrent to future victims coming forward to testify.

In conclusion, 'increased victim participation in the case concerning them does not always improve their experience of the criminal justice system and does not appear to bring them the emotional, psychological and financial benefits desired.'²⁰¹ It is highly undesirable for victims of conflict-related sexual violence in particular to experience secondary victimisation, and when this is coupled with an absence of an order of reparations it is even worse. Yet ultimately it must be acknowledged there is a struggle between recognizing the dissatisfaction of victims who were not entitled to participate in the ad hoc tribunals and the issues attaching to a more expansive participatory approach. Thus it is clear that future courts and tribunals dealing with reparations will have to strike a balance in regard to effective victim participation.

(ii) Incompetency and lengthy trials

In cases where victims have been able to effectively participate in the criminal trials, they still complain of incompetency, inefficiency, and slowness in the system.²⁰² This has the potential to result in the victims' feeling dissatisfaction and disappointment with the court process.

Judicial incompetence is a fundamental issue for criminal justice, as it erodes the notion of fairness and weakens public trust of and dependence on the court system. The allegation of incompetence has chiefly been held against national courts and tribunals dealing with post-conflict international crimes. This is relevant to consider, since serious incompetence at the national level could result in a case being transmitted to the ICC, by virtue of the principle of complementarity. That is, if it can be shown that a national court is genuinely unwilling or unable to carry out investigations or proceedings against the accused, the case can become admissible

²⁰⁰ Eaton supra note 108 at 900.

²⁰¹ Rauschenbach and Scalia supra note 171 at 445.

²⁰² Ibid at 446.

before the ICC.²⁰³ Some of the cited reasons for incompetence include: judges, lawyers and prosecutors may have been killed during the conflict; judges and lawyers may be subjected to threats and tempted by corruption; and the courts may lack necessary resources to function effectively.²⁰⁴ A recent example of the incompetence prevalent in post-conflict judicial systems is the ‘Minova trial’, which took place in December 2003 in the DRC. In this case 14 officers and 25 rank-and-file soldiers of the Congolese army were put on trial for various charges, including rape.²⁰⁵ However, there were several issues that served to cripple the deliverance of true justice and hamper accountability for serious crimes committed during the conflict in the DRC. Firstly there were challenges regarding the criminal investigation into the crimes: the investigations were of poor quality, largely due to a lack of expertise and diligence; they started late and took place whilst conflict was still ongoing; there was no coherent investigative and prosecutorial strategy, owing to the fact that several prosecution offices were involved in the investigation and prosecution of the crimes; and the interviews conducted with victims, in an attempt to collect evidence, were poorly executed and analyzed.²⁰⁶ Secondly, there were several prosecutorial errors: the prosecutors were inadequately prepared, and some accused were indicted by mistake or charged for the wrong crimes.²⁰⁷ Thirdly, the prosecutors experienced difficulties in establishing crimes of sexual violence.²⁰⁸ These name but a few of the challenges facing the DRC court, yet it provides a sufficient example of the incompetency inherent in such trials. This is problematic with regards to international criminal trials, as the victims may be disillusioned by the issues associated with the previous national case.

Another major problem associated with international criminal trials is the fact that the process is a considerably lengthy one. This may be a consequence of several important factors: acquiring custody of the accused is often highly difficult; the process of admitting a case before the ICC that was originally before a national

²⁰³ Rome Statute supra note 22. Article 17.

²⁰⁴ Laura Arriaza and Naomi Roht-Arriaza 'Social reconstruction as a local process' (2008) 2 *International Journal of Transitional Justice* 152 at 158.

²⁰⁵ 'Justice on Trial: lessons from the Minova Rape case in the Democratic Republic of Congo' (2015) Human Rights Watch.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

court is lengthy and sometimes fraught with controversy; the decision to prosecute certain accused persons can be dependent on economic and political factors, which take time to negotiate; it may be significantly difficult to investigate post-conflict cases (especially crimes of sexual violence), in terms of the collection of evidence and witness testimony; the lengthy application procedure aforementioned for victims to be able to participate in the proceedings has been reported to result in delays in court processes; and the sheer number of victims who wish to participate in cases of mass victimisation serves to further lengthen the court proceedings.

The protracted length and slowness of courts dealing with international crimes is particularly problematic for victims of conflict-related sexual violence, specifically with regards to the need for reparations. Such victims are often in need of emergency assistance, which does not abate while the court process is occurring. Therefore it is prudent for courts to be able to act swiftly, in order to provide effective relief to victims.

(iii) Cultural issues

Cultural relativism has always been a topic attracting much debate, particularly with regards to legal regulation and the enforcement of judicial mechanisms. This has posed significant challenges for courts and tribunals attempting to deal with post-conflict cases of international crimes, as they are often greeted with a sense of distrust and resentment. This is because the formal judicial system often tends to disregard the fact that justice, in order to be effective, needs to be situated within the particular society and culture of the communities affected by the conflict.²⁰⁹ This holds especially true with regards to restorative justice, where the goal is social peace, national reconciliation and the healing of both individuals and society as a whole.²¹⁰

A preliminary challenge concerns the fact that the concept of ‘victim’ is essentially a social construct, which naturally differs among various communities

²⁰⁹ Rauschenbach and Scalia supra note 171 at 455.

²¹⁰ Ibid at 453.

and cultures. For example, ‘in African and Asian societies... ‘victim’ is understood in a broader sense and encompasses the person’s immediate family and community. Consequently, in cases brought under the international system of criminal justice in such contexts, account must also be taken of indirect victims if that system wishes to provide a remedy that actually meets the expectations of the victims of human rights violations.’²¹¹ Therefore it is crucial for the courts to take into account the local customs surrounding victimisation – if the courts neglect to define and identify certain victims that are given such a status by their communities, these people will be excluded from obtaining relief. As aforementioned, victims are required to fill out a detailed application form in order to participate in proceedings before the ICC – it therefore lies with the Chamber to determine whether the applicant is deserving of victim status. This has the potential to lead to a situation where victimisation is an objective, as opposed to subjective, determination; which may result in the exclusion of certain self-identified victims from the court process. Of course one must be cognizant of the dangers of persons claiming victim status in order to take advantage of the reparations awarded to victims; however, the point to be made here is that officials charged with determining victims’ status must take heed of cultural factors associated with victimisation in particular communities.

Another issue associated with international courts and tribunals is that they often function in ways that are not translatable or transferrable to certain cultural frameworks. That is, ‘they are viewed as an entirely alien system with different laws and principles.’²¹² This is especially so in the African context, as there are significant cultural disparities between the Westernized conception of justice and the African notion of justice. For instance, traditional justice systems are chiefly concerned with social harmony and reconciliation, whereas Western systems are concerned with the safeguarding of rights and proper retribution.²¹³ In this vein, traditional systems tend more towards victim participation as well as community involvement in the trial process: the elders and traditional leaders serve as ‘judges’ (though not so-called), and members of the community are encouraged to attend the trial and actively contribute to the proceedings by way of asking questions of the

²¹¹ Ibid at 454.

²¹² Oko supra note 187 at 369.

²¹³ Ibid at 374.

accused. There are generally no formal rules of procedure; rather the trial is conducted according to local customs. The goal of the trial is not punishment of the accused, but rather a solution whereby social goodwill may resume between the accused and victim, as well as amongst the community as whole. This explains the fact that African cultures tend to view litigation as a means of last resort in resolving a conflict, rather aiming towards informal conflict resolution.²¹⁴

Consequently, the juxtaposed Westernized court system of the ICC may seem very foreign. For example, victims and witnesses who usually experience traditional justice will most probably be unfamiliar with the stringent rules of evidence and procedure adopted and implemented by the Court and may not understand the legalese used by the advocates and judges. Thus it is vital for the international courts to take this into consideration, and ensure that such participants adequately understand the judicial system. Failure to do so will likely create an unwelcome environment for victims and witnesses, and may result in feelings of unfairness and confusion.

Finally, there is the possibility of certain post-conflict communities expressing distrust and contempt for Western judicial mechanisms, which is often symptomatic of the community's history of colonialism and subservience.²¹⁵ With regards to the conflict situation in Guatemala, Laura Arriaza and Naomi Roht-Arriaza state the following:

'Even before the armed conflict, the majority of poor, rural, Mayan Guatemalans did not see the justice system as a source of rights vindication. Instead, they saw it as at best irrelevant and at worst an incarnation of the discrimination and oppression to which they had been (and are) subject since colonial times. Even now, proceedings are opaque and held in a language that many speak imperfectly.'²¹⁶

In an attempt to bypass some of these cultural difficulties, the *Gacaca* courts in Rwanda were authorized to exercise jurisdiction over international crimes that occurred during the 1994 conflict, serving as an alternative judicial mechanism to the ICTR. The *Gacaca* courts are based on a traditional dispute-settlement method, whereby the male elders of the community pass judgment on disputes with the

²¹⁴ Ibid at 379.

²¹⁵ Ibid at 367.

²¹⁶ Arriaza and Roht-Arriaza supra note 204 at 158.

assistance of public participation.²¹⁷ Punishments and sentencing are aimed not only at the individual perpetrator, but are also mindful of social reconciliation endeavours. Therefore these traditional courts have been praised for their accessibility, limited financial and resource requirements, as well as their inclusion of local cultural and community concerns and customs.

However, there are several potentially crippling issues attaching to the *Gacaca* courts and other traditional judicial entities that cannot be ignored. These have been expressed comprehensively by Arriaza and Roht-Arriaza:

‘Traditional justice systems must not be romanticized. They generally were designed to deal with property and family-related disputes, not with serious crime such as homicide. They may not be suitable for complex cases involving issues of command and indirect responsibility, as well as victims from many communities and traditions. They can be patriarchal and exclusionary of women and minorities. They can be coercive, putting pressure on individuals to make their own needs subservient to those of the community. Traditional justice systems may assume a degree of community knowledge and cohesion that, if it ever existed at all, certainly does not exist in dispersed and reshuffled communities where many original inhabitants have fled to the cities or left the country altogether. They generally rely on a high degree of case-by-case discretion that can easily become arbitrariness. Finally, because of all these variables, such mechanisms may be appropriate in some parts of a country but not in others.’²¹⁸

Thus, although the *Gacaca* courts present a commendable effort in incorporating local realities and customs, there appear to be numerous problems inherent with the structure and practical application of traditional justice systems. This is of particular concern regarding the role of women in the proceedings and their treatment by the community-based courts, especially with respect to the cultural stigma that is usually associated with sexual violence and rape. Therefore it is arguable that, instead of establishing stand alone traditional courts, a sufficient means by which to mitigate the cultural challenge is for international courts to take cognizance of the cultural disparities that may sometimes exist between their formal structures and procedures and those of other traditional-based justice systems.

²¹⁷ Rauschenbach and Scalia supra note 171 at 454.

²¹⁸ Arriaza and Roht-Arriaza supra note 204 at 161.

(iv) Timing of reparation orders

Article 75(2) of the Rome Statute states the following: ‘The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.’ This indicates two key aspects of the ICC’s powers to award reparations: (a) an order for reparations can only be made against a *convicted* person – that is, only once the accused is in custody, has been tried, and has been found guilty; and (b) the Court cannot make an order against the relevant State to provide reparations, but rather only against the convicted perpetrator. This has been confirmed in the *Lubanga* case: ‘Reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for the criminal acts is determined in a sentence.’²¹⁹

There are several potential challenges attaching to these ICC rules regarding the provision of reparations. Firstly, persons who are recognized as having victim status during the trial proceedings – and thus who are deserving of reparations – may be denied redress in a case where the accused, who may otherwise be culpable, is not convicted on the basis of a mere technicality. Even where an accused is rightfully found not to be guilty, the fact remains that certain persons have been confirmed as being victims, yet they will not be offered reparative assistance. Secondly, considering the difficulty in obtaining custody of accused persons and the lengthy process of the criminal trial, victims may wait years before they are entitled to an order of reparations. This is highly problematic, as the harms suffered by victims of conflict-related sexual violence – especially physical and bodily harms – are often serious and need immediate attention. Thirdly, with regards to the difficulty experienced by many victims in physically accessing the Court, one needs to question the fate of victims who only manage to come forward after their perpetrator has already been convicted. Fourthly, since reparations cannot be ordered against the State, a pertinent issue will be whether the convicted perpetrator will have sufficient resources to fulfill the reparation order. This may be of particular concern when an order for collective reparations is given.

²¹⁹ *The Prosecutor v Thomas Lubanga Dyilo* supra note 133. Annex A, para 20.

In an effort to mitigate some of these issues, the Rome Statute does provide for the establishment of the Victims Trust Fund.²²⁰ Rule 98 of the ICC Rules of Procedure and Evidence sets out the role of the Trust Fund:

1. *Individual awards for reparations shall be made directly against a convicted person.*
2. *The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.*
3. *The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.*
4. *Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.*
5. *Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.*

The Trust Fund therefore has two key roles: it implements reparation orders made by the Court (in accordance with Article 75(2): ‘Where appropriate, the Court may order that the award for reparations be made through the Trust Fund’), and it may itself serve as a source of funding for an order of reparations. In the latter case, the resources available to the Trust Fund come from four main sources: (i) voluntary contributions from governments, international organizations, individuals, corporations and other entities; (ii) money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court pursuant to Article 79(2); (iii) resources collected through awards for reparations if ordered by the Court pursuant to Rule 98 of the Rules of Procedure and Evidence; and (iv) resources allocated by the Assembly of State Parties.²²¹ Though the Trust Fund is a significant innovation, allowing for victims to have access to redress despite the financial difficulties of the convicted perpetrator, it has yet to come to fruition. Thus its ability to ensure that victims receive reparations in reality can only be assessed

²²⁰ Rome Statute supra note 22. Article 79.

²²¹ Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, Resolution ICC-ASP/1/Res.6, 9 September 2002.

in the future. Nonetheless, the establishment of the Trust Fund does not account for the fact that victims can only be awarded reparations once an accused is convicted.

Another difficulty facing the courts is related to the different modes of liability available in international criminal law. Due to the inherent systemic nature of the core international crimes, direct perpetration is not the sole means of accountability. Rather, there have been efforts by the ad hoc tribunals as well as the ICC to accommodate the concept of group criminality. This essentially means that the accused who is subject to criminal proceedings is not necessarily the person who directly or physically perpetrated the crimes in question, yet he is most likely the person who is ultimately most responsible for the commission of the crimes. This is problematic with regards to justice from victims, since the high-level accused are often not the ones who physically perpetrated the sexual violence suffered by the victims.²²² Therefore if the courts were to order such accused to provide reparations to the concerned victims, the latter may not feel a sense of true justice. Worse yet, the courts may not be able to prosecute the accused for crimes of sexual violence, where it is found that his subordinates engaged in such conduct *ultra vires*. In such cases, no reparations will be ordered, and the victims will continue to suffer.

A final difficulty relates to the complex nature of many conflict situations, whereby there is a blurring of the strict definitions of victim and perpetrator:

‘It is hard to see how justice systems, either criminal or civil, can adequately grapple with the ambiguities and mixed motives that color most conflicts. Criminal justice requires categorization as perpetrator, accomplice or innocent witness. It does not deal adequately with bystanders, and it deals even less adequately with...the common situation of the same person (or the same family) being both victim and perpetrator, such as individuals who hid potential victims in their houses as they went out to kill, militia members who lost family members to the army and people recruited as children and forced to commit atrocities in order to survive.’²²³

Therefore one could conceive of cases in which courts are reluctant to provide reparations to victims, due to their involvement in the hostilities. Similarly, perpetrators – who are denied the official status of ‘victim’, yet may in fact be

²²² Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda' (2014) Office of the Prosecutor, International Criminal Tribunal for Rwanda at 9.

²²³ Arriaza and Roht-Arriaza supra note 204 at 160-161.

victims of their circumstances – may be ineligible to receive reparations, even when they are in need thereof.

In summation, one of the main obstacles in obtaining redress appears to be that reparations are associated with and inextricably linked to a guilty verdict being given by the court. That is, the prevailing status quo is that victims will only be entitled to receive reparations if the following necessary conditions are met: (i) the accused is in custody of the court; (b) criminal proceedings are brought against the accused; (c) the accused is found accountable for the crimes perpetrated against the relevant victims; and (d) a guilty verdict is accompanied by an order for reparations. The culmination of these requirements often takes a substantial amount of time, and is sometimes not even attainable – especially in the case of obtaining custody of the accused, and considering the different modes of liability that may attach to the accused. This is unacceptable with regards to the provision of reparations, since victims continue to suffer greatly while these requirements come into play. Therefore there is arguably a need to award reparations to victims, regardless of the stage of criminal proceedings against the accused.

b. Alternative judicial mechanisms

Mina Rauschenbach and Damien Scalia recognize that ‘criminal proceedings are no longer concerned solely with punishing those found guilty and with upholding public order, but must now also put an end to the victims’ suffering and help them to rebuild their lives’.²²⁴ They argue that this was not the original function of courts – the prime purpose of the courts was to prosecute. Therefore courts may be ill equipped to provide victims of sexual violence with appropriate relief (aside from holding perpetrators accountable), such that the task should perhaps be left to other entities.

²²⁴ Rauschenbach and Scalia *supra* note 171.

Several post-conflict countries have employed alternative judicial mechanisms, in an attempt to avoid some of the abovementioned issues relating to formal criminal proceedings. One example, which has already been discussed and analysed above, is the expansion of the jurisdiction of the *Gacaca* courts in Rwanda to incorporate international crimes as an alternative and more traditional judicial instrument. This section will focus on two other examples of alternative justice methods – truth commissions and hybrid tribunals – in an endeavour to assess their success in providing reparations to victims of sexual violence relative to the ICC.

(i) Truth commissions

Truth commissions often emerge in the aftermath of conflicts as an alternative judicial mechanism attempting to overcome the inflexibility and formal nature of legal criminal trials.²²⁵ The key objective of truth commissions is commonly national reconciliation. This is purportedly achieved through the process of truth-telling as well as the official recognition given to the causes of the conflict, the instances of human rights abuses, and the perpetrators thereof. Truth commissions are thus hailed as a safe space where victims and witnesses are able to give testimony in a story-telling manner, confront the perpetrators who come forward, and gain an understanding of the structural and institutional causes of the conflict. Furthermore, truth commissions have been looked upon favourably as they are often accompanied by recommendations for reparation programmes and institutional reforms.²²⁶

Nevertheless, there is a somewhat controversial aspect of truth commissions that has formed the subject of much debate: the provision of amnesty to perpetrators who come forward and testify. The balance of legal compromises that is intrinsically required by truth commissions in these cases has been described as follows:

‘TRC can be characterized as representing a “third way” in dealing with a legacy of human rights abuse and attempting to institutionalize justice. This is because it

²²⁵ Megan Bastick, et al. 'Sexual violence in armed conflict: Global overview and implications for the security sector' (2007) Geneva Centre for the Democratic Control of Armed Forces at 157.

²²⁶ Ibid.

steered a middle path between an uncompromising insistence on prosecution on the one hand, and a defeatist acceptance of amnesty and impunity on the other.²²⁷

In other words, formal prosecutions are waived in favour of the provision of amnesty to perpetrators of serious crimes, in an attempt to restore peace and democracy in many countries that have experienced conflict. By appealing to the reconciliatory nature of amnesty agreements, truth commissions represent the relationship between the sometimes-conflicting values of peace and justice. It is important to note however that amnesty does not mean impunity – perpetrators may not face criminal prosecution, but they are still held to account, albeit through more creative and less stringent mechanisms.²²⁸ In this vein, Darryl Robinson claims that ‘truth commissions can supplement prosecutions as a valuable means to give a voice to victims, to build a comprehensive record of events, patterns and causes, to provide meaningful official and societal acknowledgment, to promote reconciliation, to facilitate compensation of victims, to educate the public, and to make recommendations for the future.’²²⁹

Despite the theoretical advantages attaching to truth commissions as a means of providing justice, many countries have experienced certain difficulties with regards to the effective functioning of the truth commissions and their capability of providing reparative justice to victims. Firstly, though many women have been documented as coming forward and testifying, the majority of them refuse to disclose information about their personal victimisation – especially when they have suffered sexual violence.²³⁰ Therefore gender-based violence is rendered largely invisible. Secondly, due to time and resource constraints, truth commissions are generally only able to hear the most exemplary cases which have a substantial amount of available evidence. This is problematic since ‘they are not necessarily the cases involving the worst violations, of which there may be no survivors to bear witness or even to list the dead. They may not involve the most common types of violations, as a search for illustrative cases may fail to consider all the places where

²²⁷ Paul Van Zyl 'Dilemmas of transitional justice: The case of South Africa's Truth and Reconciliation Commission' (1999) 52(2) *Journal of International Affairs* 648.

²²⁸ Scharf supra note 5 at 512.

²²⁹ Robinson supra note 7 at 484.

²³⁰ Colleen Duggan, et al. 'Reparations for sexual and reproductive violence: prospects for achieving gender justice in Guatemala and Peru' (2008) 2(2) *International Journal of Transitional Justice* 192 at 204.

there are broad patterns of violations. Thus, in cases of massive violations, a [truth commission] report, no matter how well researched, provides only a general, not a personal, 'truth' to many.²³¹ Thirdly, as truth commissions are characteristically short-term endeavours, they may fail to develop widespread public trust and support.²³² Fourthly, those victims who come forward may only be those who are especially articulate or less traumatized than others.²³³ Finally, the specific truth commission's mandate may exclude some victims from the truth-seeking process.²³⁴

Therefore truth commissions may fail to provide a full picture of victimisation and further may fail to grasp the ongoing nature and contextualization of such victimisation. This has a significant bearing on the provision of reparations, specifically with regards to the exclusion of certain victims. Evidently it has been reported that many existing truth commissions, despite their capacity to order reparations for victims, have failed to implement such programmes. An example of this can be seen by the failure of the truth commission in post-conflict Sierra Leone to actualize the reparation schemes that it recommended.²³⁵ Hence, even though truth commissions hold much value in their promise of restorative justice and national reconciliation, their effectiveness is hindered by their inability to independently implement, enforce, and monitor the reparation programmes that they recommend.

(ii) Hybrid courts

Hybrid courts are an alternative judicial mechanism that have been established in an effort to negate some of the problematic aspects of the domestic courts and ad hoc tribunals. They are deemed 'hybrid' courts due to the fact that the institutional apparatus and the applicable law represent a fusion of both the domestic and the international.²³⁶ That is, foreign and domestic prosecutors will

²³¹ Arriaza and Roht-Arriaza supra note 204 at 157.

²³² Ibid at 157.

²³³ Ibid at 158.

²³⁴ Scanlon, Helen and Muddell, Kelli 'Gender and transitional justice in Africa: Progress and prospects' (2009) 9(2) *African Journal on Conflict Resolution* 9 at 14.

²³⁵ Bastick, et al. supra note 225 at 161.

²³⁶ Laura Dickinson 'The promise of hybrid courts' (2003) 97(2) *The American Journal of International Law* 295.

argue the cases, foreign and domestic judges will hear the cases, and both domestic and international law standards will be applied.

The key benefits of hybrid tribunals have been categorized as ‘legitimacy, capacity building, and norm-penetration’.²³⁷ This is indicative of the several advantages attaching to the development of these hybrid courts, namely: the introduction of international prosecutors and judges into the domestic courts may increase the legitimacy and perceived independence of the judicial proceedings; hybrid courts are situated within the conflict-ridden country, thus accessibility is not an issue; international cooperation is usually representative of international funding, which is crucial for war-torn countries that are re-establishing their judicial system; and the merger allows for international standards to be applied conjunctively with an appreciation and understanding of the local norms and customs of the community.

There are, however, certain challenges facing hybrid courts. Firstly, the courts are fundamentally reliant on international cooperation and funding, failing which the effectiveness of the courts would almost certainly wane. Secondly, there has been expressed concern that the courts are often dominated by their international elements, which has led to the intimidation of domestic staff and the suppression of the implementation and development of domestic laws.²³⁸ Thus there has been much ambiguity over ownership and allocation of responsibility. This relates to the issue of legacy: ‘mooted schemes of instruction or skills transfer to domestic actors were left by the wayside. The focus at all times was on securing convictions at the expense of integrating local professionals or leaving a legacy of competence.’²³⁹ Thirdly, there seems to remain a preference for purely international judicial mechanisms, as opposed to a hybrid court, since there is often distrust by the community of the post-conflict domestic authorities and government. Fourthly, hybrid courts are often established during conflict situations, which makes it a relatively dangerous endeavour. Fifthly, hybrid courts have been defined as

²³⁷ Ibid.

²³⁸ Padraig McAuliffe 'How international criminal justice's golden child became an orphan' (2001) 7 *Journal of International Law and International Relations* 1 at 34.

²³⁹ Ibid at 36.

‘shoestring justice’ or ‘justice on the cheap’, since their formation is substantially cheaper than that of purely international tribunals. The result is that hybrid tribunals are often under-funded with fewer resources than international tribunals. The problem is that the quality of justice rendered will likely be proportional the resources provided.²⁴⁰ Therefore the institutional stability of hybrid courts is evidently not quite as much guaranteed as it is for international courts such as the ICC.

Unfortunately, it appears that many hybrid tribunals have also not been so successful with regards to the provision of reparations to victims. For example, the constituting statute of the Extraordinary Chambers in the Courts of Cambodia²⁴¹ (ECCC) does not contain any express provisions relating to reparations. Though Article 39 authorizes the Extraordinary Chamber of the trial court to order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct, it concludes by stating that the confiscated property shall be returned to the State. It must be noted, however, that the ECCC has made significant advances with regards to victim participation in trial proceedings. The ECCC has established a Civil Party Representative scheme, which is a unique means by which to enable victims to participate in the criminal proceedings as ‘civil parties’ or ‘complainants’.²⁴² As such, they are afforded numerous procedural rights plus the right to legal representation. Nevertheless, in the first case before the ECCC, victim participation was a challenging endeavour and many victims became frustrated with the process and their inability to meaningfully contribute to the trial.²⁴³ Consequently, the judges have amended the scheme of Civil Party participation, in the hopes of increasing victim participation in the second case to come before the ECCC. Notably, this revision includes the provision of reparations to victims, which is limited to moral and collective reparations. As such, no reparations have been awarded by the ECCC to date; yet there is the prospect of limited forms of reparations being ordered in future cases.

²⁴⁰ Ibid at 32.

²⁴¹ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

²⁴² Nadine Kirchenbauer, et al. 'Victims Participation before The Extraordinary Chambers In The Courts Of Cambodia' (2013) Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative.

²⁴³ Ibid.

A final example is the Special Court for Sierra Leone (SCSL). Similar to that of the ECCC, the Statute for the Special Court for Sierra Leone²⁴⁴ does not contain an explicit provision providing for reparations. Though Article 19(3) does empower the Trial Chamber to ‘order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone’. However, it seems that the latter provision has rarely been enforced. In addition, upon a review of several court judgments conducted by Charles Jalloh, it is clear that the SCSL has not made any orders for material reparations.²⁴⁵

(iii) Summation

It is evident that alternative judicial mechanisms suffer several obstacles in providing effective criminal justice as well as reparations. However, they are commendable in their appreciation of the importance of victim participation and of the cultural difficulties inherent in formal criminal proceedings. Therefore, despite their inadequacy in providing reparations to victims, many lessons can be learned from alternative justice mechanisms.

c. Conclusion

In recent years, with the benefit of hindsight and experience, there has been an emerging recognition of the numerous challenges facing the formal court system in awarding reparations and providing effective relief to victims of conflict-related sexual violence. Firstly, despite the significant advances made by the ICC in providing for victim participation, the criminal process does not seem to satisfy victims’ sense of justice and indeed may have a negative impact on their already traumatized state of being - ‘experiencing criminal proceedings does not appear to satisfy the victims’ needs and address their dissatisfaction in terms of recognition, involvement and retribution. On the contrary, it appears to aggravate them. Victims

²⁴⁴ Statute of the Special Court for Sierra Leone, 16 January 2002.

²⁴⁵ Charles Jalloh (ed) *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (2014) at 766.

who have experienced criminal proceedings are the very ones expressing feelings of hatred, guilt and injustice.’²⁴⁶

Secondly, the judicial system has proved to be somewhat incompetent, inefficient, and slow. This is arguably a result of the convergence of several factors, namely: the principle of complementarity, such that the ICC is not the primary source of justice for victims; the difficulties in obtaining custody of accused persons; as well as the lengthy nature of proceedings before the ICC. This has a significant bearing on the provision of reparations to those in need, as they may wait years before an order for reparations is even possible.

Thirdly, international courts may overlook and thus fail to understand the true cultural and social context of the victims’ situations. Therefore Oko argues that the ‘objectives of using criminal prosecution to reestablish social equilibrium and promote reconciliation, though laudable and rhetorically inspiring, are simply unattainable.’²⁴⁷ Similarly, Arriaza & Roht-Arriaza emphasize that the greatest contributor to social reconstruction of a post-conflict society is going to come from local processes, which are able to take account of local dynamics and culture.²⁴⁸ However, the *Gacaca* courts – which endeavoured to provide criminal justice through a more traditional process – seemingly failed to offer adequate protection and justice to female victims of conflict-related sexual violence. Therefore, the focus should remain on how the ICC can better its understanding of the cultural context of the conflict and the victims, in order to be able to provide reparations which reflect the true needs of the victims.

Fourthly, there are tangible difficulties inherent in the ICC procedure with regards to the provision of reparations. This rests mainly on the fact that reparations can only be ordered once an accused is convicted. In addition, reparations cannot be ordered against a relevant State, which further minimizes victims’ ability to receive redress timeously.

²⁴⁶ Rauschenbach and Scalia supra note 171 at 448.

²⁴⁷ Oko supra note 187 at 349.

²⁴⁸ Arriaza and Roht-Arriaza supra note 204.

Therefore one is drawn to the conclusion that the court system, specifically that of the ICC, is somewhat inadequate to meet the needs of victims. This is particularly troubling with regards to the provision of reparations, which is of clear necessity to victims of conflict-related sexual violence. It appears as though alternative judicial mechanisms too suffer similar difficulties in effectively providing reparations to victims. Thus it is crucial not to dismiss the ICC as a body by which victims can attain redress, but rather to suggest significant reforms that may be introduced in order to allow the ICC to function as an instrument for restorative and reparative justice.

CHAPTER 8: CONCLUSION

The prevalence of sexual violence being perpetrated against women and girls during international and internal armed conflicts is astounding. This phenomenon has gone unreported and undocumented for decades, yet in recent years it has finally become an issue of great global concern. Consequently, there have been numerous developments, in terms of international humanitarian law as well as official UN condemnations, which serve to acknowledge and seek to punish instances of wartime sexual violence. These advances have been instrumental in giving recognition to victims who have suffered various forms of conflict-related sexual violence.

Symbiotically much progress has been made in the sphere of criminal justice. That is, international courts and tribunals have decidedly employed their judicial imperative to recognize crimes of sexual violence committed within a conflict situation as being international crimes. This is evident in the jurisprudence of both the ICTY and ICTR, which have found rape to constitute genocide, war crimes, and crimes against humanity. During the negotiations leading up to the implementation of the Rome Statute many of the lessons learned from these ad hoc tribunals were taken into account. Consequently, crimes of sexual violence fall squarely within the jurisdiction of the ICC. Therefore, sex crimes committed during conflict have attracted a sense a criminal justice, in that retribution has been accorded to the relevant perpetrators. The problem, however, is that whilst accused persons are being prosecuted, victims of conflict-related sexual violence remain in their suffering. This is chiefly due to the fact that courts and tribunals – though empowered to do so – have not made any significant orders for reparations.

Ultimately the goals of punishment and reparation must be understood within the context of transitional justice. This means that a post-conflict society should ideally experience reconciliation between victims, perpetrators, and the community. In this light, different forms of justice are necessary: transformative, punitive, as well as restorative.²⁴⁹ If one is pursued to the neglect of another, it is unlikely that peace

²⁴⁹ Rauschenbach and Scalia supra note 171.

will endure. This illustrates that although criminal prosecution serves as a crucial function of transitional justice, it is not sufficient to alleviate the trauma experienced by victims. Therefore the provision of reparations will be essential regardless of whether or when the perpetrators are convicted.

Victims of conflict-related sexual violence suffer various substantial harms. Firstly, there are many physical ailments and health consequences associated with sexual violence. These include traumatic fistulas, unwanted pregnancies, HIV and other sexually transmitted diseases. Emergency medical care is often required in these cases. Secondly, victims may suffer from severe emotional and psychological pain; such as depression, anxiety, and suicidal tendencies. Thirdly, victims of conflict-related sexual violence often experience social exclusion and familial isolation. Fourthly, these aforementioned consequences of sexual violence plus others may culminate into serious monetary issues for victims. The effective implementation of reparation schemes is therefore critical in order to address the needs of victims of conflict-related sexual violence. This is especially true considering the fact that victims' suffering seems to perpetuate long after the incident of sexual abuse and even long after the conflict has subsided.²⁵⁰ Therefore, in achieving the goal of transitional justice, the provision of and effectual access to reparation programmes and assistance is vital.

Recognising the severe suffering of the victims, coupled with the apparent ability of ICC to order concomitant reparations, an important question comes to the forefront: what are the challenges facing the ICC in awarding reparations for crimes of sexual violence? Through a comprehensive survey of the literature and relevant statutes, several such challenges have been identified. Firstly, victims may be discouraged from participating in criminal trials before the ICC. This is due to numerous factors, including: the lengthy application process, the difficulty in physically accessing the Court at the Hague, and the possibility of experiencing secondary victimisation through the trial process. If victims are deterred from participating in the criminal process, this will likely have a considerably negative

²⁵⁰ Lawrence Rugema, et al. 'Traumatic episodes experienced during the genocide period in Rwanda influence life circumstances in young men and women 17 years later' (2013) 13(1235) *BMC Public Health* 1.

impact on the provision of reparations, as the Court may not be afforded an understanding of the needs of the victims and the victims' interests may be placed on the wayside. Secondly, criminal trials before the ICC tend to be significantly lengthy. This poses a serious problem for victims of sexual violence who are in need of emergency care, as they may not have access to reparations in time. Therefore, by the time reparations are in fact ordered, they may be superfluous. Thirdly, due to cultural differences, the Court may find it difficult to order reparations that realistically and adequately redress victims. By failing to understand the local customs and values of the victim, the Court may exclude certain persons from claiming victim status and may order reparations that do not reflect the suffering of the victim in her community. Fourthly, the fact that the Court is only empowered to order reparations against a *convicted* accused person is fundamentally problematic. This is because victims are thus required to wait until the end of a (usually lengthy) trial until reparations can even be considered, and the possibility of such an order is predicated on the proven guilt of the accused. That is, even if the victim is accepted as having victim status, she will receive no relief if the accused is found to be not guilty for whatever reason. Hence there is a clear need for certain reforms to be made in order to allow the ICC to make adequate, realistic, and effective reparation orders with regards to victims of conflict-related sexual violence.

In particular, it is recommended that Article 75(2) of the Rome Statute be revised, in order to allow awards for reparations to be considered regardless of the conviction of the accused. As a potential solution to this and other identified challenges currently facing the ICC, it is proposed that there be an introduction of a separate tribunal or chamber of the Court, which deals exclusively with the provision of reparations to victims, and which runs parallel to the criminal trial of the accused. Based on extensive research conducted for the purposes of this paper – particularly with regards to the advantages and challenges facing official court processes as well as alternative judicial mechanisms – it is recommended that these specialized forums include the following features:

- A weighty proportion of the judges should be female, with assessors who are trained in gender-sensitive issues;

- Significant cooperation should be maintained with local/national investigators and there should be an encouragement of national-level initiatives;
- Victim participation should be a crucial element of the proceedings, in order for the reparations to accurately reflect the harms suffered;
- Victims should be able to provide testimony in a story-telling manner, as opposed to the process of examinations-in-chief and cross-examination;
- The proceedings should be swift, in order for victims in need to receive reparations timeously (especially in cases where emergency medical care is required);
- Careful consideration should be taken of the various forms of reparations (i.e. compensation, rehabilitation, restitution, satisfaction, and guarantees of non-repetition), with the judges exercising discretion as to which will be the most applicable and effective on a case-by-case basis;
- There should be a consideration of both individual as well as collective reparation programmes;
- Reparations may be financed via the Victims Trust Fund, which should be funded from the resources collected from the relevant convicted accused as well as other State and voluntary contributions.

This innovation would arguably negate many of the issues plaguing the ICC in terms of reparation awards. Furthermore, it would bring the issue of restorative justice to the forefront, with an increased focus on the victim as opposed to the perpetrator of the crime. This allows for a deeper human understanding of the suffering caused during armed conflicts, and a recognition that mere criminal prosecution does not serve to alleviate these harms. It must be noted, however, that this notion of a specialised reparation forum has been developed as a mere theoretical notion based essentially on a comprehensive literature review and document analysis of existing research on sexual violence committed during armed conflicts. Therefore it is highly recommended that future qualitative and quantitative research be done, in order to assess the practical applicability and efficacy of specialized reparation forums.

In conclusion, sexual violence is a pervasive aspect of armed conflicts – one that is likely to continue to be prevalent in future conflicts. Considering the severe harms and suffering experienced by such victims, the issue of reparations must come to the foreground as a necessity of the judicial process. Therefore the ICC, as a beaker of hope for the provision of reparations, needs to take heed of the issues outlined in this paper. That is, in order for reparations to be awarded to victims of conflict-related sexual violence, there is a need for the ICC to overcome certain challenges. Hence it is recommended that certain reforms be made to ICC rules and procedures, including the potential introduction of a specialized forum dealing exclusively with the provision of reparations.

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