

Creating International Accountability

The Non-Prosecution of Sexual Violence Post-Conflict as a Violation of Women's Rights

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Abstract

The prosecution of sexual assault in international law has a relatively recent history. Although there are a number of articles exploring both the effects and prosecution of sexual violence, there have been few attempts to link the concept to human rights. Nonetheless, this author believes that this could result in an important opportunity for women seeking further protection of their human rights.

This thesis starts with a brief exploration of the history of sexual assault in conflict, and its evolution in international criminal law. This includes an exploration of the definition of sexual violence in international criminal law and the prosecution of the crime to date. This thesis then explores the effects of sexual assault as it is necessary to tie these effects to human rights. This thesis concludes that the non-prosecution of sexual violence results in a violation of women's rights, another level of protection under international law.

In order to narrow the focus of this thesis, this author explores the following articles of the *Convention on the Elimination of All Forms of Discrimination against Women*. First, this thesis examines whether this is a violation of women's freedom from discrimination under Article 1. Second, this thesis examines whether this is a violation of women's right to health under Article 12. These Articles were chosen due to the specific effects of sexual violence. As this author has narrowed the focus of the thesis to women, it is a gender-based crime of which non-prosecution may be discriminatory. This author also chooses health as sexual assault in conflicts often leaves women with very serious health problems.

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Introduction

An environment that maintains world peace and that promotes and protects human rights...is an important factor for the advancement of women. Peace is inextricably linked with equality between women and men and developments...violations of the human rights of women in situations of armed conflict are violations of the fundamental principle of international human rights and humanitarian law.¹

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

In spite of this, sexual assault has very serious side-effects for these women. This author will be so bold as to suggest that the effects of sexual violence are worse than murder - particularly those in nations which are attempting to recover from a conflict - as the physical, emotional and psychological effects of sexual assault can make their inevitable death considerably more painful and drawn out than traditional murder. Women who experience sexual assault are left with long-term physical effects, in particular HIV and AIDS, as well as unwanted pregnancies, for which little assistance is available in post-conflict states. Women who suffer

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

from sexual assault have long-term emotional effects which are often left unaddressed as therapy is widely unavailable in post-conflict states. Women who, for reasons outside their control, experience sexual assault during conflicts have long-term psychological effects which are exasperated when the individual originates from a male-dominated society where prejudice prevents women from talking about their experiences.

The non-prosecution of sexual assault is a violation of women's rights to freedom from discrimination and access to health services, as per Article 1 and Article 12 of the United Nations [hereafter "UN"] *Convention on the Elimination of All Forms of Discrimination against Women* [hereafter "CEDAW"].² This author submits that sexual violence in conflict zones is a form of gender discrimination. Sexual violence is an enumerated ground of genocide and crimes against humanity as it is used to destroy women for the role reason of their gender and their role in the propagation of their group identity. Further, sexual assaults destroy these women's right to a healthy life. Not prosecuting these sexual assaults creates an atmosphere of impunity which perpetuates further human rights violations. This thesis endeavours to prove that the non-prosecution of sexual violence post-conflict is a violation of these CEDAW articles in order to promote and incite the international community into performing further prosecutions of sexual violence crimes.

Methodology

This thesis is inter-disciplinary as it connects two distinct areas of the law. The intent of this thesis is to effectively make links between international criminal law and international human rights law through a desk study analysis of available literature, available interviews conducted with victims of sexual assault, and a textual analysis of legal documents to formulate a legal

² *Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. A/34/46, [CEDAW], Art. 1, 12.

obligation to prosecute sexual violence crimes. While this may not be a typical framework for a legal thesis, inter-disciplinary scholarship is being increasingly recognized as valuable by the academic community. This will necessarily include a brief discussion of the responsibility to respond to violations of human rights under international law.

Further, the prosecution of sexual violence under international law has a relatively recent history. Although there have been a number of academic papers written exploring both the effects and prosecution of sexual assault, there have been few attempts to link these concepts to human rights. As such, this thesis will make a number of necessary leaps for the purpose of scholarly research.

This thesis will also make reference to both the phrases of ‘sexual violence’ and ‘sexual assault.’ For the purpose solely of this thesis, both phrases are used interchangeably, despite the fact that there are slight legal differences between the two phrases. Nonetheless, they both refer to the violation of a woman’s body during a conflict situation and, as such, will be used interchangeably where appropriate in the context of this thesis.

Most scholarly work on the occurrence of sexual violence during conflicts distinguishes between whether the assault takes place against a female or a male. However, this thesis will dispense with the practice of referring to sexual assault as specifically a female sexual assault. Where either sexual assault or sexual violence is referred to, the reader is to assume that this is in reference to the violation of a woman’s body unless otherwise stated.

Finally, this thesis will use the term victim over survivor. Although survivor has a very powerful connotation, not all those who suffer from sexual violence in fact survive. More importantly, victim is a legal term which is more appropriate for the topic at hand. Therefore the more clinical term of victim will be used throughout the thesis.

The History of Sexual Violence Occurring in Conflict Situations

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

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

World War I

There are numerous reports that sexual violence was perpetrated against women during World War I, between 1914 and 1918. Women, mainly in Belgium and France, were sexually assaulted and forced into prostitution. Exact numbers are unknown, and most of the evidence is

³ Kelly D. Askin, "Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur," 1 *Genocide Studies and Prevention* 1 (2006), pg. 14. Also see the following source for an interesting article about the prevalence of sexual violence in armed conflicts, with a few very notable exceptions: Elizabeth Jean Wood, "Armed Groups and Sexual Violence: When is Wartime Rape Rare?," 37 *Politics Society* (2009), pgs. 131-161.

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

now likely lost, it being nearly a century later.⁵ Unfortunately, while there were attempts at prosecuting the non-Allies for war crimes, no such attempts were made to prosecute the instances of sexual violence which occurred during World War I.⁶

World War II

Sexual violence during World War II occurred in both Europe and Asia, between 1939 and 1945. In Europe, in addition to the gassing and other forms of murder of the Jews, *et al*, women were sexually assaulted and forced into prostitution in large numbers, though again unfortunately exact figures are unknown. Further, the forced sterilization of women was also performed on a massive scale.⁷ In addition, it is estimated that nearly two million German women alone were sexual assaulted, and that was just by the Soviet army.⁸ This number does not include the sexual assaults committed by the German military, or any of the Allied forces. Given the scale of violence during World War II, one can reasonably assume that as many sexual assaults resulted from the both the German military and Allied forces, if not more, though this is just a conjectural on the part of the author.

In Asia, the numbers for women who were affected by sexual violence are also startling. The Rape of Nanjing alone resulted in nearly 80 000 women being sexual violated. There were also a number of other accounts of sexual mutilation and violence - in addition to the nearly 200 000 women forced into prostitution for the Japanese military as comfort women - performed

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

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

⁷ Men Who Killed Me, *supra* note 4, pg. 24.

Also see:

War Crimes against Women, *supra* note 5, pg. 52-61, 71-73, 88-91.

⁸ Men Who Killed Me, *supra* note 4, pg. 24.

Also see:

Antony Beevor, "They Raped Every German Female from Eight to 80," *The Guardian*, May 1, 2002.

against Asian women.⁹ What is perhaps more disturbing than the numbers of Asian women affected by sexual violence however is the type of women affected. It should also be noted that the women attacked in the Rape of Nanjing were generally the most vulnerable of society: pre-pubescent girls, pregnant women, elderly women, and Buddhist nuns. Further, most of the comfort women were between the ages of fourteen and eighteen.¹⁰

Despite the fact that there was ample information available before the Nuremburg Tribunal and the International Military Tribunal for the Far East [hereafter “Tokyo Tribunal”], few prosecutions were carried out against any forces with regards to the sexual violence which occurred during World War II. In fact, the Japanese government denied the violence against the comfort women for years, only reluctantly offering condolences sixty years after the violence occurred.

Only two prosecutions with regards to sexual violence during World War II were ever achieved. At the Tokyo Tribunal, prosecutors were able to convict Japanese military leaders for the Rape of Nanking in 1937,¹¹ and a Dutch military court in Indonesia prosecuted a further twelve Japanese military officials for sexual violence against thirty-five Dutch women in 1948.¹² This clearly did not reflect the reality of World War II however.

Bangladesh

In 1971, Pakistan invaded Bangladesh, where its military committed nearly 200 000 sexual assaults against Bangladesh women, in addition to other genocidal acts. These sexual

⁹ Men Who Killed Me, *supra* note 4, pg. 23.

Also see:

Ustinia Dolgopol and Snehal Parajape, *Comfort Women: An Unfinished Ordeal: Report of a Mission* (Geneva: International Commission of Jurists, 1994).

¹⁰ Elizabeth Jean Wood, “Variation in Sexual Violence during War,” 34 *Politics Society* (2006), pgs. 307-341, [Variation in Sexual Violence during War], pg. 311.

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

¹² War Crimes against Women, *supra* note 5, pg. 85.

assaults also resulted in thousands of births, qualifying as a crime against humanity under the enumerated ground of forced pregnancy.¹³ No prosecutions resulted from these actions.

Sierra Leone

The horrifying conflict which occurred in Sierra Leone resulted in the internal displacement of massive amounts of people. It is estimated that approximately 64 000 internally displaced women were sexual assaulted between 1991 and 2001, although exact numbers are difficult to determine given the cultural factors deterring women from speaking about their sexual assaults.¹⁴ In one survey alone however, nine percent of women interviewed had been sexual assaulted, suggesting the numbers are probably higher. Thirty-three percent of these assaults were conducted by multiple perpetrators, a particularly concerning factor as this would increase the chances of physical side-effects, in addition to the increased psychological and emotional effects. Sexual violence was committed by both sides in this conflict, and was particularly brutal when committed against young girls. There are even accounts of female rebels checking other women for their virginity so that they could be handed over to the male rebels for sexual violation.¹⁵ The involvement of female perpetrators makes Sierra Leone unique, though this certainly does not diminish the situations in other states.

The Former Yugoslavia

The exact number of women who were sexually assaulted during the break-up of the Former Yugoslavia, which occurred between 1992 and 1995, is unknown. The numbers could be as high as 100 000, and despite the fact that there were a few prosecutions of sexual violence, the

¹³ Genocide Watch, *Case Study: Genocide in Bangladesh*, Available at: <www.genocide.org/case_bangladesh.html>.

¹⁴ Men Who Killed Me, *supra* note 4, pg. 23.

Also see:

Marie Vlachova and Lea BIASON, eds., *Women in an Insecure World* (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005).

¹⁵ Variation in Sexual Violence during War, *supra* note 10, pg. 314-315.

response was woefully inadequate considering the result for the women of the Former Yugoslavia.¹⁶

Victims have testified about the ‘rape camps’ which were established in the Former Yugoslavia to maximize the impact of the mass and systemic sexual violation of Muslim women. These women were trapped inside the camps with little regard paid to their needs; their only function was to serve the sadistic sexual pleasure of the Serbian forces. One woman, for example, just sixteen at the time, was brutally gang-raped for months on end after her capture in one of these rape camps.¹⁷

A number of these women were also forcibly impregnated in an attempt to destroy the integrity of the Muslim community. Forty women alone in one rape camp became pregnant as a result of these repeated sexual violations. This in itself was guaranteed to result in their ostracization post-conflict, another intended effect of the sexual assaults.¹⁸

As mentioned above, there were a few prosecutions of the sexual violence in the Former Yugoslavia. These prosecutions will be examined in great depth later in the thesis. This author will only state at this point that it was following the breakup of the Former Yugoslavia that sexual assaults began to be seen as worthy of prosecution under international criminal law.

Rwanda

It is estimated that between 250 000 and 500 000 women may have been sexually assaulted during the Rwandan genocide which occurred between April and July of 1994.¹⁹ The

¹⁶ Men Who Killed Me, *supra* note 4, pg. 25.

Also see:

Human Rights Watch, *Federal Republic of Yugoslavia – Kosovo: Rape as a Weapon of “Ethnic Cleansing”* (New York, 2000).

¹⁷ Joanne Barkan, “Rape Is Often Used as a Weapon of War,” In *Current Controversies: Violence against Women*, edited by Karen F. Balkin (San Diego: Greenhaven Press, 2004), [Rape Is Often Used as a Weapon of War].

¹⁸ *Ibid.*

¹⁹ Organization of African Unity, *Rwanda: The Preventable Genocide* (Addis Ababa, Ethiopia: OAU, 2000), para. 16, 20.

actions which occurred in Rwanda however were far more brutal than many other conflicts. Take, for example, the following quote of a murder witnessed by a survivor of the Rwandan genocide: “a close neighbour...shouted that she was pregnant. He sliced open her belly with a knife, opened her up like a sack.”²⁰

This level of violence extended over to the sexual violence aspects of the Rwandan genocide. Take, for example, the following quote of a witnessed sexual assault:

“Some days, when the killers caught a small group, they would take a girl away, without killing her immediately, to rape her at home. That’s how some girls lasted a few nights longer, thanks to their beauty. It’s against custom for our men to be the killer of a girl they’ve forced, because they fear bringing down a curse by mixing the two emotions. Afterward, however, other colleagues would cut the girls and heave their bodies into ditches.”²¹

This is just one quote from a number of witnesses to the genocide who attest to the brutal nature of the sexual assaults which occurred during the Rwandan genocide. Also, consider the following quote from a young woman who was brutally sexually assaulted during the genocide:

“Suddenly, a French soldier appeared out of nowhere, grabbed me by the arm, took me to a trench, took my baby off my back, slapped me, pushed me into the trench and raped me, while five other French soldiers watched...he behaved like a wild animal. When he finished raping me, the others raped me too, one by one until all six had had their fill. They did to me whatever perversion came to their minds...I couldn’t have screamed even if I wanted to, because they put their

²⁰ Jean Hatzfeld, *Life Laid Bare: The Survivors in Rwanda Speak* (New York: Other Press, 2000), [Life Laid Bare], pg. 51.

²¹ *Ibid.*, pg. 200.

tongues in my mouth. After they were finished, they threw my baby on top of me in the trench.”²²

This author recognizes that some of these quotes are rather graphic. However, it is necessary to impart on the reader the brutality of these sexual assaults so that one can begin to understand the necessity of prosecuting those who commit sexual assaults.

What this author considers to be even more interesting however is the quotes taken from the killers themselves. A number of genociders were interviewed about the acts they committed during the genocide. One genocider admitted that they would have sessions, sexually assaulting girls they found in the bush.²³ These sexual assaults took two general forms, as stated below:

“There were two kinds of rapists. Some took the girls and used them as wives until the end, even on the flight to Congo; they took advantage of the situation to sleep with prettified Tutsis and in exchange showed them a little bit of consideration. Others caught them just to fool around with, for having sex and drinking; they raped for a little while and then handed them over to be killed right afterward. There were no orders from the authorities. The two kinds were free to do as they pleased.”²⁴

In addition to the brutal attacks, the bodies of violated women were left publicly exposed in humiliating positions so as to further demonstrate the discriminatory actions and power struggle between Rwandan men and women.²⁵

²² Men Who Killed Me, *supra* note 4, pg. 46.

²³ Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak* (New York: Farrar, Straus and Giroux, 2003), [Machete Season], pg. 96.

²⁴ *Ibid.*, pg. 97.

²⁵ Men Who Killed Me, *supra* note 4, pg. 17.

Like in the Former Yugoslavia, some of these sexual violence crimes were prosecuted, though the numbers were insufficient. Nonetheless, these prosecutions will also be examined in great detail further on in the thesis.

Liberia

During five years of the civil war in Liberia, between 1989 and 1994, - though the war did not end until 2003 - it is reported that forty-nine percent of women between the ages of fifteen and seventy described at least one act of sexual violence as a result of an interaction with a soldier.²⁶ A Truth and Reconciliation Commission was established, however this is not quite the same as a prosecution. Prosecutions would have provided closure and justice for victims, as well as a significantly higher level of accountability. Nonetheless, it is certainly better than no response at all.²⁷

Central African Republic

After the attempted coup in the Central African Republic of 2002, the UN estimates that over fifteen percent of women were victims of sexual violence.²⁸ Like many of the cases where sexual violence occurs during a conflict, perpetrators were on both sides of the conflict.²⁹ This again supports the idea that sexual violence has utterly penetrated the conflict mentality. It should

²⁶ Men Who Killed Me, *supra* note 4, pg. 25.

Also see:

Shana Swiss, *et. al.*, "Violence against women during the Liberian civil conflict," *Journal of the American Medical Association* 279 (1998), pg. 625-629.

²⁷ This author suggests, for those further interested in the work of the Commission, to refer to its website, provided below:

Truth and Reconciliation Commission of Liberia," Available at: <<http://www.trcofliberia.org/>>.

²⁸ Phephelaphi Dube, "An End to Impunity? The International Criminal Court and Women in Africa," Consultancy Africa Intelligence, Available at:

<http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=482:an-end-to-impunity-the-international-criminal-court-and-women-in-africa&catid=59:gender-issues-discussion-papers&Itemid=267> [An End to Impunity].

²⁹ Alexis Arieff, *Sexual Violence in African Conflicts* (Congressional Research Service, 2009), [Sexual Violence in African Conflicts], pg. 5.

be noted that the International Criminal Court [hereafter “ICC”] has laid charges based on the facts of this particular situation, which will be explored further in the thesis.

Democratic Republic of Congo

During the conflict in the Democratic Republic of Congo [hereafter “DRC”], between 1998 and 2007, there were reports that tens of thousands of women were sexually violated. Between 2005 and 2007 alone, 32 000 sexual assault cases were registered in just one of the DRC’s southern provinces. Considering the widespread nature of the violence and the underreporting of sexual assaults, the numbers are likely much higher.³⁰

These sexual assaults have been particularly violent as well, and occurring on both sides of the conflict. There have also been a number of accusations that UN peacekeepers have been soliciting younger girls for sexual pleasure. However, as one of these girls commented, the UN peacekeepers at least pay for their sexual pleasures, as opposed to the militants who brutally take women with sadistic pleasure. In one example of these brutal occurrences, a thirteen year old girl died days after being gang-raped by a large group of militants, vomiting blood from the violent attack.³¹

In fact, there is such a high level of sexual violence in the DRC that it has been called the rape capital of the world, hardly an auspicious title for the African nation.³² In just the southern

³⁰ Men Who Killed Me, *supra* note 4, pg. 25.

Also see:

John Holmes, “Congo’s Rape War,” *Los Angeles Times*, October 11, 2007.

Also see:

An End to Impunity, *supra* note 28.

³¹ Nicole Itano, “Sex-Assault Continues Unchecked in Congo”, *WeNews Correspondent*, March 13, 2005 [Sex-Assault Continues Unchecked in Congo].

³² An End to Impunity, *supra* note 28.

Also see the following commentary given on the situation in the DRC:

Major General Patrick Cammaert, former Deputy Force Commander of the Netherlands, Military Advisor in the UN Department of Peacekeeping Operations, quoted in United Nations Development Fund for Women and the United Nations Department of Peacekeeping Operations, “Women targeted or affected by armed conflict: what role for military peacekeepers?,” Wilton Park Conference (Sussex, United Kingdom), May 27-30, 2008, Available at: <http://www.unifem.org/news_events/event_detail.php?EventID=175>.

province of South Kivu alone, it is estimated that forty women are raped each day. Of these women, thirteen percent are under the age of fourteen, three percent of the women die as a result of the sexual violence, and nearly twelve percent of the women are subsequently infected with HIV and AIDS.³³ Unfortunately, little is currently being done about this situation, particularly in terms of holding perpetrators accountable for their actions.

Uganda

Many of the internally displaced women, as a result of the ongoing conflict within Uganda and against the DRC, have experienced sexual violations. In the Pabbo camp, approximately sixty percent of women were reported as having experienced some sort of sexual violence.³⁴ There have also been a number of accusations that young girls have been enslaved as wives for leaders of the Lord's Resistance Army.³⁵ Due to the ongoing violence and danger, little has been done yet to protect these women, although the ICC has issued a few warrants, which will be examined again later in this thesis.

Kenya

While sexual violence has always been a problem in Kenya, following the election violence of June, 2008, there was a 7 500 percent increase in the incidents of sexual violence, an unimaginable increase. Not only has this resulted in further acts of wide spreading violence, but it has also resulted in a breakdown of the health services available for victims, which was already inadequate.³⁶ The situation has recently been looked at by the ICC though, and will be readdressed in this thesis as a result.

³³ Sexual Violence against Women and Girls, *supra* note 1, pg. 2.

³⁴ Akumu Christine Okot, Amony Isabella and Otim Gerald, *Suffering in Silence: A Study of Sexual and Gender Based Violence (SGBV) in Pabbo Camp, Gulu District, Northern Uganda* (New York: UNICEF, 2005), pg. 9.

³⁵ An End to Impunity, *supra* note 28.

³⁶ Men Who Killed Me, *supra* note 4, pg. 25.

Also see:

Kyle Kinner, "A Paradigm Shift in Prevention," *Caucus for Evidence-Based Prevention Newsletter* 13 (2008), pg. 1.

Darfur

In Darfur, sexual violence has been used deliberately to terrorize the civilian population. In Southern Darfur, at one aid camp alone, over a five week period workers reported that over two hundred women were sexually violated. These sexual assaults are occurring on all sides of the conflict, and the violence has been escalating, not reducing, despite the fact that the ICC has issued warrants for a number of leaders encouraging the use of sexual violence.³⁷ Unfortunately, as this is an ongoing conflict, it is impossible to note or predict the number of women that will be sexually violated. Nonetheless, the ICC warrants will be addressed further on in the paper, as noted for a number of the situations above.

Other Conflicts

These however are just a few of the conflicts which feature sexual violence that this author could have addressed. To name some more examples of sexual violence which might have been expanded upon were there sufficient space: the Korean War; the Vietnam War; Cambodia; the civil wars in Haiti, Angola, Latin America, Mozambique, Somalia, East Timor, Sri Lanka, Burma, India, Afghanistan, Turkey, Kuwait, and Georgia.³⁸ This list does not go that far back into history either. One can look at the instances of sexual violence contained in the books of the Romans and Greeks, in the history portrayed by the Bible and Koran, or the treatment of Aborigines in North America.

As stated above, for whatever reason, sexual violence and conflict go hand-in-hand. This makes the prosecution of sexual violence that much more relevant. For all the history, little has

Also see:

Sexual Violence in African Conflicts, *supra* note 29, pgs. 4, 7.

³⁷ Amnesty International, *Five Years on: No Justice for Sexual Violence in Darfur* (London: Amnesty International Publications, 2008), pg. 161.

³⁸ Janie L. Leatherman, *Sexual Violence and Armed Conflict* (Cambridge: Polity Press, 2011), [Sexual Violence and Armed Conflict], pg. 2, 37-42.

yet to be done, and anything which might encourage the prosecution of sexual violence should necessarily be given an appropriate amount of attention.

Prosecution of Sexual Assault

Having set out the history of sexual violence occurring during conflicts, at this time it is appropriate to begin addressing the few instances that the crime has been prosecuted. Technically, sexual assault is as prosecutorial a crime as murder or other forms of violence under international criminal law, regardless of the fact that the laws are usually not utilized.³⁹ Others, this author included, place sexual violence above murder in terms of importance.⁴⁰ As will become clearer when this author examines the effects of sexual assault further in this thesis – again to show the reader the importance of prosecuting the crime, as well as demonstrating the connection to human rights – sexual violence has a profound physical, emotional, and psychological impact upon women which cannot be compared to that of murder. Some have gone so far as to say that sexual violence in war times is so beyond the scope of imaginability that it is, in fact, beyond being a criminal act.⁴¹ It is certainly true that acts of sexual violence occurring during conflict tend to be extremely brutal, and it often results in a death sentence for affected women. Regardless of whether one considers it to be a more serious crime than murder, it is - at the very least - as important a crime which should be prosecuted under international criminal law and international human rights law.

³⁹ Sean Smith, “Laws against wartime rape little utilized,” *Global Post*, March 22, 2010 [Laws against wartime rape little utilized].

With the exception of Protocol I Article 76, where sexual assault crimes are not considered a grave breach *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 UNTS 3, [Protocol I], Art. 76.

⁴⁰ Take the following article as an example, where victims indicate that the long-term effects of sexual violence make it worse than death:

DS Rose, “‘Worse than death’: Psychodynamics of Rape Victims and the Need for Psychotherapy,” 143 *American Psychiatric Association* (1986), pgs. 817-824.

⁴¹ Gary Jonathan Bass, “War Crimes and the Limits of Legalism,” 97 *Michigan Law Review* 6 (1999), pgs. 2103-2116, pg. 2108.

Nevertheless, let us start by saying that after World War II there were no prosecutions of sexual violence crimes – despite the fact that there were numerous instances of sexual violence, as detailed above – for nearly fifty years.⁴² No good reason has been provided for this blank period in the upholding of women’s rights. If one examines the sociological and legal atmosphere at the time, the world powers were engaged in a number of tense conflicts, which may explain the lack of prosecutions on an international scale. On the other hand though, women and minorities were fighting for recognition, for rights, for equal power and placement. It would seem logical that further prosecution of sexual violence crimes would follow from these events. Unfortunately, we know that this was not case, for reasons which will briefly be explored later in the paper as they assist the author in proving the importance of prosecuting sexual violence crimes.

Despite the fact that sexual violence was not prosecuted post-conflict for fifty years after World War II, it was available to be used were the international community so inclined to prosecute the crime. Sexual assault - or rape, as it was more commonly known then - as an enumerated ground of crimes against humanity was first defined following World War II in the *Control Council Law No. 10*.⁴³ There are of course more modern and relevant definitions of sexual assault which are utilized now, and which will be addressed as we explore the prosecution of sexual assault post-conflict. The point is however that there were certainly mechanisms, and a definition, in place by which the above instances of sexual assault could have been prosecuted had the international community been willing.

⁴² From the Dutch Military Case referenced at:
War Crimes against Women, *supra* note 5, pg. 85.

Until *Akayesu*, referenced at:

The Prosecutor v. Jean-Paul Akayesu (Trial Judgement) [1998], ICTR-96-4-T, [*Akayesu*].

⁴³ *Control Council Law No. 10*, Dec. 20, 1945, Art. II(1)(c).

The Prosecution of Sexual Assault at the UN Tribunals

The first decision prosecuting sexual violence post-conflict took place in the late 1990's at the International Criminal Tribunal for Rwanda [hereafter "ICTR"], in the infamous case of *The Prosecutor v. Jean-Paul Akayesu* [hereafter "Akayesu"]. Not only was this one of the first prosecutions of sexual violence, and the first certainly in several generations, but it was also the first time that sexual violence was considered to be an enumerated ground of genocide, instead of only crimes against humanity.

Following the horrific level of violence which occurred in Rwanda, sexual assault was also finally given a full definition, as provided by the ICTR in their judgement in *Akayesu*. There the court defined sexual assault as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."⁴⁴ This definition was later confirmed in a number of other judgements.⁴⁵ While the definition in *Akayesu* recognized that sexual violence during conflicts occurred under coercive circumstances, there were a few grey areas in the definition. Physical invasion was undefined, and the definition did not explain what was meant by coercive circumstances. While it was certainly an important step, it was clear that the definition needed to be altered a bit if sexual violence was going to be prosecuted.

As follows then, the *Akayesu* definition of sexual violence was explored and expanded. At the International Criminal Tribunal for the Former Yugoslavia [hereafter "ICTY"] in *The Prosecutor v. Anto Furundzija* [hereafter "Furundzija"], the Trial Chamber stated the following, in recognition of the fact that the UN Tribunals were developing this important area of the law with little guidance:

⁴⁴ *Akayesu*, *supra* note 42, para. 688.

⁴⁵ *The Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement)* [1998], IT-96-21-T, paras. 478 -479.

“[N]o elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity...it is necessary to look for principles of criminal law common to the major legal systems of the world.”⁴⁶

The Trial Chamber recognized that this was a crime which was prosecuted in nearly every country in the world, from which the international community should draw inspiration, despite the fact that it is clear that sexual violence which occurs during conflicts is different from that which occurs outside of conflicts. Nevertheless, what the Trial Chamber did was carefully create a more specific definition of sexual assault, which included the following elements of the crime:

- “i. the sexual penetration, however slight:
 - a. of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - b. of the mouth of the victim by the penis of the perpetrator;
- ii. by coercion or force or threat of force against the victim or a third person.”⁴⁷

The Trial Chamber in *Furundzija* further confirmed that “the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”⁴⁸ This definition covered a number of different circumstances which might constitute sexual violence, and should be lauded for its delineation of what constitutes coercive circumstances.

⁴⁶ *The Prosecutor v. Anto Furundzija (Trial Judgement)* [1998], IT-95-17/1-T, [*Furundzija*], para. 177.

⁴⁷ *Ibid.*, para. 185.

⁴⁸ *Ibid.*, para. 186.

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

“[T]he *Furundzija* definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundzija* definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which ... is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.”⁴⁹

In broadening the definition of sexual assault, the Trial Chamber further established that the common element - found in examining other definitions of sexual assault - was that the violation of the sexual autonomy of the victim was of the utmost importance, though not necessarily in terms of exactly how the violation occurred, more so in the circumstances which it occurred.⁵⁰ As such, like the Trial Chamber in *Furundzija, Kunarac* sets out three types of circumstances which could constitute sexual violence during conflict:

“i. the sexual activity is accompanied by force or threat of force to the victim or a third party;

⁴⁹ *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)* [2001], IT-96-23-T, [Kunarac], para. 438.

⁵⁰ *Ibid.*, para. 440.

- ii. the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- iii. the sexual activity occurs without the consent of the victim.”⁵¹

This is clearly a more precise definition of coercion, as connected to sexual assault occurring during conflict, though perhaps limiting as such. Unfortunately, the Trial Chamber glossed over the physical interference element of the crime. While this was an improvement in some ways to *Furundzija*, this author feels that a happy ground between the two definitions would have been the most appropriate scenario.

More recently however, the ICTR made a decision in *The Prosecutor v. Muhimana* [hereafter *Muhimana*], whereby the court found that coercion was implicit in the elements of sexual assault in conflict situations. Therefore, the prosecutor is no longer required to prove coercion under international criminal law.⁵² This also implies that consent is a non-issue in general. If coercion is inferred, it would be left to the accused to prove that consent existed on the facts. This should result in an increased number of successful sexual assault prosecutions, as proving coercion has always been a difficult element for the prosecution. Further, placing the burden of proving consent on the defendant could theoretically result in fewer traumas for women who have to testify before the courts.

Implying coercion is also an important recognition for victims of sexual violence during conflicts. The ICTR was essentially clarifying what human rights workers have been saying for some time, that sexual violence in conflict is an anomaly from what occurs during peace time. Women have no opportunity to resist these violent acts, and doing so would result in their death.

⁵¹ *Ibid.*, para. 442.

⁵² *The Prosecutor v. Mikaeli Muhimana (Judgement and Sentence)* [2005], ICTR- 95-1B-T, [*Muhimana*].

Implying coercion is removing one of the barriers for prosecuting sexual assaults post-conflict, and should in theory result in more prosecutions;⁵³ it having only been six years since the *Muhimana* decision, it is too early to say that it will definitively result in more prosecutions. Nonetheless, it is a reasonable assumption that removing one of the most difficult elements of the crime for the prosecution to prove should result in more successful prosecutions of sexual violence crimes post-conflict.

Nevertheless, coercion was not the only problematic legal element facing the prosecutors at the UN Tribunals. As per the prosecution of sexual assault under the ad hoc tribunals of the ICTR and the ICTY, the *mens rea* of the accused is an essential element for meeting the requirements of genocide or a crime against humanity. The *mens rea* consists of attempting to destruct, in part or in whole, the group to meet the level required for the crime of genocide; this may be inferred from the circumstances in which the action occurs.⁵⁴ In so far as this applies to sexual violence, it must be shown that the action caused death or serious bodily or mental harm, that it was the deliberate infliction of a condition of life on the group, or that it was intended to prevent births within the group. If this can be done, consent naturally becomes moot.⁵⁵

Intent is the most difficult aspect of convicting an accused of sexual violence as an enumerated ground of genocide. Since it must be shown that the accused intended their actions to constitute this larger plan, the prosecutor is forced to find and provide massive amounts of damning evidence to prove the villainous nature of the accused above and beyond the actions of the sexual assault. This is a feat which most prosecutors are often unable to meet due to the

⁵³ Please note that the barriers to prosecuting sexual assaults post-conflict are raised and addressed throughout this paper as appropriate to the discussion.

⁵⁴ For more details, see:

Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals*, (Oxford: Oxford University Press, 2005), pg. 233.

⁵⁵ Adrienne Kalosieh, "Note, Consent to Genocide?: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca," *24 Women's Rights Law Reporter* (2003), [Kalosieh - Consent to Genocide], pg. 121.

limitations of the investigations. As a result, sexual violence is more likely to be successfully prosecuted as an enumerated ground of crimes against humanity. Given that crimes against humanity holds as high a penalty, this should not necessarily be a concern to human rights advocates, or victims themselves.

As for crimes against humanity, the conduct itself need not have been widespread or systematic. However, the act must be linked to the larger attacks or policy to injure the targeted group.⁵⁶ All other elements of the crime remain the same as genocide. One must still prove deliberate intention to inflict pain and suffering, of course, but need only prove that the perpetrator was aware of the larger policy to attack the targeted group to be convicted of a crime against humanity. Note that this larger policy need not have the intention to destroy in whole or in part the targeted group, as this higher level of intent qualifies the action as genocide. The lower level of intent required for crimes against humanity is simply just that there is a widespread and systemic plan against a targeted group. The lower intent does make it easier for prosecutors to convict perpetrators of sexual violence under crimes against humanity.

If one cannot prove the intention necessary for crimes against humanity, then an accused can also be prosecuted for war crimes, whereby one need only prove that an illegal act – by which sexual violence is an enumerated ground – was committed during conflict.⁵⁷ Despite the fact that it need not be part of a larger attack, sexual assaults are still illegal during war; they are not a part of the acceptable conduct allowed during conflict.

Given the number of options available for prosecuting sexual assault, one might expect more than the few prosecutions listed above to have occurred.⁵⁸ However, the number of

⁵⁶ *Kunarac*, *supra* note 49, para. 418.

⁵⁷ *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, [*Rome Statute*], Art. 8.

⁵⁸ Please note that while there were a few other cases of sexual violence being prosecuted, they did not add any value to the particular topic of this thesis.

prosecutions clearly does not reflect the numbers listed above as to the women who were sexually assaulted during the genocides of both the Former Yugoslavia and Rwanda. Further, charges of sexual violence are being dropped in order to secure convictions on the part of the prosecutor. *The Prosecutor v. Kajelijeli* at the ICTR dealt with an accused originally charged with conspiracy to commit genocide, with sexual assault being one of the enumerated grounds. While Kajelijeli was eventually convicted of genocide, he was acquitted of all sexual assault charges, despite ample evidence.⁵⁹

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

Despite this case, there has been a movement within the ICTR Prosecutions Office to encourage the prosecution of sexual violence crimes. *Muhimana*, as briefly discussed above, was recently decided whereby the Trial Chamber convicted the accused of sexual assault as an enumerated ground of genocide, with the intention of degrading women and therefore the Tutsi as an ethnic group.⁶⁰ This is certainly a step in the right direction, but again it is simply insufficient.

With the ICTR entering its final stages of operations, the number of prosecutions compared to the number of sexual assaults committed is frankly atrocious. The international

⁵⁹ It has been suggested that under joint criminal enterprise, given the ample evidence that Kajelijeli was inciting extermination and sexual violence, the Trial Chamber should have found him guilty on sexual violence: Rebecca L. Haffajee, “Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory,” 29 *Harvard Journal of Law & Gender* (2006), pgs. 201-221, pg. 216. For the reasoning given by the Trial Chamber, consult the following:

The Prosecutor v. Kajelijeli (Judgment and Sentence) [2003], ICTR-98-44A-T.

⁶⁰ *Muhimana*, *supra* note 52.

community failed to protect or provide support to the Rwandan women who suffered sexual assaults during that genocide. The ICTY unfortunately has not done much better. At this time, the author will move on to the next evolution in sexual assault law in international criminal law, under the leadership of the ICC.

The Prosecution of Sexual Assault at the ICC

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

The creation of the *Rome Statute* saw the inclusion of sexual violence as part of international criminal law, enumerated officially under genocide, crimes against humanity, and war crimes.⁶¹ Sexual violence is broadly defined however under the *Rome Statute* as ‘gender crimes,’ so as to not make any accidentally biological inferences which may undermine the prosecution of the crime.⁶² This author appreciates the attempt to further the prosecution of gender-based crimes, however feels that it was unnecessary in this instance to rename sexual assault or violence as gender crimes. The fact that sexual violence against men is rarely prosecuted is not connected to the name for the crime. Sexual violence against men does not – generally – occur on the large scale that it does against women. Thus, it does not come up often simply because there are not as many cases of sexual violence against men. Further, if it was the case that the social stigma which might incur should a male come forward claiming violence of a

⁶¹ *Rome Statute*, *supra* note 57, Arts. 6-8.

⁶² *Rome Statute of the International Criminal Court*, Elements of Crimes, ICC-ASP/1/3, [*Rome Statute* – Elements of Court], Art. 9.

See the following source for a further explanation of the gender-based violence in the *Rome Statute*: Barbara Bedont and Katherine Hall Martinez, “Ending Impunity for Gender Crimes under the International Criminal Court,” 6 *The Brown Journal of World Affairs* 1 (2009), pgs. 65-85, [Ending Impunity for Gender Crimes].

sexual nature, this author feels that asking men to come forward and claim that a gender-based crime occurred against them would not result in more reporting either, as the essential and private nature of the crime is unchanged regardless of the name.

Sexual violence, regardless of its name, is defined much broader in the *Rome Statute* than at the ICTR and ICTY. The crime is described as any invasive act on the part of the perpetrator, which includes a threat or other forms of psychological manipulation.⁶³ The word invasive is also used in this attempt to achieve gender neutrality. Granted, while the previous definitions of sexual violence were clearly geared towards the invasion of a women's body, there was certainly room for interpreting the provisions in order to prosecute an act of sexual violence against a male body post-conflict. Further, the vague wording of the crime in the *Rome Statute* could create a number of problems down the line, though, again, given the fact that sexual violence has yet to be successfully prosecuted at the ICC, this remains to be seen.

While it is clear that sexual violence could not have been included as part of the *Rome Statute* without the early work of the ICTR and ICTY, the ICC has not built upon this legacy. Nevertheless, the ICC is perfectly established to ensure the prosecution of gender-based violence. The ICC has the means and ability to prosecute sexual violence crimes. They have, in fact, gone so far as to create a specific gender team to investigate and prosecute sexual violence crimes.⁶⁴ If these means were utilized, the ICC has amazing potential to ensure the protection of women's rights following sexual violence post-conflict.

⁶³ *Rome Statute* – Elements of Court, *supra* note 62.

⁶⁴ See the following article which sets out quite well the various aspects of the gender-based focus of the ICC: Dianne Luping, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court," 17 *American University Journal of Gender, Social Policy & the Law* 431 (2009). Also see the following source: Ending Impunity for Gender Crimes, *supra* note 62.

As stated above, the ICC has issued warrants for militia leaders believed to be responsible for sexual violence crimes in a number of countries, including the DRC.⁶⁵ However, this has yet to result in any convictions. The Central African Republic has also referred a case of sexual violence to the ICC, against Jean-Pierre Bemba Gombo, though only charges have been laid at this point, with the trial in the very early stages.⁶⁶ Subsequent charges have also been laid with regards to the situation in Uganda, though again this has yet to result in any action.⁶⁷ It is however far too early to make a judgment about these cases.

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

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

Setting aside the UN Tribunals, and the potential of the ICC, even less has been done outside the international community in terms of prosecuting sexual violence crimes. This is in spite of the fact that all states have the ability, provided they have a sufficiently capable legal system, to prosecute sexual violence crimes post-conflict, regardless of where the crime was

⁶⁵ *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* [2007], ICC-02/05-01/07.

⁶⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo* [2008], ICC-01/05 -01/08.

See the following source which raises a number of concerns which have been expressed with regards to the charging of Jean-Pierre Bemba Gombo. This is simply used to illustrate the point that laying charges of sexual assault is not sufficient. The charges must be genuine, based upon evidence, and correctly done from a procedural point of view. Otherwise, one risks belittling the pain and torture of the victims:

Kai Ambos, "Critical Issues in the Bemba Confirmation Decision," 22 *Leiden Journal of International Law* (2009), pp. 715-726.

⁶⁷ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* [2005], ICC-02/04-01/05.

committed. In theory, it would not be beyond the realm of possibility for the industrialized countries of the world to take the initiative and prosecute where the UN bodies have been unable or unwilling, and particularly where the post-conflict nation is unable or unwilling.

In the DRC, for example, where sexual violence crimes are rampant, only a handful of cases have been prosecuted by the military or local courts, which can be excused by the fact that the DRC does not have a fully functioning legal system capable of carrying out such prosecutions. This is a clear instance where the industrialized nations could and should step in. Further, the UN has not done enough to encourage the prosecution of accused peacekeepers of sexual assault in the DRC. Unfortunately, the normal course of action would be for peacekeepers to be punished under the laws of their home state, and if such a state is not willing to prosecute the peacekeepers, little can be done.⁶⁸

In theory, the ICC has the option of intervening should states not be willing to prosecute peacekeepers, though this author is concerned that the ICC would not be willing to do so. Regardless, if it was found that there was a larger pattern of sexual violence being committed by peacekeepers, the ICC might in theory be willing to intervene. Of course, one could try to compel the peacekeepers home state to take appropriate action. While naming and shaming might help, this too will only be successful if a state cares about their international reputation. Were the international community to make the prosecution of sexual assault a priority, or where they legally compelled by conventions such as CEDAW, this could certainly change.

This is not to say that all countries are unwilling to prosecute those accused of sexual violence in the DRC. In Bunia, a European Commission-supported court has prosecuted over ten individuals accused of sexual violence in the DRC. However, this is the only known court to

⁶⁸ Sex-Assault Continues Unchecked in Congo, *supra* note 31.

perform such an act.⁶⁹ Regardless, it is an important step forward and continuing actions such as this must be encouraged by the international community.

Why is Sexual Violence Not Prosecuted

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

Let us start with the first of the listed reasons. As stated, a number of states have discriminatory policies towards women. Where such an atmosphere exists, sexual violence is often allowed to run unchecked. , in the DRC, for example, women are considered to be second-class citizens. Despite the fact that sexual assault is outlawed in the DRC, women are considered to be inferior to men, whereby sexual violence prosecutions are simply not considered to be a priority for the government.⁷⁰ This is hardly an exclusive attitude, and stems from traditional – and out-dated – values which place women on a lower scale of importance and equality.

When one examines the history of sexual violence offences - whether occurring during a conflict or not - a disturbing pattern begins to emerge. Gender issues have traditionally been considered to be private problems. If a woman has been violated, it is up to the family to either

⁶⁹ *Ibid.*

⁷⁰ An End to Impunity, *supra* note 28.

punish her or the offender, depending on where the blame has been placed. Government intervention rarely occurs, and when it does the situation is often twisted to lay blame on the feet of the victim. As men tend to be the police officers and judiciary, it is easy for them to say that the victim incited the incident through some sort of action which told the accused that the sexual violence was either desired or warranted as punishment. When these pronouncements are supported with twisted versions of cultural or religious beliefs, the situation becomes even direr for women. With such attitudes, victims can hardly be blamed for not wishing to come forward with their stories.⁷¹

There is also the inherent fear of sexual violence which prevents its prosecution. People, male or female, fear hearing things that scare them. No one wishes to see sexual assaults occur, and hearing about them in court forces one to address the reality that the crime exists in an inabstract manner. This is particularly true when the sexual violence has been brutal, as is more often than not the case during conflicts, with particular reference to the Rwandan genocide. There is one quote that comes to mind, given following a witness testimony to the European parliament which was particularly disturbing and which perfectly illustrates this point: “they talked to only one woman...[but] there were thousands of women with similar stories.”⁷²

Listening to one story out a thousand is certainly better than listening to none; in the circumstances of the above quote however, the evidence given was so graphic that no more could be heard. This author suggests that this simply fits the idea that “normal people (by definition) cannot understand cruel acts.”⁷³ Unfortunately though, if we do not hear stories such as this, if we do not listen to the testimony, we will neither understand the events nor be able to prevent them

⁷¹ War Crimes Against Women, *supra* note 5, pgs. 216-223.

⁷² Institute for War & Peace Reporting, “International Justice Failing Rape Victims,” 483 TRI (2010).

⁷³ Sexual Violence and Armed Conflict, *supra* note 38, pg. 3.

in the future. While it may be understandable to desire to protect oneself from something they fear, we cannot stop something we do not understand.

Where the laws are designed to protect men to the detriment of women, one cannot expect sexual assault prosecutions to be fulfilled. These states are allowed to practice discriminatory practices without regard for the human consequences. Further, such states often have laws specifically created to further the unequal relationship between the genders, for example laws which allow a rapist to marry their victim in order to escape punishment.⁷⁴ Unfortunately, nations which suffer from conflicts are often in this undesirable situation, whereby traditional inequalities existing prior to the conflict are unaltered, leaving women traumatized before and after the war. If the international community does not step into such a situation to ensure the proper prosecution of sexual violence crimes, victims will be left without justice.

Moving to the second reason why sexual assaults are often not prosecuted, evidence shows us that it is often seen as a consequence of a conflict which is considered to be insufficiently serious to be prosecuted as a separate crime. This is certainly reflected in the history of sexual violence crimes,⁷⁵ and is clear evidence of discrimination against women as they are often specifically targeted with sexual violence during conflicts.

Sexual assault has traditionally been used in two ways during conflicts: as intimidation of the enemy, and as a reward for soldiers. For whatever reason it was utilized, the end result is the

⁷⁴ LaShawn R. Jefferson, "In War as in Peace," *World Report 2004*, Available at: <<http://www.hrw.org/legacy/wr2k4/15.htm>>.

Also see the following source:

Catharine A. MacKinnon, *Are Women Human?* (Cambridge: Harvard University Press, 2006), [Are Women Human], pgs. 209-233.

⁷⁵ Laws against wartime rape little utilized, *supra* note 39.

Also see:

Rape Is Often Used as a Weapon of War, *supra* note 17.

For an interesting overview of how sexual violence can be used as a weapon of war, consider the following source: Inger Skjelsbaek, "The Elephant in the Room: An Overview of How Sexual Violence came to be Seen as a Weapon of War: Report to the Norwegian Ministry of Foreign Affairs," *Peace Research Institute Oslo* (2010).

Also see the following source:

Are Women Human, *supra* note 74, pgs. 209-233.

same – wartime rape is collateral damage.⁷⁶ Stalin was reported as saying the following about sexual violence during conflict: “can’t you understand it if a soldier who has crossed thousands of kilometres through blood and fire has fun with a woman or takes a trifle?”⁷⁷ This is a particularly disturbing attitude, and one which this author wishes could say has dramatically changed in the past fifty years. Unfortunately however, as recently as Darfur, this is an attitude which prevails.

Women are therefore considered to be a spoil of war, a legitimate object or chattel to be taken and plundered. Sexual violence is seen as legitimate an action as stealing food or trinkets. There has even been a suggestion by a Soviet leader that these sexual acts are as much for the benefit of the women as the men, suggesting that the women were so sex starved with the men gone to war that they welcomed the attention.⁷⁸ Attempts to justify their actions by suggesting woman want to be attacked is a feeble effort by these men to frame their terrible actions in a way which is seen as legitimate. This excuse cannot be allowed to continue, either for the action or the lack of prosecution of the crime, which would serve as both a specific and general deterrence to these men.

Sexual assault has also been used as a tool for getting revenge against the enemy.⁷⁹ During conflict therefore, in order to get the maximum amount of revenge or action against one’s enemy, targeting their women is an effective means of harming the opposition. Post-conflict, as the prosecution of sexual assault tends to lie in the hands of the victor, there is little incentive to

⁷⁶ Rape Is Often Used as a Weapon of War, *supra* note 17.

Also see the following source:

Are Women Human, *supra* note 74, pgs. 209-233.

Also see the following source:

Sexual Violence and Armed Conflict, *supra* note 38, pgs. 138-147.

⁷⁷ Cornelius Ryan, *The Last Battle* (London: New English Library, 1980), pg. 367.

⁷⁸ Kirsten Campbell, “The Spoils of War,” 34 *Economy and Society* 3 (2005), pgs. 495-507, pg. 502.

Also see the following source for an interesting examination of how sexual violence can be twisted and justified by the perpetrator:

Variation in Sexual Violence during War, *supra* note 10, pg. 327-328.

⁷⁹ Variation in Sexual Violence during War, *supra* note 10, pg. 325.

Also see the following source:

Are Women Human, *supra* note 74, pgs. 209-233.

prosecute one's own actions. Unless the actions of the opposition are horrendous, there is also little chance of those sexual assaults being prosecuted.⁸⁰ So, we are left with the situation where the victors will not prosecute their own actions, and have little incentive to prosecute those of their enemy as sexual violence is not seen as damning. This only leaves the greater international community left to ensure that prosecution occurs.

This also brings us to the third and final listed reason as to why sexual violence crimes are not prosecuted post-conflict. A number of considerations are taken into account when deciding whether or not to prosecute sexual assault crimes under international criminal law. Prosecutors must first ensure that a sufficient amount of information is available on the facts. This evidence is collected by the investigative department, as per the common law element of the judicial system. The problem however is not that there is an insufficient amount of information being collected, though it can be difficult to convince some of these women to come forward with their stories because of the great stigma attached. The problem is that prosecutors are simply not laying charges of sexual violence against perpetrators.⁸¹

Some prosecutors claim that sexual violence crimes are too difficult to convict, or that they are a lesser charge which can simply be dropped when convenient in order to secure a more important conviction of murder. If the goal is to ensure the prosecution of these criminals, is it

⁸⁰ See, in particular, the Nuremberg Tribunal and Tokyo Tribunal.

⁸¹ For an interesting discussion on the role and the fallacy of the prosecutors at the international tribunals and courts, see the following source:

Binaifer Nowrojee, "We Can Do Better Investigating and Prosecuting International Crimes of Sexual Violence," presented at the *Colloquium of Prosecutors of International Criminal Tribunals*, Arusha, Tanzania, November 25-27, 2004, Available at: <http://www.womensrightscoalition.org/site/publications/papers/doBetter_en.php>, [We Can Do Better Investigating and Prosecuting].

For a more technical view of the role of the prosecutor at the ICC however, see the following:

Kai Ambos, "The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports," 8 *European Journal of Crime, Criminal Law and Criminal Justice* 2 (2000), pgs 89-118.

not better to just drop the charges that cannot be properly convicted?⁸² This author would clearly argue that this is an insufficient reason to not prosecute sexual assault crimes.

One of the most common arguments put forward is that consent is far too difficult to prove in sexual assault cases. Under domestic law, consent is an essential element of a determination of the legality of sexual assault. Consent however is not as necessary under international criminal law, as the situation itself generally precludes the defence of consent.⁸³ As such, the prosecutor, should they choose to prosecute sexual assault crimes, is not required to prove that the individual did not consent to the invasion.⁸⁴ Regardless, under the ICTR and ICTY, consent can be used as a defence,⁸⁵ though it would be difficult to prove that consent existed on the facts. Citing consent as an excuse for not prosecuting sexual violence crimes therefore has no basis in fact or in law.⁸⁶

Prosecutors have also been forced to streamline their prosecutions in the face of looming deadlines for both the ICTR and ICTY, which have been operating much longer than their originally projected end-dates. Sexual violence crimes, thanks to their unfortunate reputation and

⁸² We Can Do Better Investigating and Prosecuting, *supra* note 81.

⁸³ Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, (Belgium: Intersentia, 2005), pgs. 117-124.

See also:

Kalosieh - Consent to Genocide, *supra* note 55.

See also see:

W. Peterson Schomburg, "Genuine Consent to Sexual Violence under International Criminal Law," 101 *American Journal of International Law* 1 (2007), [Genuine Consent to Sexual Violence].

⁸⁴ Genuine Consent to Sexual Violence, *supra* note 83.

⁸⁵ International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, UN Doc. ITR/3/REV.1, Rule 96. Rule 96 of the Rules of Procedure and Evidence of the ICTY is basically the same: International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, UN Doc. IT/32/Rev.39, Rule 96.

For an interesting discussion of the use of consent with regards to sexual violence, please consult the following source:

Patricia Viseur Sellers, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation," Available at:

<http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf>, pg. 18-31.

⁸⁶ Still, one cannot rule out the possibility that sexual relationships cannot form in conflict situations. This author, for the purposes of this thesis, is not concerned with such relationships though; for the purpose of this thesis, it is not necessary to consider the lines of consent with regards to sexual assault. It does however illustrate some of the issues which must be deliberated when considering the prosecution of sexual assault post-conflict.

the wariness of prosecutors, are seen as low in importance compared to other charges going before the court. As a result, sexual assault charges are either not being laid at all, or being dropped in an attempt to create efficiency at the international tribunals and courts.⁸⁷ This too is not a valid excuse for not prosecuting sexual violence crimes.

Sexual prosecutions must be consistent and made a priority in order to end impunity. This would be assisted by ensuring proper training for investigators and prosecutors. This would also be assisted by the creation of a prosecutorial strategy which places sexual violence crimes at the forefront of the agenda, which recognizes its importance and prioritizes its investigation and prosecution.⁸⁸

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

Effect of Sexual Assault

In order to show the reader why it is that these sexual assaults must be prosecuted, the effects of the sexual assaults must be explored in order to prove that their absence constitutes a violation of women's access to a healthy lifestyle. Let us start by stating that there are numerous studies which have shown that, in post-conflict situations, those who were sexually assaulted face

⁸⁷ We Can Do Better Investigating and Prosecuting, *supra* note 81.

⁸⁸ *Ibid.*

the greatest hardships.⁸⁹ This is due to a number of different reasons. The first reason stems from the discrimination that women face living in a traditional culture that does not allow them to reveal what happened without judgement, and the second reason stems from the health problems which victims are subjected to post-conflict. The third and final main effect of sexual violence is the monetary consequences on victims.

As stated, the first reason is the discrimination which faces women who come forward with information about their assault. The UN has reported that the number of women being sexually assault in Darfur may never be known, as the stigma is so extreme that victims are unlikely to report their sexual assaults.⁹⁰ Stigma is so entrenched within some of these societies that women become cloaked, enrobed, in their guilt and silence. As was briefly explored above, women who come forward will be shunned, preventing them and their families being able to achieve an acceptable standard of living. Not telling their story however leads to cycles of violence and shame which further trap women within poverty and self-loathing for an action which they did not desire.

The second main reason and perhaps the most serious of the side-effects of sexual violence post-conflict is the health effect it has on women. Women are often unable to access necessary, competent, and regular health services to heal from the physical and psychological

⁸⁹ Men Who Killed Me, *supra* note 4, pg. 11.

Also see:

UN General Assembly, *Resolution 59/137 of 10 December 2004 on Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence*, A/RES/59/137, 2004.

⁹⁰ In the case of Sudan, as the judicial system has provided immunity to military officials and police officers who are charged with sexual assault, reporting becomes a moot point for women wishing to see justice served.

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 September 2004, (2005), Available at:

<http://www.un.org/News/dh/sudan/com_inq_darfur.pdf>, paras. 451-455.

The following source contains a number of testimonials from officials who expressed concerns about the unwillingness of women following the conflict in the Former Yugoslavia to come forward with their stories, and the subsequent fallout if women do not come forward with their stories:

Karen Engle, "Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina," 99 *The American Journal of International Law* 4 (2005), pgs.778-816.

effects of sexual assault. In order to truly heal these women, access to health services means more than a superficial visit to the doctor to heal a broken bone. Although addressing the short term effects of health services is important,⁹¹ the long-term effects of sexual violence can be just as damaging, if not more so. Unfortunately, most women post-conflict do not get access to even the most basic of health services.

One of most serious effects of sexual assault is the exposure to HIV and AIDS. In Rwanda, for example, only about half of those affected with HIV and AIDS have access to necessary medicines to assist with the disease.⁹² HIV, it has been seen, is the best way to inflict as much pain as possible on a group which you are trying to destroy. There are a number of witnesses who have stated that genociders who were aware of their infected status told their victims that they were going to give them the ultimate punishment guaranteed to promise long-term suffering, torment, and eventually death. Some have gone so far as to say that as long as a victim is still suffering from HIV and AIDS, genocide continues until the last victim and all those they subsequently infected die.⁹³

An interesting dilemma faces those wishing to treat infected victims. Post-conflict, victims need medication to stall the spread of the disease and to help manage their symptoms. This medication, as indicated above, is not readily available to much of the world, let alone nations post-conflict. In fact, for most victims of sexual violence who need these drugs, it is

⁹¹ Short-term side effects which should be addressed include the following: tears, bruising, abrasions, swelling, ligitations, genital trauma, etc.

World Health Organization, *Guidelines for medico-legal care for victims of sexual violence* (France: World Health Organization, 2003), [Guidelines for medico-legal care for victims of sexual violence], pgs. 12-13.

⁹² Republic of Rwanda, *UNGASS Country Progress Report: Republic of Rwanda, Reporting Period: January 2006 to December 2007*, Draft (Kigali, 2008), pg. 7.

⁹³ Paula Donovan, "Rape and HIV/AIDS in Rwanda," 360 *The Lancet* (2002), pgs. 17-18 [Rape and HIV/AIDS in Rwanda].

See also:

Brian A. Kritz, "The Case for an International Criminal Court Prosecution for the Knowing and Intentional Spread of HIV/AIDS through Sexual Assault during Conflict," *Unpublished* (2010), Available at: <http://works.bepress.com/brian_kritz/1>.

simply not an option. Genociders with HIV and AIDS however, even those that used their status to deliberately infect their victims, are given food, shelter, and access to such drugs. The inequity of this situation has raised a number of human rights concerns.⁹⁴ The issue is not that the genociders are receiving the drugs, as this is guaranteed under the *Standard Minimum Rules for the Treatment of Prisoners*⁹⁵ and the *Basic Principles for the Treatment of Prisoners*.⁹⁶ The problems is that the victims are infinitely more damaged and left to flounder on their own, left to struggle and painfully live without the same benefits. One solution obviously is to provide access to medication for victims who agree to testify at the international tribunals and courts.⁹⁷ This would only address one of the inequalities facing these victims however.

Another unfortunate side-effect of sexual assault is pregnancy. Pregnancy is often intentionally inflicted upon women in conflict as a way to destroy the efficacy of the ethnic group. As there are no social services available however to help these women cope, they are left with unwanted children reflecting the faces of their rapists who they are expected to raise on their own, while already poverty stricken.⁹⁸ In Rwanda, it is estimated that between two and five thousand children were born to women who had been repeatedly violated during the genocide, often as the result of group assaults.⁹⁹

Another problem is the lack of access to counselling for women affected by sexual violence post-conflict. A number of women following sexual assault become suicidal or suffer from depression. Regardless of how it manifests though, all women who suffered sexual assault

⁹⁴ We Can Do Better Investigating and Prosecuting, *supra* note 81.

⁹⁵ *Standard Minimum Rules for the Treatment of Prisoners*, ESC Res. 663 C (XXIV), Arts. 9-26.

⁹⁶ *Basic Principles for the Treatment of Prisoners*, GA Res. 45/111.

⁹⁷ We Can Do Better Investigating and Prosecuting, *supra* note 81.

⁹⁸ See, for example, the story of Gloriose Mushimiyimana:

Men Who Killed Me, *supra* note 4, pgs. 105-110.

See also the story of Hyacintha Nirere:

Men Who Killed Me, *supra* note 4, pgs. 117-123.

⁹⁹ Rape and HIV/AIDS in Rwanda, *supra* note 93.

in a conflict suffer from psychological or emotional harm post-conflict.¹⁰⁰ Counselling would need to occur in a meaningful and long-term basis to be effective however, and there are currently not enough resources to ensure this occurs.

Women who are sexual assaulted are also more likely to turn to alcohol and drug abuse. They are more likely to display hostility and other antisocial behaviour. They are less able to form emotional connections with others and therefore their relationships with family and friends suffer; this is a particularly important issue for women who have children as a result of sexual assault, as they may be unable to bond with the child in a way so as to appropriately raise that child.¹⁰¹

Women who experience sexual violence are more likely to live in poverty, have less employment opportunities, and weaker community ties. They are more likely to suffer from eating disorders and sleep disturbances. Women post-conflict often suffer from post-traumatic stress disorder and cognitive distortions. All of these things can be addressed however through proper prosecutions, community support, and counselling.¹⁰² Without appropriate help though, these women will remain traumatized till their dying days, which will be particularly painful given their exposure to HIV and AIDS, extreme poverty, and excess children whom they may not desire.

Turning to the third and final effect of sexual violence on women post-conflict is the monetary consequences. Women who have been sexually assaulted become marginalized from their friends and family. If they had a husband prior to the conflict, they are unlikely to have one post-conflict, either due to their partner's death or rejection. This results in women being left as the head of their household, factor in children born prior to the conflict and children born after

¹⁰⁰ Prosecution of Rape under International Law, *supra* note 6.

¹⁰¹ Guidelines for medico-legal care for victims of sexual violence, *supra* note 91, pgs. 13-14.

¹⁰² Guidelines for medico-legal care for victims of sexual violence, *supra* note 91, pgs. 13-14.

(often the result of an unwanted pregnancy due to a sexual assault) which must then be fed, sheltered, and clothed. Most countries pre-conflict do not have economies conducive to working mothers; post-conflict women are even less likely to be able to earn a sufficient living to care for their family without risking their health and lives.¹⁰³

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

This is clearly a violation of these women's right to a healthy lifestyle, to access to health services. Proper prosecutions however could change some of the above. If prosecutions were carried out, women would be more likely to come forward, thus helping to alleviate some of the stigma and isolation. If prosecutions were carried out and women who cooperated were given access to doctors, drugs, and counselling, not only would the women themselves be assisted, but also the prosecutors as they would have the necessary evidence to convict the accused. Prosecuting their perpetrators is not the only way to ensure that these women unnecessarily suffer from the health effects of sexual violence; however it is certainly part of the solution.

¹⁰³ Sexual Violence against Women and Girls, *supra* note 1, pgs. 29-30.

The Prosecution of Sexual Assault Connected to CEDAW

Sexual assaults occurring during conflict situations are committed for a number of reasons; however, gender discrimination is certainly one of those. The purpose of this thesis is to prove that not prosecuting sexual violence post-conflict is a violation of women's rights to freedom from discrimination under Article 1 of CEDAW, as well as their access to health services under Article 12 of CEDAW. War always exasperates gender inequalities, sexual assault in particular; this inequality results in human rights violations against women.¹⁰⁴

As stated, sexual violence is a particularly effective way during conflict to ensure the damage and destruction of the female gender. In the Rwandan genocide, for example, perpetrators admitted that women were targeted: "the killers track down everyone, in particular babies, girls, and women, because they represent the future."¹⁰⁵ This selection was thorough and systematic; women were to be eliminated in order to destroy the Tutsi ethnicity. Further, sexual violence was used as a means to degrade and subjugate Tutsi women.¹⁰⁶

Despite the fact that these examples are specific to Rwanda, they are not limited to this particular conflict. Historically, women have been set apart through violence, systematically and systemically. Women have been constantly underestimated and undermined, and sexual violence is just one of the ways through which women are discriminated against.¹⁰⁷ This takes the specific form of prevention of access to human rights guaranteed under CEDAW.

¹⁰⁴ Judith Gardam, "Women and Armed Conflict," 324 *International Review of the Red Cross* (1998), pgs. 421-432. Also see the following source:

Are Women Human, *supra* note 74, pgs. 209-233.

Also see the following source for a further discussion of this structural discrimination against women:

Sexual Violence and Armed Conflict, *supra* note 38, pgs. 63-88.

¹⁰⁵ Machete Season, *supra* note 23, pg. 106.

¹⁰⁶ Men Who Killed Me, *supra* note 4, pgs. 14-15.

Also see:

Muhimana, *supra* note 52.

¹⁰⁷ Are Women Human, *supra* note 74, pgs. 28-33, 209-233.

Also see:

Sexual Violence and Armed Conflict, *supra* note 38, pg. 15.

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

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

State Responsibility to Act

There are two sources of law in international law, both of which are relevant for the topic at hand. First, there is international treaty law; secondly, there is international customary law. The idea that states have a responsibility to intervene or act, specifically in the form of performing prosecutions post-conflict, derives primarily from international customary law. However, in 2001, state responsibility was also codified in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, an important and well-received document created by the international community.¹⁰⁸

There are two different levels of state responsibility to be considered in this thesis. First, there is the responsibility of the state which suffered as a result of the conflict to carry out the

¹⁰⁸ This document has been referenced and upheld by the International Court of Justice, as will be detailed later in this thesis.

prosecutions. Second, there is the responsibility of the international community – or third state – to carry out the prosecutions. Each will be addressed in turn following a brief discussion on the idea of state responsibility.

First State Responsibility

State responsibility is essentially the principle regarding when and how a state is to be held responsible in the event of a breach of their international obligations. Breach of an international obligation is found in the committing of an international wrongful act, either by action or omission.¹⁰⁹ This internationally wrongful act is governed by international law.¹¹⁰ Sexual violence is an illegal act under international law as an enumerated ground of genocide, crimes against humanity, and war crimes, as alluded to throughout this thesis.¹¹¹ Whether a state commits sexual violence crimes themselves or allows agents to do so through omission, the state is responsible for the prosecution of such crimes post-conflict.

The responsibility of a first state is also derived from its territorial jurisdiction, or sovereignty, over the events which occurred. In essence, this means that post-conflict, nations have an obligation to try crimes that occurred within their borders, including sexual violence crimes. Therefore, if the crime is committed within the border of the first state – by action or omission – or if the action was committed by a national of the first state outside of its border, the first state is required to carry out a prosecution.¹¹²

¹⁰⁹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001*, vol. II, Part Two, [DARS], Art. 2.

¹¹⁰ *Ibid*, Art. 3.

¹¹¹ *Rome Statute*, *supra* note 57, Art. 6-8, respectively.

¹¹² See the following source for a more full discussion on first state sovereignty:

Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003).

Also see the following article for a shorter discussion on the subject regarding the lines between first state and third state jurisdiction:

Bartram S. Brown, “Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals,” *23 Yale Journal of International Law* 383 (1998).

Third State Responsibility

Third state responsibility comes from the concept of universal jurisdiction. Genocide, crimes against humanity and war crimes are considered to be the gravest breaches of international criminal law and are subject to obligatory prosecution as such.¹¹³ Universal jurisdiction is the idea that some things are so permeated within the mind of the international community as being offensive that they create a duty to the whole world, or *jus cogens*.¹¹⁴ Sexual violence crimes are part of treaty law, they are considered to be grave crimes. It is therefore left open – and necessary – for all states throughout the world to prosecute sexual violence crimes under genocide, crimes against humanity, and war crimes.

As such, we know that not prosecuting sexual violence crimes occurring during conflict is a violation of international criminal law. However, this has not been sufficient for the international community to act. This author will now use CEDAW to prove another level of violation on the part of the international community. If one can prove that non-prosecution of sexual violence is a violation of CEDAW - under international human rights law - states will have a further obligation to cease this internationally wrongful act.¹¹⁵

This author would also note that the finding of an internationally wrongful act immediately creates a level of responsibility upon the violating state or states.¹¹⁶ This obligation includes the investigation – and prosecution – of all human rights obligations, which would

¹¹³ Please see Article 146 of the Fourth Geneva Convention, which states that nations have an obligation to bring those who commit grave breaches of international law before their own courts regardless of nationality: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, Art. 147.

¹¹⁴ See the following book, which is one of many which explains universal jurisdiction:

Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht: Martinus Nijhoff Publishers, 1992).

¹¹⁵ DARS, *supra* note 109, Art. 30.

¹¹⁶ *Case Concerning the Factory at Chorzów* [1927], PCIJ Ser. B. No. 3 1925, pg. 21.

Also see:

Corfu Channel case [1949], ICJ Reports 1949, pg. 23.

include a violation under CEDAW.¹¹⁷ As previously stated, the prosecution of sexual violence perpetrators must be done in order to create a deterrence effect. States are obligated to carry out these prosecutions by either creating a court or extraditing the perpetrator as soon as reasonably possible.¹¹⁸

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

Article 1

Most countries explicitly recognize equality between men and women. In reality, most countries do not actually practice such equality however. Whether this means treating individual's alike or unlike, equality still results in a lack of discrimination against one gender over another.¹¹⁹ The fact of the matter is that woman can be violated in such a personal manner that men simply cannot, as can be seen from the above examination of the effects of sexual assault. Women suffer in such a specific manner that they are specifically targeted during conflicts; it is easy to create damage and suffering during conflicts simply by targeting women.

¹¹⁷ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, Art. 12.

Also see:

McCann and Others v. UK [1997], ECHR A 324, para. 161

Also see:

Estamirov and Others v. Russia [2006], ECHR 60272/00, paras. 85-87.

Also see:

Silih v Slovenia [2009], 49 ECHR 37, para. 159.

¹¹⁸ This is also supported by Article 80 of *Protocol I*.

Protocol I, *supra* note 39, Art. 80.

¹¹⁹ Please see the following source for an interesting discussion about the origins of equality: Are Women Human, *supra* note 74, pgs. 105-111.

As women play such an integral part of society, the easiest way to destroy a culture is to attack its women.¹²⁰

This in itself constitutes discrimination against women. Nonetheless, the lack of prosecution following such instances results in a further instance of discrimination against women. Crimes which are primarily committed against men and women – causing death, as an example – are prosecuted in spades. Sexual violence is committed primarily against women as a discriminatory action and is not prosecuted; not prosecuting sexual violence crimes post-conflict therefore is a discriminatory action against women.

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

“[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”¹²¹

Whether the international community means to restrict women’s rights post-conflict is irrelevant, the result is what is important. As set out above, it is clear that non-prosecution post-conflict nonetheless results in discrimination against women.

Let us examine Article 1 relevant word by relevant word. When interpreting the meaning of treaties such as CEDAW, the *Vienna Convention on the Laws of the Treaty* tells us that we

¹²⁰ See the following source for a discussion about the subjugation of women in and out of conflict: Are Women Human, *supra* note 74, pgs. 141-159, 192-195.

¹²¹ CEDAW, *supra* note 2, Art. 1.

must use the ordinary meaning of the words for interpretation.¹²² We will start at the beginning of Article 1. Discrimination under Article 1 is on the basis of sex (easily determined based on the evidence in this situation) on the basis of any distinction, exclusion and restriction. Distinction is defined as a “difference or contrast between similar things or people.”¹²³ This author has already made it clear that prosecutions of international crimes which effect a number of different genders and those that effect primarily males are prosecuted. Crimes such as sexual violence which primarily effect women are not widely prosecuted. This author contends that this is a case of making a distinction on which crime to prosecute on the grounds of sex.

Continuing on, exclusion is defined as “the process of excluding or the state of being excluded.”¹²⁴ Non-prosecution of crimes that primarily affect women is the exclusion of women from the process. Finally, restriction is defined as “the limitation or control of someone or something.”¹²⁵ Limiting prosecutions to crimes which primarily effect males is a limitation of women’s rights, of their access to human rights protection.

Let us turn to the next section of Article 1, that the effect or purpose is the impairment or nullification of the women’s recognition, enjoyment and/or exercise of women’s rights. Nullify is defined as “make of no use or value;”¹²⁶ impair is defined as “weaken or damage.”¹²⁷ Non-prosecution of sexual violence crimes restricts the ability of women to have their rights recognized. For example, non-prosecution restricts women’s rights of access to health services, which will be addressed below. Non-prosecution weakens women’s rights to participate in the civil process as the message send is that women are not equal to men. These are just two very

¹²² *Vienna Convention on the Laws of the Treaty*, 1155 UNTS 331, Art. 31.

¹²³ Oxford English Dictionary, Available at:

<http://oxforddictionaries.com/view/entry/m_en_gb0233130#m_en_gb0233130>, [Oxford English Dictionary].

¹²⁴ *Ibid.*, Available at: <http://oxforddictionaries.com/view/entry/m_en_gb0279150#m_en_gb0279150>.

¹²⁵ *Ibid.*, Available at: <http://oxforddictionaries.com/view/entry/m_en_gb0705000#m_en_gb0705000>.

¹²⁶ *Ibid.*, Available at: <http://oxforddictionaries.com/view/entry/m_en_gb0568480#m_en_gb0568480>.

¹²⁷ *Ibid.*, Available at: <http://oxforddictionaries.com/view/entry/m_en_gb0402010#m_en_gb0402010>.

quick examples, but it is clear that non-prosecution has the potential to impair the right of women to recognize, enjoy, and exercise their guaranteed human rights.

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

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

Finally, this discrimination must nullify or impair women's rights in the political, economic, social, cultural, civil or other fields. This has been alluded to throughout the thesis, so here it will be succinctly stated. Non-prosecution of sexual assaults impedes women's access to human rights. When prosecutions of sexual violence do not occur post-conflict it sends a message to their perpetrators, and potential future perpetrators. It sends the message that sexual violence is normalized, that it is acceptable conduct. Encouraging sexual violence through omission also has the result of re-victimization. Victims of sexual violence are being told that not only are they not worthy of protection, but they do not have equality to men. When crimes committed primarily

against women are not prosecuted, we are restricting the recognition of women's rights culturally and socially.

In societies that are already structured against women, telling men that they are superior to women and that they can use their bodies against women during conflicts without consequence perpetuates the view that women are objects not human beings.¹²⁸ Yes, this is an instance of indirect discrimination, but this hardly excuses the international community from lack of action. There is certainly room for women who have been sexually violated to turn to CEDAW post-conflict looking for justice, and for peace.

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

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

This position has been confirmed by the Committee on the Elimination of Discrimination against Women in its General Recommendations No. 19. According to the committee, gender-

¹²⁸ See the following for another interesting perspective on this idea: Are Women Human, *supra* note 74.

based violence nullifies the enjoyment of women to their fundamental rights, including their rights to life, protection from torture, liberty and security, equal protection under the law, humanitarian protection during conflict.¹²⁹ Not prosecuting these crimes perpetuates the cycle, resulting in more gender-based violence. There is therefore a violation under Article 1 of CEDAW.

Article 12

Having established that a violation exists under Article 1 of CEDAW, let us consider whether a violation may exist under Article 12 of CEDAW as well. Article 12 of CEDAW was created to ensure that women are given equal access to health care services. The basis for choosing this Article was simple. An examination of the effects of sexual violence, as outlined above, makes it clear that there are horrendous health effects for these women post-conflict. Such problems tend not to exist for men, particularly those who committed sexual violence crimes. This in itself is a discriminatory action, an instance of punishing the victim for no reason other than being a victim.

Article 12 of CEDAW states, as follows:

- “1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-

¹²⁹ Committee on the Elimination of Discrimination against Women General Recommendation No. 19, Eleventh Session, 1992, A/47/38.

natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”¹³⁰

The issue at hand is not family planning, although this is certainly a serious issue worth considering by academics; it is unfortunately outside the scope of this thesis however. What is at issue though is whether women post-conflict are getting unequal access to health care services as a result of non-prosecutions.

It is not necessary to perform as in-depth an analysis of the words of Article 12 of CEDAW as it was for Article 1. There are however several key phrases which must be addressed. First, let us examine the idea that appropriate measures are to be taken to eliminate discrimination against women in the field of health care. Appropriate is the key word in this phrase. The ordinary reading of appropriate means “suitable or proper in the circumstances.”¹³¹ The suitability of these health services is, as mentioned above, intimately tied to the prosecution of perpetrators of genocide, crimes against humanity, and war crimes.

As touched on in the above section, perpetrators currently have access to health care services, most importantly anti-viral medication. This is not a right which has been extended to victims of these perpetrators, or others. Now, some might suggest that this is not directly connected to the issue of prosecution. Stating that however would be a mistaken interpretation of the issue at hand. As previously shown, non-prosecution of sexual violence crimes post-conflict is a reflection of a greater situation than simply the prosecution of a horrendous crime. Not prosecuting perpetuates gender inequality and equality barriers in a broader sense. This includes access to health services.

¹³⁰ CEDAW, *supra* note 2, Art. 12.

¹³¹ Oxford English Dictionary, *supra* note 123, Available at: <http://oxforddictionaries.com/view/entry/m_en_gb0035950#m_en_gb0035950>.

Despite the fact that sexual violence charges are often dropped by prosecutors – or not pursued for one of the many reasons detailed above – the fact remains that evidence of the crimes exist. We know that sexual assaults occur during conflict. Post-conflict, when prosecutions do go forward, the fact that sexual violence charges are not pursued is not evidence of a lack of sexual violence. It is instead evidence of a lack of willingness and determination on the part of the international community. Not providing or ensuring health services post-conflict for those who are affected by violence is discrimination, as this is provided as part of prosecutions for perpetrators. Not providing or ensuring health services post-conflict for those who are affected by violence is not appropriate, as this is provided as part of prosecutions for perpetrators. Were the international community to pursue sexual violence crimes as a priority, the protection of victims from unnecessary harm due to a lack of health services would certainly be part of that equation.

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

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

This argument could be excused as being highly feminist, however this would ignore the bare facts at hand. The international community chooses to prosecute crimes which affect all

genders, but ignores those affecting only women. In the Former Yugoslavia, when men were targeted, prosecutions went forth. For crimes against women, the number of prosecutions was highly disproportionate to the number of victims. For these exact crimes, men who performed sexual assaults against women for the purpose of spreading HIV and AIDS are provided with health care;¹³² their victims are instead suffering needlessly. The facts show us that women are not having their rights upheld, and this can be linked to a lack of prosecution on the part of the international community.

Further, as confirmed by CEDAW General Recommendation No. 12, states have an obligation to ensure that violence does not occur against women, including the prevention of violence under Article 12's obligation to ensure equal access to health services.¹³³ This author previously referenced a writer who stated that genocide does not end until all those who were infected with HIV and AIDS have died, as well as those who they infected. Perpetrators of sexual violence are often HIV and AIDS positive, as evidenced by the horrific spread of the disease during conflict. Further, these perpetrators often purposively infect their victims to increase the level of harm or violence.

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

¹³² We Can Do Better Investigating and Prosecuting, *supra* note 81.

¹³³ Committee on the Elimination of Discrimination against Women General Recommendation No. 12, Eighth Session, 1989, A/44/38.

The connection between ensuring that sexual violence does not occur (through prosecution) and access to health services has been established therefore for Article 12 of CEDAW. Before this author can move on though, the use of CEDAW must be briefly addressed in order to ensure that compliance with these articles under international human rights law has been fully established.

Utilizing CEDAW

Regardless of the nobility of choosing CEDAW to enforce women's rights post-conflict, there are a few problems with the scenario. CEDAW's enforcement mechanisms have been criticised;¹³⁴ however, they are not without redemption. Further, even if one considers the enforcement mechanism to be weak, using CEDAW in this manner still creates a framework whereby women wishing to have their rights enforced have created a window to be heard. If one can say definitively that discrimination has occurred under any of the articles in CEDAW, but there is an enforcement issue, one can instead use the *International Covenant on Economic, Social and Cultural Rights*¹³⁵ or *International Covenant on Civil and Political Rights*¹³⁶ to get the same level of justice, although perhaps with better enforcement.

Another problem facing women who wish to have their rights enforced under CEDAW is the lack of an individual complaint mechanism. Currently under CEDAW, only groups can submit complaints. However, there is currently an *Optional Protocol* to CEDAW open for ratification which would allow for individual complaints.¹³⁷ Granted, as a group, women could go

¹³⁴ This is generally based on the argument that, under CEDAW Article 17, the Committee on the Elimination of Discrimination against Women can only make recommendations, not issue sanctions against offending states. CEDAW, *supra* note 2, Art. 17.

¹³⁵ *International Covenant on Economic, Social, and Cultural Rights*, 993 UNTS 3.

¹³⁶ *International Covenant on Civil and Political Rights*, 999 UNTS 171.

¹³⁷ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, A/RES/54/4, Art. 2.

See the following for an excellent commentary on the importance of ratifying the *Optional Protocol* to CEDAW: Are Women Human, *supra* note 74, pgs. 64-67.

forward now as an oppressed and violated group of women. However, more opportunities would certainly be open for women when individual complaints are allowed. Given the systemic nature of sexual violence during conflict though there is certainly room for women to create and submit complaints about sexual violence. Insofar as problems go, this is certainly not a substantial one.

Nonetheless, there are other articles within CEDAW to support the position of this thesis. CEDAW Article 5(a), for example, states that the international community is obligated to dispel with discriminatory practices and ensure the equality of women to men.¹³⁸ This includes discriminatory practices like those stated above, where sexual offenders are allowed to marry their victims in order to correct the situation. The articles outlined above are simply a reflection of two specific choices on the part of this author. As seen, many other ones could have been chosen had the inclination existed.

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

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

¹³⁸ CEDAW, *supra* note 2, Art. 5(a)

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

Having proven that prosecuting sexual violence crimes should be prosecuted under CEDAW Articles 1 and 12, we will now briefly explore how to obligate states to prosecute these crimes. Despite the fact that an obligation exists, this author suspects that the international community and the states which make it up may be hesitant to follow through on prosecutions.

As already stated, the ideal situation would be for domestic courts to prosecute sexual assault crimes. However, when this does not occur, the international community has an obligation to intervene. If the international community is unable or unwilling to intervene, then it must be persuaded somehow as to the importance of prosecuting sexual violence crimes.¹³⁹

The importance of prosecuting sexual assault has been recognized by the international community, specifically by the Security Council [hereafter “SC”] in Resolution 1820.¹⁴⁰ In this resolution, the SC stated that all parties to conflicts must stop using sexual violence as a means of war, as well as acknowledging that it has a responsibility to address methods of stopping sexual violence; the SC has a further obligation to take a leadership role in the prosecution of sexual assault.¹⁴¹ This was also stated by the UN Economic and Social Council *Final Report on Contemporary Forms of Slavery*.¹⁴²

¹³⁹ Some suggest that simply prosecuting is not enough, that the prosecutions must also be genderized themselves. This includes, among other things, having female prosecutors, investigators, and specific assigned departments for the investigation of gender-based violence. This also includes ensuring that the prosecutions themselves reflect gender equality. This may mean the investigation of sexual violence against both sexes, including that of same-sex sexual assault. For an interesting article on the subject, consider the following, as this was unfortunately outside the scope of this thesis:

Kirsten Campbell, “The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia,” 1 *The International Journal of Transitional Justice* (2007), pgs. 411-432.

¹⁴⁰ The following was the predecessor of SC Resolution 1820, which created a number of initiatives to address violence against women in armed conflict.

SC Resolution 1325, 31 October 2000, UN Doc. S/RES/1325.

¹⁴¹ SC Resolution 1820, 19 June 2008, UN Doc. S/RES/1820.

¹⁴² UN Economic and Social Council, *Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-like Practices during Armed Conflict*, 22 June 1998, E/CN.4/Sub.2/1998/13, para. 85.

SC Resolution 1820 has since been followed up with SC Resolution 1888, adopted in 2009, whereby the UN Secretary-General appointed a Special Representative on sexual violence in conflict. This included the creation of a team of experts to work with governments post-conflict to prevent and address the problems of sexual violence.¹⁴³ Following this, the UN Secretary-General also called for a special inquiry into the situations in Chad, the Sudan, and the DRC to address problems of sexual violence.¹⁴⁴

The creation of the ICC was an important step with regards to this leadership role. The creation of the ICC was also initially seen as an integral aspect of human rights protection.¹⁴⁵ Were the ICC to actually prosecute those who perpetuate sexual violence in conflicts, this may come to fruit.¹⁴⁶ This author would again remind the reader that – as discussed above – these types of crimes must be prosecuted under international criminal law, as well as international human rights law. The establishment of the ICC was one of the ways the international community acknowledged this fact. Despite that the ICC has been created though, the international community cannot simply rely on the creation of an international body without continuing to contribute to the creation of jurisprudence themselves. The ICC is a court of last choice; therefore first and third states have a first obligation to prosecute sexual violence crimes post-conflict.

Another, and particularly valid, reason for the international community to take a role in the prosecution of sexual assault crimes is that the domestic courts are often one of the first casualties in the breakdown of a nation post-conflict. This is assuming of course that the state had a functioning judicial system prior to the conflict, which unfortunately is often not the case in

¹⁴³ SC Resolution 1888, 30 September 2009, UN Doc. S/RES/1888.

¹⁴⁴ UN News, “Security Council Demands End to Conflict-Related Sexual Violence,” September 30, 2009.

¹⁴⁵ F. T. Pilch, “Sexual Violence: NGOs and the Evolution of International Humanitarian Law,” 10 *International Peacekeeping* 1 (2003), pg. 91.

¹⁴⁶ The obligation of the ICC to carry out sexual violence investigations and prosecutions has been noted by Amnesty International: Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court* (London: Amnesty International Publications, 2011).

states which suffer from conflicts. There are numerous reports that sexual assault cases are dropped domestically as a result of bribed police officials and judges.¹⁴⁷ As stated in the *Rome Statute*, the ICC has complementarity when a state is unable or unwilling to pursue the ends of justice themselves.¹⁴⁸ As this is a common situation in post-conflict nations, the ICC should have a large role in the pursuance of international justice.

Despite the fact that not all states have signed on to the ICC, there is no excuse for the international community to ignore those states without the ability or inclination to sign the *Rome Statute*. For example, Myanmar has not signed on to the ICC. However, the rampant use of sexual violence in Myanmar by the Burmese military is horrifying.¹⁴⁹ Should we allow such a situation to occur without regard, or should we as an international community not only be willing but eager to step forward and see to that sexual violence prosecutions happen?

Unfortunately, despite the best of intentions, little has occurred yet. It is estimated that less than five percent of sexual assault prosecutions globally result in convictions. This is due in large part to the fact that most courts place an emphasis on the conduct of women.¹⁵⁰ In Canada, for example, the courts were forced to put into place very stringent guidelines about the

¹⁴⁷ Irin: Humanitarian News and Analysis, "AFRICA-ASIA: Impunity and gender-based violence: The second wound of rape," September 2004, Available at: <<http://irinnews.org/InDepthMain.aspx?InDepthId=20&ReportId=62823>>.

¹⁴⁸ *Rome Statute*, *supra* note 57, Art. 17(1).

¹⁴⁹ For a further description of the situation in Myanmar, see the following source:

Shan Human Rights Foundation and Shan Women's Action Network, "License to Rape: The Burmese Military Regime's Use of Sexual Violence in the Ongoing War in Shan State," May 2002, Available at: <<http://www.shanland.org/resources/bookspub/humanrights/LtoR>>.

Also see the following source:

Karen Women's Organization, "Shattering Silences: Karen Women Speak Out about the Burmese Military Regime's Use of Rape as a Strategy of War in Karen State," April 2004, <http://www.burmalibrary.org/docs/Shattering_Silences.htm>.

¹⁵⁰ UN Office of the High Commissioner for Human Rights, "Impunity and the Prosecution of Sexual Violence," *Fact Sheet*, March 8, 2007.

information the court can examine about the character of the victim, so as to not influence a jury that the victim somehow deserved the sexual attack.¹⁵¹

The idea of obligating states to prosecute sexual assault crimes is, in part, an aspect of the transitional justice theory. The theory follows that accountability for human rights abuses following a conflict is necessary to provide a stable society. This is about more than just performing a few court cases; it is about the reestablishment of the rule of law in the state.¹⁵² Western states in particular may be persuaded by such an argument, with the rule of law being a cornerstone for most of their legal systems.

Globalization has opened not only the marketplace, but political discussion. Information and people pass across borders, expanding opportunities for both genders. In addition, globalization has broken down the walls of patriarchy. Patriarchy could be considered a type of colonization. As other more traditional methods and states of colonization fall out of favour, gender colonization or seclusion should also no longer be considered appropriate.¹⁵³ One of the effects of the end of gender-colonization is no longer considering gender-based violence acceptable. We must therefore prosecute any and all instances of sexual violence crimes.

More importantly, it has been proven that not prosecuting sexual assault crimes during conflicts results in higher rates of sexual assaults at the end of a conflict.¹⁵⁴ Lack of prosecution sends the message that sexual violence against women is unimportant. It sends the message that

¹⁵¹ *R. v. Seaboyer* [1991], 83 DLR (4th) 193, which was upheld by the Supreme Court of Canada, and resulted in a number of changes to the legislation which provided that evidence the complainant has engaged in sexual activity with either the defendant or any other person is inadmissible if presented to support the interpretation that the complainant was more likely to engage in the sexual activity in question, or to show that the complainant is lying.

¹⁵² Vikki Bell and Kirsten Campbell, "Out of Conflict: Peace, Change and Justice," 13 *Social & Legal Studies* (2004), pgs. 299-304.

For a more comprehensive overview on transitional justice theory, should the reader be interested, this author would suggest consulting one of the following publications:

Nicholas Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (United Kingdom: Routledge-Cavendish, 2009).

Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002).

¹⁵³ Sexual Violence and Armed Conflict, *supra* note 38, pgs. 5-8.

¹⁵⁴ Laws against wartime rape little utilized, *supra* note 39.

women are not important. It sends the message that gender-discrimination is acceptable and tolerated. We cannot allow such a message to be continuously sent to the international community. It is necessary, and, as per the outlines of this thesis, obligatory for the international community to ensure that sexual assaults are prosecuted post-conflict.

Prosecuting sexual violence crimes also creates an atmosphere of deterrence. Ending impunity is a form of deterrence. The international community has an obligation to show that sexual violence will not be tolerated. Prosecuting perpetrators of sexual violence sends the right message. Further, if those during a conflict know that they will be prosecuted, they will in theory be less likely to commit sexual violence crimes.¹⁵⁵ This follows the idea that certainty of punishment will make potential offenders think twice before committing a crime. While deterrence has not always been found effective in domestic courts, this author would suggest that the different atmosphere created by conflict would change the effect of deterrence. If combatants know that post-conflict they can and will be prosecuted under international criminal law and international human rights law, hopefully they would think twice before committing sexual violence crimes.¹⁵⁶

Is Prosecution Enough?

With all of the above taken into account, at the end of the day, is the prosecution of sexual violence sufficient for solving gender issues, for ensuring the healing and protection of women in post-conflict societies? The answer is no. It is not sufficient to simply prosecute crimes. This is not to say that prosecuting crimes is not important. As demonstrated above, it is legally

¹⁵⁵ Colm Campbell, "Peace and the Laws of War: The Role of International Humanitarian Law in the Post-Conflict Environment," 839 *International Review of the Red Cross* (2000).

¹⁵⁶ Valerie Wright, "Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment," *The Sentencing Project: Research and Advocacy for Reform* (2010).

necessary. Prosecutions alone will not solve the world's problems however; they are simply one of the many tools which should be utilized.

Further, for all of the talk about the importance of prosecuting these crimes, we must keep in mind the needs of the victims. Our definition of justice may not meet theirs, so we must be careful to ensure that the victim's needs are not overridden in the pursuance of justice. These prosecutions were done for their benefit, so we must ensure that their needs are kept in mind.¹⁵⁷

Prosecutions must also be connected to the broader needs of victims in terms of their healing. This includes, though is certainly not limited to, reparations, financial compensation, etc. This can be done directly through the ICC following prosecutions, though we shall have to wait until a prosecution is completed to see if using the ICC Victim's Fund will assist victims.¹⁵⁸

On a further note, while it was outside the scope of this thesis, sexual violence occurs against men during conflicts as well. Further, while it is quite uncommon, same-sex sexual violence also occurs during conflicts. The numbers of both these types of sexual assaults are small, considerably so when compared to the amount of women who are sexual assaulted by men during conflicts. This is not to downplay the importance or seriousness of these types of sexual assaults however. It was simply outside the scope of this thesis to discuss these different genderizations of sexual violence. Regardless, the same principles can be applied to both male sexual violence and same-sex sexual violence as was created for female sexual violence above.

Should the international community see fit to do so, it would certainly be appropriate to consider

¹⁵⁷ A big part of this is ensuring that victims are not re-victimized (secondary victimization) by the court proceedings. If interested, this author recommends consulting the following studies: U. Orth, "Secondary Victimization of Crime Victims by Criminal Proceedings," 15 *Social Justice Research* 4 (2002), pgs. 313-325.

Also see the following:

Jim Parsons, and Tiffany Bergin, "The Impact of Criminal Justice Involvement on Victims' Mental Health," 23 *Journal of Traumatic Stress* 2 (2010), pgs. 182-188.

¹⁵⁸ For an interesting, albeit brief, discussion on the other needs of victims and the role of the ICC Victim's Fund in the Central African Republic, please see the following source:

Marlies Glasius, "What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations," 31 *Human Rights Quarterly* 2 (2009), pgs. 496-520, pgs. 515-517.

the prosecutions of male sexual violence a violation of human rights under international law, though necessarily with a different legal document. One could go so far as to create a whole new legal document for such an evaluation, however this author would suggest that it would be more appropriate for such a research to use the *Universal Declaration of Human Rights*, perhaps Article 2 on freedom from discrimination based on sex.¹⁵⁹

Conclusion

In conclusion, sexual violence occurs when there is a breakdown of the rule of law; this cannot be allowed to continue. Impunity creates an atmosphere whereby sexual assaults are allowed to occur unchecked. Victims of such a gross violation of human rights are entitled to justice. Victims are entitled to face their violators. Victims are entitled to get reparations to assist them with their unwanted children and medical services for emotional, mental and physical effects of sexual violence. We must guarantee justice for these victims in order to protect women's human rights.

States must ensure that sexual violence crimes are prosecuted post-conflict. If they do not, the international community has an obligation to step in and prosecute sexual violence crimes. Further, not prosecuting sexual assault crimes post-conflict generally results in more sexual assault crimes occurring, a hardly desirable situation.

Is this a picture of what is to come following future genocides? If one is to judge the international community based on their responses to past atrocities, it would be easy to conclude that following future conflicts, women cannot and should not expect to be protected from those who would violate them in such a brutal and intimate way. Nonetheless, it does not have to be this way. As outlined above, the international community has an obligation to prosecute sexual assaults, as not doing so is a violation of women's human rights under CEDAW. The

¹⁵⁹ *Universal Declaration of Human Rights*, UN Doc. A/810 71, Art. 2.

international community should step forward and do what is appropriate - what it must do - to convict those who would use sexual violence as a tool of war. The international community must ensure that sexual assaults are charged and successfully prosecuted.

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