HUMAN RIGHTS CENTER
UNIVERSITY OF CALIFORNIA BERKELEY

THE JURISPRUDENCE OF SEXUAL VIOLENCE

Sexual Violence & Accountability Project
Working Paper Series

By

K. Alexa Koenig
Ryan Lincoln
Lauren Groth

The Human Rights Center investigates war crimes and other serious violations of human rights and international humanitarian law. Our empirical studies recommend specific policy measures to hold perpetrators accountable, protect vulnerable populations, and help rebuild war-torn societies.

THE JURISPRUDENCE OF SEXUAL VIOLENCE

By
K. Alexa Koenig
Ryan Lincoln
Lauren Groth

A Working Paper of the Sexual Violence & Accountability Project
Human Rights Center
University of California, Berkeley

May, 2011

This Working Paper was drafted by K. Alexa Koenig, Ryan Lincoln, and Lauren Groth.

K. Alexa Koenig is a Ph.D. Candidate in Jurisprudence and Social Policy at the University of California, Berkeley. She has a masters degree in Jurisprudence from the University of California, Berkeley and a J.D. from the University of San Francisco School of Law. Lauren E. Groth earned her J.D. at the University of California, Berkeley Law School. She has a masters degree in Development Studies from the University of KwaZulu-Natal in South Africa. Ryan S. Lincoln has a J.D. from the University of California, Berkeley Law School. He holds a masters degree in Theology from Harvard Divinity School and has human rights fieldwork experience in Rwanda and the Democratic Republic of Congo. Holly Hutchings Draginis is a J.D. Candidate at the University of California, Berkeley Law School. Editing support was provided by Camille Crittenden, Kim Thuy Seelinger, and Eric Stover.

The Human Rights Center would like to thank Anne Marie de Brouwer, Guenael Mettraux, and Susan Sacouto for their generous and helpful feedback on earlier drafts. Any subsequent errors or omissions are the responsibility of the authors alone.

This Working Paper was made possible by seed funding for the Sexual Violence & Accountability Project provided by the John D. and Catherine T. MacArthur Foundation.

ABSTRACT

This paper provides an overview of the international jurisprudence of sexual violence, focusing on legal milestones realized by the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Court. This paper also offers a brief, comparative case study of how Kenya and its neighbors are currently adopting and adapting international criminal law to enhance their domestic legal frameworks, to facilitate the prosecution of sexual violence within their borders.

This paper is part of a Working Paper Series published by the Sexual Violence and Accountability Project, at the Human Rights Center, University of California, Berkeley Law School. Along with three other Working Papers, it was drafted in preparation for the "Sexual Offences Act Implementation Workshop" to be hosted by the Human Rights Center in Kenya, in May 2011. It will be presented to the cross-sectoral stakeholders tasked with responding to sexual and gender-based violence in Kenya, with a view to framing the jurisprudence of sex crimes in both "domestic" and "international" contexts. We welcome your feedback, which can be sent to ktseelinger@berkeley.edu.

TABLE OF CONTENTS

I. INTRODUCTION

On March 31, 2010, a pre-trial chamber of the International Criminal Court found that Chief Prosecutor Luis Moreno-Ocampo had sufficiently demonstrated that "numerous incidents of sexual violence including the rape of men and women" had occurred in Kenya during the post-election period of 2007-2008.[1] The Pre-Trial Chamber authorized an investigation based in part on evidence of more than 900 documented acts of rape and sexual violence.[2] The Pre-Trial Chamber's decision to permit an investigation marked an important development in the recognition of rape and other forms of sexual violence as international crimes worthy of prosecution and redress.

In this paper, we review the international jurisprudence of rape and other forms of sexual violence, tracing the steps that have led to the International Criminal Court's investigation in Kenya. We begin by focusing on the evolution of rape and sexual violence as international crimes.

JURISPRUDENCE

"Jurisprudence" broadly refers to the science or philosophy of law. More specifically, jurisprudence can refer to the law as expressed in legal decisions. Under this latter definition, the jurisprudence of one case may have bearing on the outcome of other cases. In some legal systems, court decisions may have *binding* force on later cases: in other words, the decision in one case and the jurisprudence that supports that decision creates a precedent that must be followed in subsequent, similar cases. The creation of precedent refines the substantive law. In comparison, some decisions merely have *persuasive* force. That is, a court decision does not create precedent and need not be followed in subsequent, similar cases. The jurisprudence of the prior case, however, can be used to inform the decision in a subsequent case--typically at the judges' discretion--but only when there is no binding decision that conflicts.

The distinction between binding and persuasive jurisprudence is important for both domestic and international law. Common law countries especially employ these distinctions. In such systems, courts are typically related to one another in such a way that a decision by one court may be binding on some courts but merely persuasive to others. On the international level, all jurisprudence is persuasive between court systems. However, the persuasive weight of jurisprudence may have more impact on the development of substantive law in international courts than persuasive jurisprudence in domestic legal systems. Decisions by international courts can help interpret treaty relationships between states and clarify customary international law, creating strong persuasive force for other courts that deal with similar issues.

[1] Situation in the Republic of Kenya, International Criminal Court, ICC-01/09-19-Corr 01-04-2010, 31 Mar. 2010 ("Kenya Decision").
[2] Ibid.
[3] Patricia Viseur Sellers, "The Prosecution of Sexual Violence in Conflict: The Importance of Human

In slightly more than a century, international prohibitions against sexual violence have been transformed from vague protections afforded women by virtue of their status as the property of men, to well-defined declarations that establish rape and other forms of sexual violence as among the most egregious of crimes. Early efforts to recognize sexual violence as criminal, most notably undertaken through Allied Control Council Law No. 10 (which was passed to establish a framework in which to try German military and civilian personnel for crimes committed during World War II) and the 1949 Geneva Conventions, laid the basic foundations for the development of the crime of rape. However, the laws and norms that emerged from these endeavors had little practical impact on the prosecution of sexual violence. It was not until the 1990s that the International Criminal Tribunal for Rwanda (Rwanda Tribunal) and the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) would become the primary engines driving the development of an international jurisprudence prohibiting rape and sexual violence; with no precise international definitions for these crimes, the tribunals struggled to create workable definitions for use by their courts. The legal doctrines that emerged from these tribunals ultimately laid the foundation for broad definitions of rape and sexual violence and established a seminal list of elements that must be satisfied to ensure accountability.

2002 marked the birth of the International Criminal Court ("Court"). While the Court had been established in 1998, it was not until 2002 that the Court's founding treaty—the "Rome Statute"— entered into force. This unprecedented international mechanism—designed to establish a means to prosecute the perpetrators of the most significant international crimes —has actively refined the definitions of rape and sexual violence with an eye toward improving accountability. Through the Rome Statute, various acts of sexual violence have gained prominence as named crimes. At the same time, the Court has worked to extend numerous procedural protections to those victims who participate in its proceedings. However, the jurisdiction of the Court is limited by the doctrine of complementarity (discussed in greater detail below) and the mandate that it only prosecute crimes of "sufficient gravity." As such, the Court cannot assume full accountability for enforcing international norms against sexual violence; it is crucial that individual nations do their part to complement the Court's work. To illustrate the potential strengths and challenges of complementarity, we examine the interplay between international norms—in particular the Court's treaty-based Rome Statute and its use by domestic jurisdictions—to enhance the development of national regimes designed to prosecute perpetrators and prevent further sexual violence.

Specifically, this paper considers how the Kenyan International Crimes Act (2008) and Sexual Offences Act (2006) have sought to address rape and other forms of sexual violence in a

legal landscape influenced by definitions promulgated by the Rwanda and Yugoslavia Tribunals. We also consider how the domestic violence legislation found in numerous national jurisdictions suggests a growing consensus as to what constitutes sexual violence, and increased concern regarding sexual violence and related offenses. For example, legal and cultural trends have shifted the focus in rape cases from rudimentary concepts of penetration, to broader issues of coercion and consent. National and regional jurisprudence has also recognized an ever-expanding array of sexually violent crimes—ranging from sexual harassment to gang rape—and an ever-expanding array of victims, including men and children. However, many courts continue to grapple with the task of defining the act of rape, determining whether rape in marriage can and/or should be criminalized, and clarifying where consent ends and force begins. Despite these challenges, the jurisprudence of sexual violence continues to evolve to better acknowledge and redress the horrific experiences of victims.

II. THE DEVELOPMENT OF INTERNATIONAL NORMS CRIMINALIZING SEXUAL VIOLENCE

Prohibitions against sexual violence have been codified as part of international humanitarian law since at least the late 1800s, with some warrior codes prohibiting sexual violence as far back as the first century.[3] In the intervening decades, the ways in which these norms have been defined, adjudicated, and applied have evolved considerably. Early prohibitions existed primarily to protect women by virtue of their status as the property of men,[4] while later protections mostly construed sexually violent crimes as violations of honor. More recently, international criminal tribunals have made significant strides in articulating sexual violence as a crime against the bodily integrity and human dignity of victims.[5] The following section examines the international jurisprudence of sexual violence over time, summarizing important milestones in the development of legal norms through key tribunals.

[3] Patricia Viseur Sellers, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation," *Office of the High Commissioner for Human Rights* (n.d.): 7. Available at http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf.
[4] See, e.g., Jane Dowdeswell, *Women on Rape* (New York: HarperCollins, 1986).
[5] See, e.g., Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Cambridge, Mass.: Kluwer Law International, 1997).

INTERNATIONAL AND DOMESTIC LAW

International law is created through treaties willfully entered into between consenting states and through a process of custom that arises through consensual state action, the basis of international law's authority lying in the consent of nations. International law creates binding obligations *between* states, and may or may not have authority *within* states.

Each state makes its own choices about whether international law applies within the state—that is, whether international law has domestic force—and how international law becomes part of the domestic law of a state. *Monist* states incorporate international law into their domestic law automatically, and international law fully applies within the state. *Dualist* states perceive a sharper division between international law—which they say operates only between states—and domestic law. Dualist states may choose to apply international law in the domestic sphere, but must first pass some form of implementing legislation that brings international law into the domestic sphere.

A. The Evolution of International Jurisprudence Criminalizing Sexual Violence During Times of War and Political Unrest

Rape has long been prohibited during times of warfare despite its somewhat recent emergence as an international crime following World War II.[6] In the United States, the Lieber Code of 1863 (passed during the Civil War) purported to codify the customary international rules of land warfare.[7] Amongst the behaviors prohibited by the Lieber Code were acts of wanton and unnecessary violence, which were illegal and prohibited at every rank in the Union Army.[8] Both rape and sexual violence were understood to be "wanton violence" and thus not permitted.[9] More specifically, Article 37 of the Lieber Code, which governs the administration of occupied territory, protected against rape: "The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, *especially those of women*; and the *sacredness of domestic relations*."[10] Under Article 44 of the Code, punishment for rape was the immediate execution of any perpetrator caught in the act and refusing to cease such conduct.[11]

---

[6] Mark S. Ellis, "Breaking the Silence: Rape as an International Crime," *Case Western Reserve Journal of International Law* 38 (2006-07): 227.

[7] "Customary international law" is one of two sources of international law (international agreements being the other). "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement on Foreign Relations Law.* Customary law is binding on all states.

8. Lieber Code, art. 44.

9. Ibid.

10. Ibid., art. 37 (emphasis added).

11. Ibid., art. 44.

In 1907, the Lieber Code was adopted as international law at the International Peace Conference in Copenhagen and became the basis for Hague Convention IV for respecting the laws and customs of war on land.[12] Both the earlier Hague Convention of 1899[13] and the Hague Convention IV of 1907[14] quickly became the leading authorities underlying international humanitarian law. Article 46 of the 1907 Convention indirectly enjoined rape, speaking to the protection of "family honour," which was widely understood to encompass sexual violence. Much like the Lieber Code, such violence was prohibited both during war and during occupation. Ultimately, however, despite the advances they made toward prohibiting the rape of women, both the Lieber Code and the Hague Conventions' prohibitions against sexual violence were based on the notion that women deserved protection because they were the property of men; it was not until the introduction of the Nuremberg Trials in 1949 that courts began to seriously consider rape and sexual violence as crimes against women themselves.[15]

i. The Nuremberg Trials

The Nuremberg Charter—which established the rules and procedures governing the International Military Tribunal through which prominent members of the Nazi party were tried following World War II—does not specifically mention rape among its enumerated list of prohibited acts, nor did any prosecutions for rape *per se* take place during the Nuremberg Trials.[16] In Article 6(c), the Charter did define Crimes Against Humanity, however, which became an important precursor to later laws prohibiting rape and sexual violence.[17] Control Council Law No.

---

[12] International Committee of the Red Cross, "International Humanitarian Law – Treaties & Documents." Available at http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/a25aa5871a04919bc12563cd002d65c5?OpenDocument (last visited 4 Feb 2011).

[13] Convention with Respect to the Laws and Customs of War on Land (First Hague II), The Hague, 29 July 1899, 26 Martens (2d) 949, 32 Stat. 1803, T.S. No. 403.

[14] Convention Respecting the Laws and Customs of War on Land, and Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land (Hague IV), The Hague, 18 Oct. 1907, 3 Martens (3d) 461, 36 Stat. 2277.

[15] Ellis, "Breaking the Silence," 227; David S. Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine," *Duke Journal of International and Comparative Law* 15 (2005): 237; *see also* Dustin A. Lewis, "Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law," *Wisconsin Journal of International Law* 27 (2009): 22.

[16] But see Askin, *War Crimes Against Women* (asserting that evidence of sexual violence was used by the Nuremberg Tribunal to prosecute crimes against humanity, and in that sense, was prosecuted).

[17] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 ("CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated").

10, which was adopted by the occupying powers in Germany and served as the basis for later prosecutions of German military and civilian personnel at Nuremberg and elsewhere, listed rape for the first time as a crime against humanity in an attempt to provide a uniform basis for prosecuting war criminals.[18] One scholar notes three important principles established by this law: "(1) that rape on a wide scale could be prosecuted as a war crime; (2) that crimes of sexual violence committed during peacetime could constitute crimes against humanity; and (3) that responsibility for such crimes could not be limited to military personnel and…liability could attach to persons occupying other key positions."[19]

ii. International Military Tribunal for the Far East

The International Military Tribunal for the Far East (IMTFE)—created through special proclamation by Gen. Douglas MacArthur to try leaders of the Empire of Japan, also following World War II—similarly contained no reference to rape or sexual violence in its charter.[20] However, the IMTFE did explicitly charge defendants with rape and sexual violence.[21] The IMTFE charter contained three categories of crimes: joint conspiracy to wage war, commission of crimes against humanity, and failure to prevent atrocities at the command level. Under this last category, General Iwane Matsui, Commander Shunroku Hata and Foreign Minister Hirota were all found guilty of crimes—including rape—through a theory of vertical liability by which a commander may be held liable for war crimes perpetrated by his troops if he knew the crimes were occurring and had the power to stop them, but failed to prevent those atrocities or punish offenders.[22] These convictions should be contrasted, however, with the failure to pursue accountability on behalf of over two hundred thousand women who were forcibly placed in rape camps by the Japanese government.[23] Japanese military rulers used these camps as a means to

---

[18] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II(1)(c), Dec. 20, 1945.
[19] Lewis, "Unrecognized Victims," 22-23 (citing Catherine N. Niarchos, "Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia," *Human Rights Quarterly* 17 (1995): 672 n. 140.
[20] See generally Charter of the International Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589.
[21] Richard J. Goldstone and Estelle A. Dehon, "Engendering Accountability: Gender Crimes Under International Criminal Law," *New England Journal of Public Policy* (2003-2004); 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; Ellis, "Breaking the Silence," 228.
[22] Ellis, "Breaking the Silence," 228.
[23] Ellis has noted the continual plight of these women who have yet to receive any measure of recognition or compensation. Ibid. See also Yoshiaki Yoshimi's book *Comfort Women: Sexual Slavery in the Japanese Military during World War II* (New York: Columbia University Press, 1995) and Yoshimi and Yuma

provide a sexual outlet for their soldiers, and thereby curtail "unauthorized" sexual violence in Japanese occupied territories and prevent the spread of sexually transmitted diseases beyond the camps.[24] Such rape camps were based on certain presumptions about male sexuality, particularly during times of war, and failed to recognize the criminal nature of rape and sexual violence.

iii. 1949 Geneva Convention Relative to the Treatment of Prisoners of War and the 1977 Additional Protocols

Article 27 of the Fourth Geneva Convention of 1949 was the first multilateral international agreement to both explicitly mention and prohibit rape.[25] The Geneva Conventions expanded the protections previously available to individuals during wartime by granting new protections to those *hors de combat* ("out of action") during conflict, as well as civilians (those not taking part in hostilities). According to the International Committee for the Red Cross, Article 27 "occupies a key position among the articles of the [Fourth Geneva] Convention" by proclaiming the foundational principles on which the conventions are based.[26] At a minimum, the Convention entitles all protected persons "to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."[27]

The Convention goes a step further by granting special protection to women, prohibiting "any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[28] The language for these additional protections was provided by the International Council of Women and the International Federation of Abolitionists, and urged to be adopted by Claude Pilloud of the International Committee of the Red Cross during the drafting phase of the Fourth Geneva Convention.[29] The article, then, makes rape, enforced prostitution

---

Totani, *The Tokyo War Crimes Trials: The Pursuit of Justice in the Wake of World War II* (Cambridge, Mass.: Harvard University Asia Center, 2008).

[24] Yoshiaki, *Comfort Women,* 9. In 2000, a mock trial was held in Japan during which the late Emperor Hirohito was found guilty of crimes against humanity, and the government of Japan liable, for this practice. See, e.g., "Comfort Women Case," The Hague Justice Portal (providing a summary of the case and the court judgment). Available at http://www.haguejusticeportal.net/eCache/DEF/11/085.

[25] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 75 U.N.T.S. 287 (entry into force Oct. 20, 1950) ("Fourth Geneva Convention").

[26] International Committee for the Red Cross, Commentaries on Convention (IV) relative to the protection of Civilian Persons in Time of War, para. 1. Available at http://www.icrc.org/ihl.nsf/COM/380-600032?OpenDocument.

[27] Fourth Geneva Convention, art. 27.

[28] Ibid.

[29] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, p. 643. The travaux préparatoires of the convention show no resistance to Pilloud's proposal.

and other forms of indecent assault illegal, but the Convention stops short of including rape as among the grave breaches[30] listed in Article 147.

In combination, Articles 146 and 147 create a regime of enumerated acts that bind contracting parties to pursue and prosecute those persons within the territory of a contracting state who violate those specific prohibitions.[31] While the Convention does not include specific reference to rape or other forms of sexual violence as grave breaches, some scholars have argued that rape could be included among the grave breaches by implication.[32] The travaux préparatoires (the official record of the negotiations underlying the development of the Convention) do not indicate whether rape and sexual violence were considered for inclusion among the grave breaches, nor whether any of the enumerated grave breaches encompass rape and sexual violence.

On June 8, 1977, the Geneva Conventions' Additional Protocols I and II entered into force to address changes in methods of warfare that had developed since World War II. Additional Protocol I—which applies to situations of international armed conflict—explicitly prohibits "outrages upon personal dignity," including enforced prostitution and indecent assault. It also explicitly prohibits the rape of women, but still does not include rape or sexual violence among the grave breaches, leaving them without the pursue-and-prosecute obligation.[33] Additional Protocol II—relating to non-international armed conflict—prohibits rape without regard to biological sex,[34] but is restricted in force due to the limited number of states that have ratified the treaty.[35] Nevertheless, as of the early 1990s, International Humanitarian Law prohibited sexual violence perpetrated against civilians, combatants, and prisoners of war during periods of armed conflict, [36] although prosecution for such crimes remained anything but certain.

---

[30] "Grave breaches" are the most serious international crimes, which states are obligated to both prohibit and prosecute.

[31] Fourth Geneva Convention, art. 146, 147.

[32] Sellers, "The Prosecution of Sexual Violence," 9 (citing International Committee for the Red Cross, *Aide-memoire*, December 1992, para. 2: "[T]he grave breaches enumerated in art. 147… 'obviously covers not only rape, but also any other attack on a woman's dignity'"); *see also* Patricia Viseur Sellers, "Sexual Violence and Peremptory Norms: The Legal Value of Rape," *Case Western Reserve Journal of International Law* 34 (2002): 298.

[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 art. 76.

[34] Ibid.

[35] Sellers, "Sexual Violence and Peremptory Norms," 299.

[36] Sellers, "The Prosecution of Sexual Violence," 10 n. 3 ("In summary, this represents the combined protection of the four Geneva Conventions of 1949, inclusive of Common Article 3 and the two Additional Protocols of 1977 to the four Geneva Conventions.")

iv. The Ad Hoc International Criminal Tribunals

The Rwanda Tribunal and the Yugoslavia Tribunal have been the two main engines driving the contemporary evolution of rape and sexual violence jurisprudence.[37] Prior to the creation of these tribunals in the 1990s, international law had failed to clearly articulate the elements necessary for the effective prosecution of rape and sexual violence.[38] Thus, the tribunals had to establish their own definitions, which they did during a series of key cases. Through these cases, the Yugoslavia and Rwanda Tribunals have helped clarify international norms prohibiting rape and other forms of sexual violence.[39] In particular, the tribunals have included rape/sexual violence as a constituent violation under the crimes of genocide, war crimes, and crimes against humanity.

Prosecutor v. Akayesu (*Akayesu*), in the Rwanda Tribunal, was the first case from the tribunals to render a decision that directly implicated rape and sexual violence.[40] Akayesu was a bourgmestre—the top-ranking public official in his particular commune—who was found to have known about, and been present for, several instances of sexual violence that occurred under his authority.[41] He was charged with rape as a constituent act of crimes against humanity, outrages upon personal dignity as a war crime, and sexual violence as a constituent act of genocide.[42]

Two aspects of the *Akayesu* decision are particularly important. First, the Trial Chamber in *Akayesu* discussed the relationship between sexual violence and genocide. Namely, sexual violence could be done with the intent of *killing members of a group*,[43] could constitute *serious bodily or mental harm*,[44] could be comprised of *measures intended to prevent births within the group*,[45] and could amount to *forcibly transferring children of the group to another group*.[46] This was an unprecedented development in international law.

---

[37] Mitchell, "Prohibition of Rape," 240 (listing the following successes of the Rwanda Tribunal andYugoslavia Tribunal: "[E]xpanding the definitions of crimes against humanity and genocide to include rape; the participation of women in high-level positions and the inclusion of staff sensitive to gender issues; effectively prosecuting various forms of sexual violence as instruments of genocide, war crimes, crimes against humanity, means of torture, forms of persecution and enslavement; and generally defining, clarifying and redressing gender-related crimes").
[38] Ellis, "Breaking the Silence," 229.
[39] Sellers, "The Prosecution of Sexual Violence," 13. It should be noted that in early cases the specific elements of sexual violence crimes were only elucidated upon a conviction or aquittal.
[40] Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR-96-4-T, Sept. 2 1998.
[41] Akayesu at ¶ 12.
[42] Akayesu at ¶ 1.
[43] Akayesu at ¶ 733.
[44] Ibid. ¶ 731.
[45] Ibid. ¶ 507 (including acts such as sexual mutilation, sterilization, forced birth control, separation of the sexes and prohibition of marriages).
[46] Ibid. ¶ 509.

Second, the trial chamber identified the specific elements of the crime of rape for the first time in international law, and distinguished sexual violence from rape. Although the Rwandan Tribunal had previously included rape among the enumerated acts that could constitute crimes against humanity,[47] it was in *Akayesu* that a Trial Chamber first defined rape as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive."[48] Sexual violence was broadly defined as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[49] Such an act, the Trial Chamber declared, could involve dignitary harms that did not involve penetration or even physical contact.[50] For example, the instance of a student being forced to publicly undress and do gymnastics in the nude was found to constitute sexual violence.[51] Two other issues the Tribunal addressed were a) whether a victim needed to establish that he or she had been coerced into sexual behavior— something that could be difficult to prove and thus a major barrier to prosecution— and b) whether the accused could raise a defense that the victim had consented to the sexually-violent conduct. In addressing coercion, the Trial Chamber determined that "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress that prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict."[52] It further clarified that in the presence of coercion, the need to prove a lack of consent was obviated. Thus, as the violence under Akayesu's control was deemed a coercive circumstance, the Trial Chamber did not have to analyze the issue of consent.[53] *Prosecutor v. Musema* (*Musema*), decided approximately two years later, affirmed much of the jurisprudence established in *Akayesu*.[54]

Prosecutor v. Furundzija (*Furundzija*), at the Yugoslavia Tribunal, quickly followed the *Akayesu* judgment.[55] Anto Furundzija was a commander of "The Jokers," a special unit of the military police of the Croatian Defense Council.[56] Furundzija, along with another soldier, interrogated "Witness A," who was in their custody, by holding a knife to her inner thigh and

---

[47] Statute of the International Criminal Tribunal for Rwanda, art. 3(g). Available at http://www.un.org/ictr/statute.html. Also, the Trial Chamber concluded that sexual violence could be included under the Statute's prohibitions against "inhumane acts" in art. 3(i), "outrages upon personal dignity" in art. 4(e), and "serious bodily or mental harm" in art. 2(2)(b). Akayesu at ¶ 688.
[48] Ibid. ¶ 598.
[49] Ibid.
[50] Akayesu at ¶ 688.
[51] Ibid. ¶ 688.
[52] Ibid. ¶ 688.
[53] See Viseur Sellers, "The Prosecution of Sexual Violence, 20.
[54] Prosecutor v. Alfred Musema, Judgment, ICTR-96-13-T, Jan. 27, 2000.
[55] Prosecutor v. Furundzija, Judgment, IT-95-17/1-T, Dec. 10, 1998.
[56] Ibid. ¶ 38.

threatening to insert it into her vagina if she did not truthfully answer their questions.[57] In addition to charges related to this circumstance, Furundzija was accused of failing to intervene while "Witness A" was forced to have oral and vaginal sexual intercourse with "Witness B."[58]

Because the decision of one tribunal is not necessarily binding upon another, the Trial Chamber for the Yugoslavia Tribunal decided to assert the elements of rapefor itself. In part, it sought to determine whether rape could constitute torture.The Tribunal ultimately defined the violation as:

> (i) the sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against a victim or third person.[59]

Using this definition, the Tribunal convicted Furundzija of torture, as well as outrages of personal dignity—both war crimes under common article 3 of the Geneva Conventions, and incorporated under article 3 of the statute of the Yugoslavia Tribunal.[60]

The Trial Chamber's holding that rape could constitute torture was a significant development in international law.[61] While on appeal, Furundzija challenged the sufficiency of the evidence against him,[62] the Appeals Chamber affirmed the judgment in its entirety.[63]

Prosecutor v. Kunarac (*Kunarac*) was the first Yugoslavia Tribunal case to prosecute and convict individuals for rape as a constituent offense of crimes against humanity. Crimes against humanity differ from war crimes by, among other things, not requiring a nexus to armed conflict.[64] Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic were ethnic Serbs who took part in a Serb military campaign in the municipality of Foca in the Republika Srpska. One of the purposes of the military campaign was to cleanse the municipality of Muslims, especially through a campaign of terror targeting Muslim women.[65] The Yugoslavia Tribunal referred to this case as the "rape camp" case, as the three defendants had taken part in systematic sexual violence against Muslim women that had included maintaining a detention center and other facilities in which women and girls were routinely raped.[66] The three men were charged and convicted of rape as a

---

[57] Ibid.
[58] Ibid.
[59] Ibid. ¶ 185.
[60] Sellers, "The Prosecution of Sexual Violence," 20.
[61] *Furundzija* at ¶ 163.
[62] Prosecutor v. Furundzija, Appeals Judgment, IT-95-17/1-A, 21 July 2000 at ¶¶ 80-127.
[63] Ibid.
[64] Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Judgment), Case No. IT-96-23/1-T (Feb. 22, 2001).
[65] Ibid.; Press Release, International Criminal Tribunal for the Former Yugoslavia, *Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case*, 22 February 2001.
[66] Ibid.

war crime and as a crime against humanity under articles 5(g) and 3 of the Yugoslavia Tribunal statute for personally raping, or being present while other soldiers raped, Muslim women.[67]

However, in *Kunarac*, the Trial Chamber departed from the definition of rape established in *Furundzija,* by including a two-pronged lack-of-consent element that required assessing the lack of consent of the victim and the knowledge of the perpetrator that the victim did not consent.[68] The Trial Chamber reasoned that this change was necessary because the facts of *Furundzija* were narrower than in *Kunarac*, and the "non-consensual or non-voluntary" element of the crime needed to be calibrated to reflect the appropriate scope of the norm against rape under international law.[69] This was a significant change in international legal jurisprudence, as they included, for the first time, an explicit and affirmative inquiry into the consent of the victim rather than an inquiry into the presence of force or coercion, which would *imply* non-consent.

The Trial Chamber offered this definition of rape:

> The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the contents of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[70]

The Trial Chamber found that the "basic principle" underlying the crime of rape was a violation of sexual autonomy, which is captured by the consent prong of the definition.[71] Nevertheless, the Trial Chamber softened the requirement somewhat by also stating that consent could not be offered as a defense if the "victim has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression."[72] On appeal, the defendants challenged the Trial Chamber's definition of rape, arguing that the standard should be that victims must show "continuous" or "genuine" resistance to demonstrate non-consent.[73] The Appeals Chamber, however, rejected the defendants' argument and affirmed the Trial Chamber's approach.[74]

---

[67] Kunarac, at ¶¶ 4-8; 685-727; 782; 822.
[68] Sellers, "The Prosecution of Sexual Violence," 20.
[69] Kunarac at ¶ 459.
[70] Ibid. ¶ 460.
[71] Ibid. ¶ 457.
[72] Ibid. ¶ 462.
[73] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Judgment, IT-96-23-A and IT-96-23/1-A, Jun. 12, 2002 ¶ 125.
[74] Ibid.

The *Kunarac* definition remained the prevailing standard in both the Rwanda and Yugoslavia Tribunals prior to the appeal of *Prosecutor v. Gacumbitsi* (*Gacumbitsi*)[75] (although there were some cases in which the earlier *Akayesu* definition of rape was favored and applied).[76] As noted above, *Kunarac* had required physical elements of penetration coupled with the lack of a victim's consent *and* the perpetrator's knowledge of the victim's lack of consent. The second prong of the *Kunarac* consent test—that the alleged perpetrator committed the act with knowledge of the victim's lack of consent—can be an especially difficult element to satisfy in the context of armed conflict.

In *Gacumbitsi,* the Appeals Chamber reexamined the lack-of-consent element, purportedly to clarify any ambiguity in the relevant jurisprudence.[77] On appeal, the Prosecution argued that lack of consent should not be considered an element of the offense that the prosecution has to prove, but rather that the defendant could attempt to show consent by the victim as a defense against the charges, effectively shifting the burden of proof[78] from the prosecution to the defense, and thereby facilitating a conviction.[79] The Appeals Chamber affirmed that both the victim's non-consent and the accused's knowledge of lack-of-consent are elements that must be proved by the prosecution.[80] The Appeals Chamber did, however, elaborate that non-consent may be proven if circumstances can be demonstrated "under which meaningful consent is not possible."[81] Per this standard, the prosecution does not need to produce evidence of the victim's conduct or evidence indicating use or threat of force, but rather non-consent may be inferred from examining relevant and admissible evidence of the background circumstances, such as an "on-going genocide campaign" or detention of the victim.[82] The *Gacumbitsi* decision,

[75] Sellers, "The Prosecution of Sexual Violence," 21-22 (referencing Prosecutor v. Milomir Stakic, Judgment, IT-97-24-T, July 31, 2003 at 755; Prosecutor v. Dragon Nikolic, Judgment and Sentence, IT-94-2, Dec. 18, 2003 at ¶ 113). The *Kunurac* definition was also employed by the Rwandan Tribunal in *Prosecutor v. Laurent Semanza*, Judgment and Sentence, ICTR-97-20-T, May 15, 2003, ¶ 345.
[76] See, e.g., Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, 16 May 2003; Prosecutor v. Muhimana, Cas No, ICTR-95-1B-T, 28 April 2005.
[77] Prosecutor v. Gacumbitsi, Judgment, ICTR-2001-64-T, June 17, 2004; see also Sellers, "Prosecution of Sexual Violence," 21-22.
[78] "Burden of proof" is a legal term of art that signifies which party has the burden of affirmatively proving his case: for example, must the prosecution affirmatively establish that a particular act occurred (as occurs when the prosecution has the burden of proof), or is it the defense's burden to establish that a particular act did *not* occur? In cases of a "tie" (where it is difficult to tell whether the act did or did not occur), the party with the burden of proof will be the one to "lose."
[79] Gacumbitsi at ¶ 147.
[80] Ibid. ¶ 153.
[81] Ibid.
[82] Ibid.

however, seems to stop short of creating a presumption that such situations are inherently coercive.[83]

In summary, due to the work of the Rwanda and Yugoslavia Tribunals, the issue of sexual violence has gained critical prominence in international law.[84] The international approach to sexual violence during armed conflict has moved dramatically away from norms that conceived of sexual violence as a violation of a man's property rights over a woman, to norms that come closer to respecting the human dignity and bodily integrity of the victims themselves. Equally important has been the development of the international criminal law elements through the jurisprudence of international criminal tribunals that have established rape and sexual violence as constituent elements of genocide, crimes against humanity, and war crimes. These developments were the first of their kind at the international level, and opened the door to further substantive and procedural developments at the domestic level. It is noteworthy, however, that in both the Rwanda Tribunal and Yugoslavia Tribunal statutes, the crime of sexual violence is absent. Ultimately, though, the gains realized in the Rwanda and Yugoslavia Tribunals paved the way for prosecution of both rape and sexual violence in the International Criminal Court.[85]

[83] The Appeals Chamber affirmed this definition in Prosecutor v. Mahimana, ICTR Case No. 99-52-A, 28 Nov. 2007. For more information on the debate surrounding the "lack of consent" element, please see A.L.M. de Brouwer, "Gacumbitsi Judgement," In *Annotated leading cases of international criminal tribunals: The international criminal tribunal for Rwanda 2005-2006*, eds. G. Sluiter and A. Klip (Antwerp-Oxford-Portland: Intersentia, 2009), 583-594.

[84] Additional cases from the Rwanda Tribunal that we have not had room to cover that are particularly notable for the detail they contribute to the international jurisprudence of sexual violence include Prosecutor v. Renzaho, No. ICTR-97-31-T (2009); Prosecutor v. Muvunyi, No. ICTR-2000-55A-T (2006); Prosecutor v. Semanza, No. ICTR-97-20-T (2003); Prosecutor v. Rukundo, No. ICTR-2001-70-T (2009); Prosecutor v. Kamuhanda, No. ICTR-95-54A-T (2004); Prosecutor v. Bagosora, No. ICTR-98-41-T (2008); and Prosecutor v. Kajelijeli, No. ICTR-98-44A-T (2003). Similarly important advances have also been realized through other international and hybrid courts, such as the Special Court for Sierra Leone and the Ad-Hoc Tribunal for East Timor, as well as through the state court of Bosnia and Herzogovina.

[85] The sexual-violence related case law from these tribunals is joined by important cases that have emerged from other ad hoc tribunals, such as the Special Court for Sierra Leone, which has considered the criminality of forced marriage, and the Extraordinary Chambers in the Courts of Cambodia, which is currently considering the issue of forced marriage in the context of its second trial. For example, *Prosecutor v. Brima*, SCSL –04-16-A (2008), in the Special Court for Serria Leone, has become the leading international decision on forced marriage. The appellate decision is especially notable for providing a definition of forced marriage (at paragraph 196) and including a careful discussion of the differences between forced marriage and sexual slavery. Crimes related to sexual violence have also been especially at issue in several cases adjudicated by the Indonesian Ad Hoc Tribunal for East Timor.

A SUMMARY OF MAJOR INTERNATIONAL CRIMES

During the twentieth century, four major categories of crimes that relate to sexual violence came to be recognized in international jurisprudence. These categories include Crimes of Aggression, Crimes Against Humanity, Genocide, and War Crimes. Each is summarized below.

Although the Rome Statute includes this crime within the potential jurisdiction of the International Criminal Court, the ***Crime of Aggression*** has only recently been defined. On June 11, 2010 the Review Conference of Rome Statute adopted a definition of the crime of aggression as the "planning, preparation, initiation or execution by a person in s a position effectively to exercise control over or to direct the political or military action of a State of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of hte Charter of the United Nations." [1] An act of aggression is defined as "the use of armed force by a State against the sovereignty, terroritorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations," [2] without the justification of self-defense or authorization by the Security Council. [3] However, the Court is not authorized to assert jurisdiction over this crime until after January 1, 2017, at the earliest.

Any of the following acts, when committed as part of a widespread or systematic attack directed against any civilian population may constitute ***Crimes Against Humanity***: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; enforced disappearance of persons; crime of apartheid; or other inhumane acts of a similar character intentionally causing great

suffering or serious injury to body or mental or physical health. [4]

Genocide is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group. [5]

War Crimes include a variety of acts prohibited during armed conflict that have come to be recognized as criminal under international law. Most war crimes are defined by treaty, although some are outlawed principally by unwritten customary international law. The most universally accepted sources of rules on the regulation of war are the four Geneva Conventions of 1949 and their two additional protocols of 1977. The Rome Statute has jurisdiction over war crimes committed in either international or non-international armed conflict, which can include: willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile power; willfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial; unlawful deportation or transfer or unlawful confinement; and the taking of hostages. [6]

NOTES
[1] Annex I: Amendments to the Rome Statute of the Intenrational Criminal Court on the crime of aggression, art. 8 *bis* (1). Available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.
[2] Ibid., art. 8 *bis* (2). See art. art. 8 *bis* (2)(a)-(g) for a list of acts qualifying as acts of aggression.
[3] Coalition of the International Criminal Court, "The Crime of Aggression." Available at http://www.iccnow.org/?mod=aggression.
[4] Rome Statute, art. 7.
[5] Office of the High Commissioner of Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), art. 2. Rome Statute, art. 6.
[6] Rome Statute, art. 8.

III. SEXUAL VIOLENCE AND THE INTERNATIONAL CRIMINAL COURT

In July of 1998, a diplomatic conference gathered in Rome to finalize the framework for a permanent institution with the authority to investigate and prosecute "the most serious crimes of concern to the international community,"[86] including genocide, war crimes, and crimes against humanity.[87] The resulting Rome Statute of the International Criminal Court (Court) was overwhelmingly adopted on July 17, 1998.[88] By July 1, 2002, sixty-six countries had ratified the Statute, and the Court officially came into being.[89] While the Court is destined to try a relatively small number of cases because of its mandate to address only the highest level perpetrators and the most serious international crimes, the Court has the potential to have a significant impact, normatively and symbolically, on the development of international criminal law, due to its enhanced visibility as a permanent international court. Accordingly, an entire section of this paper is devoted to the structure, laws and jurisprudence of this single institution.

One of the Court's most notable features is its commitment to expanding the scope of sexual violence-based crimes in international law. Building upon the prior work of the Rwanda

[86] Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002) ("Rome Statute"), art. 1. Available at http://untreaty.un.org/cod/icc/statute/romefra.htm.
[87] Tamilnation.org, "Human Rights and Humanitarian Law: Rome Statute of the International Criminal Court." Available at http://www.tamilnation.org/humanrights/icc/romestatute.htm#Debate_&_Vote. Hall, "The First Proposal." The International Criminal Court is also authorized to prosecute the crime of aggression, but will not be able to exercise its jurisdiction until after January 1, 2017, at the earliest. See "Delivering on the promise of a fair, effective and independent Court: the Crime of Aggression," *Coalition for the International Criminal Court*. Available at http://www.iccnow/org/?mod=aggression.
[88] Yates et al, "The Reckoning."
[89] Coalition for the International Criminal Court, "Ratification of the Rome Statute." Available at http://www.iccnow.org/?mod=romeratification. As of September 2009, the agreement had been ratified by 110 countries and signed by 139. Ibid.

and Yugoslavia Tribunals, the Rome Statute added sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of equivalent gravity to the list of war crimes and crimes against humanity.[90] The Statute further acknowledged that sexual violence could be committed against both men and women, and confirmed that defendants could and should be held liable for their own actions as well as those committed by their inferiors and/or partners, through the theories of command responsibility and another form of liability ("co-perpetration") that resembes the domestic theory of conspiracy.[91]

Another notable feature was the Court's unprecedented commitment to ensuring victims, and particularly women, a participatory role in Court proceedings.[92] When the Rome Statute was being negotiated, civil law countries were especially adamant that victims be accorded extensive participatory rights.[93] As Élisabeth Guigou, then-Minister of Justice of France, argued, "Victims are not simply witnesses whose participation … should be limited to gathering the information which they are able to provide. They have a separate role to play, and this must be recognized by the [International Criminal Court]."[94] This perspective contrasted with that of many common law countries, for whom the concept of victim participation was, quite literally, a foreign concept.[95] The Court ultimately adopted the broadest victim participation scheme of any previous tribunal.[96] This was intended to ensure the capacity of the court to empower victims, including victims of sexual violence, to speak out about the atrocities they experienced.

While the precise purpose behind such expansive participation is somewhat ambiguous,[97] some commentators have suggested that it is designed "to reliev[e] the suffering and afford[] justice to victims not only through the conviction of the perpetrator by [the] Court, but also by

---

[90] *See* Rome Statute, art. 7-8; Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerp: Intersentia, 2005), 85-86; Lee, *The International Criminal Court*.

[91] De Brouwer, "Supranational Criminal Prosecution," 338.

[92] For example, Ms. Nagel Berger, Minister of Justice for Costa Rica, emphasized the need for the ICC to have "full powers" to deal with crimes infringing upon the dignity of women, such as rape, sexual slaves, prostitution, and forced sterilization, while Ms. Obando, an observer for the Women's Caucus for Gender Justice in the ICC, stressed the need for gender compliance in the investigation of crimes. United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records* Vol. 2 (Rome: June 15-July 17, 1998): 77, 96.

[93] Coalition for the International Criminal Court, "Ratification of the Rome Statute."

[94] Address of the Ministry of Justice at the International Colloquium on "L'Accès des victims à la Cour Pénale Internationale," 27 Apr. 1999, as cited in Claude Jorda and Jérôme de Hemptinne, "The Status and Role of the Victim," In *The Rome Statute of The International Criminal Court: A Commentary 2*, eds. Antonio Cassese et al. (Oxford University Press, 2002): 1397.

[95] Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court," 26 *St. Louis U. Pub. L. Rev.* 253, 255 (2007).

[96] The victim participation scheme adopted by the later-established Extraordinary Chambers in the Courts of Cambodia would become even broader by empowering some victims to become parties to cases.

[97] Ibid., 268 (explaining that "most importantly, the Statute and Rules do not concretely specify the purpose of victim participation").

attempting to redress the consequences of genocide, crimes against humanity and war crimes,"[98]for example, by granting reparations. Others have suggested the goal is to help clarify the facts surrounding an alleged crime[99] since victims have experienced the atrocities firsthand, and thus have valuable information to share. Most agree, however, that the overall objective is to "giv[e] victims a voice in the proceedings" and "to shed light on the suffering and harm that occurred."[100]

A. Prosecuting Sexual Violence though the International Criminal Court

i. Jurisdiction and Complementarity

Before crimes can be prosecuted through the Court, including crimes of sexual violence, a number of obstacles must be surmounted. The first is ensuring that the Court has jurisdiction and the case is admissible: it can only prosecute individuals accused of committing or assisting in the commission of genocide, crimes against humanity and/or war crimes.[101] The accused must be a national of a country that has accepted the Court's jurisdiction, or the crime must have taken place within the borders of a country that accepts the Court's jurisdiction, or the U.N. Security Council must have referred the situation to the Court Prosecutor. In addition, the purported crime must have taken place after the date by which the Rome Statute entered into force for the nation under consideration.[102]

The second hurdle is satisfying the principle of complementarity: the Court is designed to complement—not replace—national court systems. Specifically, there must be an absence of national proceedings designed to prosecute the alleged crime.[103] A case is inadmissible if "(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State

---

[98] ICC, "The Role of the Trust Fund for Victims and its Relation with the Registry of the International Criminal Court," ICC Press Kit no. pids.008.2004-EN, 22 April 2004. Available at http://www.icc-cpi.in/library/press/pressreleases/PIDS008.2004-EN.pdf. See also Linda M. Keller, "Seeking Justice at the International Criminal Court: Victims' Reparations," *T. Jefferson L. Rev.* 29 (2007): 189 (explaining the purpose of providing victim reparations).

[99] Miriam Cohen, "Victim's Participation Rights Within the International Criminal Court: A Critical Overview," *Denv. J. Int'l L. & Pol'y* 37 (2009): 351.

[100] Ibid., 353, 373.

[101] The Court will also be able to exercise jurisdiction over crimes of aggression after January 1, 2017, at the earliest. Coalition for the International Criminal Court, "Delivering on the promise of a fair, effective and independent Court: The Crime of Aggression." Available at http://www.iccnow.org/?mod=aggression.

[102] ICC, "Jurisdiction and Admissibility." Available at http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm.

[103] Indeed, per the principle of complementarity, it is the state and not the Court that has primary responsibility for investigating and prosecuting serious international crimes within its borders; the ICC is considered a "court of last resort" that acts only when states cannot or will not. Human Rights Watch, "Making Kampala Count," May 10, 2010. Available at http://www.hrw.org/en/node/90282/section/5.

is unwilling or unable to carry out the investigation or prosecution."[104] The Court's Appeals Chamber has elucidated this requirement, explaining that there is a twofold test that must be passed to establish the requisite complementarity: "[T]he initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past and the state having jurisdiction has decided not to prosecute the person concerned."[105] If those two questions are answered affirmatively, then the court must consider whether the nation under consideration is unwilling or unable to prosecute. If it is deemed to be either, then the Court can assume jurisdiction.

A third criterion is whether the case is of "sufficient gravity" to justify the Court's involvement.[106] In one decision, the pre-trial chamber explained that "all crimes that fall within the subject-matter jurisdiction of the Court are serious and thus the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases."[107] Gravity can be established both quantitatively and qualitatively. For example, while the existence of a large number of victims may help quantify a crime's gravity, "it is not [just] the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave."[108] Factors used to consider whether a crime is sufficiently grave from a qualitative perspective include the geographical and temporal intensity of the alleged crimes, the nature of the alleged crimes, how the crimes were committed, and the impact on victims and their families.[109]

Finally, as an overall principle, the Court must deny jurisdiction if it has "substantial reasons to believe that an investigation would not serve the interests of justice."[110]

Importantly, these requirements ensure that only a few individuals, relatively speaking, will ever be held accountable for their crimes through the Court. Thus, criminal prosecutions in national courts continue to be crucial mechanisms for addressing major crimes and challenging impunity,[111] even in countries where the Court has elected to act.

---

[104] Rome Statute, art. 17(1)(a).
[105] Appeals Chamber Judgment of 25 Sept. 2009.
[106] Rome Statute, art. 17(1). ICC, "Jurisdiction and Admissibility."
[107] No. ICC-01/09, 25.
[108] Ibid.
[109] Ibid.
[110] Ibid.; Rome Statute, art. 53(1)(c).
[111] For an excellent overview of some of the challenges to providing domestic trials to complement international prosecutions that have arisen at the ICTY, see Anna Petrig and Fausto Pocar, "Case Referral to National Jurisdictions: A Key Component of the ICTY Completion Strategy," *Criminal Law Bulletin* 45 (2009):1-21. See also Open Society Foundations, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya* (2011).

ii. Substantive Laws Addressing Sexual Violence

As discussed above, rape has only recently been prosecuted as a distinct crime at the international level. The Rome Statute incorporates a number of the normative and practical advances in the prosecution of rape and sexual violence that have developed within the last century, in an attempt to codify a progressive international standard for rape and sexual violence. Specifically, it builds upon the recognition of sexual violence as a serious international crime by the Rwanda and Yugoslavia Tribunals.[112]

As mentioned, the Rome Statute also expands upon the list of sexual violence-related crimes that are considered crimes against humanity and war crimes, including sexual slavery, enforced prostitution, enforced sterilization and forced pregnancy.[113] Further, unlike the Rwanda and Yugoslavia Tribunals, which merely prohibit persecution on the basis of religion, politics and/or race, the Court also prohibits persecution based on gender, helping to ensure that gender-related crimes can be more expansively prosecuted than ever before.[114]

Another advancement is that the Rome Statute explicitly declares rape to be a war crime—along with sexual slavery, forced pregnancy, enforced prostitution, enforced sterilization, persecution based on gender, and other sexual violence.[115] In addition, the Court has recognized that rape can constitute genocide by causing "serious bodily or mental harm" committed with the intent to "destroy" a particular population,[116] codifying the holding in *Akayesu*.

The Court's definition of rape builds on those used at the Rwanda and Yugoslavia Tribunals. Specifically, it recognizes rape as having two elements:

> 1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body and 2) The invasion was committed

---

[112] ICC Statute, arts. 7(1)(g), 8(2)(b)(xxii) & 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 90; Ellis, "Breaking the Silence," 239; *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy S. Lee (New York: International Publishers, 2001) ("ICC Elements and Rules").
[113] Ellis, "Breaking the Silence," 235.
[114] Ibid., 246; Richard J. Goldstone, "Prosecuting Rape as a War Crime," *Case Western Reserve Journal of International Law* 33 (2002): 277. Proposals offered by the United States and Switzerland played a significant role in developing the statutory prohibitions against these crimes, providing a foundation for how they should be defined as war crimes in the Rome Statute (Lee, *The International Criminal Court*). Three proposals were similarly critical to the development of these as crimes against humanity: one by the United States, one by a group of Arab states (largely designed to protect long-standing cultural and religious norms regarding the rights of husbands over wives), and one by Canada and Germany (ibid.). The non-governmental Women's Caucus for Gender Justice also played a seminal role in helping to shape the ICC's conceptualization of sexually violent crimes (De Brouwer, *Supranational Criminal Prosecution*; Lee, *The International Criminal Court*).
[115] Rome Statute, art. 8(2)(b)(xxii).
[116] ICC Statute, art. 6(b), July 17, 1998, 2187 U.N.T.S. 90. It is explained in a footnote that rape can satisfy the elements of the crime of genocide. N.3.

> by force, or by the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.[117]

This definition includes the elements of force and coercion required in *Akayesu* and *Furundzija,* however, it recognizes that coercion can demonstrated where the individual who perpetrated the crime took advantage of coercive circumstances.[118] This signals an additional step away from the historic assumption of implied consent by recognizing that in certain coercive situations, consent can not be implied.[119]

As with the other tribunals, the International Criminal Court also provides for more than just direct perpetration. Specifically, the Rome Statute recognizes joint criminal enterprise (called "co-perpetration") and command (or "superior")[120] responsibility. As for joint criminal enterprise, article 25(3)(d) states:

> A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible… [or that] (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.[121]

Meanwhile, article 28 explicitly declares that military commanders and other superiors can be held responsible for the acts of the subordinates under their authority and control under certain circumstances.[122] This is particularly important for cases of sexual violence, where those who physically commit the crimes are often relatively low on the chain of command and thus fall outside the Court's mission to ensure accountability at the highest levels. Additionally, including command responsibility as an approved mode of liability improves the likelihood that sexual violence can be recognized as a tool of warfare and not just a random crime of opportunity, and thus as an act either directly or indirectly encouraged by leaders.

---

[117] Ibid.
[118] Ellis, "Breaking the Silence," 240.
[119] Center on Law and Globalization, "The Statute of the International Criminal Court."
[120] The term "command responsibility" is generally used when referencing an actor who is a member of a military heirarchy, whereas "superior responsibility" is generally used in the context of a civilian, non-military heirarchy. For a detailed overview of the doctrines of command and superior responsibility, see Guénael Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009).
[121] Rome Statute.
[122] Ibid., art. 28(a).

MODES OF LIABILITY AND THEIR RELATIONSHIP TO SEXUAL VIOLENCE

One of the most important advancements in the prosecution of sexual violence has been the development of various doctrines—such as Joint Criminal Enterprise, Co-Perpetration, and Command or Superior Responsibility—which make it possible to prosecute a wider range of actors for sexually violent crimes than in the past. These doctrines, some of which emerged as tools in the Rwanda and Yugoslavia Tribunals and variants of which have been adopted by the International Criminal Court, add to other "modes of liability" that can be applied to find parties responsible for crimes. Overall, there are multiple ways in which responsibility for sexual violence can be assigned: either as direct or indirect *individual* liability, or as *collective* liability.

Direct individual liability, the first type of individual liability, is the most well-known and also most commonly used form of liability: it involves holding an individual responsible for a crime he or she personally committed. Specifically, such "[d]irect responsibility implicates any accused who has planned instigated, committed, ordered, or aided or abetted the execution of crimes …."[1]

Command Responsibility, an indirect form of individual liability, is used to hold high-ranking officials liable for crimes committed by their subordinates. Specifically, "[I]ndirect criminal responsibility attributes liability to a person in a position of superior authority, whether military, political, business, or any hierarchical status, for acts directly committed by his or her subordinates." [2] The elements of Command Responsibility were clarified in the Yugoslavia Tribunal's *Delalic* decision. [3] For liability to ensue, a court must find "the existence of a superior-subordinate relationship; the superior knew or had reason to know that the criminal act was about to be or had been committed; and the superior failed to take the necessary and reasonable measure to prevent the criminal act or punish the perpetrator thereof." [4] In each case, the superior must have had the material ability to prevent and punish his subordinate. [5] This mode of liability does not necessarily negate direct individual responsibility; rather, both may be appropriately applied to a single act [6].

Another form of individual liability is "Joint Criminal Enterprise" (sometimes analogized to the domestic crime of "conspiracy"). [7] There are three categories of Joint Criminal Enterprise (detailed below). For all three, to find someone liable based on the theory of Joint Criminal Enterprise, there must have been 1) a plurality of persons; 2) a common plan; and 3) the actor must have voluntarily participated in the common plan [8]. The three forms of Joint Criminal Enterprise vary depending on whether there was 1) an "intent to perpetrate a certain crime [shared intent on the part of all co-perpetrators]"; or 2) "personal knowledge of the system of ill-treatment…[and] the intent to further this common concerted system of ill-treatment"; or 3) an intent to participate in…the criminal activity…where it is foreseeable that such a crime might be perpetrated by members of the group and the accused willingly took that risk" [9].

Expanding the traditional mode of criminal liability from individual direct liability to these newer forms has been controversial (especially with regard to the third category of Joint Criminal Enterprise liability) because of the traditional perspective that one should only be found criminally responsible for those crimes he or she personally "commits." These liability modes have also been criticized as having tremendous potential to threaten the rights of the accused by not alleging his or her criminal activity in sufficient particularity [10]. However, the nature of sexual violence makes these newer liability modes critical tools to begin to mitigate the historic, rampant impunity for crimes of sexual violence. First, because sexual violence is so common in times of war, it can be impossible and inefficient to prosecute each (frequently low-level)

individual who has committed an act of sexual violence. Second, it is often difficult to gather sufficient testimony accusing specific parties of sexual violence, due to the threat of reprisal and the stigma and taboos that tend to silence its victims. Third, when fora such as the Yugoslavia Tribunal, the Special Court for Sierra Leone, or the International Criminal Court have a specific mandate to try only the highest-level criminal actors, most of the perpetrators of sexual violence necessarily escape liability, since sexual violence is so frequently carried out by relatively low-level actors—those who come in direct contact with civilian populations. The application of diverse modes of liability, however, has the potential to 1) allow prosecutors to hold high-level actors responsible for tacitly encouraging and/or accepting sexual violence committed by others [11], and 2) demonstrate the possibility that sexual violence is not only committed on an ad hoc basis, but is frequently and increasingly used as a systematic tool of war designed to terrorize and control rival populations.

NOTES
[1] Sellers, "Individual(s') Liability for Collective Sexual Violence," 154.
[2] Ibid.
[3] Prosecutor v. Delalic, Case No IT-96-21-T, Trial Chamber Judgment, 20 Feb. 2001.
[4] Mary Deutsch Schneider, "About Women, War and Darfur: The Continuing Quest for Gender Violence Justice," *North Dakota Law Review* 83 (2007): 915, 948 (citing *Delalic* at 346).
[5] Human Rights Watch, *Genocide, War Crimes and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia* (New York: Human Rights Watch, 2004), 69.
[6] Ibid., 67.
[7] Conspiracy is distinguished from JCE in one important way, however: whereas JCE is not a crime *per se,* conspiracy is the crime for which a defendant is charged and convicted, rather than the crime that is the objective of the conspiracy.
[8] Tadic Judgment, IT-94-1, Appeals Chamber, 15 July 1999.
[9] Ibid. ¶ 228.
[10] See, e.g., Cecily Rose, "Troubled Indictments at the Special Court for Sierra Leone," Jounral of International Criminal Justice 7: 353 (2009).
[11] Schneider, "About Women, War and Darfur," at 948.

Further underscoring the Court's focus on victims, the Rome Statute has a relatively broad reparations provision. The Court is empowered to determine the extent of damages suffered by victims[123] and to order reparations against the accused, to be coordinated by the Trust Fund for Victims. (The Fund is a Court institution designed to assist the victims of those being tried by the Court. Its dual functions include assisting victims and implementing court orders post-conviction, including coordinating and managing reparation awards).[124] Such reparations can include restitution, compensation and/or rehabilitation.[125] This varies from many earlier

[123] Ibid.
[124] See International Criminal Court Trust Fund for Victims website, available at http://www.trustfundforvictims.org/homepage (providing an overview of the Fund's two mandates and the services it has provided to date).
[125] Rome Statute, art. 75. Restitution generally requires that a convicted party pay money damages to a victim equivalent to the amount by which he or she was unjustly enriched by the crime. Compensation is an amount paid to compensate the victim for his or her losses. Rehabilitation would likely be other damages

international forums, such as the Yugoslavia Tribunal, where victims have been required to sue in national court or elsewhere to obtain compensation for the crimes they suffered.[126]

iii. Procedural Laws Addressing Sexual Violence

Several evidentiary rules establish how to deal with rape and sexual violence cases in the Court. For example, Rule 63 declares that the Court's Chambers cannot require corroboration to prove any crime within the Court's jurisdiction, particularly crimes of sexual violence.[127] This represents an explicit break from historic practices, in which a woman's word was often not recognized as having sufficient evidentiary weight to establish rape on its own.

Further, Rule 70 deals with evidentiary concerns underlying the historically controversial issue of "consent." The issue of whether a woman's consent could be introduced as a defense to rape charges was hotly debated throughout the process of drafting the Court's substantive and procedural rules.[128] The procedural rule that resulted is divided into four key principles for adjudicating sexual violence. Specifically,

> (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; [and] (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.[129]

While this rule discourages a consent defense, it also allows for one in limited situations. This triggers an equally controversial issue: when and how consent can be raised. During the Rules' drafting, Australia proposed that the Chamber first determine *in camera* (privately, in the

---

designed to make the victim or victims "whole," for example, the provision of medical or psychological treatment.

[126] Ibid. This issue of reparations is a particularly important advancement for victims, many of whom have stated a preference for obtaining reparations even over seeing perpetrators tried in court. This issue is controversial and critical enough that it could easily (and justifiably) fill a report of its own. Thus a careful discussion of reparations is beyond the scope of this particular paper. For some background information on this issue, see, e.g., Naomi Roht-Arriaza, "Reparations in the aftermath of repression and mass violence," In Eric Stover and Harvey M. Weinstein, *My Neighbor, My Enemy* (Cambridge University Press, 2004); Michelle Staggs Kelsall et al, *Lessons Learned from the 'Duch' Trial: A Comprehensive Review of the First Case Before the Extraorindary Chambers in the Courts of Cambodia* (Asian International Justice Initiative's KRT Trial Monitoring Group, 2009); Clara Ramirez-Barat, *Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (International Center for Transitional Justice, 2011).

[127] Rome Statute, art. 63(4).

[128] ICC Elements and Rules.

[129] Rule 70.

judges' chambers) whether evidence of consent is relevant and credible before such evidence can be introduced at trial. Some delegates, especially those from civil law countries who had no experience with the provision of separate hearings to address whether particular evidence is admissible, were uncomfortable with the proposal because they felt it would require the Chamber to make a partial and advanced decision on the merits of the case without benefit of all of the evidence that would be introduced in a full trial.[130] However, those arguing for *in camera* proceedings eventually won the debate, supported by their argument that repeatedly questioning a victim in court about his or her purported consent to sexual activity tends to "blame and re-traumatise the victim."[131]

The resulting Rule 72 establishes that "[w]here there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witnesses … [n]otification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence" to the case. Once such notice is given, the Chamber is to consider *in camera* the views of the Prosecutor, defense, witness and victim or his or her legal representative. The Chamber then weighs the probative value of the evidence, as well as any potential prejudice. The Rule specifies that the Chamber, in considering whether to admit the evidence, should be guided by the principles laid out in Rule 70 regarding the limits on establishing consent. If the Chamber decides that the evidence is admissible, then the Chamber must state on the record the precise purpose for which the evidence can be admitted.[132]

A fourth procedural rule, Rule 71, focused on whether a victim's sexual history can be discussed at trial, was also the subject of much debate. The rule that resulted ultimately went even further than the initial proposal, which had duplicated procedural aspects of the Yugoslavia tribunal. As at the Yuglosav Tribunal, Rule 71 forbids the introduction of prior sexual conduct - however, it also prohibits the introduction of *subsequent* sexual conduct.[133]

Drafters of the Rome Statute were especially concerned about the protection of victims and others who assisted the Court. When deciding whether special protections should be granted to victim witnesses, the Court specifically considers "the nature of the crime [and] whether the crime involves sexual or gender violence."[134] While the anonymity of witnesses is not

[130] ICC Elements and Rules, 373-74.
[131] Ibid., 373.
[132] Rule 72.
[133] Rule 71; ICC Elements and Rules, 384.
[134] Rome Statute, art. 68(1).

guaranteed, the Court can guarantee confidentiality, meaning that witness' identities can be withheld from the public but not necessarily from the defense. Various electronic and other means have been provided to help safeguard confidentiality. In addition to valuing security in its own right, the Court recognizes security as necessary for establishing the "truth,"[135] since many victims and other witnesses may choose not to testify without sufficient protections in place.

To help protect witnesses who may be especially vulnerable, the Rome Statute requires that the prosecutor "appoint advisors with legal expertise on specific issues, including sexual and gender violence."[136] In concordance with the Court's Victims and Witnesses Unit (which is under the purview of the Registry),[137] a Gender and Child Unit in the Office of the Prosecutor is designed to help the prosecution adequately address the specific issues faced by victims of sexual violence.[138]

iv. *International Criminal Court Case Law*

Several Court arrest warrants have been sought on the basis of sexual violence. In Northern Uganda, charges against Joseph Kony include sexual slavery and rape as crimes against humanity and rape as a war crime. The Prosecutor has similarly sought charges against Vincent Otti, also of Northern Uganda, for sexual slavery and rape as a war crime. In the Democratic Republic of Congo, the Prosecutor has sought charges against Germain Katanga and Mathieu Ngudjolo Chui for sexual slavery and rape, both as a war crime and crime against humanity. Similar charges have been sought against defendants in Darfur, including "genocide based on rape and sexual assault" (Omar Hassan Ahmad Al'Bashir) and persecution by acts of rape and outrages upon personal dignity constituting a crime against humanity (Ali Muhammad Ali Abd-Al-Rahman).[139] ICC arrest warrants have also been issued for Ahmed Harun and Ali Kushayb for crimes—including rape—committed in Darfur.[140] Finally, Jean-Pierre Bemba Gombo is currently

---

[135] Center on Law and Globalization, "The Statute of the International Criminal Court."
[136] Rome Statute, art. 42(9). For example, in 2008, Professor Catharine A. MacKinnon was appointed as Special Gender Advisor to the Prosecutor. See Press Release, "ICC Prosecutor appoints Prof. Catharine A. MacKinnon as Special Advisor on Gender Crimes," ICC-OTP-20081126-PR377. Available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/icc%20prosecutor%20appoints%20prof_%20catharine%20a.%20mackinnon%20as%20special%20adviser%20on%20gender%20crimes.
[137] International Criminal Court, "Victims and Witnesses Unit." Available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm.
[138] For additional structures that have been put into place to assist victims, please see A.L.M. de Brouwer, "What the international criminal court has achieved and can achieve for victims/survivors of sexual violence," *International Review of Victimology* 16 (2009): 183-209.
[139] "Advancing Gender Justice: A Call to Action," 2009. See also ICC, "Prosecutions." Available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Prosecutions.
[140] See, e.g., Press Release, "Prosecutor briefs UN Security Council, calls for the arrest of Ahmed Harun and Ali Kushayb for crimes in Darfur," ICC-OTP-PR-20070607-222.

being tried for crimes committed in the Central African Republic (discussed below), while summonses to appear have been issued in relation to the Situation in Kenya (also discussed below).

However, in the case of Thomas Lubanga Dyilo, the first Court case to go to trial, the prosecutors failed to charge the defendant with sexual violence, despite the fact that "witness after witness" testified of the repeated rape of young girl soldiers by their commanders.[141] In May 2010, the lawyers for 99 victim participants petitioned the Court to consider additional charges against the accused, including sexual slavery and cruel and unusual treatment, to reflect the routine rape of child soldiers.[142] Ultimately, despite the Lead Prosecutor's opening pledge that "in this court … girl victims will not be invisible," the request to expand the charges against Lubanga to include sexual and gender-based violence was rejected.[143] Although two of the three trial chamber judges had agreed to re-characterize the charges, their decision was later overturned by the appeals chamber.[144] While the appellate judges acknowledged that the trial chamber may "change the legal characterization of facts," the trial chamber cannot "exceed ... the facts and circumstances described in the charges and any amendments to the charges."[145] From a victim's perspective, this controversial interpretation of Court regulations underscores the need for more effective advocacy on behalf of victims at the earliest stage of proceedings, to ensure their interests and experiences are adequately reflected in the initial charges.[146]

---

[141] Lisa Gambone, "Failure to Charge: The ICC, Lubanga & Sexual Violence Crimes in the DRC," War Crimes: The World Affairs Blog Network. Available at http://warcrimes.foreignpolicyblogs.com/2009/07/22/failure-to-charge-the-icc-lubanga-sexual-violence-crimes-in-the-drc/, 3 Oct. 2010.

[142] Ibid. Many girl soldiers have been required to play multiple roles. Radhika Coomaraswamy, UN Special Representative for Children and Armed Conflict, has reported that the girl soldiers she interviewed in the DRC "spoke of being used as fighters one minute, a 'wife' or 'sex slave' the next, and domestic servants and food-providers at other times." Katy Glassborow, "Call for Lubanga Charges to Cover Rape," *Institute for War and Peace Reporting*, 12 May 2008. Available at http://iwpr.net/report-news/call-lubanga-charges-cover-rape.

[143] Video, "Sexual violence against girl soldiers," AEGIS, 27 Sept. 2010. Available at http://www.aegistrust.org/Lubanga-Chronicles/backgrounder-sexual-violence-against-girl-soldiers.html.

[144] "The Lubanga Trial at the International Criminal Court: Background." Available at http://www.lubangatrial.org/background.

[145]International Criminal Court Regulations of the Court, ICC-BD/01-01-04, Regulation 55(1), 26 May 2004, < http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf>, 15 Oct. 2010. Amy Senier, "The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in Prosecutor v. Lubanga," *American Society of International Law Insights* 14, 8. Jan. 2010. Available at http://www.asil.org/files/insight100108pdf.pdf.

[146] Senier, "ICC Appeals Chamber Judgment," 5.

The Court will finally have an opportunity to consider rape charges, however, in the case of Jean-Pierre Bemba, whose trial began in November 2010.[147] The Court's Pre-Trial Chamber II authorized the prosecution to pursue charges of rape as a crime against humanity, based on evidence of "widespread and systematic rape [and Bemba's] role as former president and Commander-in-Chief of the Movement for the Liberation of Congo"[148] in Central African Republic. Victims' advocates, while supporting these charges, have criticized the Pre-Trial Chamber II's decision to refuse to allow charges for torture and outrages upon personal dignity based on mass rapes as a distinct charge (the Pre-Trial Chamber II subsumed the torture charges into the charge of rape as a crime against humanity). Such advocates believe Bemba should have to defend against both since the two crimes have distinct elements. However, the Pre-Trial Chamber declined to adopt this reasoning "as a matter of fairness and expeditiousness," interpreting the two crimes as essentially the same: they conceived of "rape as a crime against humanity" as requiring just one additional element beyond "torture based on mass rape."[149] At least one critic has voiced her concern that the Pre-Trial Chamber's refusal to view these as separate crimes has begun a "recharacterization" of rape and torture in the Court, and possibly in international jurisprudence more broadly, while another has explained that the Chamber's refusal to allow both charges overlooks the experience of victims, who experienced mass rapes *both* as a crime against humanity and as a form of public torture that terrorized the local population.[150] At the very least, however, the Bemba case will allow the world its first glimpse into how the Court will handle rape charges in practice.

B. The International Criminal Court and Kenya

In December 2007, the election of incumbent Kenyan President Mwai Kibaki resulted in an eruption of ethnic and political violence throughout Kenya, resulting in widespread displacement as well as hundreds of reported deaths and incidents of sexual violence. In order to address the atrocity that had occurred, the Commission of Inquiry on Post Election Violence (informally the "Waki Commission") was established, and the Kenyan government agreed to the development of a Special Tribunal to investigate and prosecute any crimes that had been

---

[147] ACCESS: Victims' Rights Before the International Criminal Court, "Bemba Trial Begins 22 November 2010," *Victims' Rights Working Group Bulletin* 17 (Winter 2010): 1-2 ("*VRWG Bulletin*").
[148] Ibid., 4.
[149] Maria McDonald, "Rape and Torture Charges in the Case against Jean-Pierre Bemba," *VRWG Bulletin* (Winter 2010): 4-5.
[150] Mariana Goetz, "Interview with Maitre Marie-Edith Douzima, Lawyer and Victims' Representative in the Bemba Case," *VRWG Bulletin* (Winter 2010): 3; see also Brigid Inder, "Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo," Press Conference, International Criminal Court, 22 Nov. 2010.

committed. The Special Tribunal, however, was never realized, and, in the absence of state action, on the 5th of November 2009, Court Lead Prosecutor Luis Moreno-Ocampo alerted ICC President Song that he had determined that there was "a reasonable basis to proceed with an investigation into the Situation in the Republic of Kenya in relation to the post-election violence."[151] On the 6th of November 2009, the situation was assigned to Pre-Trial Chamber II.[152]

In order to proceed with his investigation, Moreno-Ocampo had to first satisfy the Court's admissibility and evidentiary tests: specifically, the Pre-Trial Chamber required him to present sufficient evidence supporting a "potential case of suspects and their alleged specific crimes."[153] The applicable "reasonable basis" standard was interpreted strictly since Moreno-Ocampo had brought the case on his own initiative and without the request of the U.N. or another entity. Specifically, the evidence had to indicate not only a "reasonable suspicion" but a "reasonable conclusion"[154] that various crimes within the Court's jurisdiction had been committed.

Ultimately, the Prosecutor was able to meet this heightened standard, using evidence collected primarily from reports generated by a variety of nongovernmental organizations, intergovernmental organizations, and the Kenyan Government.[155] The Pre-Trial Chamber concluded that there was a reasonable basis to believe that the Kenyan population had suffered several crimes against humanity, specifically murder, the deportation and forcible transfer of populations, rape and other sexual violence, and additional inhumane acts.[156] On the 31st of March 2010, the Pre-Trial Chamber granted Moreno-Ocampo permission to begin his investigation.[157] With that permission, the investigation became the fifth under the Court's authority, and the first as an investigation *proprio motu*—one that is requested on the Prosecutor's own initiative.[158]

---

[151] Luis Moreno-Ocampo, Prosecutor, International Criminal Court, ICC-01-09-1-Anx 06-11-2009, 5 Nov. 2009. Available at http://www.icc-cpi.int/iccdocs/doc/doc778245.pdf.
[152] "Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II," International Criminal Court, ICC-01/09-1 06-11-2009, 6 Nov. 2009. Available at http://www.icc-cpi.int/iccdocs/doc/doc778243.pdf.
[153] Ibid., 2-3.
[154] Ibid., 3.
[155] Ibid.
[156] Kenya Decision, para. 73. The PTC was careful to limit the scope of the investigation substantively, temporally and geographically. Moreno-Ocampo is only permitted to investigate 1) crimes against humanity, 2) crimes that occurred between the Rome State's entry into force in Kenya on June 1, 2005 and November 26, 2009, and 3) crimes that took place within the Republic of Kenya.
[157] American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), "ICC Pre-Trial Chamber Approves Prosecutor's Investigation in the Kenya Situation," 1.
[158] Ibid.

In its decision, the Pre-Trial Chamber explained that for purposes of the Court, crimes against humanity (as stated in the Rome Statute) include any one or more codified acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[159] The attack must have been directed against a civilian population in "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[160]

The Pre-Trial Chamber recognized evidence of three categories of attacks by three different organizational groups: attacks committed by the Orange Democratic Movement, retaliatory acts directed at those who were deemed responsible for the initial violence, and violent acts committed by the police.[161] The Pre-Trial Chamber also explained that evidence of rape and other forms of sexual violence would be evaluated based on the following standards: for rape to constitute a crime against humanity, the prosecution must demonstrate that "a perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."[162] To establish sexual violence as a crime against humanity, the prosecution must establish that the perpetrator "committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat or force or coercion" in a manner that was widespread and/or systematic.[163]

Ultimately, the Pre-Trial Chamber deemd the Prosecutor to have sufficiently demonstrated that "numerous incidents of sexual violence including rape of men and women" had occurred.[164] Specifically, the Pre-Trial Chamber relied on evidence that the Kenya Police Crime Record detailed "876 cases of rape and 1,984 cases of defilement" in 2007.[165] Between the end of December 2007 and the 29th of February 2008, a period of just two months, the Nairobi Women's Hospital's Gender Violence Recovery Centre "treated 443 survivors of sexual and gender based violence, 80 percent of which were rape or defilement cases."[166] From January 2008 through March 2008, the Nairobi Women's Hospital and other local partner hospitals took in "at

[159] Rome Statute, art. 7(1).
[160] Rome Statute, art. 7(2)(a).
[161] Ibid., 44-45.
[162] Rome Statute, art. 7(1)(g)-1(1).
[163] Rome Statute, art. 7(1)(g)-6(1).
[164] Kenya Decision, 60.
[165] Ibid.
[166] Ibid., 60-61.

least" 900 sexual violence cases. The Pre-Trial Chamber also noted the "high" number of documented gang rapes and the brutality of such rapes, which included cutting and inserting weapons and other foreign objects into women's vaginas.[167]

In addition to supporting possible charges of rape and sexual violence, the alleged acts were recognized as potentially contributing to the "forcible transfer of populations," another crime against humanity. The Pre-Trial Chamber recognized that sexual violence had allegedly been used as "[a] means to forcibly evict women and their families from particular communities."[168] A charge of "[o]ther inhumane acts causing serious injury" was similarly supported by allegations of forced circumcision and genital amputation of male victims.[169]

Ultimately, the Pre-Trial Chamber authorized its investigation based on evidence of "1,133 to 1,220 murders, more than 900 acts of documented rapes and sexual violence, approximately 350,000 displaced persons, and 3,561 reported acts of serious injury" affecting six of eight Kenyan provinces.[170] The devastating impact on victims was reported as especially severe among sexual violence victims, who were alleged to have experienced "psychological trauma, social stigma, abandonment [and] being infected with HIV/AIDS."[171] Victims were also alleged to have been impregnated and/or otherwise subjected to rape and sexual violence, as well as forced into transactional sex and sexual exploitation while in internally displaced persons camps.[172]

On December 15, 2010, Moreno-Ocampo announced that he had asked the Pre-Trial Chamber II to issue summonses to appear for six Kenyan politicians whom he believes were at least partially responsible for these crimes. The six suspects include William Samoei Ruto (Kenya's Minister of Higher Education, Science and Technology (suspended)), Henry Kiprono Kosgey (Minister of Industrialization), Joshua Arap Sang (Head of Operations for KASS FM), Francis Kirimi Muthaura (Head of the Public Service and Secretary to the Cabinet and Chairman of the National Security Advisory Committee), Uhuru Muigai Kenyatta (Deputy Prime Minister and Minister of Finance), and Mohamed Hussein Ali (Chief Executive of the Postal Corporation of Kenya and previously Commissioner of the Kenya Police).[173] The Court's Pre-Trial Chamber II has since found reasonable grounds to believe four of the six men are criminally responsible as

[167] Ibid.
[168] Ibid., 64.
[169] Ibid., 66.
[170] Ibid., 74.
[171] Ibid., 75-76.
[172] Ibid., 76-77.
[173] "Kenya's post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity," ICC-OTP Press Release ICC-OTP-20101215-PR615, 15 Dec. 2010. Available at http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm.

indirect co-perpetrators and two of the six men otherwise contributed to the commission of various crimes related to the Kenyan post-election violence; on the 8th of March 2011 the Pre-Trial Chamber issued summonses to appear for all six. The Kenyan Government has since filed two petitions challenging the International Criminal Court's involvement in the cases against these suspects.[174]

While the Kenya cases are still in the pre-trial phase, they have the potential to establish key international jurisprudence on sexual violence because of the large number of sexual violence-related charges that are being considered. Building upon the prior jurisprudence of the Rwanda and Yugoslavia Tribunals, the Court represents a relatively new and expansive mechanism through which perpetrators may be held accountable for acts of sexual violence, and through which victims may be granted a voice.

However, prosecutions in the Court will not be enough on their own: it is important that the various nations of the world incorporate the Court's provisions into their own legal systems whenever possible, to facilitate national and international prosecutions. The next section of this paper will consider how Kenya has utilized its domestic legislation to complement the ongoing efforts of the Court, and the lessons to be learned from the domestic sexual violence prohibitions of neighboring countries.

IV. KENYA AND ITS NEIGHBORS: A COMPARATIVE CASE STUDY

The 2007 post-election violence in Kenya has prompted a concerted effort to hold perpetrators accountable for their crimes at both an international and a domestic level. With the recommendation by the Waki Commission that a Special Tribunal for Kenya be created to address the possibility of prosecutions[175] or the evidence be forwarded to the prosecutor for the International Criminal Court, Kenya has been working on developing the jurisprudential framework necessary to effectuate the prosecution of international crimes in a domestic setting.

---

[174] See Coalition for the International Criminal Court, "Kenyan Government Challenges ICC Involvement in Post-Election Violence Case," 1 April 2011. Available at http://coalitionfortheicc.org/documents/Kenya_article_19_CICC_advisory_010411.pdf. The English version of the first petition, the "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute," 31 March 2011, is available through the International Criminal Court Website at http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf. The English version of the second petition is available at http://www.icc-cpi.int/iccdocs/doc/doc1050028.pdf.

[175] Specifically, the Waki Commission recommended that, "A special tribunal, to be known as the Special Tribunal for Kenya be set up as a court that will sit within the territorial boundaries of the Republic of Kenya and seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 general elections in Kenya. The Special Tribunal shall achieve this through the investigation, prosecution, and adjudication of such crimes. See http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf.

To better illustrate Kenya's efforts to address this problem, a brief description of the Kenyan legal system, its approach to the incorporation of international norms, and its seminal statute on the issue, the Sexual Offences Act, is provided next.

Kenya has a dualistic legal system and, thus, requires national implementing legislation before international and regional treaties can be applied in domestic courts.[176] This, in combination with the absolute supremacy of the Kenyan constitution, has resulted in a historically restrained application of international law by the Kenyan judiciary.[177] Specifically, any law that may be inconsistent with the Constitution is considered null and void.[178] Although the Kenyan Constitution does not directly address the implications of this domestic supremacy with regards to international law, in the last few decades the Kenyan High Court has sought to clarify its approach to conflicting national and international laws and has affirmed the stature of the Constitution. In *Okunda v. Republic*, the Kenyan High Court stated that:

> If we did have to decide a question involving a conflict between Kenyan law on the one hand and principles or usages of international law on the other…and we found it impossible to reconcile the two, we, as a municipal court, would be bound to say that Kenya law prevailed. [179]

Since 1970, this interpretation has been consistently applied as precedent. For example, in 2001, the High Court reaffirmed the supremacy of Kenyan law over international instruments in *Pattni and Another v. Republic*. [180] Specifically, the court held that "[a]lthough those international instruments [the Universal Declaration of Human Rights and African Charter on Human and People's Rights] testify to the globalization of fundamental rights and freedoms of an individual, it is our Constitution as a law which is paramount."[181] However, the court has also clarified that such a statement does not preclude *any* consideration of international law. Rather, the High Court has indicated that, while not required, Kenyan courts may take account of international legal precedent or international consensus should an appropriate case so require.[182]

---

[176] World Organization Against Torture (OMCT), "Violence Against Women in Kenya," *Report for the Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women by Kenya (*CEDAW 28th Session, 13-31 January 2003).
[177] Antonina Okuta, "National Legislation for Prosecution of International Crimes in Kenya," *Journal of International Criminal Justice* 7 (2009): 1068. Sources of Kenyan Law are described in the Judicature Act, Chapter 8 Laws of Kenya.
[178] Kenya Constitution, § 3 (2010).
[179] Okunda v. Republic (1970) E.A.L.R. 453.
[180] Pattni and Another v. Republic (2001) K.L.R. 264.
[181] Ibid.
[182] Ibid., 274. This precedent also holds true for international customary law. Through the Kenyan Judicature Act, courts may refer to "African customary law" under the necessary circumstances, but the courts have been reluctant to apply this provision to wider regional and international customary law. Okuta, "National Legislation," 1068. African customary law can be applied only in civil matters and only where

Prior to the 2007 violence, Kenyan law had incorporated some provisions of international law, namely through the creation of domestic human rights protections in alignment with international norms. Section 70 of the Constitution expressly provides that every individual in Kenya is entitled to "fundamental rights and freedoms irrespective of race, ethnicity, place of origin or residence or other local connection, political opinions, colour, creed or sex."[183] Kenyan citizens are also protected from torture, inhuman treatment, and degrading punishment through the Constitution.[184] Specific protections for the incorporation of international crimes and sexual violence, however, were relatively limited, given the overarching focus on the supremacy of the Kenyan Constitution.

A. The Kenyan Legal System and International Crimes

International crimes—including crimes against humanity, war crimes and genocide—were first addressed in Kenyan courts following Kenya's ratification of the Rome Statute in 2005.[185] Although there was little political will at the time to actively incorporate the standards of the Court into domestic law, Kenya did begin the process of adopting implementing legislation via the drafting of a comprehensive International Crimes Bill.[186] However, with the presidential election looming, consideration of the Bill by the parliament was postponed and any prospect of its enactment was fully suspended in 2007. It was only after the 2007 post-election violence that the Kenyan government quickly agreed to establish the Special Tribunal recommended by the Waki Commission to address the dearth of Kenyan legislation related to the prosecution of crimes recognized in international law.[187]

In addition to the agreement to establish a Special Tribunal, Kenya also drafted the "Special Tribunal for Kenya Bill," which was meant to govern crimes within the tribunal's jurisdiction.[188] The Special Tribunal Bill was progressive legislation that sought to align Kenyan law with international criminal law norms, thereby allowing for effective prosecution within the

---

one of the parties is affected by it and it is not inconsistent with written law and is not repugnant to justice and morality. Judicature Act, Section 3 (1)(2).

[183] Kenyan Constitution § 70 (2010).

[184] Ibid., § 74.

[185] Okuta, "National Legislation," 1063.

[186] Ibid., 1064.

[187] Following the post-election violence, the Kenyan Commission of Inquiry recommended that the country prosecute those who had violated international norms, but Kenya had no laws in place through which to do so. The Kenyan Penal Code does not contain any provisions that define or provide for penalties for international crimes. Ibid.,1065.

[188] Ibid., 1066. Specifically, the Draft Statute granted the tribunal jurisdiction to consider crimes against humanity, genocide, gross violations of human rights, and other crimes committed in relation to the 2007 general election.

tribunal itself. Perhaps most significantly, Section 43(3) of the bill expressly provided that where international norms were inconsistent with any other written law, the international norm would prevail.[189] This was a significant departure from the prior jurisprudence of the Kenyan High Court described above, and was believed to constitute an "important milestone and an acceptance by the Kenyan legal order that norms of international law had to be taken into account and could at times prevail over domestic law."[190]

Following several months of delay in adopting the Special Tribunal Bill,[191] in December 2008 the Kenyan government successfully adopted the International Crimes Act, which incorporated many of the Special Tribunal Bill's provisions.[192] The content of the act mirrors much of the Rome Statute and is designed "to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity, and war crimes, and to enable Kenya to cooperate with the ICC."[193] It does not define international crimes on its own, but instead refers to the Rome Statute.[194] The Act further stipulates that any provisions of the Kenyan Penal Code that may be inconsistent should not apply.[195] The Act also makes certain provisions of the Rome Statute directly applicable for purposes of proceedings for an international offense, including Article 28,[196] Article 29,[197] and Article 33.[198]

The International Crimes Act also paved the way for Kenya to consider a broader range of criminal prosecutions by embracing a co-perpetration mode of liability. Kenyan domestic legislation provides for the use of co-perpetration in two ways: 1) its domestic penal code, and 2) the International Crimes Act.[199] First, the Kenyan penal code sets out a liability scheme regarding individual commission of crimes that establishes a person can be found to be a "principal offender" if he or she "does any act for the purpose of enabling or aiding…[or] abets another

---

[189] Ibid., 1068.
[190] Ibid., 1069.
[191] In order to ensure the constitutionality of the Special Tribunal for Kenya Bill, a complementary Constitutional Amendment Bill was also drafted, which attempted to amend the Constitution by providing Parliament with the ability to establish a Special Tribunal. This Constitutional Amendment Bill was rejected by the Kenyan Parliament, requiring a reformulated approach, the International Crimes Act, which was eventually successful.
[192] Okuta, "National Legislation," 1072.
[193] International Crimes Act (2008), Preamble (Kenya).
[194] Ibid., § 6(4).
[195] Ibid., §7(5)(b)
[196] Article 28 relates to the responsibility of commanders and other superiors.
[197] Article 29 excludes any statute of limitations.
[198] Article 33 relates to superior orders. Interestingly, the International Crimes Act gives the Kenyan Courts jurisdiction to anyone who, after committing any of the offenses under the act, is present in Kenya,[198] thus applying what can be seen as an element of universal jurisdiction to the Act and Kenya's prosecution of international crimes.
[199] The Penal Code (2009) (Kenya).

person in committing the offense…or counsels or procures."[200] In a separate clause of the same article, the Code provides that "[when] two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and an offence is committed…each of them is deemed to have committed the offence."[201] Additionally, the Kenyan Penal Code includes a conspiracy clause that holds anyone who conspires with another person to commit murder, another felony or a misdemeanor, is guilty of conspiracy.[202]

Secondly, Kenya's adoption of the International Crimes Act provides for the domestic use of the International Criminal Court's interpretation of the crime. The Act "makes provision for the punishment of certain international crimes…and provisions of [Article 25] of the Rome Statute shall apply."[203] Because rape, sexual slavery…or any other form of sexual violence of comparable gravity" are considered "crimes against humanity" by the Court, this Act could give rise to Joint Criminal Enterprise-type prosecutions when there was a shared objective to commit sexually violent crimes.[204] In this way, Kenya's incorporation of the provisions and jurisprudence of the Court as they relate to rape and sexual violence can supplement its own national Sexual Offences Act (discussed below),[205] and facilitate the likelihood of future complementary prosecutions at the domestic level.

B. Kenya's Sexual Offences Act (2006)

Prior to the implementation of the Sexual Offences Act, Kenya's laws regarding rape and sexual violence were spread across the Penal Code, Criminal Procedure Code, Criminal Amendment Act, and the Evidence Act, with little reference to international norms or standards.[206] However, in 2004, the Attorney General formed a task force to consider the content of a possible bill that would address the growing problem of sexual violence within the

---

[200] Ibid.
[201] Ibid., 5 § 21.
[202] Ibid., 21 § 224; 61 §§ 393-95.
[203] International Crimes Act (2008) § 7(1)d.
[204] See Rome Statute, art. 7(1)(g). Please note, however, that there has been a significant deal of controversy with regard to Joint Criminal Enterprise being used as a mode of criminal liability with regard to sexual violence prosecutions, and that the third variant of Joint Criminal Enterprise liability does not seem to be incorporated into the Rome Statute.
[205] It should be noted that this adoption is not synonymous with implementation or effective regulation. Despite the development of the International Crimes Act, Kenya received a great deal of negative attention in August 2010 when the country failed to arrest Omar Al-Bashir while he was on a visit to the country. Al-Bashir, president of Sudan, currently has an international warrant for his arrest from the ICC for crimes against humanity and war crimes. Despite widespread agreement that Kenya had an international legal obligation to cooperate in enforcing the warrant, they failed to do so.
[206] For a discussion of Kenyan rape laws prior to the Sexual Offences Act, see Celestine I. Nyamu and James T. Gathii, "Towards Reform of the Laws on Rape and Related Sexual Offences in Kenya," In *Law and the Quest for Gender Equality in Kenya*, eds. K. Kibwana and L. Mute (Kenya: Claripress, 2000).

country.[207] The task force was charged with considering, among other things, Kenya's obligations under international conventions and treaties. In 2006, the Kenyan parliament passed the Sexual Offences Act and thus consolidated all of Kenya's laws related to sexual violence into one piece of legislation.[208] Beyond the comprehensive nature of the Act, it also sought to modernize Kenya's approach to sexual violence by addressing the rising problems of rape and sexual assault through legal reform, and introducing stiffer and enhanced penalties for offenders.

Under the Sexual Offences Act, rape is committed if the defendant "intentionally and unlawfully commits an act which causes penetration with his or her genital organs; [and] the other person does not consent to the penetration; [or] the consent is obtained by force or by means of threats or intimidation of any kind."[209] Thus, rape was redefined to consider both males and females as possible victims and perpetrators and to address concepts of consent and coercion, which feature prominently in international jurisprudence. These changes were designed to represent substantive advances on the part of the Kenyan legal system to better address the reality of sexual violence in Kenya.

In addition to these expansions, the Sexual Offences Act also addressed the issue of consent within the definition of rape. Within the Kenyan Sexual Offences Act, a person "consents" if "he or she agrees by choice and has the freedom and capacity to make that choice."[210] Conversely, the Act also recognizes the importance of addressing coercive contexts that implicitly suggest a lack of consent. To this end, the Act allows a judicial body to make "conclusive presumptions" that there was a lack of consent in situations suggesting fraud.[211]

Other progressive aspects of the Act include defining the crime of defilement as an offense of sex with a child below 18 years of age with no option of consent, as well as stipulating it as a non-bailable offense with stiff penalties.[212] New offenses were also added, including gang rape,[213] sodomy,[214] trafficking for sexual exploitation,[215] and child pornography.[216] The Act also

---

[207] Nduku Kilonzo et al., "Sexual Violence Legislation in Sub-Saharan Africa: The Need for Strengthened Medico-Legal Linkages," *Reproductive Health Matters* 17.34 (2009): 14.
[208] Ibid.
[209] Sexual Offences Act (2006) Cap. 80 § 3(1) (Kenya) ("Sexual Offences Act"). The act further specifies "an act is intentional and unlawful if it is committed (a) in any coercive circumstance, including the use of force and threat of harm, (b) under false pretenses or by fraudulent means or (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offense."
[210] Sexual Offences Act, § 42.
[211] Ibid., § 45.
[212] Ibid., § 8.
[213] Ibid., § 10.
[214] See, e.g., ibid., § 5(1) (labeling as "sexual assault" the penetration of the "genital organ" into any part of another person's body).
[215] Ibid., § 18.
[216] Ibid., § 16.

made deliberate infection with HIV a criminal act.[217] Minimum sentences were introduced for the most serious crimes and the act required the promulgation of implementing rules and regulations from the Ministry of Health.[218]

The minimum sentence for rape in Kenya, ten years to life imprisonment, is in fact tougher than the prevailing sub-Saharan norm of a minimum five-year term.[219] Although several cases have arisen in which defendants have objected to the unduly "harsh" nature of theses sentences, the Kenyan High Court has thus far abided by the provisions of the Act. The Act also includes a "rape shield'" provision, which states that:

> No evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused, or any other witness as the proceedings pending before a court.[220]

In addition to redefining rape, the Sexual Offences Act takes the progressive step of defining "sexual assault" as a criminal offense. While rape has gained more widespread recognition in recent years as a criminally prosecutable offense, the criminality of sexual assault, with its broader reach, has been less readily embraced.[221] Many countries continue to refuse to define the crime of sexual assault and those that do often recognize only the more ambiguous offenses of "gross indecency" or "attack on modesty."[222] By contrast, Kenya addresses sexual assault directly within the Sexual Offences Act, holding that a person is guilty of sexual assault if he or she unlawfully

> (a) penetrates the genital organs of another person with (i) any part of the body of another or that person; or (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes; (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ by any part of the other person's body.[223]

The Sexual Offences Act also introduced the offense of "compelled or induced indecent acts," which includes the intentional and unlawful compulsion, inducement, or causation of "any

---

[217] Ibid., § 26; Kilonzo, "Sexual Violence Legislation," 14.
[218] Sexual Offences Act, § 47.
[219] Elizabeth Barad and Elisa Slattery, *Gender-Based Violence Laws in Sub-Saharan Africa: Report prepared for the Committee on African Affairs of the New York City Bar* (2007), 30.
[220] Sexual Offences Act, § 34(1).
[221] Barad and Slattery, *Gender-Based Violence Laws*, 32.
[222] Ibid.
[223] Sexual Offenses Act, § 5(1).

contact between the genital organs of a person, his or her breasts and buttocks with that of another person."[224]

Given these significant substantive changes, many believe that the Act will play an important role in the increased prosecution of sexual violence crimes. While the Coalition on Violence Against Women-Kenya (COVAW) has extensively documented the judicial limitations they perceived prior to the enactment of the Sexual Offences Act,[225] recent commentary on the Act and its implications for judicial decision-making are mixed.[226] However, efforts to analyze the effects of the Act on jurisprudence within the Kenyan courts face two important limitations. First, jurisprudence involving sexual violence and rape is limited, given the small percentage of such cases that are actually adjudicated. Second, because the Sexual Offences Act cannot be applied retroactively, it applies only to acts of sexual violence that occurred after its adoption by the Kenyan Parliament.[227] This, in conjunction with the time that it takes a case to move through the appellate procedures of the court system, has resulted in only a few formal court opinions on offenses charged under the Sexual Offences Act.[228] Only time will tell whether the courts readily

---

[224] Ibid., § 2(1)(a), 6.

[225] See Coalition on Violence Against Women-Kenya, "Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases – A Digest" (2005): 11. This digest surveyed a variety of pre-2005 Kenyan High Court cases, noting that many of these judgments "reveal that the Kenyan courts have, generally, performed dismally in promoting and protecting the rights of women against sexual and related abuses."

[226] See, e.g., Association for Women's Rights in Development, *Legislating Against Sexual Violence: The Kenyan Experience* (2008). Available at http://www.awid.org/eng/Issues-and-Analysis/Library/Legislating-against-sexual-violence-the-Kenyan-experience> (providing a fairly optimistic overview). But see, e.g., C. Ajema, E. Rogena, H. Muchela, B. Buluma, and N. Kilonzo, *Standards required in maintaining the chain of evidence in the context of Post Rape Care Services: Findings of a study conducted in Kenya* (2009) (discussing some of the evidentiary challenges to prosecuting sexual violence cases in Kenya).

[227] See Kiarie Waweru Kiarie, "The Sexual Offences Act: Omissions and Ambiguities." Available at http://www.kenyalaw.org/Articles.

[228] For cases that have addressed the Sexual Offences Act directly, see Jacob Odhiambo v. Republic, K.L.R. (2008) (finding that under the Act it was reasonable to receive evidence of a child of tender years in a sexual offence cases where the child's testimony is the only evidence); Andrew Apiyo Dunga v. Republic, K.L.R. (2010) (holding that the testimony of a single female victim was sufficient under the act to establish a conviction of rape if the court tested with the greatest care that the evidence is reliable); James Nyakundi Machuk v. Republic, K.L.R. (2010) (holding that under the Act, an accused who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer); Andrew Masinde John v. Republic, K.L.R. (2009) (holding that because the victim was a child whose age could not be precisely established, a conviction for attempted defilement under the Act could not be upheld). One of the most interesting issues to arise out of the court interpretations of the Sexual Offences Act is the complication born out of the Act's unique "over-description" of defilement. Because the sentencing of the crime of defilement is dependent on the victim's age, situations have arisen where a failure to accurately discern the age, or assign punishment in accordance with the correct age provision, has led to the possibility of overturned convictions. See Jon Cardon Wagner, K.L.R. (2010) (holding that in a case of defilement it is essential to prove age of complainant either by way of medical evidence or through other evidence given the Act's age-dependent categorizations of punishment) and Alfayo Gombe Okello v. Republic, K.L.R. (2010) (holding that the fact that the defendant was mistakenly charged under the wrong section of the Act pertaining to defilement was serious enough to allow the question of whether this entitled him to an invalidation of the charge). Finally, several other appeals have been brought under the Act, but

adopt the Act and how they interpret its provisions. If enforced effectively, and taken in conjunction with the International Crimes Act, Kenyans may find that their government has successfully aligned much of their domestic jurisprudence with international efforts to raise accountability for acts of sexual violence.

C. Comparative Perspectives: Challenges for Domestic Legal Systems

While the development of laws and jurisprudence addressing international crimes and sexual violence in Kenya provides a good example of the domestic incorporation of international standards, such efforts are not confined to the Kenyan context. Rather, Kenya's accomplishments can be seen as part of a wider international effort to adequately address rape and sexual violence within the domestic legal system, guided by the opinions and statements of international bodies such as the Yugoslavia Tribunal, Rwanda Tribunal and the Court. The methods by which such international norms are being incorporated into domestic legislation have varied widely, but several important themes recur regardless of the national context. This section of the paper considers these themes, the concerns they raise for women, jurists, and governments, and the approaches that various nations have developed in response to such concerns.

i. Complementarity

As the Kenyan example illustrates, efforts to prosecute crimes of sexual violence on a significant scale using international law generally require both domestic criminal legislation (like the Sexual Offences Act) and legislation to incorporate international criminal norms. While domestic implementation of norms included in the Rome Statute remains limited, Kenya is not without counterparts in this pursuit. Currently, 31 African states are parties to the Rome State, and three countries from the Great Lakes Region–Central African Republic, Democratic Republic

---

most have dealt with technicalities or issues of criminal procedure not speaking directly to the substance of the Act. See P.M.M. v. Republic, K.L.R. (2010); Josphat Njue Solomon v. Republic, K.L.R. (2010); Joseph Ikaunyi Emase v. Republic, K.L.R. (2010); James Maina Manene v. Republic, K.L.R. (2010); Benson Muriithi Njoka v. Republic, K.L.R. (2010); Joseph Diwani Mandano v. Republic, K.L.R. (2010); Charles Karuga Kinyua v. Republic, K.L.R. (2009); Daniel Otieno Oracha v. Republic, K.L.R. (2010); W.H.C. v. Republic, K.L.R. (2009); Erro Oba v. Republic, K.L.R. (2009); Dalmar Musa Ali v. Republic, K.L.R. (2008); Solomon Kahi Mwanga v. Republic, K.L.R. (2008); Kamaro Wanyingi v. Republic, K.L.R. (2008); and Samuel Omukuba Ongaro v. Republic, K.L.R. (2008). Although not discussed in detail here, there is a more recent case regarding the substantive law surrounding the SOA and its provisions against child trafficking. Specifically, the Kenyan High Court considered what qualifies as a clinical officer under that provision of the act. For more information see Raphael Kavoi Kiilu v. Republic, K.L.R. (2010).

of Congo, and Uganda—have been the first to engage in self-referrals[229] to the Court prosecutor.[230] Of these states, several have attempted to initiate domestic investigations and prosecutions intended to supplement the Court's prosecutions.[231] To date, these countries' efforts have met with mixed results.

In the Democratic Republic of Congo, five years of violent conflict in the Ituri region of the country led the country, in 2004, to establish an emergency program for the restoration of the domestic judicial system, which would in turn focus on the prosecution of violent crimes, including sexual violence.[232] Funding was allocated for improving the local courts and investigative judges were sent from Kinshasa to provide support. The program, however, suffered from a notable lack of focus on international crimes committed by militia leaders, resulting in violent criminals being charged primarily with petty offences, such as theft and burglary.[233]

The weakness of the Democratic Republic of Congo's judicial efforts was due, in large part, to a failure of the government to fully implement the Rome Statute and provide a mandate for the investigation and prosecution of war crimes.[234] Although draft legislation was prepared in 2002 to implement the Court statute, it was not approved. Thus, while numerous perpetrators were arrested in 2004, they could only be prosecuted under local laws, largely limited to lesser charges. Without the ability to adequently recognize the structural and systematic nature of the pereptrators' crimes, it was widely agreed that these convictions failed to convey the true level of atrocity that had occurred.[235] Although rape and indecent assault are outlawed within the domestic penal code, the failure to implement the charge of crimes against humanity means that the systematic use of sexual violence within the country remains jurisprudentially unacknowledged. Currently, the legislation meant to implement the Rome Statute into Congolese

[229] The Court may exercise its jurisdiction over alleged crimes when those crimes are "referred to the Prosecutor by a State Party," Rome Statute, art. 13(a) (a phenomenon that is commonly known as "self-referral"). The Court may also exercise its jurisdiction when crimes are referred to the Prosecutor by the United Nations Security Council, Rome Statute, art. 13(b), or when the Prosecutor initates an investigation on his or her own accord, Rome Statute, art. 13(c). For additional details regarding ICC law relevant to self-referrals, see Rome Statute, art. 14.
[230] Dapo Akande et al., "An African Expert Study on the African Union Concerns About Article 16 of the Rome Statute of the ICC," *Institute for Security Studies* (2010).
[231] Human Rights Watch, "Making Kampala Count: Advancing the Global Fight Against Impunity at the ICC Review Conference," May 10, 2010. Notably, some nations may initiate domestic investigations and prosecutions to *challenge* the ICC's jurisdiction, since a case is inadmissible when "[t]he case is being investigated or or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution," Rome Statute, art. 17(a). Thus, engaging in domestic investigations and prosecutions that appear to be initiated and conducted in good faith can be one means to avoid the ICC's assertion of jurisdiction over a case in a particular country.
[232] Ibid., 38.
[233] Ibid., 39.
[234] Ibid.
[235] Ibid., 40.

domestic law remains pending: for now, jurisdiction for the prosecution of war crimes, crimes against humanity, and genocide has shifted to the military courts, which have yet to define these crimes within their military code.[236]

Like the Democratic Republic of Congo, Uganda has spent several years attempting to integrate the Rome Statute into domestic legislation. Although Uganda signed the Rome Statute in 1999 and ratified it in 2002, it did not immediately develop implementing legislation. Instead, Uganda self-referred its situation to the Court.[237] In 2008, however, the Ugandan government reversed the forward march toward International Criminal Court prosecutions by agreeing to the development of a domestic court—the War Crimes Division of the High Court—to address international crimes, indicating its intention to challenge the International Criminal Court's jurisdiction over the Uganda Situation. Then, in June 2010, Uganda's International Criminal Court Act formally incorporated the Rome Statute into Ugandan law.[238] Like Kenya's International Crimes Act, the International Criminal Court Act formally recognizes the international violations of crimes against humanity, war crimes, and genocide . Uganda is set to begin its first war crime trial in the coming months in the prosecution of Thomas Kweyolo, a former Lords Resistance Army commander. Although Kweyolo is not himself charged with crimes of sexual violence, several other Lords Resistance Army commanders, including Joseph Kony, face charges of sexual enslavement, rape, and sexual violence at the ICC.[239]

ii. Substantive Comparisons

Several comparative concerns have arisen with regard to the end results of many countries' updated criminal laws prohibiting sexual violence. Specifically, many African nations continue to have divergent views on conceptualizing the act of rape, defining consent and coercion, addressing marital rape and forced marriage, and incorporating provisions against sexual assault.

a. Conceptualizing the Act of Rape

Despite the standards set forth by various international legal bodies, the conceptualization and definition of the *actus reus* of rape (the acts that must have occurred for there to have been a crime recognized by courts) continues to vary widely by country, influenced by cultural concerns,

---

[236] Ibid., 39 n.81.
[237] Public Interest Law and Policy Group, *Outreach Strategy for War Crimes Division of High Court of Uganda* (2010), 15 ("PILPG").
[238] Victims' Rights Working Group, "The Ugandan International Criminal Court Act 2010: What does it mean for victims?" October 20, 2010. Available at http://www.vrwg.org/smartweb/home/home/post/21-the-ugandan-international-criminal-court-act-2010-what-does-it-mean-for-victims.
[239] PILPG, "Outreach Strategy," 14.

historical legislation, and political agendas. As a recent study commissioned by the New York City Bar Association suggested, "The universality of this prohibition [against rape] demonstrates the existence of a shared understanding ingrained in the legal conscience of the international community to punish violations of a person's bodily and sexual integrity. But this agreement does not translate directly into a shared understanding of what constitutes rape."[240] While it is generally accepted that rape involves the forcible sexual penetration of the human body, the means by which this penetration can be established, and what other actions might contribute to a determination of rape, is less clear.

Traditionally, many definitions of rape have confined the fact of penetration to the forcible act of a male utilizing his penis. For instance, the first part of Liberia's Penal Code amendments provide that sexual intercourse constitutes rape if the "perpetrator intentionally penetrates the vagina, anus, mouth, or any other opening of another person (male or female) with his penis, without the victim's consent."[241] Such a definition is insufficient because it fails to account for forms of rape that involve penetration by foreign objects or other body parts of the perpetrator. Rather, many argue that the legal definition of rape, specifically penetration, should be as broad as possible, "encompassing penetration of any bodily orifice … by any foreign object."[242]

Defining rape by gender and by marital status is another recurring limitation. For example, both Eritrea and Ethiopia confine rape to sexual violence committed against women. The Eritrean Transitional Penal Code provides that:

> 1) force or violence must be present, 2) the victim must be a woman, 3) the intercourse must be between unmarried persons, and 4) force may be implied where the woman is unconscious or incapable of resisting the rape.[243]

The overall impact of these constrained definitions is to preclude the acknowledgement and punishment of other forms of rape, leaving substantial numbers of victims without recourse.

By contrast, several countries have adopted definitions that provide a more comprehensive statutory conceptualization of rape. Botswana's Penal Code, adopted in 1986,

---

[240] Barad and Slattery, "Gender-Based Violence Laws," 18.
[241] Act to Amend the New Penal Code Chapter 14 §14.70 and 14.71, and to provide for Gang Rape (2005) § 2 (Pen. C. § 140.70(a) (Liberia). This was later amended to include the intentional penetration of the vagina or anus of another person with a foreign object or with any other part of his body.
[242] Barad and Slattery, "Gender-Based Violence Laws," 21.
[243] Ibid., 19 (quoting Carin Benninger-Budel, Lucina O'Hanlong and Eric Sottas, *Violence Against Women: 10 Reports/Year 2003 for the Protection and Promotion of the Human Rights of Women* (World Organization Against Torture, 2003), 211). Similarly, the Ethiopian Criminal Code provides that, "whoever compels an woman to submit to sexual intercourse outside of wedlock…has committed rape." See Criminal Code, art. 620 (Ethiopia).

provides an expansive definition of penetration, as well as gender-neutral language. It states that a person will be found guilty of rape if that person:

> Has unlawful carnal knowledge of another person, or … causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purposes of sexual gratification, or … causes the penetration of another person's sexual organ into his or her person, without the consent of such person, or with the such person's consent if the consent is obtained by force….[244]

South Africa's Sexual Offences Bill has a similarly broad and progressive conceptualization of rape. The bill first defines rape in gender-neutral terms, providing that a person commits rape if he or she "unlawfully and intentionally commits an act of sexual penetration with another person."[245] The Bill then goes on to explain that sexual penetration can take a variety of forms, including:

> Any act which causes penetration to any extent whatsoever by (a) the genital organs of one other person into or beyond the anus, mouth, or genital organs of another person; [or] (b) any object, including any part of the body of the animal, or other part of the body of one person, into or beyond the anus or genital organs of another person; or (c) the anus or genital organs of an animal…. into or beyond the mouth of another person.[246]

This definition, in combination with South Africa's gender-neutral provisions, presents an expansive understanding of rape that can be used to protect a broad spectrum of victims who may find themselves exposed to sexual violence, including those who experience rape with foreign objects, body parts other than the genitals, or the body parts of an animal. Such definitions are ideal for statutory provisions that seek to punish the incidence of rape in all its forms.

b. Consent and Coercion

As briefly discussed above, consent and coercion play a critical role in the definition of rape. The two concepts represent different understandings of the motives and power dynamics underlying a forced sexual encounter. The debate around whether definitions should rely on a lack of consent by victims or the presence of coercion is deeply rooted in longstanding assumptions surrounding rape, which for many years reflected the belief that a woman who did not want to engage in sexual relations would emphatically and physically resist such conduct, and thus make her lack of consent clear.[247] Although this model has been retained within many domestic laws, in the last several decades scholars and activists have begun to raise concerns with

[244] Penal Code (1986) §141 (Botswana).
[245] Criminal Law (Sexual Offenses) Amendment Bill 2006, Bill 50-2003 (GA) § 3. ("South Africa").
[246] Ibid., §1(1).
[247] Barad and Slattery, "Gender-Based Violence Laws," 19.

this approach, in particular the emphasis placed on the will and conduct of the victim rather than on the behavior of the perpetrator.[248] Other concerns include that consent-based models fail to account for contexts of power and culture that affect a woman's ability to express or otherwise assert her will, as well as the inherent inequality in male-female dynamics that can render the issue of consent almost meaningless.[249]

These critiques have prompted a shift in emphasis: instead of merely "cataloguing" whether penetration occurred and/or whether there was express consent,[250] this emerging view stresses that it is not the specific act alone that should define rape, but rather the general violation of personal dignity, as it occurs within coercive circumstances.[251] This perspective was first illustrated on the international stage in *Akayesu* before the Rwanda Tribunal, and has since gained traction within several domestic legal systems.[252]

On a practical level, these varying definitions of rape require vastly different evidentiary approaches. Those countries that choose to emphasize compulsion or coercion often frame rape within a context of inequality, focusing on "proof of physical acts, surrounding context, or the exploitation of relative position—in other words, social, contextual, and collective considerations."[253] Conversely, countries that focus on consent tend to focus more explicitly on individuals—particularly the victim—and his or her interactions with the perpetrator. The concern is less one of context and more the "atomistic, one-at-a-time interactions" in which the perpetrator and victim engage.[254]

While domestic sexual violence legislation has addressed these issues in a variety of ways, increasingly it has been understood that "it is important for sexual violence legislation to address both [consent and coercion] since lack of agreement and compulsion often overlap and converge in acts of sexual violence."[255] This is not to say, however, that a victim should be required to affirmatively demonstrate the lack of one and the presence of the other, but rather that legislators and the judiciary should be cognizant of the importance of each. Current Kenyan law on the issue of consent is *comparatively* clear and straightforward, stating, "a person 'consents' if

[248] Ibid., 20.
[249] Ibid., 20.
[250] Vanessa E. Munro, "From consent to coercion: Evaluating international and domestic frameworks for the criminalization of rape," In *Rethinking Rape Law: International and Comparative Perspectives*, eds. Clare McGlynn and Vanessa E. Munro (2010).
[251] Ibid., 17.
[252] For example, both the states of California and Illinois in the United States have adopted a definition of gender violence that includes "a physical instruction or physical invasion of a sexual nature under coercive conditions." See Munro, "From Consent to Coercion," 19.
[253] Barad and Slattery, "Gender-Based Violence Laws," 26.
[254] Ibid.
[255] Ibid., 22.

'he or she agrees by choice, and has the freedom and capacity to make that choice.'"[256] Definitions such as these are important for minimizing ambiguity and subjective judicial interpretations.

Similarly, Liberia's definition of consent expands beyond affirmatively defining consent to enumerating when consent is absent. Specifically, consent is presumed to be lacking when "any person, at the time of the relevant act or immediately before it began, was using violence…against the victim or causing the victim to fear that immediate violence would be used against him or her."[257] Thus, if a victim engages in a sexual encounter under circumstances of abuse or the threat of abuse, the defense of consent is implicitly unavailable.

South Africa has similarly defined the circumstances under which consent must be understood to have been absent. South African legislation explains that "consent is understood to involve voluntary or uncoerced agreement."[258] It then lists several instances in which a person cannot voluntarily consent to sexual penetration. These include circumstances where a victim submits or is subjected to a sexual act as a result of the use of force or intimidation by the accused or any other person, or a threat of harm by the accused or any other person, or when the victim is incapable of appreciating the nature of the sexual act.[259] In so doing, the Act recognizes that there are circumstances where consent is vitiated, where even "yes" cannot be understood to mean "yes."[260]

A comprehensive definition of rape must also consider the surrounding force and violence that may contextualize the presence or absence of consent. However, it is important to consider not only overtly violent circumstances but also "situations that … involve threat, coercion, fraud, and incapacity."[261] Once again, South Africa provides a model example, defining coercive circumstances as not only situations where force or intimidation have been used, but also where a threat of harm against the person or property is expressed, abuse of power or authority takes place, or when false pretenses or fraudulent means are used to enable the sexually violent act.[262]

Often such circumstances, considered presumptively coercive, foreground the inherent power imbalances that underlie rape. For instance, coercion occurs when the perpetrator abuses a

[256] Sexual Offences Act, § 42.
[257] Act to Amend the New Penal Code (2005) § 2 (Pen. C. §14.70.3(b)(i)) (Liberia).
[258] South Africa, § 3(2).
[259] This list is not exhaustive. For more situations where consent cannot be established, see Barad and Slattery, "Gender-Based Violence Laws."
[260] Shereen Mills and Meredith Strong, *Submission on Sexual Offences Bill to the Parliamentary Portfolio Committee on Justice June 2006* (University of Witwatersrand Center for Applied Legal Studies, 2006).
[261] Barad and Slattery, "Gender-Based Violence Laws," 25.
[262] South Africa, § 3.

position of authority and/or otherwise inhibits the victim from indicating his or her unwillingness.[263] South Africa, for example, recognizes the power imbalance that may be present in a marriage and the ways in which that power may be abused by explicitly stating that "[a] marital or other relationship, previous or existing, shall not be a defense" to a rape charge.[264] Similarly, in the Democratic Republic of Congo, factors that may contribute to a finding of coercion include whether the perpetrator is in a position of authority over the victim—for example, if the perpetrator is an instructor, public agent, or religious official who has abused his or her position, or a medical personnel, social work, or traditional practitioner who has acted against a person in custody or captivity.[265] Notably, in some countries these factors are presented as "aggravating factors" which may dictate a harsher sentence in rape cases.

c. Marital Rape and Forced Marriage

As mentioned above, one form of potential coercion stems from the marriage relationship. Despite the fact that marital rape has been condemned by the United Nations Declaration on the Elimination of Violence Against Women,[266] it remains a source of controversy within sexual violence legislation. Grounded in traditional notions of women as property, customary laws in many countries have long defined sex within marriage as necessarily consensual,[267] leading to the "conceptual impossibility" of a man raping his wife. This conception underlies the "marital rape exception" that still exists in many jurisdictions.[268] Indeed, the "defense of marriage" remains a legal defense in at least 53 countries, including Kenya.[269]

Driven by the influence of numerous women's rights and human rights groups, marital rape has been increasingly recognized as violating a woman's bodily integrity, and the prosecution of marital rape continues to grow. In fact, marital rape may now be prosecuted in at least 104 countries.[270] While 32 have made marital rape a specific criminal offense, the rest do not allow a marital defense in rape cases.[271] While a provision for prosecuting marital rape is an important first step towards its eradication, prior experiences suggest that the explicit revocation

[263] Ibid.
[264] Ibid., §3(4).
[265] Law Amending the Penal Code (2006) art. 2 (C. Pen art. 171 bis(9)) (Democratic Republic of Congo)
[266] Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 2(a), U.N. Doc. A/RES/48/104 (Feb. 23, 1994).
[267] Helene Combrink, "Rape law reform in Africa: More of the same of new opportunities," In *Rethinking Rape Law: International Perspectives* (2010), 123.
[268] Ibid.
[269] Barad and Slattery, "Gender-Based Violence Laws," 28.
[270] Ibid., 28.
[271] Ibid.

of marriage as a defense (as in South Africa)[272] is necessary in order to fully protect women and minimize any ambiguity.

Forced marriage that takes place in a war context[273] is another marriage-related phenomenon that may be criminalized. However, the recognition of forced marriage as a crime, both within international and domestic criminal law, is extremely contentious, even when it occurs outside of traditional marriage arrangements and as a "spoil" of war.

Forced marriage occurring as an off-shoot of war and political unrest was first recognized as a crime against humanity by the Special Court for Sierra Leone. In 2008, the Special Court described forced marriage as "a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim."[274] Some form of forced marriage may also be considered as a charge in the second Khmer Rouge trial in the Extraordinary Chambers in the Courts of Cambodia, where, between 1975 and 1979, the Khmer Rouge compelled countless Cambodian civilians marry and bear children without consent in order to alter the fabric of Cambodian society. [275]

Although the prevalence of forced marriage and its intrinsic connection to marital rape has been extensively documented, efforts to prohibit the practice have met with resistance in many parts of the world.[276] Most jurisdictions seem unwilling to conceptualize forced marriage as a phenomenon that is so inherently coercive that victims are incapable of giving consent to sexual interactions, thus resulting in rape when such interactions occur.[277] Notably, however, Burkina Faso, Ethiopia, and Djibouti have recently criminalized some form of forced marriage within their penal codes.[278] In Kenya, although early marriage has been criminalized under the

[272] South Africa, § 3(4).
[273] It should be noted that this phenomenon is distinct from and unrelated to the phenomenon of traditional, arranged marriages, the latter of which we are not discussing in this paper.
[274] Prosecutor v. Brima, SCSL-04-16-A (2008), ¶ 195.
[275] See Beth van Schaack, "Introducing the Crime Against Humanity of Forced Marriage," *Accountability* (2009-2010); Kong Sothanarith, "Groups Urge Adding Sexual Violence to Tribunal Charges," *VOANews*, Nov. 3, 2010. Available at http://www.voanews.com/khmer-english/news/Groups-Urge-Adding-Sexual-Violence-to-Tribunal-Charges-106609208.html.
[276] Mohamed Y. Mattar, "Access to International Criminal Justice for Victims of Violence Against Women under International Family Law," *Emory International Law Review* 23 (2009): 148.
[277] Ibid.
[278] UNIFEM, "Violence against Women." Available at: www.un.org/.../D.%20Violence%20against%20women%20(Sep%2009).pdf.

Children's Act of 2001, the issue of forced marriage between adults was not explicitly addressed in the Sexual Offences Act.[279]

iii. Expanding the Scope: Sexual Assault and Beyond

While the jurisprudence criminalizing rape has realized great gains in recent years, legal conceptualizations of sexual assault have been less clear, and certainly less uniform. However, sexual assault is gaining recognition as a critical tool for combating sexual violence. This is particularly the case because prosecutors in many jurisdictions must resort to sexual assault provisions in order to capture many forms of sexual violence—for example, marital rape in jurisdictions where marriage is a defense to rape but not to sexual assault. At its most basic level, sexual assault is commonly defined as "sexual aggression that does not involve penetration."[280] This definition, however, is at best ambiguous and, at worst, unworkable in the context of a criminal trial, which typically requires precise definitions for effective prosecution. It is therefore somewhat unsurprising that most sub-Saharan African countries, when recognizing the crime of sexual assault, tend to do so indirectly.[281] Indeed, among the sub-Saharan African countries, only South Africa has directly addressed the offense within its legislation.[282]

Among those countries that indirectly address sexual assault, the form and punishment vary widely. Some countries, such as Nigeria, refer to "unlawful and indecent assault," but fail to define the actions that are encompassed within this crime, making it difficult for victims to come forward.[283] Similarly, Shari'ah Law—practiced in Nigeria and several other African nations—refers to the crime of "assault or criminal force to women with intent to outrage modesty."[284] Conversely, sexual assault provisions may also suffer when they are too narrow. In countries where rape is defined solely as penetration with a sexual organ, for example, sexual assault has often been defined to only account for other forms of penetration.[285] This approach frequently

---

[279] Organisation Mondiale Contre la Torture, "Situation of Violence against Women and Children in Kenya: Implementation of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment," *Alternative Report to the UN Committee Against Torture* (2009).
[280] Barad and Slattery, "Gender-Based Violence Laws," 32. Notably, however, Kenya does include penetration in the Sexual Assault provision (section 5) of its Sexual Offenses Act.
[281] Ibid.
[282] South Africa, §11.
[283] Criminal Code Act (1990) § 360. Specifically the code states that any person "who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanour, and is liable to imprisonment for two years." This provision becomes all the more confusing when taken in tandem with Nigeria's provisions against a separate crime of "unlawfully or indecently dealing with a girl under sixteen years of age," (§ 222) and "gross indecency" for sexual acts committed with a child under the age of sixteen (§ 285).
[284] Zamfara State of Nigeria Shari'ah Penal Code Law (2000), § 138.
[285] See Sexual Offences Act, § 5(1).

leaves victims who experience other forms of sexual violence (as those not involving penetration) without legal recourse.[286]

Returning to the unique case of South Africa—the only sub-Saharan African country to provide an expansive and cohesive legislative response to sexual assault—sexual assault is defined as the unlawful and intentional sexual violation of the complainant without the complainant's consent. A sexual violation is defined to exclude sexual penetration, but include any act that causes direct or indirect sexual contact. Contact has been defined expansively to include contact between genital organs, the mouth, any other area of the body resulting in sexual stimulation, any object used for sexual purposes, and sexual contact with an animal.[287]

Additionally, South Africa recognizes the offense of "compelled sexual assault," and is one of only a few countries to do so. This form of sexual assault occurs if an individual intentionally and unlawfully compels an individual, without their consent, to engage in a variety of sexual acts.[288] This provision recognizes and addresses many of the issues of coercion discussed above, including the reality that in certain contexts, a complainant may be compelled to engage in sexual behavior in which they otherwise would not engage. Kenya has also addressed

---

[286] Barad and Slattery, "Gender-Based Violence Laws," 34.

[287] Specifically, sexual violation is defined as:

(a) direct or indirect contact between the –
- (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
- (ii) mouth of one person and –
  - a. the genital organs or anus of another person or, in the case of a female, her breasts;
  - b. the mouth of another person;
  - c. any other part of the body of another person, other than the genital organs or anus of that person or, in the case of female, her breasts which could –
    - i. be used in an act of sexual penetration; or
    - ii. cause sexual arousal or stimulation or
    - iii. be sexually aroused or stimulated thereby or;
  - d. any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) the mouth of the complainant and the genital organs or anus of an animal;

(b) the masturbation of one person by another person; or

(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.

[288] Specifically, that statute defines compelled assault as intentionally and unlawfully compelling a complainant, without the consent of the complainant, to (i) engage in masturbation, any form of arousal or stimulation of a sexual nature of the female breast, or sexually suggestive or lewd acts with the complainant himself or herself; (ii) engage in any act which has or may have the effect of sexually arousing or sexually degrading the complainant; or (iii) causes the complainant to penetrate in any manner whatsoever his or her own genital organs or anus.

this issue through the offense of "compelled or induced indecent acts," which includes the intentional and unlawful compulsion, inducement or causation of "any contact between the genital organs of a person, his or her breasts and buttocks with that of another person."[289]

Such an expansive understanding of sexual assault has many advantages. First, it is gender-neutral with respect to both victim and perpetrator. Second, "it accepts that purposefully inspiring in a victim the belief that he or she will be sexually assaulted should also be punishable."[290] Third, by clearly delineating what actions constitute sexual assault, it increases the power of the statute by more clearly illustrating the difference between sexual assault and rape.[291]

D. Moving Forward Domestically

As can be seen, Kenya is not alone in its efforts to improve accountability for rape and other forms of sexual violence. Building upon the efforts of the Rwanda and Yugoslavia Tribunals, as well as advances realized in the Rome Statute, Kenya continues to make significant strides towards creating an effective domestic legal framework through which to prosecute and redress sexual offences. While challenges remain, both in Kenya and elsewhere, such domestic initiatives, in combination with the ongoing efforts of the international community, will ideally continue to develop an ever-stronger and more effective framework for prosecuting sexual violence around the world.

V. CONCLUSION

This paper has raised several issues that must be considered as nations continue to grapple with how to address sexual violence through legal mechanisms. These "lessons" have in common the goal of maximizing accountability and redressing the wrongs suffered by the greatest number of people.

To meet these aspirations, it is critical that nations implement legislation to fully adopt the Rome Statute's gender and sexual violence provisions, especially the elements of crimes and rules of procedure and evidence. Not only will this help to ensure that domestic laws are as protective of victims' rights as international law, but such legislation will streamline prosecution and enforcement by ensuring consistency among jurisdictions.

---

[289] Sexual Offences Act, §2(1)(a).
[290] Barad and Slattery, "Gender-Based Violence Laws," 35.
[291] There are also extensive comparisons on the nature of domestic violence statutes throughout Sub-Saharan Africa. For more information on these, see ibid., 51.

Second, courts must be receptive to changing understandings of the nature of sexual violence and the nature of its victims. While courts are not the only mechanisms through which sexual violence can and should be addressed, there is no doubt that the law plays an important role in structuring how sexual offences are conceptualized. Courts and other institutions charged with developing relevant law may find it necessary to consider several issues, many of which are beyond the scope of this paper, including 1) broader understandings of "who" constitutes a victim, including men and children; 2) the issue of secondary victimization, including the impact on those closely affiliated to victims, such as victims' children, spouses and surrounding communities; 3) the needs of children born of rape and forced pregnancies; 4) looking beyond rape and sexual violence to also address sexual assault and domestic violence; 5) the realities of force and violence, which may blur and/or negate consent; and 5) the most effective means to empower victims through the advancement of sexual violence laws and policies.

While the international legal community has demonstrated its willingness and (less frequently) its ability to address and prosecute crimes of sexual violence, its efforts are most effective when coupled with those of national governments. Encouraged by advances made by the Yugoslavia and Rwanda Tribunals and International Criminal Court, an increasing number of national governments have begun to address rape and sexual violence through their domestic jurisprudence, tackling definitional issues and procedural hurdles to create systems that have the potential to protect and redress victims of sexual violence. Indeed, without national *and* international prosecutions, the vast majority of offenders will continue to enjoy impunity for their crimes.

Although the practice of recognizing sexually violent acts as criminal did not begin in earnest until the mid-twentieth century, the concerted efforts of the Rwanda and Yugoslavia Tribunals to acknowledge and define such crimes has significantly expanded the potential for prosecutors to hold perpetrators accountable. Through the process of addressing issues of coercion and consent and broadening relevant definitions, rape and sexual violence have progressed from crimes committed solely by virtue of women's status as the property of men, to constituent offenses underlying other international crimes, and finally to stand-alone offenses—recognized by both international and domestic jurisdictions—that recognize the sexual autonomy of all humankind.

BIBLIOGRAPHY

BOOKS, REPORTS, ARTICLES AND PRESENTATIONS

Address of the Ministry of Justice at the International Colloquium on "L'Accès des victims à la Cour Pénale Internationale." 27 April 1999.

AEGIS, "Sexual violence against girl soldiers," 27 Sept. 2010.

Ajema, C., Rogena, E., Muchela, H., Buluma, B. and Kilonzo, N. *Standards required in maintaining the chain of evidence in the context of Post Rape Care Services: Findings of a study conducted in Kenya*. 2009.

Akande, Dapo, et al. "An African Expert Study on the African Union Concerns About Article 16 of the Rome Statute of the ICC." Institute for Security Studies, 2010.

Askin, Kelly Dawn. *War Crimes Against Women: Prosecution in International War Crimes Tribunals*. Kluwer Law International, 1997.

Association for Women's Rights in Development. "Legislating Against Sexual Violence: The Kenyan Experience." 2008.

Barad, Elizabeth and Elisa Slattery. "Gender-Based Violence Laws in Sub-Saharan Africa." Report prepared for the Committee on African Affairs of the New York City Bar, 2007.

"Bemba Trial Begins 22 November 2010," *ACCESS: Victims' Rights Before the International Criminal Court: Victims' Rights Working Group Bulletin* 17, Winter 2010).

Benninger-Budel, Carin, Lucina O'Hanlong and Eric Sottas. "Violence Against Women: 10 Reports/Year 2003 for the Protection and Promotion of the Human Rights of Women." World Organization Against Torture 211, 2003.

Cassesse, Antonio. *International Criminal Law, Second Edition*. Oxford University Press, 2008.

Center on Law and Globalization, "The Statute of the International Criminal Court."

Coalition for the International Criminal Court. "Delivering on the promise of a fair, effective and independent Court: the Crime of Aggression."

Coalition for the International Criminal Court, "Kenyan Government Challenges ICC Involvement in Post-Election Violence Case," 1 April 2011.

Coalition for the International Criminal Court. "Ratification of the Rome Statute."

Coalition on Violence Against Women-Kenya. "Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases – A Digest." 2005.

Cohen, Miriam. "Victim's Participation Rights Within the International Criminal Court: A Critical Overview." *Denv. J. Int'l L. & Pol'y* 37 (2009): 351.

Combrink, Helene. "Rape law reform in Africa: More of the Same of new Opportunities." In *Rethinking Rape Law: International and Comparative Perspectives*. Clare McGlynn and Vanessa E. Munro, eds. New York: Routledge, 2010.

De Brouwer, A.L.M. "Gacumbitsi Judgement," in G. Sluiter & A. Klip (eds.), *Annotated leading cases of international criminal tribunals: The international criminal tribunal for Rwanda 2005-2006*. Antwerp - Oxford - Portland: Intersentia.

De Brouwer, A.L.M., "What the international criminal court has achieved and can achieve for victims/survivors of sexual violence," *International Review of Victimology* 16 (2009): 183.

De Brouwer, Anne-Marie. *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*. Belgium: Intersentia, 2005.

Dowdeswell, Jane. *Women on Rape*. HarperCollins. 1986.

Dunbar, Douglas. American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC). "ICC Pre-Trial Chamber Approves Prosecutor's Investigation in the Kenya Situation" (2010): 1.

Ellis, Mark S. "Breaking the Silence: Rape as an International Crime." *Case Western Reserve Journal of International Law* 38 (2006-07): 227-247.

Final Record of the Diplomatic Conference of Geneva of 1949. 2 Vols. April 21, 1949.

Gambone, Lisa. "Failure to Charge: The ICC, Lubanga & Sexual Violence Crimes in the DRC." War Crimes: The World Affairs Blog Network.

Glassborow, Katy. "Call for Lubanga Charges to Cover Rape." Institute for War and Peace Reporting. May 12, 2008. <http://iwpr.net/report-news/call-lubanga-charges-cover-rape>.

Goetz, Mariana. "Interview with Maitre Marie-Edith Douzima, Lawyer and Victims' Representative in the Bemba Case." *ACCESS: Victims' Rights Before the International Criminal Court: Victims' Rights Working Group Bulletin* 17. (Winter 2010): 3.

Goldstone, Richard J. "Prosecuting Rape as a War Crime." *Case Western Reserve Journal of International Law* 33 (2002): 277-285.

Goldstone, Richard J and Estelle A. Dehon. "Engendering Accountability: Gender Crimes Under International Criminal Law." *New England Journal of Public Policy* (2003-2004).

Human Rights Watch. *Genocide, War Crimes and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia*. New York: Human Rights Watch, 2004.

Human Rights Watch. *Making Kampala Count: Advancing the Global Fight Against Impunity at the ICC Review Conference*. New York, Human Rights Watch: 2010.

Inder, Brigid. "Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo." Press Conference. International Criminal Court. Nov. 22, 2010.

International Committee for the Red Cross. *Commentaries on Convention (IV) relative to the protection of Civilian Persons in Time of War*.

International Committee of the Red Cross. *International Humanitarian Law – Treaties and documents.*

International Criminal Court. "Jurisdiction and Admissibility."

International Criminal Court. "The Role of the Trust Fund for Victims and its Relation with the Registry of the International Criminal Court." ICC Press Kit no. pids.008.2004-EN. April 22, 2004.

International Criminal Court, "Victims and Witnesses Unit." 26 May 2004.

International Criminal Tribunal for the Former Yugoslavia. "Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case." Press Release. JL/P.I.S./566-e. Feb. 22, 2001.

Jorda, Claude and Jérôme de Hemptinne. "The Status and Role of the Victim." *The Rome Statute of The International Criminal Court: A Commentary* 2. Antonio Cassese, et al., eds. Oxford: Oxford University Press, 2002.

Jouet, Mugambi. "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court." *St. Louis U. Pub. L. Rev.* 26 (2007): 253.

Keller, Linda M. "Seeking Justice at the International Criminal Court: Victims' Reparations." *Thomas Jefferson Law Review* 29 (2007): 189-217.

Kelsall, Michelle Staggs, et al, *Lessons Learned from the 'Duch' Trial: A Comprehensive Review of the First Case Before the Extraorindary Chambers in the Courts of Cambodia*. Asian International Justice Initiative's KRT Trial Monitoring Group, 2009.

Kiarie, Kiarie Waweru. "The Sexual Offences Act: Omissions and Ambiguities." *Kenya Law Reports.* July 2007.

Kilonzo, Nduku, et al. "Sexual Violence Legislation in Sub-Saharan Africa: The Need for Strengthened Medico-Legal Linkages." *Reproductive Health Matters* 17 (2009): 10-19.

Lee, Roy S., ed. *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. New York: International Publishers, 2001.

Lewis, Dustin A. "Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law." *Wisconsin Journal of International Law* 27 (2009): 1-49.

"The Lubanga Trial at the International Criminal Court: Background." *Open Society Foundations*. 2011.

Mattar, Mohamed Y. "Access to International Criminal Justice for Victims of Violence Against Women under International Family Law." *Emory International Law Review* 23 (2009): 141-165.

McDonald, Maria. "Rape and Torture Charges in the Case against Jean-Pierre Bemba." *ACCESS: Victims' Rights Before the International Criminal Court: Victims' Rights Working Group Bulletin* 17. Winter 2010.

Mettraux, Guénael. *International Crimes and the* ad hoc *Tribunals*. Oxford University Press, 2005.

Mettraux, Guénael. *The Law of Command Responsibility*. Oxford University Press, 2009.

Mills, Shereen and Meredith Strong. "Submission on Sexual Offences Bill to the Parliamentary Portfolio Committee on Justice June 2006." Center for Applied Legal Studies: University of Witwatersrand, 2006.

Mitchell, David S. "The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine." *Duke Journal of International and Comparative Law* 15 (2005): 219-257.

Moreno-Ocampo, Luis. Prosecutor, International Criminal Court. *Letter to President Song*. ICC-01-09-1-Anx 06-11-2009. 5 Nov. 2009.

Munro, Vanessa E. "From consent to coercion: Evaluating international and domestic frameworks for the criminalization of rape." In *Rethinking Rape Law: International and Comparative Perspectives*. Clare McGlynn and Vanessa E. Munro, eds. New York: Routledge, 2010.

Nyamu, Celestine I. and James T. Gathii. "Towards Reform of the Laws on Rape and Related Sexual Offences in Kenya." In *Law and the Quest for Gender Equality in Kenya*. K. Kibwana and L. Mute, eds. Kenya: Claripress, 2000.

Okuta, Antonina. "National Legislation for Prosecution of International Crimes in Kenya." *Journal of International Criminal Justice* 7 (2009): 1063-1076.

Open Society Foundations. *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*. 2011.

Organisation Mondiale Contre la Torture. "Situation of Violence against Women and Children in Kenya: Implementation of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment." *Alternative Report to the UN Committee Against Torture.* 2009.

Petrig, Anna and Pocar, Fausto. "Case Referral to National Jurisdictions: A Key Component of the ICTY Completion Strategy," *Criminal Law Bulletin* 45: 1-21 (2009).

Public Interest Law and Policy Group. "Outreach Strategy for War Crimes Division of High Court of Uganda." 2010.

Ramirez-Barat, Clara. *Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice*. International Center for Transitional Justice, 2011.

Roht-Arriaza, Naomi, "Reparations in the aftermath of repression and mass violence." In Eric Stover and Harvey M. Weinstein. *My Neighbor, My Enemy*. Cambridge University Press, 2004.

Rose, Cecily. "Troubled Indictments at the Special Court for Sierra Leone." *Journal of International Criminal Justice* 7 (2009): 353.

Schaack, Beth, "Introducing the Crime Against Humanity of Forced Marriage," *Accountability* (2009-2010).

Schneider, Mary Deutsch, "About Women, War and Darfur: The Continuing Quest for Gender Violence Justice," *North Dakota Law Review* 83 (2007).

Sellers, Patricia Viseur. "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation." *Office of the High Commissioner for Human Rights* (n.d.): 7.

Sellers, Patricia Viseur. "Sexual Violence and Peremptory Norms: The Legal Value of Rape." *Case Western Reserve Journal of International Law* 34 (2002): 287-303.

Senier, Amy. "The ICC Appeals Chamber Judgment on the Legal Characterization of the Facts in Prosecutor v. Lubanga." *American Society of International Law Insights* 14 (2010).

Sexual violence against girl soldiers. AEGIS, 2010. Film.

Sothanarith, Kong. "Groups Urge Adding Sexual Violence to Tribunal Charges." *VOANews*. Nov. 3, 2010.

Tamilnation.org. "Human Rights and Humanitarian Law: Rome Statute of the International Criminal Court."

Totani, Yuma. *The Tokyo War Crimes Trials: The Pursuit of Justice in the Wake of World War II.* Cambridge: Harvard University Asia Center, 2008.

United Nations. *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*. Vol. 2. Rome: United Nations, 1998.

United Nations Women Website. "Violence against Women." *n.d.*

van Schaack, Beth. "Introducing the Crime Against Humanity of Forced Marriage." *Accountability* (2009-2010).

Victims' Rights Working Group. "The Ugandan International Criminal Court Act 2010: What does it mean for victims?" Oct. 20, 2010.

Women's Initatives for Gender Justice, *Advancing Gender Justice: A Call to Action* (2009).

World Organization Against Torture (OMCT). *Violence Against Women in Kenya: Report for the Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women by Kenya*. CEDAW 28th Session. Jan. 13-31, 2003.

Yoshimi, Yoshiaki. *Comfort Women: Sexual Slavery in the Japanese Military during World War II*. New York: Columbia University Press, 1995.

LEGAL AUTHORITIES

Act to Amend the New Penal Code Chapter 14 §14.70 and 14.71 and to provide for Gang Rape (2005) (Liberia).

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1544, 82 U.N.T.S. 279. Aug. 8, 1945.

Andrew Apiyo Dunga v. Republic, K.L.R. (2010).

Andrew Masinde John v. Republic, K.L.R. (2009).

Benson Muriithi Njoka v. Republic, K.L.R. (2010).

Charles Karuga Kinyua v. Republic, K.L.R. (2009).

Charter of the International Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589.
Constitution (2010) (Kenya).

Control Council Law No. 10. Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity. Dec. 20, 1945.

Convention on the Prevention and Punishment of Genocide. 102 Stat. 3045, 78 U.N.T.S. 277. Dec. 9, 1948.

Convention Respecting the Laws and Customs of War on Land, and Annex to the Convention, Regulations Respecting the Laws and Cusftoms of War on Land (Hague IV) The Hague, 18 Oct. 1907, 3 Martens (3d) 461, 36 Stat. 2277.

Criminal Code (Ethiopia).

Criminal Law (Sexual Offenses) Amendment Bill 2006, Bill 50-2003 (GA) (South Africa).

Dalmar Musa Ali v. Republic, K.L.R. (2008).

Daniel Otieno Oracha v. Republic, K.L.R. (2010).

Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II. International Criminal Court. ICC-01/09-1 06-11-2009. 6 Nov. 2009.

Declaration on the Elimination of Violence Against Women. United Nations General Assembly Resolution. G.A. Res. 48/104. U.N. Doc. A/RES/48/104. Feb. 23, 1994.

Erro Oba v. Republic, K.L.R. (2009)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War. 75 U.N.T.S. 287. Aug. 12, 1949.

International Crimes Act (2008) (Kenya).

Kamaro Wanyingi v. Republic, K.L.R. (2008).

Jacob Odhiambo v. Republic, K.L.R. (2008).

James Nyakundi Machuk v. Republic K.L.R. (2010).

James Maina Manene v. Republic, K.L.R. (2010).

Jon Cardon Wagner K.L.R. (2010).

Joseph Diwani Mandano v. Republic, K.L.R. (2010).

Joseph Ikaunyi Emase v. Republic, K.L.R. (2010).

Josphat Njue Solomon v. Republic, K.L.R. (2010).

Law Amending the Penal Code (2006) (Democratic Republic of Congo).

Okello v. Republic, K.L.R. (2010).

Okunda v. Republic, K.L.R. (1970).

Pattni and another v. Republic, K.L.R. (2001).

Penal Code (1986) (Botswana).

Penal Code (2009) (Kenya).

P.M.M. v. Republic, K.L.R. (2010).

Prosecutor v. Bagosora. Judgment. International Criminal Tribunal for Rwanda. ICTR-98-41-T. 2008.

Prosecutor v. Brima, Special Court for Sierra Leone, SCSL-04-16-A (2008).

Prosecutor v. Delalic, Judgment. International Criminal Tribunal for the Former Yugoslavia. IT-96-21-T. 2001.

Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic. Judgment. International Criminal Tribunal for the Former Yugoslavia. IT-96-23/1-T. Feb. 22, 2001.

Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic. International Criminal Tribunal for the Former Yugoslavia. IT-96-23-A and IT-96-23/1-A. Jun. 12, 2002.

Prosecutor v. Furundzija. International Criminal Tribunal for the Former Yugoslavia. IT-95-17/1-T. Dec. 10, 1998.

Prosecutor v. Furundzija. Appeals Judgment. International Criminal Tribunal for the Former Yugoslavia. IT-95-17/1-A. July 21, 2000.

Prosecutor v. Gacumbitsi. International Criminal Tribunal for Rwanda. ICTR-2001-64-T. June 17, 2004.

Prosecutor v. Jean-Paul Akayesu. International Criminal Tribunal for Rwanda. ICTR-96-4-T. Sept. 2, 1998.

Prosecutor v. Kajelijeli. International Criminal Tribunal for Rwanda. ICTR-98-44A-T. 2003.

Prosecutor v. Kamuhanda. International Criminal Tribunal for Rwanda. ICTR-95-54A-T. 2004.

Prosecutor v. Muhimana. International Criminal Tribunal for Rwanda. ICTR-99-52-A. 2007.

Prosecutor v. Musema. International Criminal Tribunal for Rwanda. ICTR-96-13-T. 2000.

Prosecutor v. Muvunyi. International Criminal Tribunal for Rwanda. ICTR-2000-55A-T. 2006.

Prosecutor v. Renzaho. International Criminal Tribunal for Rwanda. ICTR-97-31-T. 2009.

Prosecutor v. Rukundo. International Criminal Tribunal for Rwanda. ICTR-2001-70-T. 2009.

Prosecutor v. Semanza. International Criminal Tribunal for Rwanda. No. ICTR-97-20-T. 2003.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. 1125 U.N.T.S. 3. June 8, 1977.

Raphael Kavoi Kiilu v. Republic, K.L.R. (2010).

Rome Statute of the International Criminal Court. 2187 U.N.T.S. 90, 37 I.L.M. 1002. July 17, 1998.

Samuel Omukuba Ongaro v. Republic, K.L.R. (2008)

Situation in the Republic of Kenya. International Criminal Court. ICC-01/09-19-Corr 01-04-2010. Mar. 31, 2010.

Zamfara State of Nigeria Shari'ah Penal Code Law (2000) (Nigeria).