THE PROSECUTION OF SEXUAL AND GENDER BASED VIOLENCE IN ARMED CONFLICT AT THE INTERNATIONAL CRIMINAL COURT

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Abstract

Sexual and Gender Based Violence (SGBV) is a wicked, harmful and animalistic act directed at persons of both sexes. Such acts include but not limited to rape, forced prostitution, selective malnourishment of female child, organ mutilation, and the like. SGBV is a prevalent issue that is devoid of solution. The most pervasive form of gender violence is rape and is the least recognised and prosecuted human rights violation. No doubt SGBV is generally accorded recognition as a crime under municipal and international law, yet victims suffer from under prosecution. SGBV remains largely under reported and under prosecuted mainly because of the shame, stigma, psychological, physical and emotional trauma ascribed to the victims. The paper provides an overview of the extent of prosecution of gender based violence in armed conflict and the challenges in the investigation and prosecution. It also explores the obstacles to gender sensitive investigation and prosecution thereof. Against this backdrop, the doctrinal method was used in the course of writing this paper whereby references were made to conventions, statutes, and case laws. This paper prescribed possible solutions in the form of recommendations and the way forward.

1.0 Introduction

Sexual and Gender-based violence encompasses a multitude of conduct, directed at persons because they are of a particular gender. It particularly resonates as a code phrase for violence inflicted against women and girls, which is itself, a manifestation of the woman rights violation of discrimination based on sex.[1] However, persons of any gender – male or female can be victims of sexual or gender based violence in armed

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[1] Sellers V.P., "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation." www.ohchr.org /issues/women/docs accessed 23rd October, 2015.

conflict. In most cases, women and girls are particularly the most affected. As a matter of fact, males have been severally abused in armed conflict. A research carried out in Uganda by Refugee Law project stated that 1 in 3 Congolese male refugee have experienced sexual violence in their lifetime.

For centuries, sexual violence during armed conflict was widely viewed as part of the legitimate spoils of war. Even as customary law began to change this perception, there was little ability or interest to acknowledge, let alone prosecute such actions. Rape and other forms of sexual violence have also been used as strategic weapons and policies of war, designed to invoke terror, prove absolute power over a population and tear apart the fabric of communities that fall prey to such acts of violence. Rape and other sexual violence are also crimes perpetrated against men with equally devastating consequences.[2] More so, dealing with male victims of sexual violence is even more complicated because male victims hardly ever come forward with what has happened to them and services are mostly addressed to women.[3]

SGBV usually are designed to humiliate men and emasculate the victim and it takes on variety of form which includes anal or oral rape, torture cutting off the genitals, enforced nudity. There are instances where men are forced to rape fellow men or women or even watch a female relative being asexually assaulted.[4]

In 1994 Rwanda, during the Rwanda Genocide, the *Interahamwe*[5], members of the Rwanda Armed Forces, communal

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[2] Anna Griffin and Yvette Zegenhagen, "The Development of Prohibitions Against Sexual Violence in Armed Conflict" www.redcross.org.au/gender-armed-conflict-and-humaniterian-responce.aspx accessed 23rd October, 2015.

[3] SDC, "Sexual and Gender-based Violence in Crisis and Conflicts" https://www.eda.admin.ch/dam/laender accessed 23rd October 2015.

[4] Schulz A. "The ICC and Crimes of Sexual and Gender Based Violence" www. justicehub.org/article/icc-and-crimes-sexual-and-gender-based-violence-sgbv accessed 02 January, 2017.

[5] Askin K.D., Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles, (21 BERKELEY J.INT'L L 2003) p. 288.

police, and the militia used rape and sexual violence as weapons of war.[6] Tutsi women and girls, described as 'accomplices' of enemy combatants, were targeted, raped, assaulted, and eventually killed. Tutsi women and moderate Hutu women were singled out, raped, sexually assaulted, and later also killed.[7] These practices were specifically implemented as a policy for genocide. Tutsi women were sexually assaulted with the specific intent to destroy their reproductive competence, while other Tutsi women were raped and sexually assaulted simply because they were Tutsi.[8] This was confirmed by Réne Degni-Segui, the Special Rapporteur on the situation of human rights in Rwanda,[9] estimated that between 250,000 and 500,000 rapes occurred in total.[10]The consequences are legion.

Over the last decades, the international community has taken concrete steps in response to the various calls to recognize gender based violence as a serious crime. Prior to the development of International Humanitarian Law, laws governing conduct in war were primarily based in custom, bi-lateral agreements, military doctrine and religious codes.[11] In 1863 the Lieber Code listed rape as one of the most serious violations of war, punishable by death.[12] One of the earliest attempts at international codification of sexual violence was the Regulations to the 1899 Hague Convention II that implicitly referenced a prohibition on sexual violence during occupation, stating 'family honour and rights … must be respected.'[13] This was also expressed in the 1907 Hague

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6 Odora A.O. "Rape and Sexual Violence in International Law: ICTR Contribution" www.nesl.edu/VOL12/obote-adora accessed 23rd October, 2015.

7 Ibid.

8 Ibid.

9 as appointed by the United Nations Human Rights Commission

10 Haffajee R.L., "Prosecuting Crimes of Rape and Sexual Violence At The ICTR: the Application of Joint Criminal Enterprise Theory" www.law.harvard.edu/vol291/haffajee accessed October 2015.

11 The Australian Red Cross, "Prohibitions against sexual violence in armed conflict" http://www.redcross.org.au/sexual-violence-in-armed-conflict.aspx accessed 23rd October 2015.

12 Ibid.

13 Ibid.

Regulations and after World War II in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY). International legal prohibitions against gender based violence or sexual violence were considerably expanded during the development of the 1949 Geneva Conventions and their 1977 Additional Protocols.[14] More so, both the ICTY and ICTR have included rape as a crime against humanity, but in 1996, in a watershed judgment; in the case of Prosecutor v. Akayesu,[15] rape was recognized and prosecuted as genocide. Furthermore, The ICC Statute has gone further by specifically providing an expansive list of sexual and gender based crimes as distinct war crimes relating to both international and non-international armed conflict. It has also expanded the list of sexual and gender based crimes as crimes against humanity, to include not only rape but other forms of sexual violence as well as persecution on the basis of gender.[16]

The UN has also recognized the use of rape as a means of warfare. In 2008 the UN Security Council (UNSC),[17] focused on sexual violence in armed conflict. For the first time the UN recognized rape as a tactic of war and acknowledged that sexual violence is a barrier to building sustainable peace. Toeing this part, there has been Secretary General's Bulletins, G8 statements, human rights law and policy instruments and civil society projects, which together with the 2010 establishment of the UN Special Representative of the Secretary General on Sexual Violence in Conflict, have all contributed to developing the ways in which gender based violence and sexual violence in wartime is viewed and subsequently prosecuted.[18]

In as much as IHL, International Human Rights law and International Institutions have done so much in developing laws prohibiting Gender Based Violence and also enhancing

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14 Ibid.

15 Case No. ICTR-96-4-T, Judgment (2nd September 1998).

16 ICC- The Office of the Prosecutor: Draft Policy Paper on Sexual and Gender Based Crimes, 2014.

17 Resolution 1820.

international judicial mechanism in the prosecution of those who perpetrate these acts, the challenges in prosecuting such offences is still enormous-the victims are not willing to publicly come out and seek justice; also, victims suffer a great deal of social and ethnic discrimination. To further compound this situation states are not doing enough in investigating and prosecuting persons who commit gender based violence. Therefore, the need to bring to justice does who perpetrate these heinous crimes in an efficient, prompt and effective manner must be addressed, especially by states, because they bear the highest responsibility of investigation and prosecution.

2.0 Conceptual Issues

In this part of the work we shall discuss the meaning of gender and the definition of violence.

2.1 Gender

The word gender has been used since the 14th century as a grammatical term, referring to classes of noun designated as masculine, feminine, or neuter in some languages.

Gender has simply been defined as, "the state of being male or female (typically used with reference to social and cultural differences rather than biological ones)".[19] The Merriam-Webster Dictionary[20], as well as the English Learners Dictionary[21] both define gender as "the state of being male or female". The Black's Law Dictionary[22] defines Gender as, the "Defined difference between men and women based on culturally and socially constructed mores, politics, and affairs". This definition for the purpose of this work is too wide, for it brings in Gender identity in its definition. Furthermore, gender has been defined as, referring

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[19] Ibid.

[20] http://www.merriam-webster.com/dictionary/gender accessed 28th October, 2015.

[21] http://www.learnersdictionary.com/definition/gender accessed 28th October, 2015.

[22] http://thelawdictionary.org/gender/- Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. accessed 28th October, 2015.

"to the culturally expected behavior of men and women based on roles, attitudes and values ascribed to them on the basis of their sex."[23] This definition is limited for it defines gender in light of the behaviors expected from men and women by the customs of a people, excluding its simple connotation as a distinction between sexes.

The term Gender can simply be defined as a term used to differentiate between sexes- male or female, boy or girl, man or woman. In armed conflict, the only general distinction is that between combatant(s) and civilians and not between a male and female,[24] however, the question is, why should certain kind of violence be targeted at persons based only on their gender alone?

2.2 Violence

Violence can simply be defined as the "exertion of physical force so as to injure or abuse"[25]. It could also be defined as a "Behavior involving physical force intended to hurt, damage, or kill someone or something"[26] it must be pointed out that, this definition does not define violence as one which could be carried out against one's own self

3.0 Cases of Sexual Gender-Based Violence

The first case at the ICTY to concentrate entirely on charges of sexual violence was that against Anto Furundžija, in *Prosecutor v. Anto Furundzija*[27]. The trial focused on the multiple rapes of a Bosnian Muslim woman committed during interrogations led by Furundžija who was at the time the commander of the Jokers, a special unit of the Croatian Defence

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[23] Report Summary, International Expert Meeting: 'Gender Perspectives on International Humanitarian Law' 4–5 October 2007 Stockholm, Sweden.

[24] Though, specifically speaking, as in some cases distinctions must be made between males and females e.g when camping civilians.

[25] http://www.merriam-webster.com/dictionary/violence accessed 28th October, 2015.

[26] http://www.oxforddictionaries.com/definition/english/violence accessed 28th October, 2015.

[27] Case No.: IT-95-17/1-T 10 December 1998.

Council (HVO).[28] The court in discussing the position of the law on Gender-based violence stated that:

> The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very raison d'être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.

The court holding further stated that; As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration.

However, it was not Furundžija that personally carried out these acts, but his subordinate who raped the woman in front of a laughing audience of other soldiers. Nevertheless, as the unit's commander, and falling under the principle of 'command responsibility' Furundžija was found guilty as a co-perpetrator and as an aider and abettor. The conviction was upheld on appeal and Furundžija was sentenced to 10 years' imprisonment.[29]

The second ICTY trial to deal entirely with charges of sexual violence was the case of *Prosecutor .v. Dragoljub Kunarac*

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[28] ICTY-Landmark cases, http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases accessed 29th October, 2015.

[29] Ibid.

et al[30], where sexual enslavement and rape was punished as crimes against humanity. The judgement broadened the acts that constitute enslavement as a crime against humanity to include sexual enslavement and determined the relationship of gender crimes to customary law.[31] Bosnian Serbs gathered Muslim women in detention centers around the town where they were raped by Serb soldiers. Many women were then taken to apartments and hotels run as brothels for Serb soldiers. The judges heard the testimonies of over 20 women regarding repeated acts of rape, gang rape and other kinds of sexual assault and intimidation. The women also described the way in which they were obliged to perform household chores, were forced to comply with all the demands of their captors, were unable to move freely and were bought and sold like commodities. In short, they lived in conditions of enslavement.[32] There was no doubt in the Judges' minds that the enslavement was sexual in nature. This was a significant ruling, because international law had previously associated enslavement with forced labour and servitude. The definition of the crime was therefore widened to include sexual servitude. All three accused were also found guilty of rape as a crime against humanity.[33] The convictions were upheld by the Appeals Chamber.

Furthermore, in the case of *Prosecutor .v. Jean-Paul Akayesu*[34] where rape and acts of sexual violence was held and punished as an act of genocide that was targeted at the Tutsi's.

The court stated that; the rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. Therefore, the court held that, the acts described were indeed acts that constituted the factual elements of the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi. The trial Chamber further satisfied its self beyond reasonable doubt that these acts were committed by

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30 Case No.: IT-96-23& IT-96-23/1-A 12th June, 2002.

31 ICTY-Landmark cases, http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases accessed 29th October, 2015.

32 Ibid.

33 Ibid.

34 Case No. ICTR-96-4-T 2nd September, 1998.

Akayesu with the specific intent to destroy the Tutsi group, as such.

Gender-based violence is one which the international community frowns against and has also punished. This is clear from the cases provided above. Therefore, any form of gender-based violence targeted against a person, be it male or female is prohibited under international law and must be punished.

It is noteworthy to state that ICC has comprehensive provision relating to gender crime but the ICC is failing to fulfil its obligation to investigate, charge and fully prosecute these crimes more so worrying is that there has not being and charge of SGBV perpetrated against men. The social stigma created by this crime are not less as they affect not only the individual victim but the families and immediate communities.

4.0 Recognition of Sexual Violence Under International Humanitarian Law, International Criminal Law and International Human Rights Law

Here we shall examine the provisions of International law (under the three heads stated above), in their recognitions of gender-based violence in armed conflict.

Rape or any other form of sexual violence in time of war is specifically prohibited by treaty law: the Geneva Conventions of 1949, Additional Protocol I of 1977 and Additional Protocol II of 1977 all prohibit any form of sexual violence.

Common Article 3(1)(c) of the 1949 Geneva Conventions provides that "outrages upon personal dignity" are prohibited at any time and in any place whatsoever with respect to persons hors de combat. Although, common Article 3 does not explicitly mention rape or other forms of sexual violence, it however prohibits "violence to life and person" including cruel treatment and torture and "outrages upon personal dignity" and as such it impliedly prohibits whatever form of sexual violence.

Article 27,[35] also prohibit any form of sexual violence against women. Additional Protocol I[36] also makes provisions

[35] Geneva Convention IV 1949.

[36] Protocol Additional to the four Geneva Conventions 1977.

prohibiting any form of sexual violence in armed conflict. Article 75(2)(b) of the said protocol provides that "enforced prostitution and any form of indecent assault" shall remain prohibited at any time and in any place whatsoever. Furthermore, Article 76(1) provides that women "shall be protected in particular against rape, forced prostitution and any other form of indecent assault". In Article 77(1) children are protected against any form of indecent assault. For non-international armed conflict, Article 4(2)(e) of Additional Protocol II[37] provides that "enforced prostitution and any form of indecent assault" shall remain prohibited at any time and in any place whatsoever".

Before the existence of the four Geneva Conventions and Additional Protocols, there existed laws which now constitute customary international law. It has gradually crystallized out of the express prohibition of rape in Article 44 of the Lieber Code[38] that specifically prohibits any form of rape.

Pursuant to Article 6(d) of the ICC Statute[39], "imposing measures intended to prevent births within the group" constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". Also, pursuant to Article 7(1)(g) of the Statute, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" constitutes a crime against humanity. Furthermore, pursuant to Article 8(2)(b)(xxii) and (e)(vi) of the Statute, "committing rape, sexual slavery, enforced prostitution, forced pregnancy … enforced sterilization, or any other form of sexual violence" constitutes a war crime in both international and non-international armed conflicts.

The ICTR[40] statute prohibits any form of sexual violence in armed conflict; Article 3 recognizes rape as a crime against humanity, when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic

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37 Protocol Additional to the four Geneva Conventions 1977.

38 Francis Lieber, Instructions for the Government of Armies of the United States (1863).

39 The Statute entered into force on 1 July, 2002.

40 UN Doc.S/RES/955 (8th Nov. 1994).

or religious grounds. Article 27 of the 1990 African Charter on the Rights and Welfare of the Child[41] provides that "States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials". The preamble to the 1993 UN Declaration on the Elimination of Violence against Women,[42] expresses concern that "women in situations of armed conflict are especially vulnerable to violence". Article 2 of the Declaration supports prohibition of violence against women.

By virtue of Section 7.2, 7.3 and 7.4 of the 1999 UN Secretary-General's Bulletin,[43] rape, enforced prostitution or any form of sexual assault and humiliation against persons not, or no longer, taking part in military operations and persons placed hors de combat, with a specific reference to women and children, are prohibited at any time and in any place.

Furthermore, the N'Djamena Declaration on Ending Recruitment and Use of Children by Armed Forces and Groups in June 2010, Cameroon, the Central African Republic, Chad, Nigeria, Niger and Sudan adopted the N'Djamena Declaration. In the preamble, the participating States reiterated their concern regarding the precarious situation of children affected by conflict and the consistent presence of children within armed forces and groups in their region".

International law generally prohibits sexual violence in whatever form and in whatever situation. It is clear from the above that whether under IHL or international criminal law or even International human rights law, the all prohibits this kind of Violence mostly as crimes against Humanity or where the

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41 AU Doc. CAB/LEG/24.9 (1990).

42 UN Declaration on the Elimination of Violence Against Women, (85th plenary meeting, December 1993).

43 ST/SGB/1999/13, 6th August, 1999.

necessary conditions are fulfilled, it is punished as an act of genocide.

5.0 Investigation of Sexual and Gender-Based Violence

It is clear that, there are various judicial remedy a victim of sexual violence could explore in other to seek remedy. However, even when a victim is willing to take actions against his or her attacker in court, such a person is still faced with myriad of challenges which could clog the wheels of justice. The investigation itself could be difficult- the collection of testimony and evidence in sexual violence cases can pose unique challenges.[44] These problems can be compounded in times of armed conflict, when authority structures are disrupted and authorities may even be the perpetrators. In some cases, investigators and prosecutors may bear the same gender biases or rape myths prevalent in their community, treating sexual violence cases as personal matters or as less important than other crimes.[45] Also, a lack of coordination between prosecutors and investigators poses a challenge with evidence collection, causing eventual prosecutions to suffer.

Whether a crime of sexual violence occurred in private or in public, investigators must engage a range of fact-finding efforts to produce evidence to support the case and also engage standard procedures in investigation. This fact-finding usually involves gathering legally relevant historical and circumstantial facts surrounding the crime (as with victims' and witnesses' statements), as well as proof of the physical aspects of the crime (as with crime scene evidence or the medical condition of victim). The latter includes forensic evidence, such as physical crime scene material and DNA samples, which investigators and healthcare professionals collect and forward for analysis and use in court.[46]

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[44] Seelinger K.T., et al, "The Investigation and Prosecution of Sexual Violence" www.usip.org/seelinger-the- investigation. Accessed 30th October 2015.

[45] Ibid.

[46] Ibid.

6.0 Challenges

Victims of sexual violence can face myriad obstacles to reporting an assault. In much of the world, women are viewed as keepers of the family virtue and female modesty is enshrined in law or tradition. A woman may suffer if she reports a crime: she may lose status in her community or her husband may leave her. She may even be killed. Where female sexuality itself is taboo, women may not be able to discuss sexual crimes with male authorities. Too often, women view violence, including sexual violence, as a fact of life. Under these circumstances women sometimes elect, or are pressured by their families or communities, not to report sexual violence to authorities[47].

Many victims have no prior experience with the legal system and do not know how to proceed in sexual violence cases. The insensitive attitudes of police officers may deter women from coming forward or prevent them from pursuing a case[48].
Even more innocuously, lack of resources in law enforcement may discourage victims from reporting crimes, generally.

Some commentators have argued that many of the difficulties in prosecuting sexual violence and gender-based crimes stem from the fact that, historically, acts of sexual violence were often viewed as "a detour, a deviation, or the acts of renegade soldiers . . . pegged to private wrongs and . . . [thus] not really the subject of international humanitarian law."

7.0 Challenges of Prosecution of Sexual and Gender Based Violence

Trial chambers sitting in the recently created international criminal courts, the *ad hoc* tribunals and mixed courts are challenged to deliver gender-competent interpretations of

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[47] Liz Kelly, "Promising Practices addressing sexual violence" (paper presented at the expert group meeting, UN Division for the Advancement of Women in collaboration with UN Office on Drugs and Crime, Vienna, Austria, May 17-20, 2005): 4.

[48] Kelly, Liz, Jo Lovett, and Linda Regan, "A gap or a chasm? Attrition in reported rape cases," Home Office Research Study 293 (London: UK Home Office Research, Development and Statistics Directorate, 2005): x-xi.

humanitarian norms that govern war crimes, international crimes, and doctrines of individual responsibility, such as command responsibility or procedural safeguards of due process, especially in light of the plethora of evidence submitted by witnesses recounting gender-based violence.

In this light, the prosecution of rape, a core violation of humanitarian law, serves as a measurement of the protection from gender-based violence and of the right to equal access to judicial forum that is afforded women and girls. As a result of the creation of judicial institutions and their co-existing international penal jurisdictions, several definitions of the elements of rape as a crime exist. The following are setbacks encountered in the prosecution of gender based violence:

(a) Charges

Building on the preliminary examination and the substantive and detailed investigations and collection of evidence, the Office will ensure that charges for sexual and gender-based crimes are brought wherever there is sufficient evidence to support such charges.

In principle, the Office will bring charges for sexual and gender-based crimes explicitly as crimes *per se*, in addition to charging these acts as forms of other violence within the Court's subject-matter jurisdiction, where the material elements are met, e.g., charging rape as torture, persecution, and genocide.

The situations and cases before the Court have tended to show that rape and other sexual and gender-based crimes against both females and males are often widespread, and/or used systematically as a tool of war or repression.[49] These crimes may

[49] In the *Bemba* case, the Office included in the charges rapes committed against both females and males, and called not only female victims, but also two men in positions of authority who were victims of rape to testify at trial. See *Prosecutor v. Bemba*, Public Redacted Version of the Amended Document containing the charges filed on 30 March 2009, ICC-01/05-01/08-395-Anx3, 30 March 2009, alleging, *inter alia*, that, women were raped on the pretext that they were rebel sympathizers. Men were also raped as a deliberate tactic to humiliate civilian men, and demonstrate their powerlessness to protect their families. In the *Kenyatta* case, the Office included in the charges acts of forcible circumcision against, and penile

be committed, *inter alia*, as a result of explicit or implicit orders or instructions to commit such crimes; as a consequence which the individual is aware will occur in the ordinary course of events during military operations directed against civilian populations, for instance; or because of an omission (e.g., a failure to order subordinates to protect civilians, or failure to punish similar crimes committed in prior operations). These crimes may also be caused by a combination of other relevant factors at all levels of an organisation, such as a culture of tolerance. In order to ensure accountability in the diversity of scenarios, the statutes provide for various modes of liability under Article 25 and 28, and standards required to satisfy the mental element are set out in Article 30.

(b) Witness Preparation

The Office will consistently seek approval from Chambers to prepare witnesses for the purpose of promoting efficient and accurate testimony.[50] Bearing in mind the additional stigma as well as the social and other consequences of sexual and gender-based crimes, the Office considers witness preparation, particularly in such cases, to be highly desirable in supporting the psychological well-being of witnesses, diminishing the intimidation of the court-room environment, and facilitating the complete provision of

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amputation of, men perceived to be supporters of the opposition party. See *Prosecutor v. Kenyatta*, Public Redacted Version of the Corrigendum of the Second Updated Document Containing the Charges, ICC-01/09-02/11-732-AnxA-Corr-Red, 10 May 2013, p. 34.

[50] Departing from the practice in earlier cases, Trial Chamber V in the two Kenya cases decided to permit witness preparation, recognising that proper witness preparation not only helps ensure that the witness gives relevant, accurate, and structured testimony, but also enhances the protection and well-being of witnesses, including by helping to reduce their stress and anxiety about testifying. *Prosecutor v. Ruto et al*., Decision on witness preparation, ICC-01/09-01/11-524, 2 January 2013, paras. 4, 37, and 51; *Prosecutor v. Kenyatta et al.*, Decision on witness preparation, ICC-01/09-02/11-588, 2 January 2013, paras. 4, 41, and 52. Witness preparation has been widely practised by the *ad hoc* international criminal tribunals to facilitate the presentation of testimonial evidence.

evidence pertaining to sexual and gender based crimes.[51] This process will be carefully conducted in accordance with any guidance that may be issued by the Chamber, as well as the Office's internal guidelines, in order to ensure that the fairness and integrity of the proceedings are not compromised in any manner.

The general obligations during proceedings are as enshrined in Article 68 of the Statute is the central article with regard to the protection of victims and witnesses throughout the proceedings, and is binding for all Organs of the Court.[52]

With regard to In-court measures, Article 68(2) of the Statute provides that as an exception to the principle of public hearings, the Chambers may conduct any part of the proceedings *in camera,* or allow the presentation of evidence by electronic or other special measures to protect victims and witnesses. In particular, such special measures are mandatory in the case of a victim of sexual violence, or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

Where necessary to protect a victim or witness of sexual and gender-based crimes, the practice of the Office is to request a Chamber to order measures pursuant to rule 87. These include hiding the name of a person and any identifying information from the public records of the Chamber; prohibiting the parties and the participants to the proceedings from disclosing the name and any identifying information of a person to a third party; presenting evidence by electronic or other special means, including by image or voice alteration, video-conferencing, and closed-circuit

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[51] *Prosecutor v. Ruto et al*., Decision on witness preparation, ICC-01/09-01/11-524, 2 January 2013, para. 37.

[52] According to article 68(1) of the Statute, ,The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

television, or the exclusive use of sound media; using pseudonyms; and conducting proceedings, or parts thereof, in closed session. In the case of witnesses who may face an increased risk of psychological harm and/or psychological or physical difficulties which may affect their well-being and ability to testify, the Office will request the Chamber to take special measures with a view to minimizing the risk of re-traumatization and facilitating their testimony.[53]

With respect to the evaluation of the evidence necessary for charging sexual and gender-based crimes, and the burden on the prosecution to prove its case, as a matter of law, should be no more substantial or onerous than for other crimes. The Office will ensure that this is reflected in its investigation and prosecution strategies, including in its litigation before Chambers.

The Rules contain provisions that aim to protect witnesses/victims of sexual and gender-based crimes, in particular, with regard to the issues of corroboration, consent, and past behaviour. Rule 63(4) of the Rules provides that corroboration is not required in order to prove any crime within the Court's jurisdiction, in particular, crimes of sexual violence. Within the limits of its mandate, the Office will contribute to the consistent application of this rule, while ensuring sufficient evidence to prove the charges.

Rule 70 outlines the principles of evidence in cases of sexual violence. Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force or coercion, or taking advantage of a coercive environment, undermined the victim's ability to give voluntary and genuine consent.[54] Similarly, consent cannot be inferred by reason of any

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[53] The first sentence of rule 88(1) of the Rules provides, ,Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2.

[54] Rule 70(a) of the Rules.

words or conduct of a victim where the victim was incapable of giving genuine consent,[55] or by reason of silence or lack of resistance.[56] According to rule 70(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. Rule 71 further provides that in light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69(4), evidence of the prior or subsequent sexual conduct of a victim or witness is generally inadmissible. These provisions provide an important disqualification of any attempt to undermine or discredit victims or witnesses of sexual violence based on their perceived or actual sexual conduct.

(c) Interpreter.

It is worthy of note that often times, interpreters fail to work closely with the investigators and prosecution counsel to ensure that interviews with rape victims are conducive to eliciting testimony. Equally, attention has not been paid to creating an enabling environment that is culturally empathetic and comfortable for the rape victim. In the past, interpreters have not provided a cultural bridge to help investigators and prosecutors to correctly ask questions in a manner that is acceptable. The competence and honesty of language assistants and interpreters are crucial to the integrity of the entire process of investigation and prosecution.[57] It however continues to provide a challenge in prosecution.

(d) Enabling Environment

Equally observed is the fact that Prosecution counsel and Judges have ensured that rape victims are treated with sensitivity, respect, and care whenever they come forward to testify. In that respect, all parties being part of the judicial process, such as

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55 Rule 70(b) of the Rules.

56 Rule 70(c) of the Rules.

57 BEST PRACTICES MANUAL for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict Lessons from the International Criminal Tribunal for Rwanda 2008, pp. 11-12.

judges, lawyers or interpreters, should be trained on how to handle such victims and how to recognize trauma. It requires significant courage for a rape victim to publicly speak about the sexual assault against them due to the stigma and taboo. Judges and prosecution counsel must intervene when necessary to ensure that rape victims are not harangued and harassed on the stand by defense counsel[58].

While clearly the defense has a right to cross-examine witnesses, care should be taken to ensure that the questioning of rape victims is not excessively or gratuitously repetitive. Courtroom cooperation should be ensured to diminish unnecessary time being spent on issues relating to disclosure, between defense and prosecution when handling rape victims. Prosecution counsel should strive to create a friendly and reassuring atmosphere. Such an atmosphere would relax the witness, while also winning his/her confidence to talk freely about his/her experience. In addition, it is recommended that witnesses should be given a brief familiarization tour in order to prepare them for the courtroom experience. A good and effective orientation session with respect to the proceedings and the courtroom experience will ultimately affect the evidence the witnesses are able to give on the stand. Rape witnesses should be permitted to have a witness care assistant seated next to them, if necessary, while they testify.

Lastly, the work also observed that in the past, counseling and other services were not adequately provided throughout the trial. Courtroom television screens on the witness stand, which periodically show the face of the accused on the screen, should be turned off if they are upsetting a rape witness. Tissues and water should be provided on the witness stand.[59]

(e) Gathering or Collection of Evidence

Prosecutors and investigators must coordinate to ensure that the latter are gathering the evidence upon which the former can build accurate and comprehensive indictments.[60]

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[58] Ibid p. 15.

[59] Ibid p. 16.

[60] Owrojee N, (explaining that investigators in Kigali, Rwanda, often gathered witness statements of only a few paragraphs that were of little assistance to

In particular, locating physical, documentary, and testimonial evidence that proves the commission of sexual violence may present unique challenges [61]as compared to other crimes of violence that may be more visible or publicly documented.[62] Victims of sexual violence, both male and female, are often initially unwilling to come forward to testify about such acts, and investigators may be reluctant to pressure witnesses to reveal the full scope of the harm suffered.

The basic obstacles in the prosecution of gender based violence are not limited to financial and legal obstacles. The momentum behind the development of the ICC has yet to be fully translated into justice. Systemic indicators to measure progress in international justice, such as efforts to mainstream gender, remain more discretionary than absolute. The speed at which the Rome Statute secured 60 ratifications has been followed by the slow pace and failures of the court in apprehending and trying suspects. While the number of investigations, arrests and prosecutions may qualify as achievements insofar as they challenge international norms, until 2009—when the first international criminal trial commenced— there had not been a single trial in the nearly seven years following the Rome Statute's entry into force.[63]

While apprehending suspect's remains one of the most challenging and timely aspects of the ICC, additional obstacles persist.[64] As an international treaty, only those states parties that

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prosecutors). This coordination was hampered within the ICTR by the fact that many investigators were located in Kigali, Rwanda, whereas the prosecutors were more often in Arusha, Tanzania, where the Tribunal is located.

61 Ibid.

62 ICC Office of the Prosecutor, Annex to the "Paper on Some Policy Issues Before the Office of the Prosecutor": Referrals and Communications 1 (Sept. 2003) (noting that the ease of investigation is a factor that is taken into account when deciding on which situations to focus).

63 International Center for Transitional Justice, 'What next for international justice?', Fact sheet, 2009, <http://www.ictj.org/static/2009/English/factsheets/prosecutions.html>. accessed 11/10/2015.

64 On the misalignments of legal mandates, resources and expectations see Burke-White, W. W., 'Proactive complementarity: the International Criminal Court and national courts in the Rome System of international justice', *Harvard International Law Journal*, vol. 49, no. 1 (winter 2008), pp. 59–61.

formally express their consent are bound by the statute's provisions.

Additionally, despite its global mandate, the ICC has concentrated its efforts in African countries, partly because of its ability to only prosecute crimes those committed on or after the date of the adoption of the Rome Statute.

(f) Political and Cultural Setbacks

Significant political and cultural limitations to the efforts to prosecute sexual violence persist. The ICC's emphasis on individual accountability contributes to the obscuring of the structural causes as well as the political and economic contexts of sexual and gender violence.[65] Indeed, since the ICC intended only to try a few superior commanders for the crimes committed by many, other deeper problems, specific to a region's socio-economic make-up will persist. Established as a 'court of last resort', the ICC had hoped and expected national judicial bodies to bring to justice other, lesser-known perpetrators. This ambition, however, has fallen through the cracks of complementarity with little notice.

8.0 Rape, Human Rights and Criminal Law

A two prong approach will look at comparative provisions of international human rights law and international criminal law that proscribe sexual violence or sexual exploitation, to inquire how they address the consent or "lack of consent of the victim, taking into account, the age of the victim. The aim is to understand how human rights law can inform IHL and *vice versa*, what human rights law demands, particularly in relation to non-discrimination can impact the manner in which IHL should be interpreted.

Examining the legal reasoning adopted by regional human rights courts in adjudicating cases of rape is pertinent. The Inter-American Commission on Human Rights, exercises jurisdiction

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[65] Wilson, R. A., 'Is the legalization of human rights really the problem?', eds S. Meckled-Garcia and B. Cali, *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge: London, 2005), pp. 81–87.

over the rights protected by the American Convention on Human Rights,[66] the Convention of Belem do Para and other regional human rights instruments.[67] The *Raquel Martí de Mejía v. Perú* case,[68] usually cited for its interpretation of the American Convention's guarantee of the right to be free from rape, did not define the elements of rape. *Mejía v. Perú*, held that the act of rape could violate the safeguards of torture which are prohibited by Article 5 of the American Convention. The State was assigned responsibility for torture. Rape, thus, fulfilled one of the elements of torture, namely: 1) an intentional act through which physical and mental pain and suffering is inflicted on a person. The other two elements of torture held that such an act is; 2) committed with a purpose; and 3) committed by a public official or by a private person acting at the instigation of the former." [69]

In *Miguel Castro Prison v. Peru*,[70] a detention case, whereby women visitors to a male detention centre were caught in a two-day uprising, the Court held forced nudity inflicted upon the women violated their personal dignity. The Court, did not define the sex-based conduct, but relied on the definitions that were put forth by the ICTR in the Akayesu, such as sexual violence, when determining that forced nudity was an act of sexual violence.[71]

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[66] Organization of American States, American Convention on Human Rights, 22 November 1969, O.A.S.T.S. No, 36, 1144 U.N.T.S. 123.

[67] These include the Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador', arts. 8(a), 13, 19, 17 November 1988, O.A.S.T.S. No. 69; Organization of American States, Inter-American Convention to Prevent and Punish Torture, 9 December 1985, O.A.S.T.S. No. 67; Organization of American States, Inter-American Convention on Forced Disappearance of Persons, art XIII, 9 June 1994, 33 I.L.M. 1429.

[68] *Raquel Martín de Mejía v. Perú*, Case 10.970, Inter-Am.C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7, at 157, 1996.

[69] The Court also found that Meija's right to privacy under Article 11.1 was violated. The *Mejia* Court's holding that the rape satisfied the human right prerequisites of torture was cited to by the Delalic Trial Chamber when it delivered the first ICTY conviction for acts of rape as torture.

[70] Case of the *Miguel Castro-Castro Prison v. Peru*, Inter-Am Ct. H.R. (ser. C) No. 160, 25 November 2006.

[71] *Akayesu*, para. 688.

Upon recognition that one of the women had been subjected to "a finger vaginal 'inspection', carried out simultaneously by several hooded people the Court again resorted to the ICTR jurisprudence to classify the sexual conduct as "sexual rape", the gravity of which was made clear after drawing on several other sources of international human rights law.[72]

The European Court of Human Rights, (ECHR) exercises jurisdiction over all matters of interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR has held that State Parties are responsible for rape crimes either when State agents perpetrated rape or when the State failed to provide an adequate remedy at the national level. The European Convention, like the American Convention, never explicitly provides for the right to be free from sexual violence. As a result, the ECHR initially characterized rape as a violation of the right to privacy. Later, the ECHR followed the progression of the Inter-American Commission's jurisprudence, when it recognized rape as torture and as a severe form of inhumane treatment.

In *X & Y v. Netherlands*, the ECHR[73] held that rape abridges the right to privacy under Article 8, which protects the "physical and moral integrity of the person, including his or her sexual life". The Court did not define the elements of rape.

In *Aydín v. Turkey*,[74] decided in 1997, the ECHR found that rape can also constitute a violation of Article 3 of the European Convention, which prohibits torture. In this case, a local Turkish police officer had been charged with the rape of a seventeen-year-old Kurdish girl who was illegally detained. The Court did not pronounce itself on the elements of rape, since its deliberations focused on rape as a form of torture which is a human rights violation.

The case of *M.C. v. Bulgaria*[75]concerned a 14 year-old girl that had mental disabilities and who had been raped by two men while on a date. The age of consent in Bulgaria was 14 years old.

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72 Akayesu Supra para. 309 -312.
73 *X&Y v. Netherlands*, ECHR, 1983.
74 *Aydin v. Turkey*, 25 EHRR 251, 1988.
75 *M.C. v. Bulgaria*, ECHR 646, 2003.

The *M.C.* Court found that the State's investigation procedures and interpretation of the rape elements should have taken into account M.C.'s mental deficiencies when interpreting evidence of whether force by the perpetrator or resistance by M.C. had been established. Neither, in M.C. was deemed a requirement. Hence, the Grand Chamber found a violation of Article 3 and Article 8 – prohibition of degrading treatment and the right to respect for private life respectively – and held that Bulgaria had failed to fulfil its punish the rape of M.C..

As to whether M.C. consented to the sexual intercourse, the Court opined that historically in rape cases domestic law and practice required proof of the use of physical force by the perpetrator and physical resistance on the part of the victim. It noted, however, that now, many European countries, including common-law jurisdictions, had removed references to physical force from their legislation. The Court held that lack of consent, *via* assessment of the surrounding circumstances, not a *sine qua non* of resisting force, had become the critical assessment in defining rape. The M.C. jurisprudence noted that ICTY's interpretation of the definition of rape under *Kunarac*, paid heed to the circumstances in which the rape occurred as did the ICTR in their recognition of the coercive circumstances approach established in *Akeyesu*. It, moreover, found that failure to protect victims subject to coercive surrounding would lead to impunity and contravenes the State responsibility to investigate and prosecute appropriate to any pertinent status of the victim/survivor.

In general, the Court recognized that the State's positive obligation to adopt measures to secure respect for private life must be in conformity within the wider requirements of non-discrimination within the Convention. The *M.C.* case is the first to raise sexual autonomy and equality as relevant to the State's obligation to investigate and prosecute sexual violence, in order to comply with its ECHR Art 3 substantive and procedural obligations. The Court also observed that law and legal practice reflect the changing social attitudes requiring respect for the individual's sexual autonomy and equality.

How sexual autonomy and equality were examined in the non-war context might be of relevance to conflict-related prosecutions. The ICC could glean support from the *M.C.* holding. To interpret elements of rape, one must be cognizant of the factual circumstances, such as the age or relevant status of the victim, for example, limited mental ability. This approach is reflected in the sub-provision Article 8(2) (b) (xxii)-1 of the Element of the Crimes that supplements the Rome Statute. It reads, in pertinent part, that rapes can be perpetrated "by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[76]

Regional human rights jurisprudence has examined a range of human rights violations, such as torture, degrading treatment of violations of privacy, factually established by the inflictions of rape. Nevertheless, the regional human rights courts are slim on any assessments of rape as an enumerated human rights violation in and of itself or other specific acts gender-based violations. Accordingly, the elements of rape as an international crime are only indirectly assessed and only when relevant to determining the presence or absence of a human rights violation, such as inhumane treatment. Two decisions from regional courts have invoked jurisprudence from the *ad hoc* Tribunals. The 2006 decision in *Miguel Castro Prison* resorted to ICTR opinions concerning rape and sexual violence, while the 2003 decision in *M.C.*, cited to the ICTY and ICTR jurisprudence on rape. Accordingly, the jurisprudence of human rights law cannot offer definitive responses about the requirement of the lack of consent element under international criminal law, however, their opinions, such as the regional human rights expression of sexual autonomy and sexual equality, enlighten the purview of human rights standards that inform the prosecution of gender-based violence.

9.0 Prosecution of Sexual and Gender Based Voilence in ICTR, ICTY and SCSL

[76] EoC, Article 8(2) (b) (xxii)-1.

The SGBV concept has its roots in feminist epistemology, in its articulation of women's human rights. Specifically, it focuses on violations directed against women and other vulnerable groups and attempts to assess the violations and prosecutions so far:

The approach under this head shall take the format of a critical analysis of the various judgments that have been handed down in the ICTR, ICTY and the SCSL that have had an impact on the prosecution of SGBV. Some of the cases are detailed in order to give a proper description as to why and how the different trial and appeals chambers arrived at their decisions whereas some of the cases only state the legal principle that was unique to the particular facts of the case without any in-depth factual background.

The reason for this is because all of the cases were not dealing directly alone with the issue of gender-based crimes. However, these cases illustrate the uniqueness of each with regards to the definition of the different forms of SGBV and how they dealt with the evidence and the testimonies of the witnesses. Comparisons are also made within the different cases of the different courts and how each of the courts applied each other's precedents and definitions. The cases in the ICTR will be discussed first followed by the cases in the ICTY and finally the cases in the SCSL.

The cases that are discussed below are of importance because first, the international tribunal had to deal with the crime of rape as a form of genocide and second, precedent was set in international law as to how the prosecution of gender-based crimes should be carried out. The first case was important because it was the first time that the definition of rape was given in an international tribunal.

Prosecutor v Jean-Paul Akayesu[77]

The Trial Chamber held that "rape is a form of aggression and the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts." Rape was

[77] Case No IT-96-4-T**,** hereinafter referred to as the *Akayesu* case.

then defined as; "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive." This definition was accepted and used in the ICTY judgment of *Prosecutor vDelalic*[78] but rejected in another ICTY judgement of *Prosecutor v Furundzija*[79] where the chamber decided to define rape as according to "a mechanical description of objects and body parts" a definition that was the direct opposite of the *Akayesu* one. The definition given in the *Akayesu* case illustrated how the Trial Chamber was culturally sensitive towards the victims because in their culture, most of the victims were not allowed to discuss matters such as rape or sexual violence in detail in public. The Trial Chamber also rejected the need for "lack of consent" in the definition when the crime occurred. This also illustrated that the Chamber acknowledged the widespread and extreme nature in which the sexual violence had occurred during the conflict.

This case was unique because in most instances rape and sexual violence has male perpetrators.[80] However, just like other original indictments, the indictment in this case had to be amended in order to include charges of inciting the militia to commit acts of sexual violence against Tutsi women.

In ***Prosecutor v Delalic, Mucic, Delic and Landzo***[81]conviction was secured. In ***Prosecutor v Anto Furundzija***[82] the accused was found guilty and deemed a co-perpetrator (or principal perpetrator) in the war crime of torture but an accomplice (secondary perpetrator) with regard to the crime of rape and therefore received 10 years and 8 years respectively as a sentence. In ***Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovicl***[83]The charge of forced marriage was not yet recognised in the ICTY statute and the precedent punishing the crime of forced marriage was not yet established by the time the *Kunarac* decision

78 Case No. IT-96-21-T paras 1065 – 1066.
79 Case No IT-95-17/I-T Para 185.
80 S.K Wood Op Cit 287.
81 Case No IT -96-21-T 2008.
82 Case No IT -95-17/1-T.
83 Case No IT-96-23-T and IT-96-23\1-A.

was given. In ***Prosecutor v Radislav Krsti,c***[84] the Trial Chamber held that where rape crimes were committed incidentally for example when an attack was taking place and the perpetrators then spontaneously decided to commit rape, meaning that rape was not planned and systematic; the accused was still found guilty of rape crimes. The cases that are discussed below are of importance in international law because the court had to deal with the unique form of SGBV known as forced marriage. This type of crime had never been prosecuted at any international tribunal. In ***Prosecutor of the Special Court For Sierra Leone v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Boror Kanu.***[85]**.** the three defendants Brima, Kamara and Kanu were arrested in 2003 and charged with fourteen crimes against humanity.

There were two aspects of the judgment that are recognised as being unique to this case and international criminal law in general. The first aspect was that the *AFRC* case was the first judgment from an international tribunal that dealt with the "conscripting or enlisting of children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities". This was considered a war crime and all three of the defendants were convicted of this crime.

Secondly, and most important to this research was the fact that the majority of the judges ruled that forced marriage could not be classified as the crimes against humanity charge of "other inhumane acts" because it was part of the crimes against humanity charge of sexual slavery.

In ***Prosecutor v Fofana and Kondewa***[86] unlike the *AFRC* judgment, the *CDF* judgment did not consider any evidence of sexual violence because decisions were made during the trial proceedings to exclude that type of evidence. The reason for this was that the Prosecutor had failed to include the charges of rape, sexual slavery and inhumane acts (forced marriage) in the initial indictment and the Trial Chamber then refused the amendment of

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84 Case No IT-98-35-T.

85 Case No. SCSL-2004-16-T. Hereinafter referred to as the *AFRC* case.

86 SCSL-04-14-T.

the indictment.[87] The accused were therefore not charged and convicted with these crimes.

10.0 Prosecution Under the International Criminal Court

The Statute is the first international criminal law instrument that explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as distinct types of war crimes.[88] It also expands the list of sexual and gender-based crimes constituting crimes against humanity to include not only rape, but also other forms of sexual violence, as well as persecution on the basis of gender. It is the first international instrument expressly to include various forms of sexual and gender-based crimes as underlying acts of crimes against humanity or war crimes committed during international and non-international armed conflicts. In addition, the Statute authorizes the Court to exercise jurisdiction over sexual and gender-based crimes if they constitute acts of genocide or other underlying acts of crimes against humanity or war crimes.[89]In the case of genocide, these crimes could be an integral part of the pattern of destruction inflicted upon targeted groups.

The Office will take steps to ensure a consistent approach in giving full effect to these provisions enunciated within the Statute, the Elements, and the Rules. The inclusion of Article 21(3) in the Statute is particularly important, as it mandates that the application and interpretation of the Statute be consistent with

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87 Emily Nyiva Kinama, Post Conflict Prosecution of Gender-Based Violence: A Comparative Analysis of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL); Mini-Dissertation Submitted in Partial Fulfilment of the Requirements for the Degree Ll.M (International Law) (University of Pretoria, 2010) p. 64.

88 As mentioned in the introduction, the statutes of the ICTY and ICTR include only rape as a crime against humanity. The ICTR Statute includes rape and enforced prostitution as a form of the war crime of outrages upon person dignity. While the ICTY Statute includes no explicit reference to sexual violence as a war crime, acts of rape and other acts of sexual violence have been mostly prosecuted as a form of the war crime of outrages upon personal dignity.

89 For example, rape as a form of torture.

internationally recognized human rights, and without any adverse distinction founded, inter alia, on gender or ‚other status'. The Office will take into account the evolution of internationally recognized human rights.[90]

The Office conducts a preliminary examination of all situations that are not manifestly outside the jurisdiction of the Court on the basis of information available in order to determine whether there is a reasonable basis to initiate an investigation. The Prosecutor shall reach such a determination after having considered the factors set out in Articles 53(1)(a)-(c) of the Statute: jurisdiction (temporal, subject-matter, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of justice.[91] During the process of the preliminary examination of a situation, the Office analyses information on crimes potentially falling within its jurisdiction.[92]In so doing, the Office will also examine the general context within which the alleged sexual and gender-based crimes have occurred, and assess the existence of local institutions and expertise, international organizations, non-governmental organizations, and other entities available as potential sources of information and/or of support for victims. Such an assessment will support any investigation that may be opened at a later stage.

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[90] Committee on the Elimination of Discrimination against Women (CEDAW), General recommendation No. 30, noting that, International criminal law, including, in particular, the definitions of gender-based violence, in particular sexual violence must also be interpreted consistently with the Convention and other internationally recognized human rights instruments without adverse distinction as to gender. CEDAW, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, 18 October 2013, para. 23.

[91] The Office's policy and practice in the conduct of preliminary examinations are described in detail in its Policy Paper on Preliminary Examinations (ICC-OTP 2013). Rule 48 of the Rules requires that the Prosecutor consider the factors set out in article 53(1)(a)-(c) of the Statute in determining whether there is a reasonable basis to proceed with an investigation under article 15(3).

[92] In accordance with article 15 of the Statute, the Office may receive information on such crimes, and may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources.

If there are investigations or prosecutions that relate to potential cases being examined by the Office, an assessment will be made into whether such national proceedings are vitiated by an unwillingness or inability to carry out genuine proceedings. The complementarity assessment is made on the basis of the underlying facts as they exist at the time of the determination, and is subject to ongoing revision based on a change in circumstances. Although crimes falling within the Court's jurisdiction are in and of themselves serious, article 17(1)(d) of the Statute requires that as part of the admissibility determination, the Court assess whether a case is of sufficient gravity to justify further action by the Court. Factors relevant in assessing the gravity of the crimes include their scale, nature, manner of commission, and impact.[93] Where the Office has jurisdiction, it may also issue preventive statements to deter the escalation of violence and the further commission of crimes, to put perpetrators on notice, and to promote national proceedings[94].

11.0 Sentencing

The Office will propose sentences which give due consideration to the sexual and gender dimensions of the crimes charged, including their impact on victims' families and communities, as an aggravating factor and reflective of the gravity of the crimes committed. In the determination of an appropriate sentence, the Court is required to take into account factors such as

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[93] Regulation 29(2), Regulations of the Office. See, in concurrence with the Prosecution's submissions, Prosecutor v. Bahar Idriss Abu Garda, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 31; Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19- Corr,31 March 2010, para. 188; Situation in the Republic of Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, 3 October 2011, para. 204.

[94] ICC Prosecutor confirms situation in Guinea under examination (14 October 2009); ICC Deputy Prosecutor: We are keeping an eye on events in Guinea (19 November 2010); Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the occasion of the 28 September 2013 elections in Guinea (27 September, 2013).

the gravity of the crime, and the individual circumstances of the convicted person.[95] Several factors, including the extent of the damage caused — in particular, the harm caused to the victims and their families, the nature of the unlawful behaviour, and the means employed to execute the crime —must also be considered by the Court.[96]Bearing this in mind, the Office will adduce evidence to propose appropriate sentences for sexual and gender-based crimes, and for related harm, including physical, psychological, and social damage to victims, their families, and communities. Where appropriate, the Office will adduce evidence of the impact of the sexual and gender-based crimes on the victims, their families, and the community as a whole, by way of victim or expert testimony and written statements.

The commission of a crime with a motive involving discrimination, including on the grounds of gender, or where the victim is particularly vulnerable, in itself constitutes aggravating circumstances.[97] Even where the evidence precluded the inclusion of sexual and gender-based crimes in the charges, the Office will give due consideration to any sexual or gender dimension involved in the crimes charged, which may be treated as an aggravating factor or as part of the gravity factor for the purpose of sentencing.

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[95] Article 78(1) of the Statute provides, in determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

[96] According to rule 145(1)(c) of the Rules, in its determination of the sentence, the Court shall, in addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

[97] The aggravating circumstances set out under rule 145(2)(b) of the Rules include commission of the crime where the victim is particularly defenceless (rule145(2)(b)(iii)), and commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3, which include gender (rule 145(2)(b)(v)).

12.0 Conclusion and Recommendations

International standard-setting developments have succeeded in prioritizing attention towards the recognition and cessation of sexual violence in armed conflicts. The reality of SGBV in conflict and post-conflict situations demands that the focus now shift toward the effective implementation of legal instruments that exist to combat violence against women.

A range of measures, both legal and non-legal, are essential to ensuring that the ideals set forth in international standard-setting instruments become a reality for men and women. Amongst others, measures must be taken to increase reporting of gender-based crimes, including lowering the social stigma attached to rape victims which leads persons to keep silent either out of shame or fear of the police. Eliminating complicated and degrading reporting procedures and completing prompt and thorough investigations are also necessary steps, so that victims will not avoid reporting due to the low possibility that any action will be taken on the case. Under-reporting combined with inefficient or corrupt judicial systems are major sources of continued impunity. Generally, measures to strengthen the judicial system and reform the security sector are essential to increasing reporting and reducing impunity. Accountability will in turn lower the number of SGBV attacks. When perpetrators of gender-based war crimes are rarely held accountable, the social acceptability of SGBV is normalized and reinforced.

It is important also to incorporate women into justice processes, including creating space for women leaders on advisory boards and planning committees. Post-conflict countries should consider developing gender-specific initiatives such as the ones used in Liberia, including strengthening national legislation, training judicial and law enforcement personnel, and creating special courts to counter the rise of SGBV, which typically accompanies post-conflict transitions. Truth and Reconciliation Commissions should hold special women-only hearings in order to create an environment where the women feel more comfortable sharing their testimonies of SGBV and participating in the

reconciliation process. Funding for proper and effective programs to address the needs of victims in conflict and post-conflict settings, including medical treatment, mental health services, and education about legal rights must also be increased. These measures will help to ensure the effective implementation of recent standard-setting instruments and hopefully begin to stem the onslaught of SGBV in conflict and post-conflict settings.