



PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE INTERNATIONAL CRIMINAL COURT

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I. Introduction

Despite growing awareness and intensified condemnation of sexual violence in conflict zones throughout the past decade, rape and other forms of sexual violence continue to be widely used weapons in conflicts around the world.¹ Both the individual and the society suffer from the effects of sexual violence. Survivors of sexual violence endure psychological, physical, social, cultural, religious and economic effects in the aftermath of the assault and for the rest of their lives. The United Nations Security Council, in Resolution 1820, acknowledged the systematic and widespread use of rape as a war tactic that has an impact on the health and safety of civilians as well as ‘the economic and social stability’ of nations.²

The 1998 Rome Statute of the International Criminal Court (ICC) is the first mechanism for holding leaders of states accountable for genocide and other serious international crimes.³ Significantly, the statute’s promise to prosecute those most responsible for ‘unimaginable atrocities that deeply shock the conscience of humanity’ includes the unprecedented, explicit criminalization of rape and other forms of sexual violence in international humanitarian law (IHL).⁴ Furthermore, while the overarching objective of the ICC is to provide justice for the most severe human rights abuses, states parties to the statute also anticipated that the court would contribute to preventing egregious violence committed against future generations.

¹ Office for the Coordination of Humanitarian Affairs (OCHA) and Integrated Regional Information Networks (IRIN), *Broken Bodies, Broken Dreams: Violence Against Women Exposed* (OCHA/IRIN: Nairobi, 2005); United Nations Development Fund for Women (UNIFEM), *Not a Minute More: Ending Violence Against Women* (UNIFEM: New York, 2003); and Heise, L., Ellsberg, M. and Goettemoeller, M., ‘Ending violence against women’, *Population Reports*, series L., no. 11 (1999), <<http://www.infoforhealth.org/pr/l11/violence.pdf>>.

² UN Security Council Resolution 1820, 19 June 2008; and United Nations, ‘Security Council demands immediate and complete halt to acts of sexual violence against civilians in conflict zones, unanimously adopting Resolution 1820’, Press release, 19 June 2008, <<http://un.org/News/Press/docs/2008/sc9364.doc.htm>>. On the implications and limitations of ‘locating’ violence within the national security framework see Giles, W. and Hyndman, J., ‘Introduction: gender and conflict in a global context’, eds W. Giles and J. Hyndman, *Sites of Violence: Gender and Conflict Zones* (University of California Press: Berkeley, CA, 2004), p. 12.

³ The Rome Statute of the International Criminal Court, opened for signature on 17 July 1998, entered into force on 1 July 2002, available at <<http://www.un.org/law/icc/statute/contents.htm>>.

⁴ Rome Statute (note 3), preamble.

SUMMARY

● The 1998 Rome Statute of the International Criminal Court (ICC) promised to prosecute those most responsible for the ‘unimaginable atrocities that deeply shock the conscience of humanity’. The promise includes the unprecedented explicit criminalization of rape and other forms of sexual violence in international humanitarian law. As of 1 May 2009 the ICC had opened investigations in 4 situations and had issued 13 arrest warrants, 8 of which relate to charges of sexual slavery and rape constituting crimes against humanity or war crimes. However, the number of ICC investigations, arrests and prosecutions is not the only measure of the court’s success: the ICC has also made intentional efforts to take gender issues into account.

Yet, nearly seven years after its establishment, the ICC’s ability to serve as both a symbol of deterrence and as a catalyst for the elimination of sexual violence in armed conflict altogether remains questionable. The court’s efficacy remains hampered by a number of limitations, and a reassessment of the ICC’s self-defined capacity to both prevent and provide justice for sexually violent crimes is needed. The upcoming Review Conference of the Rome Statute in 2010 marks a pivotal opportunity for such an assessment and next steps.



Yet, nearly seven years after its establishment, the ICC's ability to serve as both a symbol of deterrence and as a catalyst for the elimination of sexual violence in armed conflict altogether remains questionable. On the one hand, the very existence of the ICC may be reason enough to take a positive outlook on its future in upholding international law and spearheading the prosecution of human rights abuses. On the other hand, the lofty expectations of the Rome Statute may exceed the ICC's ability to carry out its judicial purpose.

Section II of this paper defines sexual and gender violence in the context of conflict and explores its inclusion as a crime as defined by the Rome Statute. Section III analyses the efficacy of the ICC in achieving justice and delineates the actual and symbolic implications of including gender in the Rome Statute and in reframing sexual violence as an international war crime. Section IV explores whether there really is a role for the ICC in preventing sexual violence and proposes next steps. The conclusions are presented in section V.

II. Background

While 'largely invisible'—that is, unrecognized and unanalysed—until the 1990s, the use of sexual violence during war has remained a historical constant.⁵ It has been noted that 'the literature is so replete with depictions of rape during war that it is exceptional to read in detail about one (war) without reading about the other (rape)'.⁶ For centuries, the bodies of unarmed civilians, mostly women and girls, have been turned into 'battlefields' at heightened rates during periods of conflict, whereby sexual violence is strategically inflicted in order to humiliate, demonstrate domination and instil terror, among other political motivations.⁷ With the development of IHL in the 20th century, sexual violence was increasingly considered to be a war crime, but it remained unpunished by international law.⁸ Neither the 1945–46 International Military Tribunals in Nuremberg nor the 1946–48 International Military Tribunals for the Far East explicitly enumerated war

⁵ Copelon, R., 'Gender crimes as war crimes: integrating crimes against women into international criminal law', *McGill Law Journal*, vol. 46 (2000), p. 221; and OCHA and IRIN (note 1), pp. 177–97. On why the rapes committed in the former Yugoslavia received more international attention than in previous conflicts see Seifert, R., 'The second front: the logic of sexual violence in wars', *Women's Studies International Forum*, vol. 19, no. 1–2 (1996), pp. 35–43.

⁶ Askin, K. D., 'Holding leaders accountable in the International Criminal Court (ICC) for gender crimes committed in Darfur', *Genocide Studies and Prevention*, vol. 1, no. 1 (July 2006), p. 14.

⁷ Current data on the occurrence of sexual violence during armed conflict does not encompass the entirety of its scope nor the degree of trauma that victims are subjected to. Capturing data on rape in war is extremely difficult since it remains a taboo topic and survivors are not guaranteed security if they come forward to report it. See Farouk, S., 'Violence against women: a statistical overview, challenges and gaps in data collection and methodology and approaches for overcoming them', Paper prepared for Expert Group Meeting, United Nations Division for the Advancement of Women, Geneva, Apr. 2005, <<http://www.un.org/womenwatch/daw/egm/vaw-stat-2005/>>. On the symbolic use of women's bodies during conflict see Gangoli, G., 'Engendering genocide: gender, conflict and violence', *Women's Studies International Forum*, vol. 29, no. 5 (2006), pp. 534–35; and Réseau des Femmes pour un Développement Associatif (RFDA), Réseau des Femmes pour la Défense des Droits et la Paix (RFDP) and International Alert, *Women's Bodies as a Battleground: Sexual Violence Against Women and Girls During the War in the Democratic Republic of Congo South Kivu (1996–2003)* (RFDA/RFDP/International Alert: Uvira, Bukavu, London, 2005), p. 8.

⁸ See Meron, T., 'Rape as a crime under international humanitarian law', *American Journal of International Law*, vol. 87, no. 3 (1993), pp. 424–28.



crimes involving rape, despite evidence that rape and other sexually violent crimes were systematically used during World War II.⁹ However, in June 2008—in an international climate of total condemnation for rape as a weapon of war and in acknowledgement of the national, community and civilian-borne costs of systematic sexual violence—the UN Security Council unanimously adopted Resolution 1820.¹⁰ Eight years earlier, the UN Security Council had summoned, albeit vaguely, ‘all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict’.¹¹ These resolutions represent the increasing inclusion of sexual violence in UN Security Council discourse and reflect, in part, a shift away from institutionalized norms that dismiss it as an unfortunate but unavoidable by-product of conflict.¹²

The International Criminal Court is the first mechanism for holding leaders of states accountable for genocide and other serious international crimes

Defining sexual violence

Although legislation, as well as local, national and international reports, defines sexual violence in diverse ways, this paper focuses on rape and other forms of sexual violence specifically against women, as defined by the Inter-Agency Standing Committee (IASC) Task Force on Gender and Humanitarian Assistance and the Reproductive Health Response in Conflict Consortium.¹³ Sexual violence is a form of gender-based violence, which is ‘an umbrella term for any harm that is perpetrated against a person’s will, and that results from power inequities that are based on gender roles’.¹⁴ More

⁹ Charter of the International Military Tribunal for the Far East (IMTFFE), Article 5, <http://www.oup.com/uk/orc/bin/9780199203109/resources/cases/ch01/1945_int_mil_tribunal_east.pdf>. Although the indictments brought about by the IMTFFE eventually included rape, it was only charged in conjunction with other crimes. See also Companaro, J., ‘Women, war, and international law: the historical treatment of gender-based war crimes’, *Georgetown Law Journal*, vol. 89, no. 8 (2001), p. 2560. On the implicit prosecution of sexual atrocities at these tribunals see Askin, K. D., ‘Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles’, *Berkeley Journal of International Law*, vol. 21, no. 2 (2003), p. 299.

¹⁰ UN Security Council Resolution 1820 (note 2).

¹¹ UN Security Council Resolution 1325, 31 Oct. 2000.

¹² See e.g. King, K. L. and Greening, M., ‘Gender justice or just gender? The role of gender in sexual assault decisions at the International Criminal Tribunal for the former Yugoslavia’, *Social Science Quarterly*, vol. 88, no. 5 (Dec. 2007), pp. 1050–52; May, L., ‘International crime: the case of rape’, *Crimes Against Humanity: A Normative Account* (Cambridge University Press: Cambridge, 2005), p. 98; Brownmiller, S., *Against Our Will: Men, Women and Rape* (Simon and Schuster: New York, 1975); and MacKinnon, C., ‘Rape, genocide and women’s human rights’, ed. A. Stiglmayer, *Mass Rape: The War Against Women in Bosnia-Herzegovina* (University of Nebraska Press: Lincoln, NE, 1994).

¹³ As noted in Bastick, M., Grimm, K. and Kunz, R. (eds), *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Geneva Centre for the Democratic Control of Armed Forces: Geneva, 2007); and Inter-Agency Standing Committee (IASC), *Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies* (IASC: Geneva, 2005), pp. 11–12. Examples of gender-based violence include: forced early marriage, domestic violence, trafficking and female genital mutilation. Examples of other forms of sexual violence include: sexual harassment, sexual abuse and exploitation, rape, gang rape or attempted rape, sexual slavery, forced pregnancy or abortion, and trafficking for the purpose of sexual exploitation. OCHA and IRIN (note 1), pp. 17–19.

¹⁴ Reproductive Health Response in Conflict (RHRC) Consortium, *Gender-based Violence Tools Manual* (RHRC Consortium: New York, Nov. 2003), p. 9.



specifically, the IASC defines sexual violence as ‘any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic a person’s sexuality, using coercion, threats of harm or physical force, by any person regardless of relationship to the victim, in any setting, including but not limited to home and work’.¹⁵ Despite evidence that men and boys are also targeted and victimized, this analysis emphasizes the disproportionate affect of sexual violence on women during—or exacerbated by—conflict.¹⁶

Criminalizing sexual violence at the International Criminal Court

Hailed as ‘a benchmark in the progressive development of international human rights’, the Rome Statute establishing the ICC was adopted on 17 July 1998, with only seven votes in opposition—those of China, Iran, Iraq, Israel, Libya, Sudan and the United States. It entered into force on 1 July 2002 after obtaining the requisite 60 ratifications, far earlier than anyone imagined.¹⁷

The Rome Statute is the most advanced international treaty of its kind because it legally prohibits crimes against civilians that are committed because of gender

The Rome Statute is the most advanced international treaty of its kind because it legally prohibits crimes against civilians that are committed because of, among other things, gender. The inclusion of gender in the statute has its beginnings in the 1949 Geneva Convention (IV) and the 1977 Additional Protocols to the Geneva Convention—which legally prohibit attacks ‘against honour’—as well as the 1948 Universal Declaration of Human Rights.¹⁸ This transformation of legal discourse has amounted to the international recognition that ‘women’s rights are human rights, that human rights are indivisible, and that impunity for gender crimes and acceptance of discrimination must end’.¹⁹

The establishment of the ICC and the inclusion of gender in its statute mark a milestone in gender crime jurisprudence. Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and that for Rwanda (ICTR), after significant pressure, indicted and convicted defendants for rape and came to explicitly include rape as a war crime in their statutes.²⁰ The ICTR defines rape as a ‘physical invasion of a sexual nature, committed on a person under circumstances which are coercive’. Additionally, the ICTR

¹⁵ Inter-Agency Standing Committee (IASC) (note 13), p. 8.

¹⁶ See Carpenter, R. C., ‘Recognizing gender-based violence against civilian men and boys in conflict situations’, *Security Dialogue*, vol. 37, no. 1 (2006), pp. 83–103.

¹⁷ Schabas, W. A., *An Introduction to the International Criminal Court* (Cambridge University Press: Cambridge, 2004), p. ix. The Rome Statute was adopted at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, by a vote of 120 to 7 with 21 absentions. Article 126, ‘Entry into force’, allowed the statute to remain open for signature until 31 Dec. 2000. Rome Statute (note 3). As of May 2009, 108 states had become parties of the statute.

¹⁸ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, opened for signature on 12 Aug. 1949, entered into force on 21 October 1950; Protocol I Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts and Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature on 12 Dec. 1977, entered into force on 7 Dec. 1978; and Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III), 10 Dec. 1948. All documents available at <<http://www2.ohchr.org/english/law/index.htm>>.

¹⁹ Copelon (note 5).

²⁰ UN Security Council Resolution 808, 22 Feb. 1993; UN Security Council Resolution 955, 8 Nov. 1994; and Drumbly, M., ‘Punishment goes global: international criminal law, conflict zones and gender (in)equality’, *Canadian Woman Studies*, vol. 19, no. 4 (winter 2000).



also notes that ‘sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact’.²¹ In the aftermath of these two ad hoc tribunals, the ICC incorporated the lessons learned into its structure, function and jurisdiction. The tribunals, which did not initially include rape as a crime in their statutes, are considered to be watershed trials for prosecuting sexual violence in international law.²² However, the 1998 landmark decision by the ICTR against Jean-Paul Akayesu, the former mayor of Taba commune in Rwanda, provided international law’s first definition of rape, but it was not readily translated into the Rome Statute.²³

Similar to previous attempts to clearly define or denounce sexual and gender violence—i.e. the UN General Assembly’s adoption of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the 1993 World Conference on Human Rights (Vienna Conference) and the 1995 Fourth World Conference on Women (Beijing Conference)—disputes over terminology threatened the inclusion of rape and other forms of sexual violence in the ICC’s statute altogether.²⁴ Intentionally broad and gender-neutral, the eventual definition of gender crimes, which included sexual violence, embraced at the Rome Diplomatic Conference was greatly influenced by the roughly 200 non-governmental organizations (NGOs) and women’s groups in attendance.²⁵ Although the term ‘gender crimes’ met with opposition at the conference, it is more widely used in the Rome Statute than ‘sexual violence’ because of the concept’s broader implications.²⁶ ‘Gender’ includes socially constructed differences between men and women, whereas ‘sex’ is limited to biological differences—an important distinction if people are targeted because of socially ascribed roles stemming from, or exacerbating, social power imbalances. The ICC came to broadly define sexual violence as ‘coercive acts of the perpetrator, including threats and psychological oppression’.²⁷

The shift in gender and sexual violence’s visibility in international law was prompted by a new intolerance: the international community demanded accountability and secured their request with legal mandates aimed to pros-

²¹ International Criminal Tribunal for Rwanda (ICTR), *Prosecutor vs. Jean-Paul Akayesu*, Judgment, Case no. ICTR-96-4-T, 2 Sep. 1998, <<http://www.ictr.org>>.

²² International Criminal Tribunal for Rwanda (ICTR), *Prosecutor of the Tribunal Against Jean Paul Akayesu*, Amended indictment, Case no. ICTR-96-4-I, 17 June 1997, <<http://www.ictr.org>>.

²³ Askin, K. D., ‘Gender crimes jurisprudence in the ICTR: Positive developments’, *Journal of International Criminal Justice*, vol. 3, no. 4 (2005), pp. 1007–18; Women’s Initiatives for Gender Justice, ‘Treatment of sexual violence in international law: background papers’, <<http://www.iccwomen.org/resources/crimeschart.htm>>.

²⁴ The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), opened for signature on 18 Dec. 1979, entered into force 3 Sep. 1981, available at <<http://www.un.org/womenwatch/daw/cedaw/>>; United Nations, ‘Vienna Declaration and Programme of Action’, A/CONF.157/23, 12 July 1993, Pt. I: 18, 28 and Pt. II: 37; and United Nations, ‘Beijing Declaration and Platform for Action’, A/CONF.177/20, 17 Oct. 1995, para. 142(b).

²⁵ See Oosterveld, V., ‘The definition of “gender” in the Rome Statute of the International Criminal Court: a step forward or back for international criminal justice?’, *Harvard Human Rights Journal*, vol. 18 (spring 2005), pp. 67–70.

²⁶ On issues of gender terminology in the Rome Statute see Hall-Martinez, K. and Bedont, B., ‘Ending impunity for gender crimes under the International Criminal Court’, *Brown Journal of World Affairs*, vol. 6, no. 1 (winter/spring 1999), pp. 65–85.

²⁷ Amnesty International, ‘The International Criminal Court: ensuring justice for women’, Fact Sheet 7, 11 Apr. 2005. <<http://www.amnesty.org/en/library/info/IOR40/006/2005>>; Rome Statute (note 3), ‘Elements of Crimes’, Article 9.



ecute those highest up the chain of command. By enumerating sexual violence as a type of war crime, the Rome Statute created a legal mechanism for holding those most responsible for human rights abuses individually accountable.²⁸ Under Article 8, the Rome Statute allows the ICC to prosecute rape and sexual violence by combatants in the context of armed conflict as a war crime and allows the prosecution of widespread systematic sexual violence directed against any civilian population as crimes against humanity, and in some cases genocide, under articles 6 and 7.²⁹

III. The efficacy of the International Criminal Court: actual or symbolic justice?

Assessing recent progress

On 17 July 2008 the ICC celebrated the 10-year anniversary of the Rome Statute's adoption. Although facing significant challenges, the court has made notable progress towards fulfilling its mandate: to bring the perpetrators of the 'most serious crimes of international concern' to justice.³⁰ As of 1 May 2009 the Office of the Prosecutor (OTP) of the ICC had opened investigations in four situations: the Central African Republic (CAR), the Democratic Republic of the Congo (DRC), the Darfur region of Sudan and northern Uganda. Based on those investigations, 13 arrest warrants have been publicly issued, 8 of which relate to charges of sexual slavery and rape constituting crimes against humanity or war crimes (see table 1).

The plight of women and girls in the DRC, particularly, has attracted widespread attention to the pervasive existence of sexual violence in conflicts, to the extent that it has been deemed by Human Rights Watch and other NGOs as a 'war within a war'.³¹ Some have said that eastern DRC is 'the worst place in the world to be a woman or a girl'.³² Despite the signing of the 1999 Lusaka Ceasefire Agreement, the deployment of a UN peacekeeping mission in 2000 and the formation of a transitional government in 2003, violence and sexual violence in the DRC continue at unprecedented rates. Between 2003 and 2006 the International Rescue Committee has registered 40 000 cases of gender-based violence in the DRC, which it says 'is just the tip of the iceberg'.³³ It is estimated that 50 per cent of the victims in the DRC are under the age of 18. Focusing on the district of Ituri in north-eastern DRC, the ICC's

²⁸ Rome Statute (note 3), articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi). See also corresponding articles in the elements of crimes. The Rome Statute specifically enumerates rape, enforced prostitution, sexual slavery (including trafficking of women), forced pregnancy, enforced sterilization and other forms of sexual violence and persecution on account of gender as crimes.

²⁹ Askin (note 6), pp. 15–17; and Rome Statute (note 3), articles 6–8.

³⁰ See also Human Rights Watch (HRW), *Courting History: The Landmark International Criminal Court's First Years* (HRW: New York, July 2008).

³¹ Human Rights Watch (HRW), *The War within the War: Sexual Violence against Women and Girls in Eastern Congo* (HRW: New York, June 2002).

³² Major General Patrick Cammaert, former Deputy Force Commander of the Netherlands, Military Advisor in the UN Department of Peacekeeping Operations, quoted in United Nations Development Fund for Women (UNIFEM) and the United Nations Department of Peacekeeping Operations (UN DPKO), 'Women targeted or affected by armed conflict: what role for military peacekeepers?', Wilton Park Conference, Sussex, UK, 27–30 May 2008, <http://www.unifem.org/news_events/event_detail.php?EventID=175>.

³³ Brian Sage, International Rescue Committee Coordinator, quoted in Nordland, R., 'More vicious than rape', *Newsweek*, 13 Nov. 2006.



OTP has investigated and arrested three Iturian militia leaders: Thomas Lubanga Dyilo on 17 March 2006, Germain Katanga on 17 October 2007 and Mathieu Ngudjolo Chui on 6 February 2008. The trial of Dyilo, President of the Union of Congolese Patriots, began on 26 January 2009. This marked the first ICC trial.³⁴ Dyilo is charged with war crimes relating to the recruitment of child soldiers, which do not explicitly include rape or sexual violence.³⁵ As of 1 May 2009, the cases of Lubanga and Katanga are before the Trial Chamber and three cases are before the Pre-Trial Chamber following the issuing of arrest warrants.³⁶

In a sign that the ICC's potential to act is not being affected by the elapse of time since the offences are committed, in May 2008, the Congolese former Vice-President Jean-Pierre Bemba Gombo was arrested in Belgium on charges that he led a campaign of mass rape, torture and pillage in the CAR in 2002 by his Movement for the Liberation of Congo (MLC) rebel group.³⁷ Shortly thereafter, in July 2008, the ICC Chief Prosecutor, Louis Moreno-Ocampo, requested an arrest warrant for the President of Sudan, Omar Hassan al-Bashir. The request came after years of violence in the Darfur region, where Human Rights Watch alleges that 'tens of thousands of women have been subject to sexual violence' by Sudanese forces and allied militias.³⁸ Moreno-Ocampo's request for al-Bashir's arrest was met with ambivalence, despite its marking the first time a prosecutor of the ICC brought charges against a sitting head of state.³⁹

It is interesting to compare the situation in Sudan with the situation in Uganda. During peace negotiations in 2005 the ICC issued an arrest warrant for Joseph Kony, the head of the Lord's Resistance Army (LRA), the Ugandan guerrilla group that has been engaged in an armed resistance against the Ugandan Government since 1987.⁴⁰ In both situations, diplomats, human rights activists and policy analysts urged the ICC to withhold war-crime indictments so as to not jeopardize the peace negotiations. Circumventing these fears, Moreno-Ocampo nonetheless went ahead with the warrant request for al-Bashir. Validating his decision as dictated by the judicial mandate of the Rome Statute, Moreno-Ocampo maintained that his role is to apply the law 'without political considerations'.⁴¹ Notably, on 3 April 2009, an

The ICC came to broadly define sexual violence as 'coercive acts of the perpetrator, including threats and psychological oppression'

³⁴ 'Lubanga trial a landmark case', Institute for War & Peace Reporting, ICC–Africa Update no. 198, 23 Jan. 2009, <http://www.iwpr.net/?p=acr&s=f&o=349431&apc_state=henh>.

³⁵ In his opening statement before Trial Chamber I, the prosecutor told the ICC how 'girl soldiers, some as young as 12 years, were the daily victims of rape by their commanders'. See complete transcripts of the opening statements of the prosecutor, <<http://www.icc-cpi.int/iccdocs/doc/doc623638.pdf>>; and Women's Initiatives for Gender Justice, 'Legal Eye on the ICC', <http://www.iccwomen.org/news/docs/LegalEye_Mar09_WEB.html>.

³⁶ Coalition for the International Criminal Court, <<http://www.iccnw.org/?mod=courtnews>>. The latter 3 cases are those of Joseph Kony, Ahmad Harun and Omar al-Bashir (see below).

³⁷ 'Democratic Republic of Congo: Jean-Pierre Bemba arrested', *Africa Research Bulletin: Political, Cultural and Social Series*, vol. 45, no. 5 (June 2008).

³⁸ Human Rights Watch (HRW), *World Report 2007* (HRW: New York, 2007), p. 47.

³⁹ International Criminal Court, Office of the Prosecutor, 'ICC prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur', Press Release ICC-OTP-20080714-PR341, [n. d.].

⁴⁰ Cooper, H., 'Waiting for justice', *New York Times*, 27 July 2008.

⁴¹ See Moreno-Ocampo, L., Address at the international conference 'Building a future on peace and justice', Nuremberg, 25–27 June 2007, <http://www.peace-justice-conference.info/download/speech_moreno.pdf>.

Table 1. Summary of arrest warrants issued by the Office of the Prosecutor of the International Criminal Court enumerating those charges specifically related to sexual violence

Accused	Arrest warrant issued	Charges {Applicable article(s) of the Rome Statute}
<i>Central African Republic</i>		
Jean-Pierre Bemba Gombo ^a	23 May 2008 ^b	Rape constituting a crime against humanity {Articles 7(1)(g) and 25(3)(a)} Rape constituting a war crime {Articles 8(2)(e)(vi) and 25(3)(a)} Outrage upon personal dignity constituting a war crime {Articles 8(2)(c)(ii) and 25(3)(a)}
<i>Darfur, Sudan</i>		
Omar Hassan Ahmad al-Bashir	4 March 2009	Rape constituting a crime against humanity {Articles 7(1)(g) and 25(3)(a)}
Ahmad Muhammed Harun	27 April 2007	Rape constituting a crime against humanity (2 counts) {Articles 7(1)(g) and 25(3)(d)} Rape constituting a war crime (2 counts) {Articles 8(2)(e)(vi) and 25(3)(d)} Outrage upon personal dignity constituting a war crime {Articles 8(2)(c)(ii) and 25(3)(d)} Prosecution of acts of . . . rape . . . constituting a crime against humanity (2 counts) {Articles 7(1)(h) and 25(3)(d)} Prosecution by acts of . . . outrages upon personal dignity {Articles 7(1)(h) and 25(3)(d)}
Ali Muhammad Ali abd-al-Rahman	27 April 2007	Rape constituting a war crime (2 counts) {Articles 8(2)(e)(vi) and 25(3)(d)} Rape constituting a crime against humanity (2 counts) {Articles 7(1)(g) and 25(3)(d)} Outrage upon personal dignity constituting a war crime (2 counts) {Articles 8(2)(c)(ii), 25(3)(d) and 25(3)(a)} Prosecution by acts of . . . rape . . . constituting a crime against humanity (2 Counts) {Articles 7(1)(h) and 25(3)(d)} Prosecution by acts of . . . outrage upon personal dignity . . . constituting a crime against humanity {Articles 7(1)(h) and 25(3)(d)}
<i>Democratic Republic of the Congo</i>		
Thomas Lubanga Dyilo ^a	10 February 2006 ^c	No counts of or relating to sexual violence as of 1 May 2009
Germain Katanga ^a / Mathieu Ngudjolo Chui ^a	2 July 2007/ 6 July 2007 ^d	Sexual slavery constituting a crime against humanity {Articles 7(1)(g) and 25(3)(a) or (b)} Sexual slavery constituting a war crime {Articles 8(2)(e)(vi) or 8(2)(b)(xxii) and 25(3)(a) or (b)} Rape constituting a crime against humanity {Articles 7(1)(g) and 25(3)(a) or (b)} Rape constituting a war crime {Articles 8(2)(e)(vi) or 8(2)(b)(xxii) and 25(3)(a) or (b)}
Bosco Ntaganda	22 August 2006	No counts of or relating to sexual violence as of 1 May 2009
<i>Uganda</i>		
Joseph Kony	27 September 2005	Sexual enslavement constituting a crime against humanity {Articles 7(1)(g) and 25(3)(b)} Rape constituting a crime against humanity {Article 7(1)(g)} Inducing rape constituting a war crime {Articles 8(2)(e)(vi) and 25(3)(b)}



Accused	Arrest warrant issued	Charges {Applicable article(s) of the Rome Statute}
Raska Lukwiya	13 October 2005 ^e	No counts of or relating to sexual violence as of 11 July 2007 when proceedings were terminated upon confirmation of his death
Okot Odhiambo	8 July 2005	No counts of or relating to sexual violence as of 1 May 2009
Dominic Ongwen	8 July 2005	No counts of or relating to sexual violence as of 1 May 2009
Vincent Otti	8 July 2005 ^f	Sexual enslavement constituting a crime against humanity {Articles 7(1)g) and 25(3)(b)} Inducing rape constituting a war crime {Articles 8(2)(e)(vi) and 25(3)(b)}

^a These defendants are in ICC custody at the Hague as of 1 May 2009.

^b The charges listed reflect those enumerated in the arrest warrant dated 6 June 2008, which replaced the original arrest warrant issued on 23 May 2008.

^c The trial began on 26 Jan. 2009.

^d The trial is set to begin on 24 Sep. 2009.

^e The defendant died on 12 Aug. 2006.

^f The defendant died on 3 Nov. 2007 (date of death is approximate). See 'Uganda's LRA confirm Otti death', BBC News, 23 Jan. 2008, <<http://news.bbc.co.uk/2/7204278.stm>>.

Source: Women's Initiatives for Gender Justice, *Making a Statement: A Review of Charges and Prosecutions for Gender-based Crimes before the International Criminal Court* (ICC Women: The Hague, June 2008), p. 8. Table modified from original with permission.

arrest warrant was issued for al-Bashir for war crimes and crimes against humanity, which include rape.⁴²

ICC judges issued arrest warrants for two other Sudanese suspects in 2008—government minister Ahmed Haroun and militia commander Ali Kushayb—but the Sudanese Government, which is not a party to the ICC, refuses to hand the men over.⁴³ Actually apprehending al-Bashir—and others for whom arrest warrants have been issued by the OTP but remain at large—is perhaps the ICC's largest hurdle. Meanwhile, the July 2008 arrest of Radovan Karadzic, the former President of Republika Srpska in Bosnia and Herzegovina, who was indicted by the ICTY in 1995, reinforced the prospects of credibility and accountability within the international criminal justice system. For current and would-be perpetrators of sexual violence, these developments contribute to the potential for the ICC to represent accountability and to symbolize intolerance for these crimes.

Implications of gender mainstreaming⁴⁴

The number of ICC investigations, arrests and prosecutions is not the only measure of the court's success in ending impunity for sexual violence committed during armed conflict. In a conscious move away from 'victors' jus-

⁴² International Criminal Court, 'ICC issues warrant of arrest for Omar Al Bashir, President of Sudan', Press Release ICC-CPI-20090304-PR394, 3 Apr. 2009.

⁴³ Thomasson, E., 'ICC Prosecutor seeks arrest of Sudan's Bashir', Reuters, 14 July 2008.

⁴⁴ Gender mainstreaming is 'a globally accepted strategy for promoting equality. Mainstreaming is not an end in itself but . . . a means to achieve the goal of gender equality. Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities—policy development, research, advocacy/dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects'. United Nations, Office of the Special Advisor on Gender Issues and Advancement of Women Department of Economic and Social Affairs, <<http://un.org/womenwatch/osagi/gendermainstreaming.htm>>.



In a conscious move away from ‘victors’ justice’, the ICC was crafted as a victim-based court

tice’, the ICC was crafted as a victim-based court and has intentionally included female jurists. The establishment of a Victims and Witnesses Unit (VWU), which provides protection and support for victims and witnesses participating in or affected by potential investigations and trials, is especially significant for survivors of sexual or gender violence.⁴⁵ The ICC is responsible for protecting the dignity, privacy, safety, and physical and psychological well-being of all victims and witnesses. In particular, the questioning of wit-

nesses is controlled to avoid harassment or intimidation.⁴⁶ Moreover, the Rome Statute established a trust fund for the benefit of victims of crimes, and their families, where those crimes fall within the jurisdiction of the ICC. In certain cases, the court can award reparation to or in respect of victims, including restitution, compensation and rehabilitation.⁴⁷ By incorporating such protective measures, the court understands that its success is tightly bound to the participation and cooperation of victims and witnesses.⁴⁸

The ICTR and ICTY paved the way for women to be built in to the organizational structure of an international judicial body. One of the reasons Jean-Paul Akayesu was even charged with rape by the ICTR was the questioning by one of the three judges—notably, the only female judge—of a witness who had mentioned having witnessed the rape of her daughter. In response, an amicus brief was filed by the Coalition on Women’s Human Rights in Conflict in collaboration with other NGOs. The NGOs later wrote to the Chief Prosecutor, Louise Arbour, encouraging her to amend the charges against Akayesu.⁴⁹ Likewise, and despite opposition from colleagues, Richard Goldstone, the ICTY prosecutor, created a judicial branch to deal specifically with gender-based prosecutions.⁵⁰ As a result, the ICC’s statute requires states when electing judges to take into account the need for ‘fair representation of female and male judges’, and it requires that the prosecutor and registrar do the same when hiring staff.⁵¹ The selection of judges also requires that legal expertise on violence against women and children be taken into account.⁵² Similarly, the ICC prosecutor is required to appoint advisors with legal expertise on sexual and gender violence and the VWU must include staff with experience in trauma related to sexual violence.⁵³

For survivors of sexual violence, the creation of the VWU may provide nothing more than a symbol of validation, rather than justice. Ultimately, life

⁴⁵ Rome Statute (note 3), Article 43(6).

⁴⁶ See Human Rights Watch (HRW), ‘International justice for women: the ICC marks a new era’, HRW Backgrounder, 1 July 2002, <<http://www.hrw.org/legacy/campaigns/icc/icc-women.htm>>.

⁴⁷ The Rome Statute states that the registrar shall take ‘gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings’. Rome Statute (note 4), Rule 16(1)(d) RPE. See also Rome Statute (note 3), Article 75, rules 94–97 RPE and Article 79, Rule 98 RPE.

⁴⁸ Human Rights Watch (note 30).

⁴⁹ Arbour, L., ‘Stefan A. Riesenfeld award lecture: crimes against women under international law’, *Berkeley Journal of International Law*, vol. 21, no. 2 (summer 2003), pp. 197–212; International Criminal Tribunal for Rwanda (note 22); and Coalition on Women’s Human Rights in Conflict et al., ‘Amicus brief respecting amendment of the indictment and supplementation of the evidence to ensure the prosecution of rape and other sexual violence within the competence of the tribunal’, in the case of Prosecutor vs. Jean-Paul Akayesu, 27 May 1997.

⁵⁰ See King and Greening (note 12).

⁵¹ Rome Statute (note 3), articles 36(8)(a)(iii) and 44(2).

⁵² Rome Statute (note 3), articles 36(8)(b) and 44(2).

⁵³ Rome Statute (note 3), Article 43(6).



goes on for the victims whether the trials materialize or not. Beyond retribution, the establishment of the ICC and its ability to prosecute gender crimes must be seen as an ‘indispensable part of norm recognition and institution building for the protection of human rights’.⁵⁴ Once seen as a crime only against honour or dignity—which primarily linked sexual violence against women with an attack on men’s property—gender and sexual violence have been accepted as crimes against the individual’s human rights.⁵⁵ The shift and literal transfiguration in the politicized bodies of women—as evidenced by the legal prosecution of sexual violence and the effort to institutionalize gender equality within an international judicial body—has changed the landscape on which sexual violence is fought.

The ICTR and ICTY paved the way for women to be built in to the organizational structure of an international judicial body

Confronting expectations with limitations

Financial and legal

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.⁵⁶

While apprehending suspects remains one of the most challenging and timely aspects of the ICC, additional obstacles persist.⁵⁷ As an international treaty, only those states parties that formally express their consent are bound by the statute’s provisions. Theoretically, states parties must accept the court’s jurisdiction and cooperate with the court in investigating and prosecuting crimes and enforcing penalties. Yet, even states parties have failed to uphold issues of complementarity.⁵⁸ Without its own police force, the ICC has limited power in making arrests and, as an independent body, there is no formal agreement with the UN to assist in its investigations.

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. In Myanmar, for example, the use of systematic sexual violence as a

⁵⁴ Pilch, F. T., ‘Sexual violence: NGOs and the evolution of international humanitarian law’, *International Peacekeeping*, vol. 10, no. 1 (spring 2003), p. 91.

⁵⁵ On sexual violence against women as an attack on men’s honour see Copelon (note 5), p. 221.

⁵⁶ International Center for Transitional Justice, ‘What next for international justice?’, Fact sheet, 2009, <<http://www.ictj.org/static/2009/English/factsheets/prosecutions.html>>.

⁵⁷ 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.

⁵⁸ ‘Complementarity’ refers to the ICC’s intent to take prosecutorial jurisdiction or authority only if crimes are not already being investigated or prosecuted by national judicial systems. See Rome Statute (note 3), preamble.



part of the government's anti-insurgency tactics has been alleged.⁵⁹ Yet no ICC investigations currently exist in Myanmar. Myanmar is not a party to the ICC and no mandate has been granted by the UN Security Council to investigate the situation; legally, the ICC has no responsibility to investigate.

Political and cultural

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.⁶⁰ 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.

Despite the provisions for protecting victims throughout the ICC's investigative process, unanticipated adverse effects have not gone unnoticed. While some proponents of the ICC argue that testimony allows individuals to account for their narrative, others contend that ongoing security concerns, lack of legal aid during the application phase, the burden of proof, the right to silence and lack of survivors' control over the criminal trial may actually 'reinforce victimization instead of mitigating it'.⁶¹ Likewise, the patriarchal roots of the language of law itself have been called into question by some women's human rights advocates, who emphasize that the expansion of international legal mandates and resolutions do little to ultimately protect victims of rape and other forms of sexual violence.⁶²

IV. Looking forward

Whether the ICC can actually serve as a catalyst in the elimination of sexual violence as an instrument of war depends on how well, and how earnestly, it chooses to define its progress. The upcoming Review Conference of the Rome Statute in 2010 marks a pivotal opportunity for such critical questions to emerge. If proponents of the Rome Statute's current mission hope to retain its desired objectives—of both providing justice and contributing to preven-

⁵⁹ E.g. Shan Human Rights Foundation and Shan Women's Action Network, 'License to rape: the Burmese military regime's use of sexual violence in the ongoing war in Shan State', May 2002, <<http://www.shanland.org/resources/bookspub/humanrights/LtoR>>; and Karen Women's Organization, 'Shattering silences: Karen women speak out about the Burmese military regime's use of rape as a strategy of war in Karen State', Apr. 2004, <http://www.burmalibrary.org/docs/Shattering_Silences.htm>.

⁶⁰ 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.

⁶¹ Drumbl (note 20), p. 24. See also Goetz, M., 'The international criminal court and its relevance to affected communities', eds N. Waddell and P. Clark, *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society: London, 2008), pp. 69–70.

⁶² Kapur, R., 'Revisiting the role of law in women's human rights struggles', eds Meckled-Garcia and Cali (note 60), pp. 101–12.



tion—then a redefinition of justice as well as a recalculation of how to measure progress is in order.

While the discourse of international law provides a platform to acknowledge a universalized set of rights, it is only a starting point from which to diversify the appropriate approach to realizing justice. Although all of the situations that the ICC is currently investigating are in Africa, it is critical to distinguish the modalities of sexual violence in distinct contexts, in order to formulate responses that meet the specific needs of survivors and communities. Such context-specific responses cannot occur unless survivors are incorporated into the process of redefining what justice looks like for them, specifically in ways that fit both their country's political histories and the distinct culture of their communities.

If the ICC hopes to serve as a symbol of deterrence, then the international community must be prepared to justify whether symbolic purpose alone is good enough and if it can even live up to its ascribed symbolic status. How much of a deterrent is the ICC if its ability to actually apprehend suspects remain constrained? More importantly, proponents of deterring rape and other forms of sexual violence must not be satisfied with an international legal emblem of intolerance. To truly deter the gravest human rights abuses, what is on trial—including but not limited to, the status of women, root causes of poverty and the socio-economic conditions that contribute to societal power imbalances—must be assessed with more long-term fervour than who has been charged. To accomplish this, the ICC may find that its current progress in integrating gender equity throughout the justice process is an outcome worth commending.

How international responses to sexual violence come to be remembered holds the potential to create a collective vision of how it can be prevented in the future. Yet the ICC must not alone bear the weight of prosecuting perpetrators of genocide, war crimes and crimes against humanity. Indeed some countries have preferred to try to strengthen the national capacity to implement the norms of the IHL—this is illustrated in Uganda's newly formed national High Court Division, developed to deal with serious war crimes, including those committed by Joseph Kony and other leaders of the LRA.⁶³ In light of the adoption of UN Security Council Resolution 1820, Srgjan Kerim, UN General Assembly President, noted that more efforts were needed to address sexual violence against women.⁶⁴ As long as rape and other forms of sexual violence continue to be systematically used as weapons of war, the call for more efforts is a modest expression of the urgent need for change.

The potential for the ICC to proactively prevent gender crimes has not—despite initial anticipations—been fully developed in its present capacity, as it serves the duties of a reactive judicial body. However, by reframing rape and other forms of sexual violence as war crimes, the Rome Statute became the first permanent international legal entity to emphasize the relationship

Established as a 'court of last resort', the ICC had hoped and expected national judicial bodies to bring to justice other, lesser-known perpetrators

⁶³ 'Uganda: war crimes court set up', *Africa Research Bulletin: Political, Cultural and Social Series*, vol. 45, no. 5 (June 2008).

⁶⁴ Kerim stated, 'Clearly we all have to do more to prevent human rights violations against women and girls in situations of armed conflict, do more to punish perpetrators and end the impunity of war crime violators' quoted in United Nations (note 2).



between impunity and prevention in conflict-ridden regions. With the problem internationally defined, the Review Conference of the Rome Statute should seek feedback on the possibility of developing a more aggressive international preventive organ within the ICC, which could coordinate local and regional outreach efforts to boost the role of women in local and national leadership positions. It could also establish much needed benchmark mechanisms for fighting impunity specific to sexual violence. The attendance of women's groups from affected regions at the conference may, as a first step, gesture to both long-term gender mainstreaming possibilities, as well as to the need to identify a permanent role for local leaders in shaping international law.

V. Conclusions

The Rome Statute set a new direction in the trajectory of international criminal justice when it integrated gender into its structure and procedures. Despite optimistic expectations, the codification of sexual and gender violence in international law has not proved to be enough of a deterrent to prevent such violence from occurring before, during and after conflict. On the contrary, sexually violent crimes are actually on the rise.⁶⁵

Since coming into force in 2002, the ICC's advances in combating the pervasive and silent war waged against women are extraordinary. Within the past year, the issuing of new arrest warrants and the apprehending of wanted suspects—in addition to current and newly scheduled trials—have revitalized hope of the court's credibility and reliability. While measuring the progress made by the ICC thus far has proved elusive at best, with much ambiguity prevailing, only those survivors most affected by its outcomes may be able to actually define 'successful' gender crime justice in the future.

Shifting norms do not neatly translate into ubiquitous adoptions of day-to-day justice for all women, especially during periods of conflict. Judge Goldstone spoke to the grim outlook of rapid change when he stated that 'the hope of "never again" [has become] the reality of again and again'.⁶⁶ In the short run, the 2010 Review Conference of the Rome Statute offers a venue for clarification on how to measure small achievements. Although, in the long run, questions regarding when and how sexual violence will cease to be used as a tactic of war must be asked with vehemence to all witnesses of the 21st century, whether directly affected by conflict or not. While responses to sexual violence must be diversified, the ICC's quest for justice must be remembered as a universal pursuit if a collective vision of prevention is to be accepted as the next, and possibly only, step forward.

The ICC must not alone bear the weight of prosecuting perpetrators of genocide, war crimes and crimes against humanity

⁶⁵ OCHA and IRIN (note 1); and UNIFEM (note 1).

⁶⁶ As quoted in Booth, C., 'Prospects and issues for the International Criminal Court: lessons from Yugoslavia and Rwanda', ed. P. Sands, *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press: Cambridge, 2003), p. 157.



Abbreviations

CAR	Central African Republic
DRC	Democratic Republic of the Congo
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
LRA	Lord's Resistance Army
NGO	Non-governmental organizations
OTP	Office of the Prosecutor
VWU	Victims and Witnesses Unit

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PROSECUTING CONFLICT- RELATED SEXUAL VIOLENCE AT THE INTERNATIONAL CRIMINAL COURT

ASHLEY DALLMAN

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