Combating Impunity for Sexual Violence against Women in Armed Conflict

An Analysis of International Mechanisms and their Co-operation

By Helle Dahl Iversen

"Punishment for gender crimes is no longer merely a question of international law, but one of international integrity. The quest for justice is of legal importance and moral significance to all people everywhere"

Kelly Dawn Askin

Thesis written as part of

European Master's Programme in Human Rights and Democratisation, Venice

Under supervision of Professor Cees Flinterman

Netherlands Institute of Human Rights (SIM), Utrecht

1.1 Abstract

In the course of the last decade, a progressive development has taken place as a response to the problem of sexual and gender-based violence against women in armed conflict. This development has resulted in a workable framework consisting of three branches of international law, i.e. international human rights, humanitarian and criminal law. Focus has shifted from standard setting to implementation. To this effect, a number of mechanisms have been established to ensure avenues of redress for the victims and accountability on the part of the perpetrators. This thesis analyses current contributions from human rights mechanisms like the Committee on the Elimination of Discrimination against Women and the Special Rapporteur on Violence against Women, its causes and consequences and from the International Criminal Court. It discusses possible improvements in their future endeavours and concludes by saying that a concerted action is needed at the international level to end the cycle of impunity.

Table of Contents

2. Introduction

As a result of women's efforts in the twentieth century, a number of concrete commitments exist at present to tackle violence against women as a violation of human rights and to end impunity for perpetrators at the international level. Despite these commitments, violations of women's human rights continue to be cruel and massive. In many countries there is not only a lack of remedies for the violations, but they remain unnoticed as discriminatory or as an affront to the dignity of women. The major legal advancements for women are woefully inadequate as "equality between the genders has not been the reality, in domestic laws or international laws, in civil laws or criminal laws, in times of war or in times of non-war"[1] . While an impressive set of international legal instruments aimed at the protection and promotion of women's rights have been put in place over the years, a gap remains between the enactment of a law and its full implementation, resulting in high levels of impunity.

The focal point of this thesis is the issue of gender-based or sexual violence against women in armed conflict. Sexual violence has to a certain extent been recognised as a human rights violation as well as a violation of international humanitarian law. It is now condemned after decades of silence and a framework of legal standards has been set up to ensure that these horrendous crimes are no longer marginalised. The words are in place to a certain extent even if further elaboration or formulation of substantive norms is desirable[2]. It is now time to implement legal and policy measures in order to enhance operational effectiveness of the bodies that are responsible for the protection and promotion of women's human rights law and the prosecution of the perpetrators of these violations. These mechanisms along with states should ensure that action takes place and that the standards are implemented in a proper way that gives justice to the words.

The legal framework for protection against and prosecution for crimes of sexual violence has evolved from at least three different sources of law, i.e. international human rights, humanitarian and international criminal law, each with different customary and treaty-based origins and historic precedents[3]. This provides a possibility to compare different responses to and means of ensuring avenues of redress for the victim-survivors of sexual violence in armed conflict.

---

[1] K. Askin, *Prosecution in International War Crimes Tribunals*, The Hague, Martinus Nijhoff Publishers, 1997, p. 260.
[2] A. Byrnes, *Using International Human Rights Law and Procedures to advance Women's Human Rights* in K. Askin and D. Koenig, (eds.), *Women and International Human Rights Law,* New York, Ardsley, vol. 2, 1999, p. 79.
[3] G. McDougall, Special Rapporteur, Final Report on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, UN Doc E/CN.4/Sub.2/1998/13, 22 June 1998, para. 34.

"*Gender violence*, whether public, private, *or wartime*, is a particularly discriminatory area which greatly impacts upon women's full enjoyment of basic human rights and freedoms"[4]. In peace times, women are subjected to all forms of gender-based persecution, discrimination and oppression, including acts of sexual violence and slavery which often go unpunished even in functional criminal justice systems. These horrific acts expand greatly in number, frequency and severity during armed conflicts where a general atmosphere of chaos, violence and hatred reigns[5]. There is a significantly increased risk of abuses directed at women during armed conflict situations and the degree of impunity may also increase at the same time. This deterioration is not merely caused by a collapse of social restraints and the general mayhem, but also in many cases by a deliberate and strategic decision on the part of combatants to intimidate and destroy "the enemy" as a whole by raping and enslaving women who are identified as members of the opposition group[6].

This thesis will consider the developments that have taken place as regards sexual violence against women in the areas of human rights, international humanitarian law and criminal law. It will become clear that human rights have had a major impact on the international prosecution of sexual crimes against women. Subsequently, I will give an analysis of the relevant human rights mechanisms, i.e. the Commission on the Status of Women (CSW) and the Committee on the Elimination of Discrimination against Women (CEDAW/C), the Special Rapporteur on Violence against Women, its causes and consequences, as well as the International Criminal Court (ICC). In light of the developments, I will undertake to answer the following questions: What has each of these organs contributed with in relation to the problem of sexual violence? What might the contributions be in the future and are there any problems or lacunae in this respect? Could one imagine a co-operation between the different organs where they exchange experiences and thereby mutually reinforce one another in the form of a synergy? Or is it in fact preferable to have several parallel bodies that supplement and complement each other?

Structure in the following

In chapter 2, I will give a brief description of the developments that have taken place in international human rights, humanitarian and criminal law as regards the issue of sexual violence against women in armed conflict.

Chapter 3 will analyse the work of the two organs that deal exclusively with women's rights, i.e. CSW and CEDAW/C. International supervisory and monitoring procedures, as well as international complaints mechanisms, have been developed to ensure national compliance with international norms, and to establish accountability of governments for their human rights performance vis-à-vis

[4] K. Askin, *Prosecution.*.op.cit. p. 236 (emphasis added).
[5] Ibidem, p. 260

the international community. I have chosen to deal with these two bodies in the same chapter but could also have chosen to deal with CSW, a political, charter-based body in the same chapter as the Commission on Human Rights (CHR). My division is based on the distinction between women's bodies and the mainstream[7] rather than treaty-based and charter-based bodies. This is to highlight the parallel tracks within the UN system, for human rights activities on the one hand and for activities dealing with the concern of women, on the other.

Chapter 4 will consider the work carried out by the two special rapporteurs with thematic mandates directly concerning the issue of sexual violence during armed conflict. The Special Rapporteur on Violence against Women, its causes and consequences was appointed by CHR, the main political organ in relation to human rights within the United Nations. The Special Rapporteur on Systemic rape, Sexual slavery and Slavery-like Practices during Armed Conflict was appointed by the Sub-Commission on Promotion and Protection of Human Rights, an expert group established under and with reference to CHR.

International criminal law is witnessing heightened prosecution of violations of international human rights and humanitarian law. In this process, the three bodies of law are increasingly overlapping and reinforcing each other. The Rome Statute for the International Criminal Court[8] is an example of this relationship. Chapter 5 will analyse the second part of the Rome Statute that contains its subject matter jurisdiction in relation to gender-specific crimes. I will compare and contrast the jurisdictional regime of the ICC with those of the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY)[9] and Rwanda (ICTR)[10]. The jurisprudence and experiences of ICTY and ICTR played a pivotal role in the course of the negotiations prior to the adoption of the Rome Statute, and the final text draws upon the precedents and attempts to address some of the deficiencies and shortcomings of the tribunals.

In chapter 6, I will consider the feasibility of an international co-operation both between human rights organs within the United Nations, and between CEDAW/C and the ICC as a criminal judicial organ applying international humanitarian law. If one considers gender-based violence as discrimination against women and thereby as a human rights violation in itself, it would imply a violation of both the Rome Statute and CEDAW.

---

[6] G. McDougall, Final Report, op.cit. para. 9.
[7] The 'mainstream' includes the various instruments, committees, programs, and procedures that are serviced by the Office on the High Commissioner of Human Rights in Geneva.
[8] *The Rome Statute of the International Criminal Court*, UN Document A/CONF.183.9.17 July 1998. The Rome Statute was adopted and opened for signature on 17 July 1998 by the United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998, A/CONF.183/9* and Corrections to the Rome Statute of the International Criminal Court, C.N.577.1998 Treaties-8 (Annex) [hereinafter Rome Statute].
[9] *Statute of the International Tribunal for the former Yugoslavia,* UN Doc S/25704, annex, 1993.
[10] *Statute of the International Criminal Tribunal for Rwanda,* UN Doc S/INF/50, annex, 1994.

Definitions and material

In the course of this thesis, there are continuous references to gender and/or sexual violence. The definitions of these terms[11] are as follows for the purpose of this thesis. 'Gender violence' means violence that targets or affects one gender exclusively or disproportionately primarily because of that gender. It also includes violence that is based on or perpetuates socially constructed or stereotyped gender roles or the power differentials between men and women. The term 'sexual violence' refers to violence of a sexual nature. Whether directed against women or men, sexual violence is usually a form of gender violence, as an attack on one's gender identity, whether masculine or feminine. Gender violence does not have to include sexual violence. Earlier attempts to address the problem of sexual violence against women referred almost exclusively to 'rape'. At times I will use the notion of 'rape' when dealing with the precedents. This implies an understanding of the notion of 'rape' as part of the broader notion of 'sexual violence'.

There is a plethora of material available as regards sexual violence against women within international human rights, humanitarian and criminal law. In accordance with the scope of the thesis and the page limit set, however, it is not possible to give a full account of all three sources of international law. Instead, I have tried to underline the essential aspects of and highlight eventual problems in relation to each source of international law in its response to sexual violence against women.

[11] The definitions are borrowed from the Women's Caucus for Gender Justice in the International Criminal Court which is made up of women from around the world with expertise in women's issues, http://www.iccwomen.org.

3. Developments in the area of sexual violence against women during wartime

The most fundamental principle of human rights law is the principle of non-discrimination. This principle governs the rights of women during armed conflicts as well. The most fundamental principle of humanitarian law is the principle of 'humaneness'. The prosecution of other crimes, while ignoring gender crimes, both violates and undermines each of these basic principles of international law.[12]

3.1 Women and international human rights

3.1.1 Earlier developments

The increase in the number of human rights standards at the international level in the last fifty years has been a striking feature of the development of international law in that period[13]. The UN aimed from the very beginning for a recognition of the principle of non-discrimination. In the preamble of the UN Charter[14], the peoples of the United Nations reaffirmed their faith in "fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". A female perspective can be found in the Universal Declaration of Human Rights[15] where Article 1 asserts that "*all* human beings are born free and equal in dignity and rights". The general principle of non-discrimination is contained in Article 2.

Of the several blind spots in the early development of the human rights movement, none is more striking than that movement's failure to give violations of women's human rights the required attention, and in some respect the required priority. This is contrary to the fact that violence against women is the most brutal manifestation of women's oppression, occurring both within the public and private spheres[16]. Feminists challenge international human rights law for failing to recognise oppressive practices against women as human rights violations. For a long time, human rights critical to men have occupied the centre stage in the human rights discourse and in many areas, women have been denied equality with men. Furthermore, when women's human rights are violated or not fully implemented, their race, class, or *gender* may render the violation more serious[17].

---

[12] K. Askin, *Prosecution..*op.cit. p. 379.
[13] A. Byrnes, *Using International Human Rights…*op.cit. p. 79.
[14] *Charter of the United Nations and Statute of the International Court of Justice,* Office of Public Information, United Nations, New York.
[15] *Universal Declaration of Human Rights,* adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948 (emphasis added).
[16] U. O'Hare, *Realizing Human Rights for Women,* «Human Rights Quarterly», The Johns Hopkins University Press, vol. 21, 1999, p. 364.
[17] D. Cartwright, *The Committee on the Elimination of Discrimination Against Women* in K. Askin and D. Koenig (eds.), *Women and International Human Rights Law*, New York, Ardsley, vol. 2, 1999, p. 165 (emphasis added).

Much of the impetus for the trends of heightened attention on sexual violence in the course of the last decades can be traced back to the women's human rights movement. The movement for recognition of the equal rights of women has to some effect exerted its influence on human rights law. An example is the Convention on the Elimination of Discrimination Against Women (CEDAW)[18]. Sexual violence against women is perhaps one of the clearest examples of how discrimination against women that exists in all societies during peacetime is exacerbated during periods of armed conflict[19].

In the early 1990s, the issue of sexual violence against women in armed conflict achieved prominence within the UN system. Two particular cases of widespread sexual violence prompted this development. One was the struggle of Asian women forced into sexual slavery by the Japanese army during World War II, to have the crimes committed against them acknowledged and redressed. Secondly, there was widespread media coverage of the sexual atrocities committed during the armed conflict in the former Yugoslavia[20]. At the same time, there were intensified efforts by advocates for women's rights to have violence against women recognised as a human rights issue. Violence against women in armed conflict is an integral part of the wider campaign to eradicate violence against women[21].

A progressive development has taken place in the area of women's human rights in the course of the last decade. The four main elements are the World Conference in Vienna, the UN Declaration on the Elimination of Violence against Women, the Special Rapporteur on Violence against Women, its Causes and Consequences and the World Conference on Women in Beijing. The work of the Special Rapporteur will be dealt with explicitly in chapter 4.

3.1.2 The Vienna Declaration and Programme of Action

Violence against women in public and private life was only formally recognised by the international community as a fundamental human rights concern after unprecedented lobbying by non-governmental women's organisations at the World Conference on Human Rights in Vienna in 1993[22]. The Conference took some important steps towards *de jure* and *de facto* incorporation of the human rights of women into the theory and practice of human rights. The Declaration recalls the preamble of the UN Charter and emphasises that the human rights of women and of the girl-

---

[18] *Convention on the Elimination of Discrimination Against Women*, adopted by General Assembly resolution 34/180 of 18 December 1979 [hereinafter CEDAW].
[19] It is beyond the scope of this thesis to consider all the other ways in which armed conflict affects women, see J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law*, Kluwer Law International 2001 in chapter 2, The impact of armed conflict on women, pp. 19.
[20] J. Gardam and M. Jarvis, op.cit. p. 136.
[21] R. Coomaraswamy and L. Kois, *Violence against Women* in K. Askin and D. Koenig, D. (eds.), *Women and International Human Rights Law*, New York, Ardsley, vol. 1, 1999, p. 178.
[22] Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24, 12 July 1993.

child are an inalienable, integral and indivisible part of universal human rights[23] and that the eradication of all forms of discrimination on grounds of sex are priority objectives for the international community.

It is stressed that "violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, *systematic rape*, *sexual slavery*, *and forced pregnancy*, require a particularly effective response"[24]. The Conference advocated a number of steps to improve the integration of women's issues within the human rights community, including gender mainstreaming within the framework of UN. Particular emphasis was put on the increased co-operation between CSW, CHR and CEDAW/C[25].

3.1.3 The UN Declaration on the Elimination of Violence against Women (DEVAW)

The formal expression of the commitment made in Vienna can be found in the UN Declaration on the Elimination of Violence against Women[26]. The Declaration is a comprehensive document that identifies root causes and suggests remedies for the eradication of violence against women. DEVAW was passed unanimously and thus has the moral force of world consensus. In the preambular part, DEVAW frames the issue of violence against women and recognises that it is "a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men". In this respect, violence against women is not endemic but socially constructed and historically justified and it can be eliminated with concerted intervention by the international community, states and civil society actors. The Declaration is a measure to "strengthen and complement" the process of ensuring the effective implementation of CEDAW.

DEVAW takes a comprehensive view of violence and encompasses any act of gender-based violence that results in, or is likely to result in, physical, *sexual* and psychological harm or suffering by women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life, in peacetime or in wartime, i.e. within the family, within the general community and finally perpetrated or condoned by the state[27]. Gender-based violence is presented as a form of discrimination against women. The right to freedom from all forms of discrimination is contained in the preambular part of the Declaration. Prescriptions for state action include a due diligence standard to ensure the prevention, investigation, and punishment of perpetrators[28]. With

---

[23] Ibidem, para. 18.
[24] Ibidem, part II, para. 38 (emphasis added).
[25] Ibidem, part II, para. 37.
[26] *Declaration on the Elimination of Violence Against Women*, UN Doc A/Res/48/104, 23 February 1994.
[27] Ibidem, articles 1 and 2 (emphasis added).
[28] Ibidem, article 4.

the link between discrimination and violence, responsibility for the monitoring of state compliance is put into the hands of CEDAW/C. This presupposes an improvement of the operational efficiency of CEDAW/C in order to ensure effective protection.

The reiteration of the due diligence standard is essential but the reference to national legislation in this regard undercuts the normative force of the provision[29]. Women in armed conflict are included as one of the target groups and it is recognised that this group is particularly vulnerable to violence[30]. DEVAW together with the Inter-American Convention on Violence against Women[31] indicate a shift in recognition. These two documents reframe the boundaries of human rights law[32].

3.1.4 The Beijing Declaration and Platform for Action[33]

At the World Conference for Women in Beijing, the issue of violence was identified as one of the twelve critical areas of concern to be addressed by Member States, the international community and civil society, including NGOs and the private sector. For the first time the problem of women and armed conflict was placed in a broader context and most importantly, it was recognised that the vulnerability of women during armed conflict is a direct consequence of the discrimination and disadvantage that women face throughout their lives "because of their status in society and their sex"[34]. Six strategic objectives addressed the effects of armed conflict on women. These include significant aspects of armed conflict, including the incidence of gross and systematic violations of human rights during armed conflict and the disregard thereof by IHL and human rights law; the upholding and reinforcement of the norms of IHL and human rights law in relation to these offences against women, and the prosecution of all those responsible. Governments undertook to integrate a gender perspective in the resolution of armed or other conflicts and foreign occupation[35].

These developments indicate a shift in the recognition by the international community that sex or gender is an important element of analysis when it comes to examining the enjoyment of human rights. They reflect an awareness that wartime violence against civilians, including sexual violence, can never be justified by military necessity and is a gross violations of human rights[36]. The efforts undertaken have emphasised a two-pronged strategy. On the one hand, a strengthening of the women specific regime represented by CEDAW and its monitoring mechanism and on the other hand, increasing attention on the extent to which general human rights activities are paying atten-

---

[29] U. O'Hare, op.cit. p. 378.
[30] DEVAW, op.cit. article 7.
[31] *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, "Convention of Belém do Pará,", OAS/Ser.L.V/II.92/doc.31 rev.3, 1994.
[32] U. O'Hare, op.cit. p. 374.
[33] *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, Action for Equality, Development and Peace, UN Doc A/Conf.177/20, 1995.
[34] Ibidem, para 135.
[35] Ibidem, para. 142(b).
[36] K. Askin, *Women..*, op.cit. pp. 61.

tion to the human rights of women. This issues will be addressed in chapter 3 and in chapters 4 and 6 respectively.

3.2 Women and International humanitarian law (IHL)

Armed conflict, whether internal or international in nature, is governed by the rules of war, or IHL, consisting of treaty law, customary international law and the practice of international war crimes tribunals[37]. IHL is largely codified through the four 1949 Geneva Conventions[38] following the atrocities committed in World War II, along with the 1977 Protocols to the Conventions[39]. International criminal law applies the framework of IHL.

IHL is often referred to as the part of international human rights law which is applicable to armed conflict[40]. International human rights law supplements, reinforces and complements IHL[41]. Common article 2 of the Geneva Conventions states that these Conventions apply "in addition to" provisions which apply during times of peace. Accordingly, as a general principle, most provisions of human rights treaties, such as CEDAW and the Convention Against Torture[42], do not cease to be applicable during times of war.

As indicated above, non-discrimination and humaneness are the guiding principles in armed conflict. IHL contains general provisions protecting all civilians and a number of provisions affording women "special protection" to women during armed conflict. The provisions dealing with women are drafted in a different language than the ones relating to combatants and civilians generally, as the former refer to a concept of "protection" rather than prohibition. The special protection rules only relate to the sexual and reproductive aspects of women's lives viewed from a male perspective[43].

---

[37] However, the jurisprudence of the Tribunals is not a primary source of international law, although it has considerable normative effect, J. Gardam and M. Jarvis, op.cit. p. 227.
[38] Geneva Convention No. I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention No. II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention No. III Relative to the Treatment of Prisoners of War and Geneva Convention No. VI Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
[39] *Protocol [I] Additional* to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977. *Protocol [II] Additional* to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977
[40] K. Askin, *Prosecution..*op.cit. p. 243.
[41] K. Askin, *Women..*, op.cit. p. 58.
[42] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 of 10 December 1984.
[43] J. Gardam and H. Charlesworth, *Protection of Women in Armed Conflict,* , «Human Rights Quarterly», The Johns Hopkins University Press, vol. 22, 2000, at p. 160.

In the past, preventing, punishing, or even acknowledging these crimes against women have been regarded as neither imperative nor important by the military and international communities[44]. Even though it has long been understood that sexual assaults on women during internal and international armed conflicts are prohibited under IHL as well as under international criminal law[45], efforts to address and to prosecute these serious violations were, until a decade ago, *"lacklustre, both nationally and internationally"*[46]*.* The area of sexual violence has been characterised by an atmosphere of silence[47], and IHL has been particularly negligent in addressing gender issues.

Rape and other forms of sexual violence were traditionally viewed as one of the inevitable spoils of war and consequently, as an integral part of women's experience of armed conflict. Historically, crimes of sexual violence have been associated or equated with crimes against the honour or dignity of a woman, and not as a grave act of violence. This obscures the violent nature of the crime and inappropriately shifts the focus towards the imputed shame of the victim and away from the intent of the perpetrator to violate, degrade and injure. Stereotypical concepts of femininity have been formally enshrined in IHL and conceal the fact that "rape is a crime of extreme physical and mental violence and interminable harm that invades and violates the most sacred, most private parts of a person's body"[48]. The official failure to condemn or punish rape in wartime has resulted in an international military culture of impunity[49].

Despite a comprehensive legal framework, discriminatory interpretation and application of IHL has resulted in an inconsistent and inadequate protection of women from gender related violence in wartime. The laws were drafted and interpreted as not truly universal, but as masculine[50]. IHL is regarded as a thoroughly 'gendered' system which has failed to incorporate the perspective of women into the assessments of the types of harms considered to be the most serious[51]. IHL fails to take account of women as subjects in their own right[52]. The boundaries of IHL themselves represent an additional hierarchy with specific implications for women and do not address the humanitarian problems in the aftermath of a conflict situation when the needs of women are particularly marked[53]. All in all, in the context of IHL and international criminal law, there has been a refusal to acknowledge discrimination against women as the root cause of the particular vulnerability of women in armed conflict. This has only been acknowledged by special mechanisms focusing on the human rights of women, such as CEDAW/C.

---

[44] K. Askin, *Prosecution...*,op.cit. p. 377.
[45] A. McDonald, *Prosecuting IHL Violations against Women*, «Nemesis», No. 5, 1998, p. 133, note 6.
[46] Ibidem, p. 133.
[47] R. Coomasraswamy and L.. Kois, op.cit. p. 213.
[48] K. Askin, *Women..*, op.cit. p. 55.
[49] K. Askin, *Prosecution..*op.cit. p. 214.
[50] Ibidem, p. 253.
[51] J. Gardam and M. Jarvis, op.cit. p. 185.
[52] J. Gardam and H. Charlesworth, op.cit. p. 160.
[53] J. Gardam and M. Jarvis, op.cit. p. 252.

3.2.1 The 1949 Geneva Conventions

The Geneva Conventions constitute customary international law and regulates the conduct of both State and non-State actors. The prohibition of violence against women during times of armed conflict is a principle of modern systems of laws relating to armed conflict. Article 27 of the fourth Geneva Convention[54] explicitly prohibits rape during wartime. It is however seen as a crime of honour. When Article 27 is read in conjunction with Article 147, it becomes clear that it is not articulated as a grave breach subject to universal jurisdiction. Similar provisions are to be found in Common article 3, a provision that does not expressly prohibit rape, but refers to "outrages upon personal dignity, in particular humiliating and degrading treatment". It is widely recognised, however, that Common article 3, clearly prohibits, as a matter of customary international law, acts of sexual violence and rape by State and non-State actors whether committed in internal or international armed conflict[55]. An additional problem is that IHL is complicated in its application, despite its relatively broad coverage[56]. The Geneva Conventions generally fail to identify the level of conflict or internal strife that may be necessary to trigger the application of the provisions of Common article 3.

3.2.2 The 1977 Protocols to the Geneva Conventions

The Protocols reflect a slightly more enlightened approach and are intended to supplement and clarify the Geneva Conventions. They contain stronger references to sexual violence even if these crimes continue to be subsumed under categories dealing with honour and dignity. The Protocols have not been as widely ratified as the Conventions and are not considered by all to reflect customary international law[57]. Article 75 of Additional Protocol I[58], entitled "Fundamental Guarantees", prohibits "outrages upon personal dignity" in gender-neutral terms. Article 76, para. 1 provides special protection for women "..in particular against rape, forced prostitution and any other form of indecent assault". Article 4, para. 2(e) of Additional Protocol II[59] relates to internal armed conflicts. The latter provides a similar protection as Article 75 of Additional Protocol I, but adds an express reference to rape. Merely one sentence in each of the Protocols protects explicitly against sexual violence. It is still not expressly considered among the violent crimes; instead the Protocols distinguish sexual assault from crimes of violence[60].

---

[54] Geneva Convention No.VI, op.cit.
[55] G. McDougall, *Final Report*, op.cit. para. 69 and K. Askin, *Women.*.op.cit. p. 69.
[56] G. McDougall, *Final Report*, op.cit. p. 17
[57] C. Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, «Human Rights Quarterly», The Johns Hopkins University Press, vol. 17, 1995, p. 676.
[58] *Additional Protocol I*, op.cit.
[59] .*Additional Protocol II*, op.cit.
[60] C. Niarchos, op.cit. p. 675.

The grave breaches provisions of the Geneva Conventions have attained the status of customary international law and many provisions in addition the status of *jus cogens*[61]. Grave breaches are among the most egregious violations of IHL. Indeed, violations of grave breaches "create universal mandatory criminal jurisdiction among contracting States"[62] However, as a consequence, the harms that women most need protection against, are not reflected in the norms of *jus cogens*[63]. In practice, IHL has failed to address specifically the issue of wartime rape.

As a result of discriminatory attitudes and practices, women do not only have distinctive needs in the context of redress for their suffering, but they experience particular problems in obtaining it[64]. It is essential to fill out the gap outlined above. It exists alongside the fact that parties to contemporary armed conflicts, both international and internal, increasingly target civilian populations when waging hostilities[65]. There is thus a need to ensure that women are given access to international criminal procedures in their search for justice.

3.3 Women and international criminal law

Some of the violations of IHL and human rights are crimes attributing individual criminal liability to the perpetrator or to others responsible for their commission or omission[66]. As crimes against international law are committed by individual perpetrators, not abstract entities, the provisions of international law can only be enforced by prosecuting and punishing individuals who commit such crimes through international criminal law, applicable in armed conflict. The elevation of an action to international crime status is most often based upon express language in international instruments, recognition of customary international law, or violations of *jus cogens.*

The process of establishing individual criminal responsibility began with the Nuremberg trials[67] and the Tokyo Tribunal[68] after WW II, followed by ICTY and ICTR, and leading up to the International Criminal Court. Rape was not included in any of the indictments of the Nuremberg Tribunal, although it was included in some of the indictments of the lesser-known proceedings of the Tokyo Tribunal.

Increasingly, mechanisms are being established at the international level to prosecute crimes committed during the course of armed conflicts. Modelled somewhat on the precedents, interna-

---

[61] *Vienna Convention on the Law of Treaties*, adopted 23 May 1969, UN Doc A/CONF.39/27. Article 53 contains a definition of *jus cogens.*
[62] D. Koenig and K. Askin, op.cit. p. 22, note 80.
[63] J. Gardam and M. Jarvis, op.cit. p. 184.
[64] Ibidem, p. 178.
[65] G. McDougall, *Final Report,* op.cit. para. 7.
[66] Ibidem, p. 41.
[67] Charter of the International Military Tribunal, 8 August 1945.

tional war crimes tribunals have been instituted[69], partly stipulated by reports of mass and systematic rape, deliberate impregnation, and other gross atrocities committed during the Yugoslav and Rwandan conflicts[70]. The Special Rapporteur appointed by the Commission on Human Rights highlighted the role of rape both as an attack on the individual victim and as a method of 'ethnic cleansing', "intended to humiliate, shame, degrade and terrify the entire ethnic group"[71]. There has been widespread support to include rape as a crime against humanity in the Statutes of ICTY and ICTR[72], a progress that is considered to be an application of customary law. Despite the widespread nature of these crimes, rape was not expressly included in the relevant sections on grave breaches or war crimes in the respective Statutes.

Through creative interpretation of the Statutes in a manner reflecting development of the law[73], the Office of the Prosecutor has charged and successfully prosecuted acts of sexual violence as genocide, crimes against humanity, and as grave breaches of the Geneva Conventions as well as other war crimes. Sexual violence was a major impetus for the establishment of the ICTY and it was considered to be committed against the whole Moslem society and not merely against individual victims. In contrast, sexual violence was not mentioned in the resolution prior to the establishment of the ICTR tribunal[74]. The inconsistent response of the United Nations to the treatment of women in the Yugoslav and Rwandan conflicts gives rise to the question whether a permanent change of attitude has in fact taken place in relation to crimes of sexual violence[75]. It seems as if the problem of sexual violence receives most attention when it is perceived as a method of warfare[76]. "It is a pity that calamitous circumstances are needed to shock the public conscience into focusing on important, but neglected, areas of law, process and institutions"[77].

Even if the term 'rape' was scarcely mentioned in the Statutes of ICTY and ICTR, the Statutes and the case law from the tribunals as a whole have been highly significant in making sexual violence an offence in both international and internal conflict. The most significant development is not that

---

[68] Charter of the International Military Tribunal for the Far East, 19 January 1946.
[69] Established by the Security Council under Chapter VII of the UN Charter since the commission of these atrocities constituted a threat to international peace.
[70] United Nations, Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, 1992, UN Doc. S/1994/674, 1994, Annex para. 241. The documented rapes seemed to fall into five patterns, para. 244.
[71] T. Mazowiecki, *Report on the situation of human rights in the territory of the former Yugoslavia*, UN Doc. A/48/92-S/25341, 1993, Annex, para. 20, 57.
[72] In articles 5(g) and 3(g) respectively.
[73] C. Steains, op.cit. p. 363.
[74] Security Council Resolution 955, 1994.
[75] J. Gardam and M. Jarvis, op.cit. p. 148.
[76] Ibidem, p. 159.
[77] T. Meron, *Rape as a Crime under International Humanitarian Law,* «The American Journal of International Law», vol. 87:424, 1993, pp. 424-428.

the normative framework has been further developed but that individuals can now in fact be prosecuted[78].

The idea of a permanent International Criminal Court has been a part of the human rights movement since 1948, when the UN General Assembly instructed the International Law Commission to study the possibility of establishing such a court. However, the Rome Statute was not adopted until 1998[79] and entered into force on 1 July, 2002. The inclusion of its comprehensive gender provisions transpired more generally in the wake of important developments in the field of IHL and advances in the international community's response to violence against women and women's human rights. These developments and advances as a whole formed the necessary political impetus for the integration of a gender perspective throughout the ICC Statute.

The developments outlined above indicate that gender issues have received more adequate reflection in recent years. International criminal law applicable in armed conflict is predicated on a hierarchy of values, and gender is one of the factors in the operation of this hierarchy[80]. The most extensive development is perhaps the increased recognition of sexual violence as an international crime. Although women have gained ground, extensive improvements are required to effectuate non-discriminatory laws and practices. The tribunals act as normative instruments of the general law of war.

[78], Advisory Council on International Affairs, *Violence against women, Legal developments*, No. 18, February 2001, p. 14.
[79] The Rome Statute to the ICC, op.cit.
[80] J. Gardam and M. Jarvis, op.cit. p. 179.

4. CSW and CEDAW/C

There are two institutions within the universal human rights system that are exclusively concerned with women's rights, i.e. the Commission on the Status of Women and the Committee on the Elimination of all Forms of Discrimination against Women. Both institutions are serviced by the Division for the Advancement of Women (DAW)[81] and not by the Office of the UN High Commissioner of Human Rights in Geneva.

4.1 The Commission on the Status of Women

4.1.1 Mandate

The Commission was established as a functional commission of the Economic and Social Council (ECOSOC)[82] to monitor the situation of women and to promote and encourage implementation of women's rights in political, economic, civil, social and educational fields. It should additionally make recommendations on "urgent problems requiring immediate attention in the field of women's rights with the object to implementing the principle that men and women shall have equal rights, and to develop proposals to give effect to such recommendations"'[83]. The Commission consists of forty-five representatives of states, reflecting the geographical distribution of UN membership. It submits its recommendations and reports directly to the Council and, through ECOSOC, to the General Assembly. It holds an annual session in New York for a relatively brief period. The central part of the work of CSW is universal standard-setting regarding gender equality. Due to its efforts, women's rights have become the substance of international treaties and declarations, many of which set important precedents in the area of human rights, including DEVAW and CEDAW.

4.1.2 The communications procedure

After a period of stagnation during the late 1970s and early 1980s, CSW was in 1984 granted the authority by ECOSOC[84] to receive and *respond* to communications relating to the status of women sent to it by individuals and organisations. The communications have to reveal a consistent pattern of reliably attested injustice and discriminatory practices against women. The allegations directed against a particular state are considered by a CSW Working Group who also considers government replies and then brings to the attention of the Commission itself that fulfil the requirements outlined above. The Working Group makes use of a confidential and a non-confidential list of communications. CSW is authorised to examine communications as a source of information only

[81] With effect from 1 August 1993, DAW moved back to the United Nations Headquarters in New York where it now forms part of the Department of Economic and Social Affairs, http://www.un.org/womenwatch/daw.htm.
[82] ECOSOC Resolution 11 (II) of 21 June 1946.
[83] As amended by ECOSOC Resolution 48[IV] of 29 March 1947.

for purposes of identifying general trends and patterns. It may "take note" of the report and make general recommendations for action to ECOSOC, but it cannot take any further action. Cook describes the procedure as "a complaint information procedure rather than a complaint recourse procedure"[85]. In addition, the procedure is relatively unknown and little used. It does not appear that it has provided an avenue for redress of specific individual grievances[86]. According to Byrnes[87], it has not followed the path of the Commission on Human Rights in debating alleged violations of human rights in particular countries, although it does consider these by way of its rather ineffectual confidential communications procedure. It cannot be considered to be a monitoring mechanism with powers of investigation like the Commission on Human Rights.

4.1.3 Other tasks

The Commission has been involved in the process of drawing attention to the issue of violence against women, in elaboration of international documents and of policies and strategies aimed at women's rights, and in the holding of numerous world conferences on human rights issues. The terms of reference that establishes the mandate of the Commission were expanded in 1987 to include the monitoring of the 1985 Nairobi Forward-looking Strategies for the Advancement of Women[88]. Following the Fourth World Conference on Women in Beijing, the General Assembly mandated CSW in 1996 to integrate in its work programme a follow-up to the conference, regularly monitoring, reviewing and appraising progress achieved and problems encountered in the implementation of the 1995 Beijing Declaration and Platform for Action at all levels. It was to review the critical areas of concern in the Platform for Action, including violence against women, and to develop its catalytic role in mainstreaming a gender perspective in United Nations activities[89].

The CSW considered the issue of 'women and armed conflict' as one of the four critical areas of the Beijing Platform for Action during its 42nd Session in March 1998[90]. Compared to earlier approaches, the prevalence of sexual violence, including physical and psychological consequences, appeared as a central feature at the session. There was an emphasis on gender-sensitive enforcement of IHL which reflects the development in the area in relation to the ad hoc tribunals and the ICC. The issue of redress was also addressed.

In June 2000, a special session of the General Assembly entitled "Women 2000: Gender Equality, Development and Peace for the Twenty-First Century" was held to review the progress made to-

---

[84] ECOSOC Resolution 1983/27 of 26 May 1983.
[85] R. Cook, *Enforcing Women's International Human Rights* in A. Yotopoulos-Marangopoulos (ed.), *Women's Rights Human Rights*, Athens, Estia Publications, 1994, p. 42.
[86] A. Byrnes, op.cit. *Using International Human Rights*, p. 102.
[87] Ibidem, pp. 107-108.
[88] U. O'Hare, op.cit. pp. 371-72.
[89] ECOSOC Res. 1996/6 of 22 July 1996.
[90] J. Gardam and M. Jarvis, op.cit. p. 165.

wards implementation of the Platform for Action in the five years following the Beijing Conference. The developments in the context of the tribunals and the Statute of the ICC were highlighted as examples of achievements in the critical area of women and armed conflicts. There were very few concrete initiatives, however. Gardam and Jarvis[91] considers the outcome document to be a failure in the process of moving beyond words towards implementation. This reiterates the need for new approaches.

4.2 The Committee on the Elimination of Discrimination Against Women

4.2.1 Background

One fundamental protection of women stems from the assurance of equal protection which has been a dominant theme in the human rights movement as described previously in chapter 2. Prohibition of discrimination on the grounds of sex has been an essential ingredient of that theme. The fundamental principles of equality and non-discrimination are at the core of human rights treaties and declarations.

The Convention on the Elimination of Discrimination against Women (CEDAW)[92] is the only major international instrument solely concerned with the rights of women and often referred to as 'bill of human rights for women'. It requires respect for and observance of the human rights of women; it is universal in reach, comprehensive in scope and legally binding in character[93]. It incorporates the norms against gender-based discrimination as well as all the standards relating to women or having particular significance for women that had been set in earlier instruments. It contains guarantees of equality and freedom from discrimination by the *state* and by *private* actors in all areas of public and private life[94]. The Convention is the highlight of more that thirty years of work by CSW. The Convention calls for national legislation to ban discrimination against women, it recommends temporary special measures to speed equality between men and women, and indicates the actions necessary to modify social and cultural patterns that perpetuate sex-biased discrimination[95].

Through CEDAW, States Parties demonstrate an unqualified positive commitment to the comprehensive prohibition of all forms of discrimination against women. Articles 1 to 16 contain the concrete state obligations of which the following are of particular importance for the issue of sexual violence against women; Article 1 with its definition of 'discrimination', Article 2 where states parties

---

[91] Ibidem, op.cit. p. 169-170.
[92] CEDAW, op.cit. The Convention was opened for signature during the mid-Decade Conference of the United Nations Decade for Women held in Copenhagen in 1980, and entered into force on 3 September 1981.
[93] R. Cook, op.cit. p. 30.
[94] Emphasis added.
[95] D. Gaudart, *Charter-based Activities Regarding Women's Rights in the United Nations and Specialized Agencies* in W. Benedek, E. Kisaakye and G. Oberleitner (eds.), *The Human Rights of Women: International Instruments and African Experiences*, World University Service Austria, 2002, p. 62.

condemn discrimination in all its forms and agree to pursue a policy of elimination of discrimination against women by "all appropriate means"[96], Article 5 on the modification of social and cultural patterns of conduct, and Article 6 on trafficking and exploitation of prostitution.

4.2.2 Mandate of CEDAW/C

Articles 17 to 21 contain the provisions relating to CEDAW/C which was established to monitor compliance with CEDAW by State parties to the Convention. CEDAW/C consists of twenty-three independent experts in the field covered by the Convention, nominated and elected by states parties to the Convention, but intended to serve in their own personal capacity[97]. CEDAW reports annually, through the Economic and Social Council (ECOSOC), to the General Assembly[98]. The Committee holds two three-week sessions annually, each preceded by a pre-session working group[99].

Among the six treaty bodies set up to monitor the implementation of the key international human rights instruments, CEDAW/C has for a long time been the least visible one for the international human rights community. It started its work in 1982, but it was not until the mid-1990s with the developments described in chapter 2 that greater opportunities were provided for the Committee to increase its impact and visibility both within and outside the United Nations human rights treaty system[100].

CEDAW's title incorporates a classic civil and political issue, discrimination, but the content of the rights of the Convention and the work of CEDAW/C range more broadly. At present, the work is divided into three main areas: consideration of states parties' reports under Article 18; development of suggestions and general recommendations based on the examination of reports and information received from states parties under Article 21; and development of links with specialised agencies under Article 22. In addition, the individual complaints and inquiry procedure will produce a further working area. A former member of CEDAW/C enumerates the three main areas of concern as the following: Civil and political rights and the legal status of women; women's reproductive rights; and the recognition of the influence, culture and tradition has on restricting women's enjoyment of their

---

[96] Article 2(c) states an obligation to "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination" and article 2 (f) deals with the modification or abolishment of existing discriminatory laws, regulations, customs and practices.
[97] At present, there are two male expert members of CEDAW/C, Mr. Cees Flinterman, the Netherlands and Mr. Göran Melander, Sweden.
[98] CEDAW article 21, para. 1. A copy of the report is transmitted to CSW.
[99] M. Bustelo, *The Committee on the Elimination of Discrimination Against Women at the Crossroads* in P. Alston and J. Crawford (eds.);*The Future of the UN Human Rights Treaty Monitoring*, Cambridge University Press 2000, p. 83.
[100] Ibidem, p. 79.

fundamental rights[101]. Given the broad mandate of the Convention it is obvious already at this stage that CEDAW/C cannot concentrate exclusively on the issue of sexual violence against women in armed conflict.

4.2.3 The notion of 'discrimination'

The Convention explicitly states in its preamble that "extensive discrimination against women continues to exist" . For the purposes of CEDAW, a legal definition of discrimination against women was required and is contained in Article 1 as; "…any distinction, exclusion or restriction made on the basis of sex which has the *effect* or the *purpose* of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil *or any other field*"[102]. The concept of discrimination is the thread that runs through CEDAW's substantive provisions[103].

There are three vital characteristics in this definition; both *direct* and *indirect* discrimination is included which means that a discriminatory impact suffices; it is not limited to state action; and it is further expanded by "or any other field"[104]. The definition thus focuses not merely on the formal *de jure* enjoyment of equality by women, but additionally on the *de facto* situation, or the extent to which women in practice enjoy those rights.

CEDAW supplements the anti-discrimination provisions in the Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR)[105], by identifying specific areas of discrimination of special concern to women. An approach to clarifying what constitutes discrimination against women in international human rights law is through the development of General Comments or Recommendations on substantive matters covered by the Convention[106]. General Recommendations are an increasingly important part in the process of ensuring that the provisions are applied to serious violations, both old and new. They Illuminate international knowledge and understanding of the topic. Whereas the earlier recommendations were short and narrowly focused, the more recent ones are sophisticated and lengthy.

---

[101] D. Cartwright, op.cit. p.166.
[102] Emphasis added.
[103] A. Byrnes, *The Convention on the Elimination of All Forms of Discrimination against Women* in W. Benedek, E. Kisaakye and G. Oberleitner, (eds.), *The Human Rights of Women: International Instruments and African Experiences*, World University Service Austria, 2002, p. 124.
[104] Freedom of expression is not explicitly mentioned in the Convention. The general obligations in the Convention, especially article 2, impose an obligation of states parties not to discriminate in relation to these rights. The right is therefore incorporated by reference as a result of the terms of article 1, e.g. 'any other field'.
[105] *International Covenant on Civil and Political Rights*, adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, at articles 2, para. 1 and 3. *International Covenant on Economic, Social and Cultural Rights*, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, at article 3.
[106] A compilation of General Comments and General Recommendations adopted by the human rights treaty bodies dated 26 April 2001 can be found in HRI/GEN/1/Rev.5.

4.2.4 General Recommendation No. 19

It is important to note that there is no comprehensive, legally binding instrument on violence against women. It is not explicitly covered by a specific article in the Convention, but is nevertheless covered by the Convention as a whole as it is within the meaning of the Convention and therefore covered by a number of articles. In response to the lack of adequate reflection in the state reports of the close connection between discrimination against women, gender-based violence and violations of human rights and fundamental freedoms, CEDAW/C adopted General Recommendation No. 12 on Violence Against Women in 1989[107]. It emphasised the use of the existing non-discrimination provision in the Convention[108].

CEDAW kept the issue on its agenda and at its 10th session in 1991, it decided to allocate part of the 11th session, in 1992, to a study of violence against women. Instead of supporting a proposal for an Optional Protocol limited to the issue of violence, the Committee adopted a major Recommendation and Comment on Violence Against Women, No. 19[109]. Based on the experience of the Committee, "*gender-based violence* is a form of *discrimination* that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men"[110], a human rights violation in itself, and the enumerated list of rights and freedoms included the right to equal protection according to humanitarian norms in time of international or internal conflict.

Article 1 of the General Recommendation defines discrimination as encompassing all forms of violence against women and it includes "gender-based violence, that is, violence directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering". With the words of Cartwright, this is perhaps the most striking work of the Committee[111]. It reminds states that full implementation of their obligations under CEDAW requires them to "take positive measures to eliminate all forms of violence against women". In accordance with Article 2(e) of the Convention, states parties should ensure that laws against e.g. rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. In order to achieve this, detailed guidance is provided to states parties as to their obligations under the Convention and the types of action they are expected to undertake in this regard. In addition, states are required, in their reporting to CEDAW, to consider methods to combat and to report on sexual violence against women.

---

[107] A General Comment or Recommendation is a statement that has been formally adopted by the Committee which interprets, clarifies or *expands* upon a particular treaty right. It can be used to evaluate the Committee's likely position on an issue in the absence of case law. It draws upon the experience gained from the reports of states parties, provided by NGOs as well as the knowledge of individual experts.
[108] U. O'Hare, op.cit. p. 372.
[109] CEDAW, Eleventh Session, *General Recommendation 19*, UN Doc CEDAW/C/1992/L.1/Add.15 (1992).
[110] Emphasis added.
[111] Cartwright, op.cit. p. 173.

It is important to emphasise that the state is responsible not only for its own acts of violence, but also for acts committed by *private* individuals where the state fails to act "with *due diligence* to prevent violations of rights or to investigate and punish acts of violence and for providing compensation"[112].

CEDAW/C has thus articulately interpreted CEDAW as prohibiting violence against women in all its forms, and further insisted that humanitarian law must likewise not be discriminatory in its treatment of women[113]. As a treaty, CEDAW carries with it legal force to the states parties to the Convention, since the most fundamental principle of international law is *pacta sunt servanda*, or agreements must be observed[114]. The treaty must be Interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties[115]. General Recommendations as such, however, have an ambiguous status as a guide to the meaning of the Convention. While they are entitled to be taken into due account as the considered collective pronouncement of the expert body, recommendations of the CEDAW do not carry legally binding obligations, merely moral persuasion.

4.2.5 The reporting procedure

The primary responsibility of CEDAW/C is the task of monitoring states' efforts to meet their obligations through the review of periodic reports submitted by the states parties[116]. States are required to submit an initial report within one year from the entry into force of the Convention for the state concerned and every four years thereafter[117]. The reports should contain the steps taken to implement the state obligations under the Convention and the difficulties experienced in doing so. The reports are reviewed at a public meeting to which representatives of the reporting states are invited.

The aim of the periodic reporting procedure is to encourage a 'constructive dialogue' between CEDAW as the monitoring body and the state. This notion does not mean that the discussion is uncritical and mutually congratulatory. There are examples of criticism from individual members as well as collectively, both on technical limitations and substantive positions. Essentially the success of the process depends on the willingness of states parties to take part in good faith.

---

[112] General Recommendation 19, op.cit. para. 9.
[113] K. Askin, *Prosecution*.., op.cit. p. 234.
[114] Vienna Convention on the Law of Treaties, op.cit. article 26.
[115] A. Byrnes, *The Convention…,* op.cit. p. 123.
[116] As of 3 June 2003, 174 countries – or ninety percent of the members of the United Nations – are party to CEDAW. Additional three have signed the treaty, binding themselves to do nothing in contravention of its terms. See http://www.un.org/womenwatch/daw/cedaw/states.htm. The number of members makes CEDAW the second most widely accepted international human rights treaty after the Convention on the Rights of the Child (CRC).

Even a decade ago, CEDAW/C chose violence against women as a matter of special attention when States reports were under consideration. Since its Twelfth Session, the Committee has been scrutinising state reports for steps that have been taken to eliminate violence against women, including sexual violence in armed conflict, in accordance with General Recommendation No. 19[118].

Several reforms have been carried out to improve the reporting procedure in general, and in relation to the problem of sexual violence against women in armed conflict in particular. Guidelines from 1997 encourage states to comment on implementation of the twelve critical areas of concern in the Beijing Platform of Action[119], including the issue of violence against women. Some reports have been requested on an exceptional basis following "..and further whenever the Committee so requests"[120]. In these reports, CEDAW/C requested information about the protection of women in war and about the measures taken in order to protect the women nationals of each state from the tragic consequences of the wars being fought on or near their territories. The question is whether it is possible for a country in a state of emergency to provide such information in a comprehensive report?[121].

Access to independent sources of information, such as NGOs and specialised UN agencies is essential to the effective operation of the reporting procedure. Gradually, the procedure has changed in order to take full account of all sources. This is a means of securing maximum level of co-operation in the area and of securing women a voice within the UN human rights system[122].

Concluding comments

The Committee formalised its use of concluding comments in connection with state reports at its thirteenth session in 1994[123]. The concluding comments are incorporated into the Committee's outcome report on the consideration of the state party's report. They consist of the following four sections: an introduction; the positive aspects of the report, addressed in the order of the articles of the Convention; the factors and difficulties affecting implementation of the Convention and highlighting the principal areas of concern; and finally recommendations, suggestions and aims to provide concrete suggestions from the Committee with regard to the problems identified in the comments[124]: The concluding comments, representing the most visible input of CEDAW/C should be detailed

---

[117] CEDAW article 18, para. 1(a) and (b).
[118] See generally, H. Steiner and P. Alston, *International Human Rights in Context, Law, Politics, Morals*, Second edition, Oxford University Press, 2000, pp. 158-236.
[119] U. O'Hare, op.cit. p. 283 and Beijing Platform for Action, op.cit.
[120]CEDAW article 18, para. 1(b). Extraordinary reports have been received from the Former Republic of Yugoslavia, Rwanda and Zaire, or Congo.
[121] Rwanda submitted its third periodic report at CEDAW/C's twelfth session in 1993 and not since then, see http://www.un.org/womenwatch/daw/cedaw/.htm.This is a problem if the Committee is to have an essential role in relation to the problem of sexual violence against women in situations of armed conflict.
[122] An example is the International Women's Rights Action Watch (IWRAW).
[123] U. O'Hare, op.cit. p. 385.
[124]M. Bustelo, op.cit. p. 94.

enough to act as 'an agenda for action' for the state[125]. The importance of a high quality in the concluding comments has been emphasised in various forums[126].

4.2.6 The Optional Protocol to CEDAW

In Vienna it was stated that "new procedures should also be adopted to strengthen implementation of the commitment to women's equality and the human rights of women"[127]. One of the new procedures established to this effect is the Optional Protocol (OPT) to CEDAW[128], establishing an individual complaints procedure as well as an inquiry procedure. The question of the OPT has been controversial, e.g. in relation to justiciablity of rights and eventual overlap with other procedures. However, the great majority of experts involved in the negotiations considered that full compliance with CEDAW would never be achieved without the ability to communicate directly with the Committee[129]. The need for an individual communications procedure could also be identified from the fact that several communications dealt with by the Human Rights Committee under the Optional Protocol to ICCPR claimed discrimination on the basis of sex[130]. The OPT is the result of a delicate negotiation, and it reflects balance and consensus among the different opinions[131]. The OPT follows the general structure of the ICCPR Protocol. It is a treaty in its own right and states have to have ratified the OPT separately. It explicitly provides that no reservations may be entered to its terms.

4.2.6.1 Individual Communications

4.2.6.1.1 Admissibility

By becoming a state party to the OPT, a state recognises the competence of CEDAW/C to receive and consider written communications from individuals or groups of individuals who claim to be victims of a violation of any of the rights set forth by the Convention[132]. There has thus been a retreat from the initial draft optional protocol which proposed a much wider *locus standi* and where communications could be submitted by a group or an organisation who had a sufficient interest in the matter. It covered positive obligations as well[133]. Although CEDAW/C has not yet considered a complaint, it has formally adopted Rules of Procedure to govern the consideration of individual

---

[125] U. O'Hare, op.cit, p. 385.
[126] M. Bustelo, op.cit. p. 95, note 38. There has been an improvement in the elaboration of concluding comments even if they are still uneven in length, detail and calibre.
[127] The Vienna Declaration and Programme of Action, op.cit.
[128] On the basis of an open-ended working group of the CSW which met annually from 1996 to 1999, CSW adopted the optional protocol to CEDAW on 12 March 1999 by consensus, and then by the ECOSOC in July 1999. It was adopted by General Assembly Res. 54/4 in October 1999. It was opened for signature on 10 December 1999 and entered into force on 22 December 2000, following its tenth instrument of ratification or accession in accordance with Article 16, para. 1 of the Protocol.
[129] D. Cartwright, op.cit. p. 179.
[130] E. Evatt, op.cit. p. 448.
[131] The OPT does not contain possibilities of ex officio inquiry procedure and no inter-state complaints.
[132] OPT, article 2.
[133] U. O'Hare, op.cit. p. 388.

communications[134]. A communication cannot be anonymous[135]. It cannot be incompatible with the provision of the Convention or manifestly ill-founded. The Committee shall not consider a communication if the domestic remedies have not been exhausted "unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief"[136]. This leaves a certain degree of flexibility to CEDAW/C, even if this degree has been limited in comparison with the term 'unreasonable' in the original draft[137].

A communication is inadmissible where the same matter has already been, or is being, examined under another procedure of international investigation or settlement[138]. This limitation applies whenever such a procedure has been invoked, even if it is concluded.

4.2.6.1.2 Fact-Finding Powers

CEDAW/C shall consider the communications in the light of all information made available to it *by or on behalf of* individuals or groups of individuals and by the State Party concerned[139]. This is a retreat compared to the original draft protocol which empowered CEDAW/C take information from "other relevant sources" into account which would have facilitated the use of *amicus* briefs in relation to gender-based violence[140]. CEDAW/C may request a State party to the OPT to take "such *interim measures* as may be necessary to avoid possible *irreparable* damage to the victim or victims of the alleged violation"[141]. The possibility of taking interim measures is explicitly mentioned in an OPT establishing an individual complaints procedure for the first time. This represents a significant development and "may be particularly useful in the context of cases concerning potentially life-threatening violence against women"[142].

4.2.6.1.3 Subject Matter for Potential Communications[143]

As mentioned above, the General Recommendations provide some assistance to the approach of CEDAW/C to the interpretation of rights and freedoms set forth in the Convention, together with the concluding comments on state reports. The application of these general principles and statements to specific circumstances will have to be further developed in the context of an individual case. General Recommendation No. 19 states that gender-based violence, including sexual violence, is 'discrimination' in terms of CEDAW Article 1, and Article 2 requires states parties to condemn and

---

[134] Anne F. Bayefsky: *How to Complain to the UN Human Rights Treaty System*, Klüwer Law International 2003. Chapter VI, pp. 107-127, contains a detailed account of the Rules of Procedure.
[135] OPT, article 3.
[136] Ibidem, article 4, para. 2.
[137] U. O'Hare, op.cit, p. 389.
[138] OPT, article 4, para. 2(a).
[139] OPT, article 7.
[140] U. O'Hare, op.cit. p. 390.
[141] OPT, article 5 (emphasis added).
[142] U. O'Hare, op.cit. p. 391.
[143] A. Bayefsky, op.cit. pp. 112.

eliminate this violence, whether it is perpetrated by public authorities or by private parties. The rights and freedoms include e.g. “the right to equal protection according to humanitarian norms in time of international and internal conflict” and “the right to equal protection under the law”[144]. This implies that a female victim of sexual violence in times of peace or during armed conflict would be able to file a complaint against a given state party to the OPT under the complaints procedure if the state has not fulfilled its obligations in Article 2 as well as the due diligence standard in General Recommendation No. 19, that is if the state has failed to investigate and punish acts of violence and provide compensation. She could profit from the possibilities of interim measures in this respect[145].

4.2.6.2 Inquiry procedure

Article 8 of the Optional Protocol to CEDAW contains an inquiry procedure in response to allegations of rights violations which is a special feature of the treaty body system. The procedure follows the model set out in the Convention Against Torture[146], and the practice from the Torture Committee is likely to become an influential guide despite certain differences between the two systems[147]. To be subject to the procedure, states parties have to have ratified the OPT, and they must not have exercised the right to opt out of the procedure in accordance with Article 10. CEDAW/C may make inquiries if it receives “reliable information” indicating “grave *or* systematic violations” by a State party of rights set forth in the Convention. As opposed to the complaints procedure, the inquiry procedure cannot address a single violation, but a pattern of misconduct. Bayefsky does not rule out the possibility, however that even an isolated but egregious violation of the Convention could satisfy the disjunctive requisite standard[148]. The procedure can be triggered by information coming from individuals, organisations and from the state reporting system.

CEDAW/C and the members that have been appointed to conduct the inquiry have “wide latitude in determining the methods of their investigation”[149]. The prerequisite for a country visit and the conduction of hearings in the course of the visit is the state party’s consent. The investigations are confidential, but CEDAW/C is required to include a summary of its activities in its annual report to the General Assembly, including the existence and results from any investigations undertaken by the Committee[150]. The state reporting system is foreseen to be the formal follow-up vehicle for

---

[144] In addition, one could also consider whether other articles are relevant as regards gender-based violence, such as articles 5, 10(c), 11, 12 and 16.
[145] G. McDougall, *Final Report*, op.cit. p. 21. Women must be legally entitled, on an equal basis with men, to claim and receive compensation on their own behalf.
[146] Convention against Torture, op.cit.
[147] A. Bayefsky, op.cit. pp. 123.
[148] Ibidem, p. 123 for a comparison of the two procedures.
[149] Ibidem, p. 126.
[150] OPT, articles 8 and 12.

monitoring compliance with the outcome of an inquiry[151]. Successful implementation is, to a significant extent, a function of follow-up and the maintenance of pressure.

4.2.6.3 Remedies

There is no sanction connected to failure to comply with the final Views of the Committee 'other than' the possibility to give publicity to the views and follow-up information through the Committee's Annual Reports to the UN General Assembly. The possibility of publicity is significant, though, as states generally do not like to be named and shamed in public. CEDAW has not considered any cases under the OPT yet. In the future, CEDAW can request specific remedies, or reparations such as compensation, rehabilitation, restitution and satisfaction, or guarantees of non-repetition, in its Views as recommendations[152]. A number of these would be of importance for a victim of sexual violence. CEDAW/C can draw upon the experiences from the other human rights treaty bodies or maybe other judicial organs, such as human rights courts. As there are no enforcement mechanisms as such in the treaty body system, there is a general problem of non-compliance. As an example, in the case of the Human Rights Committee, the insistence of the Committee that a remedy be forthcoming in response to a finding of a violation has been respected in about one-fifth of the cases[153].

In relation to the topic of this thesis, it should be mentioned that the right of victims to reparation for gross violations of international law is a critical issue with respect to sexual violence, including rape, committed during armed conflict[154].

4.3 An assessment

In the above, I have highlighted the different procedures that CEDAW/C can undertake in its deliberations. The time has come to ask the question whether this treaty system, and its activities, has made or has the potential of making a meaningful contribution to the protection against gender-based sexual violence in armed conflict. I will make an assessment of CEDAW/C in the overall and relate this to the question of sexual violence.

Notwithstanding the numerous contributions by CEDAW/C in the development of the normative understanding of women's rights in recent years, the system faces a large number of challenges for the future. The Committee has reached an important juncture in its work, offering opportunities

---

[151] OPT, article 9.
[152] OPT, article 7, para. 3.
[153] A. Bayefsky, op.cit. p. 141.
[154] G. McDougall, *Final Report,* op.cit. p. 20 with reference to the Final report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms),

for increased impact and visibility, but if it cannot deal with the challenges, this will prevent its capacity to realise its full potential[155]. Problems relate to poor resourcing, a heavy workload, backlog of reports, and the lack of sanctions in cases of non-compliance by the States parties. In addition, reservations are considerable in breadth and substance without any procedure to determine incompatibility. In recent years, CEDAW has expressed its views on incompatibility more forcefully in an effort to protect the integrity of the system, and regularly included these views in its concluding comments[156].

The Convention has a very broad mandate and covers practically all areas of women's lives. As a matter of course, it is not able to focus exclusively on the problem of sexual violence. The Committee can, however, "develop a permanent self-critical attitude and continue to re-examine its working methods in order to exploit its potential and the opportunities outlined above"[157]. It must continue to introduce the necessary changes and to search for more productive ways to promote implementation of the Convention, including of state obligations relating to sexual violence against women. To this end, there is a need for CEDAW/C to continue to address contemporary violations of women's rights, by applying a dynamic interpretation, partly through the questioning in connection with the reporting procedure and partly through the General Recommendations[158]. With General Recommendation No. 19, the Committee showed its capability in this respect.

The reporting procedure

The Committee has decided to review implementation of the Convention in up to a maximum of eight countries at each of its sessions[159]. This has attracted criticism from a number of states parties due to the growing backlog of reports awaiting consideration. Bustelo states that it might be possible for the Committee to reduce its backlog by considering more reports at each session, but such a decision "would inevitably affect the quality of report review" [160]. In order to respond to the backlog, CEDAW/C will have to discuss possibilities of combining reports or ask for reports with a more limited range of issues, including the issue of sexual violence against women where this is pertinent. The Committee could highlight the individual circumstances of each state party that pose the greatest challenges to implementation of the Convention. A way to enhance the reporting procedure and its responses to sexual violence would be for the Committee to increase its focus on country-specific issues and problems or to develop a formalised practice of specialisation, e.g.

Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc E.CN.4/2000/62, 18 January 2000.

[155] M. Bustelo, op.cit. p. 109.

[156] A. Byrnes, *The Convention*…op.cit. p. 128.

[157] M. Bustelo, op.cit. p. 111.

[158] Ibidem, p. 97. At its seventeenth session in July 1997, CEDAW/C adopted a new and more structured approach to the preparation of General Recommendations, allowing it to take advantage of expertise of the members as well as input possible from the UN system and NGOs.

[159] M. Bustelo, op.cit. p. 84.

[160] Ibidem, p. 84-85.

Committee members with specific knowledge of gender-based violence or the situation in the reporting countries. So far there is little evidence of efforts to implement this procedure in practice[161].

An essential problem is the failure of states parties to CEDAW to report in the first place[162]. CEDAW/C needs to develop techniques to encourage states parties to report, and to do so in a timely fashion. There is a strong basis, in both law and policy, to support the consideration of a state party in absence of a report, once repeated requests have failed to persuade the state party in question to honour its reporting obligation[163].

The Optional Protocol to CEDAW

According to O'Hare, the OPT creates a judicially enforceable right for women to be free from private violence due to the fact that violence against women has been authoritatively interpreted elsewhere as a form of discrimination, that is in General Recommendation No. 19[164]. The potential subject matter for the individual communications procedure in the OPT as regards sexual violence against women is mentioned above. One can imagine the same set of facts being addressed both through the individual communications procedure and the inquiry procedure at the same time[165]. The latter cannot "yield a recommendation for an individual remedy" but it "might bolster any related claim of individual rights violations". As the Commission on Human Rights that will be considered in the next chapter, the inquiry procedure offers the potential for international public scrutiny of widespread or gross human rights violations, with the accompanying hope of international pressure and incentive for reform. The inquiry procedure has a number of advantages as a complementarity to the individual complaints procedure[166].

In addition to providing an international remedy for violations of women's rights, the Optional Protocol will hopefully act as an incentive for Governments to take a fresh look at the means of redress that are currently available to women at the domestic level. Lastly, NGOs can play an essential role in monitoring armed conflict situations and exposing cases of violence against women both nationally and internationally. In this regard, they can utilise the many international and regional human rights bodies and complaint mechanisms, including the CEDAW OPT. The latter provides the possibility of group complaints unlike the individual complaints procedure in relation to ICCPR.

The Commission on the Status of Women

---

[161] Ibidem, p. 92.
[162] Ibidem, p. 84.
[163] Ibidem, p. 110.
[164] O'Hare, op.cit. p. 394.
[165] A. Bayefsky, op.cit. p. 127.
[166] U. O'Hare, op.cit. p.393.

The importance of CSW in the elaboration of the legal framework for the promotion and protection of women's human rights cannot be exaggerated. It has not made substantial use of its communications procedure and the efficacy of this procedure can be called in question. The CSW does not take decisions on the merits of communications and does therefore not provide an avenue for the redress of individual grievances as a result of sexual violence against women. CSW should be encouraged to improve this procedure for the purposes of identifying specific situations in which individuals need redress, or inequitable country situations, and conducting thorough studies of them.

Another possibility would be to supplement the CSW procedure with a similar right of inquiry which could stimulate greater use of the communication procedures generally. The procedure as such remains under-utilised in terms of its potential. Despite important flaws indicated above, it might be possible to use it to greater effect. There is nothing that prevents an individual from simultaneously drawing the attention of the Commission to an individual example of violations of women's rights, and from submitting a complaint to CEDAW/C, where the state party has ratified the OPT[167].

[167] A. Bayefsky, op.cit. p. 146.

5. The investigatory procedures within the UN (the mainstream)

5.1 The Commission on Human Rights

The responsibility for human rights under the UN Charter is entrusted to the General Assembly and the Economic and Social Council (ECOSOC). In its tasks, ECOSOC is assisted by functional commissions, including the Commission on Human Rights (CHR). The Commission is a Charter-based political body, established in 1946, and it currently consists of fifty-three member governments elected for three-year terms. It meets annually for six weeks in Geneva from the middle of March to late April. In addition, it has held four emergency sessions as of April 2000[168]. Although CHR occupies a lower place in the organisational hierarchy within the UN than the General Assembly or the ECOSOC, in the human rights area, it is actually more significant in numerous aspects than those other bodies. CHR covers a wide agenda of issues and it has three possible approaches to address violations: confidential consideration of a situation under the 1503 procedure[169]; public debate under the 1235 procedure[170]; and the appointment of a 'thematic' rapporteur or Working Group to consider violations anywhere relating to special theme, such as violence against women.

In contrast to treaty-based bodies like CEDAW/C, the Charter-based bodies have a much broader mandate to promote awareness, to foster respect, and to respond to violations of human rights standards[171]. The emphasis in the work of CHR is on responding to relatively discrete, but gross and noticeable violations, and not on "what might be termed persistent, endemic, and commonplace violations that are often ignored by states", such as systematically entrenched discrimination against women[172]. The major benefits of using a political forum is publicity and the possibility to put the spotlight on abuses in an individual country.

Most complaints coming to the UN, which allege systemic or group rights violations, or complain of abuses in situations of massive violations of human rights, make no mention of the specific UN mechanism they wish to address. The confidential 1503 Procedure is not directed at an assessment of the accuracy of an isolated individual violation, or the suggestion of a particular remedy. Instead, it is directed at establishing that there are reasonable grounds to believe that "a consistent

[168] There have been two sessions in relation to the Former Republic of Yugoslavia and one each for Rwanda and East Timor.
[169] Established by ECOSOC Res. 1503 (XLVIII).
[170] Established under ECOSOC Res. 1235 (XLII).
[171] H. Steiner and P. Alston, op.cit. pp. 601 with a comparison between the two types of bodies.
[172] Ibidem, p. 602.

pattern of gross and reliably attested violations of human rights and fundamental freedoms exist"[173].

CHR is a forum where the choice of words has an essential impact. The wording in the resolutions range from expressing concern to condemnation or the establishment of a special mechanism, such as a country rapporteur. CHR elaborates and adopts an annual resolution on the issue of violence against women. The language included in the resolutions has become stronger over the years and the latest resolution[174] is more comprehensive, refers to various developments in the area of violence against women and includes a strong condemnation of all violations of international human rights of women and IHL in situations of armed conflict. It is clear, however, that a strong condemnation against a particular state has greater political effect and potential for international embarrassment than a similar condemnation of a theme such as sexual violence that does not have one state as its direct addressee.

Resolutions of CHR in 1997 and 1998 made specific references to the need to integrate a gender perspective into the Rome Statute[175]. In 2003, CHR reiterates in its preamble that elimination of discrimination on the basis of sex is an integral part of efforts towards the elimination of violence against women[176]. It urges the integration of a gender perspective into all efforts to eliminate impunity[177] and makes a clear reference to the inclusion of gender-related crimes and crimes of sexual violence in the Rome Statute of the International Criminal Court; criminal acts can be committed by "the State, by private persons or *by armed groups or warring factions*"[178], a link to armed conflicts that reflect the reality of today. CHR urges the integration of a gender perspective into all efforts to eliminate impunity, including prosecution in the ad hoc tribunals and the ICC[179]. As this is a resolution that deals specifically with women's rights, there is an additional need to include
gender issues in other resolutions, including country resolutions.

The appointment of special rapporteurs

Over the past decade, CHR has created numerous special rapporteurs with ever-widening mandates. There are two types of procedures; *thematic* procedures and *country* procedures[180]. The functions of the individual rapporteurs vary according to the different mandates granted to them by the Commission. It is the responsibility of CHR to formulates their mandates in such a way as to require the inclusion of a gender perspective in terms of both identifying violations and formulating

[173] A. Bayefsky, op.cit. p. 145.
[174] CHR Resolution 2003/45 of 23 April 2003, para. 15.
[175] CHR Resolution 1997/44, at para. 5.
[176] CHR Resolution 2003/45, op.cit.
[177] Ibidem, para. 19.
[178] Ibidem, para. 5 (emphasis added).
[179] Ibidem, para. 19.

responses to such violations[181]. This is essential given the fact that a number of rapporteurs could provide a useful avenue for claims of violations of women's human rights[182]. Their reports are public documents and are often presented and distributed during the sessions of CHR.

5.1.1 The Special Rapporteur on Violence against Women, its Causes and Consequences

The Special Rapporteur is the only gender-specific thematic mechanism, created by the Commission on Human Rights in 1994[183]. Her functions are similar to those of the other thematic rapporteurs[184].

5.1.1.1 Mandate

The Special Rapporteur is to conduct her work within the framework of the Universal Declaration of Human Rights and all other international human rights instruments, including CEDAW and DEVAW. She is to seek and receive information from various sources, including CEDAW/C and to respond effectively to this; recommend measures, ways and means, in dialogue with states, aimed at eliminating violence at the international, national and regional levels; remedy its consequences; and co-operate closely with a number of entities, including CEDAW and CSW. In addition, her mandate includes reporting to the Commission on Human Rights, fact-finding missions to specific countries, the assessment of individual allegations of violence being committed against women and the forwarding of complaints to governments with the purpose of receiving clarification[185] On the other hand, treaty bodies, other special rapporteurs and entities should respond to her requests for information[186]. Her mandate is based on the substantive breakdown of the phenomenon of violence against women contained in DEVAW which she often refers to in the course of her work. She regards DEVAW as the document that unequivocally articulates standards and principles with regard to violence against women on the international human rights agenda with the moral force of world consensus despite its non-binding character.

She divides her deliberations into three main parts, i.e. violence in the family, in the community, and violence perpetrated or condoned by the State. The last part is of particular relevance to the issue of sexual violence in armed conflict and will be dealt with in connection with the consideration

---

[180] A. Bayefsky, op.cit. p. 141. In recent years, the Special Procedures have conducted over 50 field missions, and issued about 1000 urgent appeals annually.
[181] A. Gallagher, *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System*, «Human Rights Quarterly», The Johns Hopkins University Press, vol. 19, 1997, pp. 283-333.
[182] A. Byrnes, *Using International Human Rights..,* op.cit. p. 104.
[183] For an initial period of three years following CHR Resolution 1994/45. The mandate of the Special Rapporteur has been extended by resolutions 1997/44, 2000/44 and 2003/45.
[184] In addition, some country rapporteurs have considered sexual violence within the course of their studies, see J. Gardam and M. Jarvis, op.cit. 160, note 156 with references to the reports.
[185] Gaudart, D. op.cit. p. 64.
[186] CHR Res. 2003/45, op.cit. para. 30.

of reports by the Special Rapporteur. From the outset, the Special Rapporteur made it clear that her mandate would cover "all violations of the human rights of women in armed conflict, and in particular, murder, systematic rape, sexual slavery and forced pregnancy…"[187].

5.1.1.2 Reports

According to the Special Rapporteur, the state is an ambiguous locality for women[188]. On the one hand, the state is the site of violence against women. Women in custody often face torture and demeaning treatment. Additionally, during times of armed conflict, state actors can be direct perpetrators of violence, through rape and pillage at will at the women's expense. Victimisation of women can also be caused by state inaction with regard to violence against women and its refusal to take the violence seriously and to prosecute and punish male perpetrators of the violence. On the other hand, the state is the place where victims turn to redress grievances at the same time, as the national criminal justice system is directly responsible for ensuring women's safety and bodily integrity. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women"[189]. States can thus be indirectly responsible for acts committed by non-state actors if it fails to honour its obligations under this principle of *due diligence.* According to the Special Rapporteur, "a state that does not act against crimes of violence against women is as guilty as the perpetrators".

In her preliminary report, the Special Rapporteur dealt with the issues of sexual violence in armed conflict as well as refugee women. In the first three years of her mandate, she undertook a wide range of activities and her reports included communications to governments in individual cases, a general survey of violence against women as a phenomenon, proposals for draft domestic violence legislation, field visits to both Koreas and Japan on the issue of military sexual slavery during wartime, and visit to other countries[190].

In 1998 she compiled a more detailed report with a significant focus on sexual violence against women during armed conflict[191]. The report discusses the international legal framework in connection with sexual violence, partly from a feminist perspective, and contains recommendations for future improvements. In the report is included a list of specific incidents of violence against women in current armed conflicts in order to point to the nature and degree of the violence[192]. The record of

---

[187] R. Coomaraswamy, Special Rapporteur. *Preliminary Report on Violence Against Women, its Causes and Consequences,* UN Doc E/CN.4/1995/42, 22 November 1994 [hereinafter Preliminary Report], para 7.
[188] R. Coomasraswamy and L. Kois, op.cit.
[189] R. Coomasraswamy, *Preliminary Report*, op.cit, para. 72. The standard of State responsibility for non-State paramilitary operatives was set forth in the Velasquez decision of the Inter-American Court of Human Rights.
[190] For reports of the Special Rapporteur in this period, see U.N. Docs. E/CN.4/1997/47, 1997 and E/CN.4/1996/53, 1996.
[191] R. Coomasraswamy, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, UN Doc E/CN.4/1998/54, 26 January 1998 [hereinafter Coomaraswamy 1998 Report].
[192] Ibidem, pp. 4-10.

national prosecutions for IHL crimes against women are typically poor. The International Criminal Court is a welcome and timely development in international human rights and humanitarian law[193] but it should meet a number of requirements outlined by the Special Rapporteur[194]. A comprehensive addendum to this report on the basis of her mission to Rwanda[195] deals with the issue of violence against women in a concrete country perspective. She covers a broad range of issues in relation to both conflict and post-conflict responses and is critical towards the response from the UN. She highlights the dire situation of women in the aftermath of armed conflict in which sexual violence was widespread and largely unpunished. The Special Rapporteur published a report in 1999 following her visit to Indonesia and East Timor. This report examines the problem of gender-based violence in the broader context of the position of women in society[196].

The Special Rapporteur has developed her mandate in an encouraging way and is now taking a more sophisticated approach. One can detect a progressively broader view on the effect of armed conflict on women which is in accordance with the Beijing Platform of Action[197]. She has made an effort to visit war-torn countries in order to speak to women and women's groups, and to gain an understanding of the reality of armed conflict and its aftermath for women. Her work provides an important precedent, even if it must be taken into account that sexual violence against women and armed conflict is just one part of her mandate. To this end, her ability to comprehensively consider the issue is necessarily limited by the time and resources available to her[198].

In the final report submitted by the current Special Rapporteur[199], entitled "Developments in the area of violence against women (1994-2002)", she gives an overview of the developments and the work undertaken which is a possible reference for and valuable contribution to future work in the area. The Special Rapporteur refers to it as the current "state of the world" in the campaign to eliminate violence against women in all its forms"[200] The recommendations of the Special Rapporteur can serve as indicators of State compliance with international standards[201]. She concludes her term by stating that the needs of women are generally adequately addressed at the normative level and she refers to the work of CEDAW in developing definitions and standards. The challenges ahead lie in ensuring respect for and effective implementation of existing laws and standards. As regards violence against women during times of armed conflict, the greatest successes can be

---

[193] Ibidem, para. 8.
[194] Ibidem, paras. 8-11.
[195] Ibidem, addendum 1 (mission to Rwanda from 22 to 31 October 1997).
[196] UN Doc E/CN.4/1999/68/Add. 3
[197] Beijing Platform for Action, op.cit.
[198] J. Gardam and M. Jarvis, op.cit. pp. 166.
[199] R. Coomasraswamy, Special Rapporteur, *Final Report on Violence Against Women, its Causes and Consequences,* UN Doc E/CN.4/2003/75 and addenda, 6 January 2003 [hereinafter Coomasraswamy 2003 Report].
[200] R. Coomasraswamy, Special Rapporteur on Violence against Women, its Causes and Consequences, *Statement on Violence against Women* delivered to the Commission on Human Rights, 9 April 2003.
[201] R. Coomasraswamy, 2003 Report, op.cit. p. 20, para. 80.

identified in the areas of awareness raising and standard setting. The ICC is perhaps the greatest development of the decade in terms of legal development and standard setting. Another important victory has been the due diligence standard. Despite the various successes, very little has changed in the everyday lives of most women and that is the challenge for the future. DEVAW provides effective guidelines for the eradication of violence against women to this effect[202].

5.2 The Sub-Commission on the Promotion and Protection of Human Rights[203]

In contrast to CHR, the Sub-Commission consists of twenty-six independent experts, elected by CHR upon the nomination of governments. It meets for four weeks annually in Geneva in August. This session is generally preceded by various Working Groups dealing with communications, the rights of indigenous populations and contemporary forms of slavery. The Sub-Commission is an expert body, primarily with a research mandate. It acts in a political context, however, and this has had a significant impact on its work[204]. It has provided a forum in which country-specific allegations of rights violations may be raised in public debate. At present, it continues to undertake a range of detailed studies, e.g. on systematic rape during armed conflict and it has made use of a number of procedures, including its Working Groups on Contemporary Forms of Slavery and on Traditional Practices Affecting the Health of Women and Children as well as special rapporteurs to address alleged human rights violations where women are most vulnerable.

5.2.1 The Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict

5.2.1.1 Mandate

The Special Rapporteur was entrusted to undertake an in-depth study on the situation of systematic rape, sexual slavery and slavery-like practices during wartime, including internal armed conflict[205]. In accordance with her mandate and in contrast to the Special Rapporteur on Violence against Women, she has limited her focus to the issue of sexual violence. The primary motivation for the appointment of the Special Rapporteur was to increase the recognition of the crimes committed against the “comfort women” or “jugun ianfu” by Japanese soldiers during World War II. There was a recognition of the need to address the past, and the unremedied violations of human rights, international humanitarian law and criminal law. All three sources of international law is affected by the crimes of sexual violence.

---

[202] R. Coomaraswamy, 2003 Report, p. 22, para. 93.
[203] Known from 1947 to 1999 as the Sub-Commission on Prevention of Discrimination and Protection of Minorities [hereinafter the Sub-Commission].
[204] H. Steiner and P. Alston, op.cit. p. 601.
[205] Sub-Commission on Human Rights resolution 1993/24 of 25 August 1993 and its decision 1994/109 of 19 August 1994, as well as CHR decision 1994/103 of 4 March 1994

5.2.1.2 Reports

The original Special Rapporteur, Ms. Linda Chavez submitted her preliminary report in July 1996[206]. In the report, she summarises the purpose and scope of the study, the history of systematic rape as an instrument of policy, relevant international norms, issues of responsibility and liability, forms with jurisdiction to try perpetrators, possible sanctions against violators and possible forms of reparation. Subsequently, the Sub-Commission appointed Ms. Gay J. McDougall as Special Rapporteur[207] and asked her to prepare the final report.

The final report was submitted in 1998[208]. In this report, the Special Rapporteur identified three main purposes of the mandate: a reiteration of the call for a response to the use of sexual violence and sexual slavery during armed conflict; an emphasis on the true nature and extent of the harms suffered by women who are raped, sexually abused or enslaved by parties to an armed conflict; and finally an examination of the prosecutional strategies for penalising and preventing international crimes committed against women during armed conflict, with a view to achieving a more consistent and gender-responsive application of human rights and humanitarian and international criminal law[209]. In the introductory part of the report, the use of sexual slavery and sexual violence are considered to be tactics and weapons of war that is an all too common yet often overlooked atrocity, demanding consistent and committed action on the part of the global community. Although it is clear that a wide range of responses are needed to address these problems, the report focuses primarily on the development of international criminal law "as a fruitful area for effective action to end the cycle of impunity" for these crimes.

In section III, she examines the legal framework for prosecuting sexual slavery and sexual violence under international law, from a feminist perspective. She calls for the incorporation of an understanding of *gender* into the legal framework for responding to systematic rape and sexual slavery, whereby the full range of obligations and legal accountability of all parties to a conflict may be carefully articulated[210]. An effective response requires that concrete steps are outlined to ensure that the acts of sexual violence and slavery are properly documented, the perpetrators brought to justice, and the victims provided with full and effective criminal and civil *redress,* including compensation[211]. The Commission on Human Rights recommended that the final report should be transmit-

---

[206] U.N. Doc E/CN.4/Sub.2/1996/26
[207] By its decision 1997/41.
[208] G. McDougall, *Final Report*, U.N. Doc. E/CN.4/Sub.2/1998/13, op.cit.
[209] Ibidem, paras. 9-11.
[210] Ibidem, p. 6.
[211] Ibidem, para. 8 (emphasis added). Beijing Declaration and Platform for Action, op.cit. paras. 131-149.

ted to Governments, to the established international tribunals, to the Preparatory Commission for the Establishment of an ICC, and other competent bodies of the United Nations[212].

In the same decision and upon the request of the Sub-commission, the mandate of the Special Rapporteur was extended for a further year in order to enable her to submit an update to her final report on developments with respect to her mandate[213]. The update considers a number of developments and actions at the international and national levels to end the cycle of impunity for sexual violence committed during armed conflict, including the ad hoc tribunals and ICC. She highlight various conflict situations around the world where sexual violence continues to be used as a weapon of war[214]. The request by the Sub-commission was made with a view to wide distribution of the entire study, including to Governments, competent bodies of the United Nations….the established international tribunals and to the Assembly of States Parties of the ICC[215].

5.3 An assessment

The UN system is an effective mechanism for focusing international attention on an issue and formulating a co-ordinated strategy in response and, as such, represents the most promising forum for a comprehensive approach to the problem of women and armed conflict. The Charter-based organs with the 1503 procedure and special rapporteurs and the treaty-based organs with the Optional Protocol to CEDAW provide two separate ways of approaching the problem of sexual violence against women[216].

The mandates or operation of the rapporteurs are not strictly associated with ratification of the human rights treaty standards and the investigatory procedure can therefore target states that have so far avoided the treaty body system, or avoided some dimension of its operation, such as a particular treaty, the individual complaints or inquiry procedures. The special rapporteurs are very capable of providing overviews of specific country situations or going into depth with a particular theme which has been the case with the reports considered above. Their reports have contributed significantly to creating awareness surrounding various international crimes, such as sexual slavery. In general, their work is quite visible and it often involves on-the-spot investigations or high profile visits as well as presentations of the reports to CHR or the General Assembly. The special rapporteurs are, however, ad hoc mechanisms with no avenue for redress.

---

[212] CHR decision 1999/105
[213] G. McDougall, Special Rapporteur, *Update to the Final Report on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict,* UN Doc E/CN.4/Sub.2/2000/21, 6 June 2000 [hereinafter McDougall, *Update*]
[214] G. McDougall, *Update*, op.cit. section II.
[215] Sub-Commission on Human Rights resolution 2000/13 of 17 August 2000 with reference to its resolution 1999/16 of 26 August 1999.

Choosing a forum - a comparison

In relation to an individual case, it should be directed to CEDAW/C under the OPT rather than the 1503 procedure, if the state complained against is a party to the OPT and the alleged violation is covered by the provisions of CEDAW. The 1503 procedure has been criticised for the way in which it has operated and of its limitations for providing timely and effective responses to gross violations of human rights. So far as addressing issues of sex discrimination or violations of human rights that have a significant gender division, it seems that the ECOSOC 1503 procedure has made little contribution[217]. The alternative measures, such as CEDAW/C, provide the complainant with an opportunity to have her case directly addressed, rather that being dealt with in a highly politicised and indeterminate context. Neither the 1503 procedure nor the special procedures are likely to be considered as another procedure of international investigation or settlement for the purpose of the admissibility requirements in Article 4 of the OPT[218]. Another possibility is therefore available for an individual to make simultaneous use of the 1503 Procedure and the CEDAW OPT and draw attention to the individual example of violations of human rights which has taken place in the context of a broader human rights abuse.

At least as long as universal ratification of CEDAW and its OPT has not occurred, "mechanisms which extend the principles of international human rights protection *beyond* participation in the treaty system will be necessary"[219]. In some instances, states will be subjected to both the scrutiny of the special rapporteurs and CEDAW/C in relation to substantially the same facts. Sometimes the two bodies overlap but this overlap is not strictly-speaking duplication. They make use of different methods of work. The special procedures employ country visits while CEDAW/C engages in written and oral dialogue with states. Treaty bodies have a limited capacity to deal with general emergency situations, to focus on systemic human rights violations, or to focus on violations for sustained periods of time. A possible strategy would be to direct the case to a special procedure in the first place and then subsequently to the relevant authoritative quasi-judicial treaty body on the same issues.

A distinction is made between 'urgent appeals' and 'substantive complaints'. Individual complaints are often sent directly to the special rapporteurs, even if Bayefsky is of the opinion that the ability of treaty bodies to act in urgent contexts has been underestimated, as they have the possibility of making use of interim measures as a successful response to the issue of sexual violence as highlighted in chapter 3. Although the treaty system is of considerable length as opposed to the alternative procedures, it should still be applied if possible. The action of the treaty body is grounded in

---

[216] A. Bayefsky, op.cit. pp. 141.
[217] A. Byrnes, *Using International Human Rights,* op.cit, at p. 102.
[218] A. Bayefsky, op.cit. p. 137.
[219] Ibidem, p. 142 (emphasis added).

legal obligations on the part of the state. The outcomes and eventual remedies have considerable more weight as an advocacy tool or as a method of applying pressure to states to change legislation, policies or practices than the outcomes of appeals from the special procedures.

All in all, there is a need to use the existing procedures to greater effect. The thematic special procedures of relevance to the issue of sexual violence against women, e.g. the Special Rapporteur on Violence against Women and the Special Rapporteur on Torture, both provide an urgent action procedure in appropriate cases as well as a public revelation of complaints and government replies. The choice of the appropriate mechanism depends on the nature of the violation that has occurred. The special procedures are quite accessible and cheap and can furthermore be seen as an opportunity to making cases relating to sexual violence against women visible by bringing them to the international forum where the state in question will be under a certain amount of pressure. Urgent appeals procedure can be of considerable importance in preventing a threatened violation or stopping an existing one. This is essential for possible victims of sexual violence[220].

The pursuit of a broad-ranging thematic strategy adopted across a range of bodies and procedures can be an effective means of focusing attention on a problem area and of holding states accountable for violations of sexual violence against women[221]. State responsibility can arise out of human rights violations perpetrated by state actors as well as by private individuals. In the following chapter, focus has shifted to the international criminal responsibility of private individuals. With the words of McDougall, the most immediate and effective deterrent to the use of sexual violence during armed conflict is to hold the perpetrators responsible for their crimes[222].

[220] A. Byrnes, op.cit. at p. 92.
[221] Ibidem, p. 115.
[222] G. McDougall, *Update*, op.cit.. p. 7, para. 21.

6. The Rome Statute of the International Criminal Court

The Rome Statute of the ICC was adopted on July 17, 1998 and entered into force on July 1, 2002[223]. The Statute is a compromise text as a result of hard-fought negotiations[224], but it is encouraging that the Statute, among other advances, acknowledges the criminality of several gender-based and sex-based crimes and integrates those crimes into the jurisdiction of the ICC. In its preamble, the Statute commits itself to end impunity for international crimes and in furtherance hereof, it incorporates a gender perspective into the Statute. For the purposes of the Statute, the term 'gender' is defined as "the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above"[225]. As a result of a difficult compromise, it is up to the Court to interpret the provision and apply it to the circumstances before it, as appropriate[226].

The gender provisions go a considerable way towards addressing the shortcomings in existing international instruments as outlined in chapter 2 and more generally, towards overcoming the international community's traditionally inadequate approach to sexual and gender violations. There are restrictions and set-backs as well which will be addressed in the course of this chapter. The Statute draws upon the experiences and jurisprudence of ICTY and ICTR. The judgements are reflected in the Rules of Procedure and Evidence[227] as well as in the Elements of Crimes[228] that have since been drawn up by the Preparatory Commission (or Committee) and adopted by the Assembly of States Parties in accordance with Article 9 of the Statute. The Elements shall assist the Court in the interpretation and application of the crimes under its jurisdiction. These three documents constitute the primary sources of the applicable framework within which the process will unfold[229]. The primary focus in the following is the subject-matter jurisdiction in part 2 of the Statute.

6.1 Admissibility

The admissibility requirements are contained in Article 17, para. 1. A case which has been or is being investigated or prosecuted by a State with jurisdiction is inadmissible, unless the State is "unwilling or unable genuinely to conduct the proceedings". It follows that the ICC is complementary to

---

[223] Following the deposit of the sixtieth ratification with the Secretary-General in accordance with article 126.
[224] C. Steains, *Gender Issues* in R. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results,* The Hague, London, Boston, Kluwer Law International, 1999, pp. 364 with a comprehensive discussion of the negotiations of the provisions relating to sexual violence in the Rome Statute.
[225] ICC Statute, article 7, para. 3.
[226] C. Steains, op.cit. p. 374.
[227] *Rules of Procedure and Evidence,* ICC-ASP/1/3, available online on www.un.org/law/icc.
[228] *Elements of Crimes*, ICC-ASP/1/3, available online on www.un.org/law/icc.
[229] ICC Statute, article 21 on applicable law.

national court proceedings. Lack of independence or impartiality is an indication of "unwillingness"[230]. In order to determine "inability", the Court shall consider whether the national judicial system is unable to carry out its proceedings "due to a total or substantial collapse or unavailability of its national judicial system"[231]. The extent to which the national system in question protects the rights of women should be taken into account by the Court[232]. Crimes of violent sexual nature require specific procedural and evidentiary safeguards to ensure that national proceedings adequately respond to the violations and to the needs of victims. Due to gender bias or gender-based stereotypes, municipal laws or procedures can be considered unable or unwilling to secure the rights of women survivors of sexual violence to justice and the rights of defendants to a fair trial. Another reason might be the lack or collapse of existing institutions resulting from conflict situations.

6.2 The subject matter jurisdiction

Article 5 of the Statute limits the jurisdiction of the ICC to certain core international crimes, i.e. genocide, crimes against humanity, war crimes and aggression[233]. Jurisdictional thresholds are included in the Statute in order to ensure that only "the most serious crimes of concern to the international community as a whole" will be justiciable[234]. These crimes are considered to affect or have the potential of affecting the peace and security of humankind and are shocking to universal human conscience[235]. In theory, almost all of the substantive jurisdictional provisions provide a basis for the prosecution of all forms and manifestations of rape and sexual abuse, in almost all circumstances. There are limitations in some of their chapeaux, however, that might prove problematic in particular cases[236]. The following will take its point of departure in the so-called "hierarchy of evil"[237].

---

[230] ICC Statute, article 17, para. 2(d).
[231] ICC Statute, article 17, para. 3.
[232] McDougall, *Final Report*, op.cit.. p. 21, paras. 91-94.
[233] The Court cannot exercise jurisdiction over the crime of aggression in article 5, para. 1(d) until a provision is adopted defining the crime and setting out jurisdictional prerequisites that are consistent with the United Nations Charter, article 5, para. 2.
[234] As a point of departure, this should not be interpreted as an additional jurisdictional limitation as regards the four core crimes but it is difficult to know in advance what situations might arise in the future in which this language could be used as a limiting devise, See D. Koenig and K. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes against Women* in K. Askin and D. Koenig (eds.), *Women and International Human Rights Law,* New York, Ardsley, vol. 2, 1999, p. 8, note 16.
[235] ICC Statute, preamble.
[236] A. McDonald, op.cit. p. 135.
[237] "Genocide is the worst, crimes against humanity are next and "ordinary" war crimes are the lowest on the scale. This is not to justify or excuse them; it is a question of the tariff for engaging in them", R. Clark, *Crimes Against Humanity and the Rome Statute of the International Criminal Court* in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court. A challenge to impunity*, Chippenham, Wiltshire, Antony Rowe LtD, 2001, pp. 92-93.

6.2.1 Article 6 Genocide[238]

The Rome Statute includes the crime of genocide within the jurisdiction of the Court, and adopts, verbatim, the definition as in the 1948 Genocide Convention[239]. There was a strong reluctance of delegations during the negotiations to deviate in any way from this definition that had entered the realm of customary international law[240]. As a result, rape is not included as one of the acts constituting genocide and a group based on gender is not considered under these provisions. Genocide is widely recognised to be justiciable whether committed in wartime or peacetime.

Genocidal intent

The key element of the crime of genocide is the specific requirement on the part of the perpetrator to commit one of the enumerated acts with the intent to destroy, in whole or in part, a protected group, i.e. a national, ethnic, racial, or religious group. The mental element will be determined by the Court on a case-by-case basis. The genocidal intent may be inferred from the perpetrators actions or from all surrounding circumstances[241]. Article 6(b) refers to acts causing serious bodily or mental harm to members of the group. The Elements of Crimes state that this conduct may include, but is not necessarily limited to, acts of torture, rape, sexual violence or inhuman or degrading treatment. Article 6(d) with its reference to imposition of measures intended to prevent births within the group is another possible link to sexual violence. Even if it is not explicitly spelled out in the Genocide Convention or in the Statute, forced pregnancy as a result of sexual violence may be evidence of genocidal intent. This can be the case in a patriarchal society where membership of a group is determined by the identity of the father. There is thus a clear link between sexual violence, forced impregnation, and genocide[242].

Sexual violence as genocide

There is a difference of opinion between commentators as to whether sexual violence can constitute genocide. McDonald states that rape crimes, although extremely serious, do not rise to the level of genocide. It was never suggested to include women as a separate group under the Genocide Convention as the intent requirement in addition to the range of acts were narrowed during the course of the negotiations[243]. Contrary to this, Askin believes that rape crimes resulting in the intentional destruction of the group constitute genocidal rape[244]. In support hereof, the Preparatory Commission/Committee of the ICC specifically acknowledges that sexual violence may fall within

---

[238] Articles 4 and 2 of the Statutes of ICTY and ICTR.
[239] *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 2670, 9 December 1948, Article II.
[240] C. Steains, op.cit. p. 363.
[241] McDougall, *Final Report,* op.cit, p. 12, para. 50
[242] Ibidem, p. 13.
[243] A. McDonald, op.cit. pp. 136-137. It is submitted that any changes to the current legal regime should come by way of amendment to the Genocide Convention.
[244] K. Askin, *Prosecution..* op.cit. p. 338-39.

the definition of genocide in certain instances[245]. All in all, there is an increasing willingness to include acts of sexual violence as genocidal acts, even if it has not been included in the Statute.

The landmark case of Jean Paul Akayesu[246], the Hutu bourgmestre, or mayor, of Taba provides guidance. It held that it was patently the intent of the drafters of the Genocide Convention "to ensure the protection of *any* stable and permanent group"[247]. Females constitute such a group and indeed probably the largest group possible[248]. Akayesu was found guilty of incitement to commit genocide[249] and of crimes against humanity, including torture and rape[250]. He was not accused of physically committing the acts of sexual violence, but of being present during the acts, thereby encouraging them, and of knowing such acts were being committed by his subordinates and failing to stop them[251]. It is a welcome innovation by the Prosecutor to charge superior authorities in the chain of command with genocide. Rape and other forms of sexual crimes can be an integral part of genocide when they are committed with a specific intent to destroy, in whole or in part, a targeted group. In this case, the attacks solely on Tutsi women were part of the process of destruction of the Tutsi group as such[252].

The Trial Chamber defined rape and sexual violence as acts of a sexual nature committed on a person under circumstances that are coercive. Unlike rape, sexual violence may include acts that do not involve penetration or even physical contact"[253]. The Akayesu judgement has pushed the bounds of international law[254] and augurs well for the response of the ICC to sexual and gender violence crimes"[255].

As indicated above, there is a strong opinio juris for including gender as a target group[256]. Such an inclusion would appropriately identify gender as a pervasive basis of genocidal persecution, would help enable successful prosecution for violations, and could serve as some deterrence to future gender-based crimes[257]. With the necessary intent, even a single act of rape against a member of a targeted group may theoretically be grounds for a prosecution for the crime of genocide, provided

---

[245] J. Gardam and M. Jarvis., op.cit. p. 82, note 172-74. See http://www.un.org/law/icc/precomm/.
[246] Prosecutor v. Akayesu, Judgement of 2 September 1998, ICTR-96-4-T [hereinafter the Akayesu judgement].
[247] Ibidem, para. 516 (emphasis added).
[248] D. Koenig and K. Askin, op.cit. p. 25.
[249] Akayesu judgement, op.cit. para. 731. Incitement to commit genocide is included in article 25, para. 3(e) of the ICC Statute.
[250] Ibidem, para. 596,
[251] Ibidem, para. 704.
[252] Ibidem, para. 732, "destruction of the spirit, of the will to live, and of life itself".
[253] Ibidem, para. 690.
[254] Prosecutor v. Musema, Judgement of 27 January 2000, ICTR-96-13-T is another precedent-setting judgement.
[255] C. Steains, op.cit. p. 359.
[256] A. McDonald, op.cit. p. 137, note 45.
[257] K. Askin, *Women..*, op.cit. p. 76.

that the act was related to a larger series of acts, all of which were designed to bring about the destruction of the targeted group[258].

6.2.2 Article 7 Crimes against Humanity

In the past, there has been a confusion about the constituent elements of a crime against humanity. The precedents or authorities in the war crimes tribunals outlined in chapter 2 differed as to the precise contours of the definition of crimes against humanity. Structurally, Article 7 consists of three paragraphs. Paragraphs 2 and 3 are definitions of the terms appearing in paragraph 1, which contains the thrust of the enacting provisions.

The threshold test

The ICC Statute contains no nexus to armed conflict. Under the terms of the Statute, crimes against humanity are therefore justiciable regardless of whether they occur in wartime or peacetime. The chapeau of Article 7 includes a so-called 'threshold test' in that it prescribes that crimes against humanity are acts "committed as part of a widespread *or* systematic attack directed against any civilian population, with knowledge of the attack"[259]. The disjunctive test has been maintained in accordance with the precedent set in ICTY[260]. The knowledge standard is an innovation and its implications are unclear. The essence of a criminal act, whether it is national or international, is to have the intention to commit the crime. The *mens rea* should correspond to the action, or *actus rea.* Did the new standard merely repeat the essence of a criminal act[261], or did it imply that the perpetrator should have knowledge of the larger plan or strategy in order to be prosecuted? According to the Elements of Crimes, the knowledge standard should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack of the precise details of the plan or policy of the State or organisation. The mental element is satisfied if he or she intended to further such an attack. It is left to the Court to provide further clarification through its interpretation. Article 7, para. 2 provides a definition of 'attack' that requires the multiple commission of acts and a policy element. Proof of systematic governmental planning in the form of a policy, plan, or design is generally considered to be a necessary element of a prosecution[262]. This implies that "not every murder, rape, etc., especially if random, is a matter of international concern or, of more immediate significance, is appropriate to be within the jurisdiction of the Court"[263]. According to McDougall, a single case of serious sexual violence, including rape, may be grounds for prosecution for crimes against humanity, so long as prosecutors link that single violation to a larger series

---

[258] McDougall, *Final Report,* op.cit. p. 12, para. 52.
[259] ICC Statute, article 7, para. 1 (emphasis added).
[260] In the Tadic case, the Tribunal decided that the requirement that the acts be directed against a civilian 'population' can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts. Prosecutor v. Tadic, 2nd Amended Indictment, IT-94-I-T, December 14, 1995.
[261] ICC Statute, article 30 prescribes that the material elements are committed with intent and knowledge. This can be inferred from the relevant facts and circumstances.
[262] T. Meron, op.cit. p. 428.

of violations of fundamental human rights or humanitarian law that evidence a widespread or systematic attack against a civilian population[264].

The Elements of Crimes limit the jurisdiction of the ICC to cases in which there is "active promotion or encouragement" on the part of the state or a comparable body and to cases of "deliberate failure" to take action which is consciously aimed at encouraging such attacks. The existence of a policy can not merely be derived from absence of governmental or organisational action. In order for prosecutors to pass this obstacle, it must be proved that a state or comparable body has deliberately allowed or promoted assault, mutilation or sexual abuse for these to be deemed crimes against humanity. One of the reasons why this restriction was adopted was to make it difficult for ICC to prosecute cases of sexual or domestic violence[265]. It is imperative that the Prosecutor and the judges interpret these restrictions in a gender-sensitive way.

The ICC Statute rejects the persecution or discriminatory intent requirement for all crimes against humanity. The chapeau does not require proof of discrimination against the targeted civilian population. It is important that the Statute has returned to the prior treatment of crimes against humanity in comparison with the ad hoc tribunals[266].

Sexual violence

Article 7, para. 1(g) includes sexual crimes directed primarily against women. This is a significant advance in comparison with the ad hoc Tribunals[267]. The range of sexual crimes in Article 7 has been expanded significantly. Constituent acts of crimes against humanity now include rape, sexual slavery, enforced prostitution, forced pregnancy[268], enforced sterilisation, or "other forms of sexual violence of comparable gravity". Most of these acts have been explicitly criminalised under international law for the first time, at least in this form. It is important to notice that the list is not exhaustive. The important residual clause may be used to prosecute other acts under this category, e.g. (enforced) maternity, (en)forced abortion, (en)forced nudity, (en)forced marriage, and sexual mutilation[269].

Article 7 is the only article in the subject-matter jurisdiction to include a definitional section in Article 7, para. 2. The definitions in themselves make a considerable contribution to international law[270].

---

[263] R. Clark, op.cit. p. 88.
[264] McDougall, *Final Report,* p. 7 and p. 11, para. 43.
[265] Advisory Council on International Affairs, report, op.cit. p. 15.
[266] ICTR Statute article 3 and the ICTY Tadic judgement, op.cit.
[267] Articles 5 (g) and 3 (g) of the Statutes of the ICTY and ICTR respectively.
[268] The term 'forced pregnancy caused particular problems during the negotiations, C. Steains, op.cit. pp. 365-369 and D. Koenig and K. Askin, op.cit. pp. 14-15.
[269] D. Koenig and K.. Askin, op.cit. p. 14, note 50.
[270] T. Meron, *Crimes under the Jurisdiction of the International Criminal Court,* in von Hebel, Lammers and Schuking (eds.), *Reflections on the International Criminal Court*, The Hague, T.M.C. Asser Press, 1999, p. 50.

Forced pregnancy is the only specific crime of sexual violence defined explicitly in the Statute. The various forms of sexual violence have no generally accepted definitions or elements so it was left to the Preparatory Commission to appropriately define these crimes and adequately differentiate between such crimes as rape, enslavement, enforced prostitution and sexual slavery in the Elements of Crimes. A certain overlap among the crimes could not be avoided[271]. It is clear that the definition of rape in the Elements of Crimes has drawn upon the precedents in Akayesu[272] and Furundzija[273]. As a result, oral and anal sex both satisfy the constituent elements of the crime and sexual violence may include acts that do not involve penetration or even physical contact[274]. The ICC is not bound by these precedents but it is important that individual international tribunals and courts apply similar definitions and elements of crimes for purposes of consistency and fairness to those accused.

Examples of a gender component in other crimes

Enslavement is a constituent act of crimes against humanity. Article 7, para. 2(c) defines enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children". The Elements of Crimes[275] include the requirement of an element of commercial transaction for the crime of sexual slavery. This is "unnecessary and inappropriate" as customary law interpretations of most contemporary forms of slavery, including sexual slavery, do not involve payment or exchange[276]. The element may serve as indicia but it is not the decisive factor. The status or condition of being enslaved differentiates sexual slavery from other crimes of sexual violence, such as rape[277]. In the Foca indictment[278], the defendants were charged with and convicted of crimes against humanity for a variety of sexual offences, including rape and sexual entertainment. The detained women were not able to flee in any meaningful sense, since they "had nowhere to go as they were surrounded by Serbs, both soldiers and civilians"[279]. The mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery does not in and of itself nullify a claim of slavery. The Prosecutor's introduction of sexual violence as slavery constitutes an important contribution to international law[280].

---

[271] D. Koenig and K. Askin, op.cit. p. 15.
[272] Akayesu judgement, op.cit, para. 688.
[273] Prosecutor v. Furundzija, Judgement of December 10, IT-95-17/I-T, para. 185.
[274] *Elements of Crimes*, op.cit.
[275] Ibidem, p. 8.
[276] G. McDougall, *Update,* p. 9, para. 29. According to R. Clark, op.cit. p. 83 with note 42, the property aspect has been emphasised too much and a sensible approach would be to de-emphasise the right of ownership and stress that it is all about exercising power, de facto or de jure.
[277] G. McDougall, *Update,* op.cit. p. 13, para. 50.
[278] Prosecutor v. Gagovic and others, ('Foca'), Indictment, IT-96-21-T, 21 March, 1996.
[279] Ibidem, para. 10 with reference to the work of the Special Rapporteur on Systematic Sexual Slavery.
[280] R. Coomaraswamy, *1998 Report*, op.cit. p. 13.

Torture is defined in Article 7, para. 2(e) as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused". Lawful sanctions are excluded, and the requirements of "official capacity" and "purpose", inherent in the definition in the Torture Convention[281], are omitted from the ICC definition. Torture is thus justiciable irrespective of who commits it or why it is committed. The act of torture may constitute not only a crime against humanity but also a war crime[282]. Rape and other forms of sexual violence often amount to and are forms of torture and in this connection, gender might constitute the very motif of the crime[283].

The jurisdiction of persecution against any identifiable group or collectivity in Article 7, para. 1(h) has been expanded in comparison with ICTY and ICTR[284]. It now includes persecution on national, ethnic, cultural, *gender* or other grounds in addition to political, racial and religious grounds[285]. These grounds are universally recognised as impermissible under international law. The recognition of gender as a target group for persecution and meriting specific protection under international law, is an "explicit articulation of what has been an obvious omission in earlier codifications and formal definitions of crimes against humanity" [286]. It is furthermore consistent with more recent developments in the international law of discrimination[287]. A possible modification might be found in the reference to the unclear definition contained in Article 7, para. 3[288]. The *mens rea* required is the intent to deprive the group of the fundamental rights concerned and to do so wholly or partially because of their membership of a protected group. Finally, the inclusion of 'gender' helps to reinforce the idea that sexual crimes may be committed against women because they are women and it is hoped that this can lead the way for developments as regards genocide[289].

6.2.3 Article 8 War Crimes; grave breaches of the 1949 Geneva Conventions, and violations of the laws and customs of war

War crimes are serious violations of the laws or customs of war and include certain violations of the 1907 Hague Convention and Regulations[290], the 1949 Geneva Conventions[291], and the 1977

---

[281] Convention Against Torture, op.cit, article 1.
[282] Torture is listed in article 8 on war crimes under the grave breach provisions of para. 2(a)(ii) and under the common article 3 provisions of para. 2(c)(i).
[283] Aydin v. Turkey, European Court of Human Rights, Judgement of 25 September 1997, at para. 86, the Furundžija judgement, op.cit. paras. 158-164 and the Akayesu judgement, op.cit. para. 687. See also Report of the Special Rapporteur on Torture, Mr. Nigel S. Rodley, submitted pursuant to CHR Resolution 1999/32, U.N. Doc. E/CN.4/1995/34, 12 January 1995, paras. 15-24, in particular para. 19.
[284] Articles 5 (h) and 3 (h) of the Statutes of the ICTY and ICTR respectively.
[285] Emphasis added.
[286] G. McDougall, *Update,* op.cit. p. 9, para. 31.
[287] As an example, the category of crimes against humanity is in accordance with the developing norms of refugee law, in which gender is increasingly being recognised as a distinct basis for persecution, see R. Coomaraswamy, *1998 Report,* op.cit. pp. 12-13.
[288] D. Koenig and K. Askin, op.cit. p. 20.
[289] A. McDonald, op.cit, p. 139.
[290] Convention Concerning the Laws and Customs of War on Land (Hague IV), signed at The Hague October 18, 1907.
[291] The four Geneva Conventions, op.cit.

Additional Protocols[292]. The elements of the various war crimes shall be interpreted within the international framework of the international law of armed conflict. The violations have to be serious. As an effect, low level crimes are not justiciable in the ICC Statute. According to the Celebici judgement, "serious" requires that the alleged offence breach a rule protecting important values and involve grave consequences for the victim"[293]. Having this in mind, it is difficult to determine what would not constitute "serious" sexual violence due to the fact that sexual violence is inherently serious[294].

All war crimes are included in Article 8 of the Rome Statute[295], under the heading of 'war crimes'. The original distinction is however upheld to a certain extent considering the subdivision of war crimes in Article 8 into four categories. The first two cover violations occurring in international armed conflict, i.e. grave breaches and other serious violations and the last two concern violations occurring in internal conflicts, i.e. violations of Common article 3 and other serious violations. None of the categories apply "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature"[296]. By definition war crimes require a nexus to armed conflict. In the following, it is important to keep in mind that those offences that would constitute violations of *jus cogens* norms are prohibited during all armed conflicts, regardless of the nature or level of the hostilities.

The threshold test

The chapeau of Article 8 refers to all categories of crimes and grants the Court jurisdiction over war crimes "*in particular* when committed as a part of a plan or policy or as part of a large-scale commission of such crimes"[297]. This is an important restriction as it might imply a sort of preference from the part of the Court for prosecuting war crimes carried out as part of a plan or policy while discouraging prosecutions of isolated rapes[298]. As point of departure, an isolated serious act of rape should be sufficient to constitute a war crime and one could have hoped that Article 8 would catch some of the sexual crimes that did not make it through the threshold test in the chapeau to Article 7, i.e. "widespread or systematic". The Elements of Crimes do not bring any clarification to this point[299]. In accordance with the principle of complementarity it could be feared that such a threshold might have the effect in practice that national courts would not be encouraged to prose-

---

[292] Additonal Protocol I and II, op.cit.
[293] Prosecutor v. Delalic and others ('Celebici'), Judgement, IT-96-21-T, November 16, 1998, para. 394.
[294] D. Koenig and K. Askin, op.cit.
[295] This consolidation is in line with contemporary developments. In comparison, the ICTY Statute divides war crimes into grave breaches in article 2 and other types of war crimes in article 3.
[296] ICC Statute, article 8, para. 2(d) and (f). The language is taken from Additional Protocol II, op.cit. article 1, para. 2.
[297] Emphasis added.
[298] A. McDonald, op.cit. p. 139.
[299] The reasoning behind the US proposal is repeated in H. von Hebel and D. Robinson, *Crimes within the Jurisdiction of the Court*, in Roy S. Lee, (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results,* The Hague, London, Boston, Kluwer Law International, 1999, p. 107.

cute such incidental cases either[300]. On the other hand, while the chapeau suggests a threshold, the inclusion of the words "in particular" make it clear that such a threshold is not absolute or even that it is to be regarded as a guideline rather than a threshold. Either way it should be stressed that it is absolutely necessary for the Court to step in if the States do not fulfil their obligations to prosecute the perpetrators on condition that the crimes meet the seriousness requirement. Lastly, the Elements of Crimes establishes the mental requirement to be awareness by the perpetrator of the factual circumstances that established the existence of an armed conflict implicit in the terms: "took place in the context of or in association with"[301].

6.2.3.1 International conflicts

6.2.3.1.1 Grave Breaches

Article 8, para. 2(a) is relative uncontroversial and refers to the grave breach provisions in the Geneva Conventions of 1949, without reference to Additional Protocol I. The specific recognition of sexual violence in Article 8, para 2(b), to be discussed below, made it preferable to reproduce the existing language of the grave breach provisions. In addition, most States considered that the existing general language covered the specific sexual crimes in any event[302]. This consideration was based on practice and jurisprudence from the ad hoc tribunals. It has always been possible to interpret the grave breach provisions of the Geneva Conventions so as to include sexual violence committed by enemy or occupying forces[303]. Various forms of sexual violence have been charged as grave breaches, constituting torture, inhuman treatment, and wilfully causing great suffering or serious injury to body or health[304].

Ideally, however, each form of gender and sexual violence should be explicitly recognised and identified as a grave breach in its own right, without having to fit within other categories of crimes[305]. If a wartime offence is regarded to be a grave breach, States can prosecute and punish the perpetrator in accordance with universal jurisdiction.

6.2.3.1.2 Other serious war crimes

Article 8, para. 2(b) refers to war crimes other than grave breaches committed during international armed conflict. Article 8, para. 2(b)(xii) recognises crimes of sexual violence explicitly. It reads as follows; "Committing rape, sexual slavery, enforced prostitution, forced pregnancy…, enforced ster-

---

[300] Ibidem, p. 108.
[301] *Elements of Crimes*, op.cit.
[302] H. von Hebel and D. Robinson, op.cit. p. 109.
[303] T. Meron, *Rape as a Crime..* op.cit. p. 424, and J. Gardam and M. Jarvis, op.cit. p. 201. At this stage the fourth Geneva Convention may arguably require that the victim and the victimiser have different nationalities, see K. Askin, *Women*…, op.cit. p. 79.
[304] Examples are the indictments of '**Foca', op.cit. and the Prosecutor v. D**elalic and others ('Celebici'), IT-96-21, March 21, 1996.

ilizations, or any other form of sexual violence *also constituting a grave breach* of the Geneva Conventions"[306]. The inserted language signals that the enumerated crimes are themselves capable of being regarded as grave breaches. The ICC Statute goes beyond the grave breaches provisions of the Geneva Conventions in this regard[307]. It is a significant progress that the provision includes the same forms of sexual violence as Article 7. Sexual violence no longer depends on terms like "outrages upon personal dignity" as the latter is contained in a separate subsection[308]. The provision has an open-ended character, given the words "or any other form of sexual violence". Other forms of violence might be included but it is at the same time qualified in that such violence has to amount to a grave breach[309].

It is difficult to foresee the practical effect of the two different categories of war crimes and their relationship. How does one distinguish between the act of rape charged as the grave breach of inhuman treatment and the act of rape charged specifically as the war crime of rape[310]? Is there a hierarchy between them or is the latter a logical extension of the former? It is too early to answer these questions. It will depend on how the Prosecutor chooses to charge the defendants as well as the interpretations made by the judges accordingly[311].

6.2.3.2 Internal conflicts

The majority of the world's contemporary armed conflicts are non-international, or internal, in character. There is an essential need to ensure the protection of civilians against all crimes, including sexual violence crimes, in the course of these conflicts.

6.2.3.2.1 Violations of Common article 3

Sections (c) through (f) of Article 8, para. 2 relate to conflicts not of an international character. Section (c) affords the ICC jurisdiction over serious violations of Common article 3 as a codification of an existing customary norm. Sexual violence is not explicitly mentioned but indictments in the ICTY have brought charges for sexual violence under Common article 3 as torture, cruel treatment, and outrages upon personal dignity, in particular humiliating and degrading treatment[312].

---

[305] K. Askin, *Women..*, op.cit. p. 79.
[306] Emphasis added.
[307] T. Meron, *Crimes under the Jurisdiction..* op.cit. p. 52.
[308] ICC Statute, article 8, para. 2(b)(xxi).
[309] H. von Hebel and D. Robinson, op.cit. p. 117.
[310] A. McDonald, op.cit. p. 140.
[311] Interview with A. Kuenyehia, Vice president of the ICC, op.cit.
[312] The Furundzija indictment, op.cit. is an example in this regard.

6.2.3.2.2 Other serious violations of the laws and customs of war applicable in armed conflicts not of an international character

Just as the ICC Statute treats sexual crimes as if they were subsumed within the grave breach provisions, it similarly situates these same crimes within the context of Common article 3 crimes. Section (e) enumerates further norms applicable in internal conflicts and many of the provisions find support in Additional Protocol II. In order to take the different character of conflicts into account, some of the provisions contained in section (b) were slightly modified when section (e) was drafted. For example, on sexual violence, the reference to "also constituting a grave breach" in section (b)(xxii) was replaced by "also constituting a serious violation of article 3 common to the four Geneva Conventions". Apart from this, Article 8, para. 2(e)(vi) enumerates the same forms of sexual violence as section (b). It is thus recognised and confirmed that rape and other forms of sexual violence constitute violations of Common article 3. The ICC Statute goes further than Article 4, para. 2(e) of Additional Protocol II in that it includes new categories, such as sexual slavery, forced pregnancy and enforced sterilisation. This is a welcome innovation as more explicit prohibition is preferable.

6.3 Other gender-specific provisions

The Statute contains two further clusters of important gender-specific provisions. Part 4 contains structural provisions referring to the composition and administration of the Court and Part 5 and 6 refer to the investigation, prosecution, and the trial[313]. The Statute addresses expressly the need for participation of women in the various organs of the Court and for inclusion of persons with gender expertise to be appointed throughout the Court[314]. In addition, the appointment of judges with legal expertise in certain areas, including violence against women or children, are to be considered[315]. Seven female judges have been elected for the Court[316]. For the first time principles of female participation have been incorporated explicitly in an international treaty of this nature. It became clear during the course of the negotiations that it was impossible to reach a compromise for a gender balance requirement as such at this point.

The special needs of victims and witnesses are equally addressed[317]. A Victims and Witnesses Unit is to be established by the Registrar to provide special services, including protective measures, security arrangements, counselling and "other appropriate assistance"[318]. "Procedures should

[313] For a detailed examination of the specific provisions, see generally, C. Steains, op.cit. pp. 375-382.
[314] ICC Statute, article 36, para. 8.
[315] Ibidem, article 36, para. 8(b).
[316] The Women's Caucus for Gender Justice in the International Criminal Court, op.cit. The newly elected Vice President, Mrs. Akya Kuenyehia, Ghana, is a former member of CEDAW/C.
[317] The Rules of Procedure and Evidence, op.cit. include specific references to victims of sexual violence and to witnesses in these proceedings in its rules 63, 70 and 71.
[318] ICC Statute, article 43, para. 6.

be developed that provide women with a genuine choice between remaining silent and coming forward"[319]. Victims and witnesses must be protected from intimidation, retaliation and reprisals at all stages of the proceedings and thereafter[320]. The interests and personal circumstances of victims and witnesses are to be taken into account and special attention attributed to the "nature of the crime, in particular…where the crime involves sexual and gender violence"[321]. In contrast to the general principle of public hearings, there is a presumption of *in camera* proceedings in cases of sexual and gender violence but the wish of the victim or witness to testify openly or by alternative means must be a primary consideration for the Court[322]. Finally, a balance has to be struck between the possible anonymity of victims and witnesses in a prosecution for wartime sexual violence and the right of the defendant to a fair trial[323].

Article 21 is the provision that governs applicable law. Article 21, para. 3 comprises two important principles; first, that the application of the law must be consistent with international human rights; and second, that the application of law must be without any adverse distinction or discrimination. Gender is included as one of the enumerated grounds as a result of a delicate compromise[324]. The no-adverse clause is included in the determination of a sentence, pursuant to Article 78, para. 1. The Court has to balance all relevant factors in this regard, mitigating as well as aggravating. The latter include the commission of the crime for any motive involving discrimination on any of the grounds referred to in Article 21, para. 3, including gender[325]. This is yet another example of the inclusion of a gender perspective throughout the ICC Statute.

6.4 Remedies

The right to an effective remedy is clearly essential in overcoming impunity and non-accountability for sexual violence during armed conflict. As a judicial organ, the judgements delivered by the ICC are binding and its sanctions enforceable. In addition to prosecution, Article 75 provides that the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. In assessment of the reparation, taking into account the scope and extent of any damage, loss or injury, the Court may award reparation on an individualised basis, or on a collective basis on both, if appropriate[326]It is an internationally accepted principle that there are no statute of limitations barriers to the prosecu-

[319] J. Gardam and M. Jarvis, op.cit. p. 222.
[320] ICC Statute, article 68, paras. 1 and 2.
[321] Ibidem, article 54, para. 1(b)
[322] Ibidem, article 67 and C. Steains, op.cit. p. 389.
[323] J. Gardam and H. Charlesworth, op.cit. p. 158.
[324] C. Steains, op.cit. p. 371.
[325] Rules of Procedure and Evidence, op.cit. rule 145, para. 2(v).
[326] Ibidem, rule 97, para. 1.

tion and compensation of serious violations of human rights and IHL[327]. This is critical to ensuring full redress to victims of sexual violence in armed conflict as they often face particularly grave social and legal obstacles to coming forward in a timely manner[328].

6.5 Assessment

Chapter 5 shows that the Rome Statute provides a workable framework for prosecution of sexual violence against women. It has filled many of the gaps contained in the Statutes of ICTY and ICTR and explicit language prohibits all types of sexual violence during wartime. It does not meet all requirements in order to deal with every aspect of sexual violence, however, and it is even compromised in certain instances. It is imperative to bear in mind that the Statute is the result of difficult multilateral negotiations amongst 160 states with different values, interests and concerns. The negotiations were conducted with the ultimate objective of adoption by consensus which was fundamental if the Court was to be universally accepted[329].

In terms of both its institutional contribution to the implementation of the law and its codification and progressive development of the substantive law, the Statute constitutes an immensely important development for international criminal law, human rights, and humanitarian law. A gender perspective is incorporated into all areas of the ICC Statute. This reflects a new spirit of determination to tackle serious crimes of sexual abuse against women. Sexual violence can thus be expected to form an integral part of the ICC proceedings.

By explicitly placing sexual violence, including rape, within the jurisdiction of the ICC, it "confirms the criminal nature of the act, in and of itself"[330]. In addition, rape can be a manifestation or an instance of another type of crime[331] but this requires the fulfilment of a 'double-burden of evidence'. In this case, the Prosecutor has to prove the elements of both rape and the other type of crime, as well as external elements included in threshold tests. If sexual violence is explicitly incorporated, it becomes easier to prosecute in a successful manner. It must be reiterated that it is legally important to formally call these crimes by the most specific form of sexual assault that has been committed.

In accordance with current gender-sensitive law reform, it is important that the Rules of Procedure and Evidence protect the rights of women as well. Otherwise, crimes will be enumerated on paper whereas actual prosecution may fail because they do not give women proper protection under the

---

[327] ICC Statute, article 29.
[328] G. McDougall, *Final Report,* op.cit. p. 21.
[329] See H von Hebel and D. Robinson, op.cit.
[330] R. Coomaraswamy, *Report 1998,* op.cit. part 1 (C)(7).

law[332]. Restrictive definitions, elements, or rules of procedure and evidence can impede or prevent successful prosecution. In the case of the ICC, a gender perspective has been included in all the documents constituting the legal framework of the ICC, i.e. the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence. There are, however, some limitations and restrictions that need further clarification and interpretation and some questions that remain unanswered for the time being.

The indictments are the first step in the fight against impunity. It is imperative that the office of the Prosecutor[333] is dedicated and determined to prosecute crimes against women, e.g. by establishing a strong gender division. The Prosecutor has to be innovative and create the possibilities for gender-sensitive prosecutions. The judges are bound by these indictments but ultimately, it is for the Trial Chambers to decide whether the charges will stand[334]. The success of the ICC in its response to sexual and gender-based crimes depends to a large extent on the human factor, i.e. the willingness of women to testify, the commitment to prosecuting the crimes, and the character and sensitivity of judges and attorneys[335].

The choice between national and international prosecutions

The definitions of the crimes are in place. It is now up to States to make them effective, to punish violators, and to deter future crimes through both national prosecutions and prosecutions before the ICC.

The Statute constitutes principal offences and it serves as an authoritative and largely customary statement of IHL and international criminal law. It may thus become a model for national laws to be enforced under the principle of universal jurisdiction. The latter is of great importance due to the complementary status of the ICC pursuant to Article 17. The ICC Statute cannot be applied to conduct prior to the Statute's entry into force[336]. As a consequence, the national judicial systems must be relied upon to investigate, prosecute and punish the perpetrators in the vast majority of cases of sexual violence occurring in contemporary armed conflict[337]. If the national prosecutions are conducted in gender-sensitive ways, they may often be preferable to prosecutions before international tribunals, as they are more likely to satisfy the fundamental rights of victims to know the truth of what occurred[338]. At the national prosecutions, defendants should be charged with international crimes wherever possible. The significance of national proceedings is emphasised by the fact that

---

[331] A. McDonald, op.cit. p. 135.
[332] R. Coomaraswamy, *2003 Report*, op.cit. p. 8.
[333] Mr. Luis Moreno Ocampo from Argentina was elected as Prosecutor of the ICC on 21 April 2003.
[334] Interview with Mrs. Akya Kuenyehia, Vice President of the International Criminal Court, delivered to the/this author on 30 June 2003, the Hague.
[335] C. Niarchos, op.cit. p. 681.
[336] ICC Statute, article 11 on jurisdiction ratione temporis.
[337] G. McDougall, *Final Report*, op.cit. p. 7, para. 22.

international proceedings will likely be available only to address a small fraction of the violations that are committed every year.

The ICC has the potential to serve as an important tool for combating impunity by providing an avenue of redress to victims and their families and countering the failures of national systems that are often more acute in times of armed conflict as well as in post-conflict situations[339]. It is to be hoped that the ICC will bring perpetrators of serious breaches of human rights and international humanitarian law to justice, where national justice fails to do so. International proceedings may provide an appropriate reflection of the injury inflicted on the global community, as a result of massive scale violations of *jus cogens* norms, including acts of sexual violence.

[338] Ibidem, p. 21, para. 22.
[339] R. Coomaraswamy, *1998 Report,* op.cit. p. 15.

7. Co-operation in the area of sexual violence against women in armed conflict

Despite the various efforts by the international community to respond to the problem of sexual violence against women in armed conflict, these atrocities still occur. This calls for more concerted action by the international community in general, and the United Nations, Governments and NGOs in particular. The first part of chapter 6 explores possible ways of enhancing the co-operation within the UN human rights system and the second part considers the relationship between CEDAW/C and the ICC as a means of narrowing the gap between human rights and humanitarian law.

7.1 Co-operation within the United Nations human rights system

Among the main purposes of the United Nations, the UN Charter lists achievement of "international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" [340].

As a response to the low priority given to women's rights in the past, the outcome documents from the Vienna World Conference[341] called for action to integrate the equal status and human rights of women into the mainstream of United Nations activity system-wide. The goal of gender mainstreaming[342] is to achieve gender equality and to this effect there is a need for co-ordination and co-operation by a range of actors, both within and external to the UN-system[343]. Gender mainstreaming includes facilitating an understanding of how the exercise and enjoyment of human rights and fundamental freedoms is adversely affected by social constructions of the female and male roles[344]. A recent CHR resolution recognised the need of mainstreaming gender issues within the human rights enforcement machinery[345].

There has been no institutionalised mechanism of co-operation and co-ordination between CEDAW/C and CHR and its Sub-Commission or between CEDAW/C and the other treaty bodies or non-conventional human rights mechanisms. In the absence hereof, *ad hoc* strategies have been initiated[346], e.g. in the form of exchange of output. CEDAW/C has a global leadership role when it comes to promoting and protecting human rights of women[347]. There is a need for CEDAW/C to expand its efforts to collaborate with and influence other bodies to incorporate a gender perspec-

---

[340] The Charter of the UN, op.cit. article 1, para. 3
[341] Vienna Declaration and Programme of Action, op.cit. part II.B.3, paras. 36-44.
[342] See generally A. Gallagher, op.cit.
[343] Beijing Declaration and Platform for Action, op.cit. paras. 221, 222, 231.
[344] A. Gallagher, op.cit. p. 289.
[345] CHR Resolution 2002/50, paras. 17 and 22.
[346] M. Bustelo, op.cit. p. 99.
[347] Interview with A. Kuenyehia, ICC, op.cit.

tive in their human rights activities. The creation of means of forging strong linkages with other parts of human rights framework of the UN serves two purposes for CEDAW/C; it enhances its own work practices and it contributes to the declared gender mainstreaming mandate[348].

7.1.1 The treaty body system

All human rights treaty bodies offer opportunities for advancing a gender perspective, and indeed, an increasing attention to gender issues is evolving[349], to a significant extent influenced or prompted by CEDAW/C. Examples hereof are recent efforts to introduce a gender perspective into the reporting procedures[350].

Violence against women, including sexual violence in armed conflict, is recognised as a form of discrimination[351]. The principle of non-discrimination on the basis of sex is specifically included in the two Covenants, in the Convention on the Rights of the Child, and in CEDAW. From among these, the Covenant on Civil and Political Rights (ICCPR) and CEDAW provide for an individual complaints procedure[352]. A complainant that has been the victim of discrimination as a result of sexual violence might have more than one potential individual complaints procedure available to advance her case[353] and she will have to choose which of the available avenues is preferable to her individual circumstances.

There tend to be certain overlaps of rights protected in the human rights treaties, but they differ in terms of their specificity, breadth and the categories of people they protect[354]. Article 1 of CEDAW and Articles 3 and 26 of ICCPR contain provisions concerning discrimination. The Optional Protocol to CEDAW offers the possibility of group complaints as indicated in chapter 3. CEDAW Article 1 covers legislation or policies that appear neutral on their face. As a mechanism dealing exclusively with the rights of women, one might receive a more receptive hearing from CEDAW/C in a complaint alleging violations of women's rights, and the Convention contains somewhat more favourable substantive law[355]. If a number of issues are at stake, including issues that are not covered by CEDAW, the Human Rights Committee of ICCPR might provide a better avenue of redress for the victim[356].

---

[348] M. Bustelo, op.cit. p. 100.
[349] A. Byrnes, op,cit., p. 114.
[350] A. Gallagher, op.cit.
[351] CEDAW, General Recommendation No. 19, op.cit.
[352] The Optional Protocol to ICCPR was adopted by the General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976. CEDAW OPT, op.cit.
[353] A. Bayefsky, op.cit.
[354] Ibidem
[355] A. Byrnes, Using International Human Rights.., op.cit. p. 92.
[356] A. Bayefsky, op.cit. p. 138.

An increased co-operation between the human rights treaty bodies would offer the opportunity to develop a common jurisprudence on the human rights of women. This could include certain specific rights as well as important areas such as discrimination and the responsibility of states for violations of women's human rights[357]. A new general comment from the Human Rights Committee regarding the equal rights of men and women[358] offers a welcome opportunity to conduct a thorough and systematic gender analysis of all the provisions of the Covenants[359]. The far-reaching implications are evident in the requirements for States parties to prohibit discrimination on the ground of sex and "put an end to discriminatory actions both in the public and the private sector". Considering the particular vulnerability of women in times of armed conflicts, States parties must take special measures to protect women from rape, abduction and other forms of gender-based violence[360].

The ninth meeting between chairpersons of the human rights treaty bodies suggested that all treaty bodies should consider to draw on the general recommendations and comments of other treaty bodies and additionally that they consider issuing joint recommendations on relevant areas[361]. Such an approach would ensure a consistent interpretation of human rights obligations across treaty bodies, including in the areas of discrimination and sexual violence, and ensure that the gender mainstreaming mandate of Vienna and Beijing are fully pursued where the treaty bodies are concerned.

7.1.2 Co-operation between CEDAW and the Special Procedures

The call for gender mainstreaming included the formal recognition that gender should be considered under all the special procedures. According to Gallagher, this is an exhortation that has been realised unevenly among the individual procedures and that has generally borne limited fruit in nearly all cases[362]. There is a considerable variation in the way in which the human rights of women are being dealt with in the reports of the special rapporteurs, representatives, experts, and working groups, and the extent to which they form an integral part of a report[363].

CEDAW/C has to consider devising serious linkages with these extra-conventional human rights mechanisms. An example could be a more active role by CEDAW/C in supporting, suggesting top-

---

[357] A. Gallagher, op.cit. p. 308.
[358] General Comment No. 28, CCPR/C/21/Rev.1/Add.1.
[359] C. Brautigam, *International Human Rights Law: The Relevance of Gender* in W. Benedek, E. Kisaakye, and G. Oberleitner (eds.), *The Human Rights of Women: International Instruments and African Experiences*, World University Service Austria, 2002, p. 26..
[360] Another example is the Committee on the Elimination of Racial Discrimination (CERD) with its General Comment 25 on gender-related dimensions of racial discrimination.
[361] M. Bustelo, op.cit. p. 98. To this effect, a useful document is the Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.5 of 26 April 2001.
[362] A. Gallagher, op.cit.
[363] Ibidem

ics for, and co-operation in the preparation of studies by the Sub-Commission, as well as by special rapporteurs and other experts appointed by CHR, e.g. within the area of sexual violence in armed conflict. CEDAW/C could engage in a "direct co-operation on issues of mutual concern" with the special rapporteurs and other experts whose work is relevant to the activities of CEDAW/C[364]. One possibility was for the Committee to nominate a representative to attend the meetings of these relevant special procedures. Formally CEDAW/C has made this kind of link with the Special Rapporteur on Violence against Women already, but for some reason it has not really worked in practice.

From the perspective of the Special Rapporteur, she is empowered to engage in field missions either independently or jointly with other rapporteurs and working groups and to prepare joint reports, urgent appeals and communications; to seek and receive information from governments, other treaty bodies, specialised agencies of the UN and NGOs; and to consult with CEDAW/C in the course of her investigations. In addition, her reports should be brought to the attention of the Commission on the Status of Women and CEDAW/C[365]. Careful consideration should be given to the role of the Special Rapporteur in the process of integrating gender perspectives into the United Nations human rights system. As the only investigatory procedure established by CHR with a mandate specifically concerning women, she is one of the few bridges between "the women's mechanisms" and the mainstream[366]. Accordingly, the other special procedures should co-operate with the Special Rapporteur on the matter of violence against women.

CEDAW/C has consistently requested the UN High Commissioner on Human Rights to facilitate the presence of the Special Rapporteur at all its sessions[367]. So far, she has only attended twice. The Committee endeavours to share with the Special Rapporteur its extensive knowledge and experience of the suffering of women who have been subjected to violence and vice versa[368].

At a closed session in 1999, CEDAW/C and the Special Rapporteur made various informal agreements in order to ensure that their work is co-ordinated and mutually enhancing[369]. Possible issues of collaboration may include trafficking in women, and a discussion of the Committee's General Recommendation No. 19 on Violence against Women, including the impact of measures which have been implemented to address various forms of violence against women in states parties to the Convention. At the session, the Special Rapporteur agreed to brief CEDAW/C periodically and

---

[364] M. Bustelo, op.cit. pp. 101-102. These would include the special rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment; on internally displaced persons; on religious intolerance; on sale of children, child prostitution and child pornography; and on education.
[365] CHR Resolution 2003/45, paras. 30, 31 and 34.
[366] A. Gallagher, op.cit. p. 311.
[367] U. O'Hare, op.cit, p. 393, note 165.
[368] D. Cartwright, op.cit. p. 176.
[369] M. Bustelo, op.cit. p. 102

to provide briefing material as well as information on states parties to be considered by the Committee in the reporting procedure. In addition, she agreed to provide information to the Committee on country missions that she had undertaken. The latter is a means to enhancing the Committee's knowledge of sexual violence against women in conflict situations.

Despite these deliberations, the direct co-operation has not been improved. Possible explanations for this might be limited resources or differences of opinion regarding working methods[370]. Mrs. Coomaraswamy finished her term in April and it is to be hoped that a better means of communication will be established between her successor and CEDAW/C. This would be beneficial for CEDAW/C. It is clear that strategies are needed to ensure that the Special Rapporteur considers attendance at the sessions of CEDAW to be valuable for her as well. The Special Rapporteur could involve individual member of CEDAW/C in her missions. This would enhance the fact-finding capabilities of the Committee. In certain instances, it might be of advantage to the Special Rapporteur as well, e.g. if her missions take place in the home countries or countries of residence of Committee members[371]. It is this author's opinion that such joint missions might take place in connection with the inquiry procedure in cases of gross human rights violations in the future. The necessary and long overdue co-operation between the two mechanisms will contribute to keeping the issue of sexual violence against women high on the international agenda.

Various forums have undertaken activities to address the problem of sexual violence in armed conflict. These efforts are currently rather fragmented and need to be drawn together. A forum is needed to discuss the way forward for the better protection of women in armed conflict. Instead of establishing yet another institution, it could be left with the Special Rapporteur on Violence against Women to pull these efforts together and highlight best practices from the various organs which could serve as benchmarks for all actors involved[372]. The Special Rapporteur has shown her ability to provide overviews and draw attention to problem areas. The High Commissioner for Human Rights[373] has the responsibility for co-ordinating human rights throughout the entire UN system and could be seen as another possible gathering organ[374], e.g. with the establishment of a specialist unit within the office focusing on all aspects of women and armed conflict.

7.2 Narrowing the gap between international human rights and humanitarian law

---

[370] Interview with A. Kuenyehia, ICC, op.cit
[371] M. Bustelo, op.cit.
[372] Interview with A. Kuenyehia, ICC, op.cit.
[373] The office of the High Commissioner for the promotion and protection of all human rights, G.A. Res. 48/141, UN Doc. A/Res/48/141, 1993. A. Gallagher, op.cit. pp. 332-333 with note 140.
[374] CHR Resolution 2002/50, para. 7 calls for a co-operation between OHCHR and the Division for the Advancement of Women, op.cit.

7.2.1 The relationship between international human rights and IHL

There is a need to fully implement international humanitarian and human rights law in order to protect the human rights of women and girls in armed conflict. Chapter 2 showed that the boundaries of IHL fail to consider the reality of warfare for women. Human rights and IHL have not developed in a complementary fashion, to the detriment of all victims of armed conflict, and to the significant disadvantage of women affected by armed conflict[375]. Various proposals have been put forward to change the current state of affairs. These include a reform of the rules of IHL including the grave breaches provisions of the Geneva Conventions and Additional Protocol 1. Another possibility is a re-examination and re-evaluation of the Geneva Conventions[376] as to "incorporate developing norms on violence against women in armed conflict". This would acknowledge the influence of gender perspectives and foster changing interpretations of the rules. Such an approach is consistent with the idea of gender mainstreaming reiterated in Beijing Platform of Action[377] and could include a revision of the commentaries of the International Committee of Red Cross on the Geneva Conventions and Protocols. The latter are important sources for interpretation and comprehensive guidelines on the treatment of women in armed conflict.

The Rome Statute of the ICC might be a means to narrowing the gap between human rights and IHL. The Statute is made up of these two bodies of law as well as international criminal law[378]. The pertinent provisions that include Common article 3 and crimes against humanity contain norms that are virtually indistinguishable from fundamental human rights[379]. In addition, the Statute has made an important contribution to the protection of human rights in its impact on the thresholds of applicability of IHL. Article 7 on crimes against humanity contain no nexus to armed conflict and is thus applicable in all situations, including peace and internal wars and strife. This is even below the threshold of applicability of Common article 3.

The ICC as an international jurisdiction deals with international human rights and IHL at the same time. It creates a clear link between these two branches of war whose developments have moved in separate directions[380], both as far as customary and treaty law are concerned. The ICC is the first international instrument where the two bodies of law have been dealt with together in from the point of view of the exercise of jurisdiction. Crimes against women are referred to as grave breaches of fundamental human rights in the context of Article 7 and its requirement of multiple

---

[375] J. Gardam and M. Jarvis, op.cit. p.175.
[376] McDougall, *Final Report,* op.cit. para. 95.
[377] Beijing Platform of Action, op.cit. paragraph 143, strategic objective E.
[378] D. Koenig and K. Askin, op.cit. p. 3.
[379] T. Meron, *Introductory Remarks* in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court. A challenge to impunity*, Chippenham, Wiltshire, Antony Rowe LtD, 2001, pp. 65-66.
[380] See to the whole, F. Pocar, *The Rome Statute of the International Criminal Court and Human Rights* in M. Politi and G.Nesi (eds.), *The Rome Statute of the International Criminal Court. A challenge to impunity*, Chippenham, Wiltshire, Antony Rowe LtD, 2001, pp. 68 with many interesting observations in relation to the relationship between the two bodies of law.

commission of acts. ICC Statute adopts a notion of crimes against humanity which fully belongs to the field of human rights law, thus trying to bridge between the latter and humanitarian law. The definitions of torture and enslavement might prove important for the development of such rights and related rights in other contexts.

By establishing an international criminal jurisdiction competent to prosecuting not only violations of IHL but also serious violations of human rights law, ICC will have an important impact on the existing regime of international human rights enforcement mechanisms, including the treaty bodies, and with that CEDAW/C. If CEDAW/C finds a state violation, it puts pressure on the State in order to have it conform to its obligations under the treaty. This is an affirmation of the duties of the State to punish the perpetrators of the crimes or to provide redress in the form of reparation or compensation. It is left with the State to put the proper procedures in place and CEDAW/C does not have any sanctions to apply in cases of non-compliance by the State. Provided that the violations are of such a gravity as to be of particular concern to the international community and thus within the jurisdiction of the ICC, the latter will intervene to ensure that the perpetrators are brought to justice if the State fails to do so. The ICC should be regarded as a complementary guarantee for the protection of human rights and not a replacement of CEDAW/C in this regard.

7.2.2 Possible co-operation between CEDAW/C and the ICC

The preamble to the ICC affirms that the effective prosecution of the most serious crimes must be ensured through… "enhancing international co-operation". Part 9 of the ICC Statute includes provisions on international co-operation and judicial assistance. These provisions are supplemented by chapter 11 of the Rules of Procedure and Evidence. This is first and foremost addressed to the States parties but makes references to non-States parties and intergovernmental organisations, including the United Nations, as well.

Various instances of gender-based and sexual violence against women are incorporated throughout the Statute. These types of violence may be directed specifically against women because they are women and thus constitute a discriminatory as well as a criminal act. To frame it differently, these violent crimes might constitute a violation of CEDAW as well as the ICC Statute. The human rights of women have become criminalised under a multilateral treaty[381]. Before considering a possible co-operation between these two enforcement mechanisms, it is important to reiterate that CEDAW addresses the obligations of states and ICC the criminal responsibility of individuals.

[381] T. Meron, *Crimes under the Jurisdiction,* op.cit. p. 49.

7.2.2.1 The preliminary stages

The Court's jurisdiction may be exercised on the initiative of a State Party to the Statute, of the Security Council, or after an investigation carried out by the Prosecutor[382]. In accordance with Article 15, para. 1, the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. He shall analyse the seriousness of the information received and for this purpose, he may seek additional information from "…organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources"[383]. In connection with gender-based violence, he may therefore seek information from CEDAW/C or even the Special Rapporteur on Violence against Women if he deems it appropriate[384].

If CEDAW/C establishes, within its competence, the existence of a serious violation, such as sexual violence that might fall within the jurisdiction of the Court, it would be natural if the Committee took the initiative in bringing the question to the attention of the Prosecutor[385]. The latter could benefit from the activity of CEDAW/C when carrying out his investigation. It does not interfere with the admissibility requirements in Article 17 that a matter has been considered by CEDAW/C.

ICTY has made specific reference to the work of CEDAW/C, including its General Recommendation No. 19, and to the final report of the Special Rapporteur on Systematic Sexual Slavery[386] in the case of Celebici[387]. The Trial Chamber commented that the rapes were inflicted for the purposes specified in the definition of torture and that the violence was inflicted on each of the women because they were women. This was found to be a form of discrimination that constitutes a prohibited purpose for the offence of torture[388]. The Trial Chamber did not totally eliminate the "purpose" requirement but it held the purposes of punishment, coercion, discrimination, or intimidation to be "inherent in situations of armed conflict"[389]. This effectively reduced the burden of proof in relation to the purpose of torture when it is committed during wartime. The purpose requirement is no longer included in the definition of torture in the ICC Statute. In the future, one could imagine that the ICC would likewise refer to the work of CEDAW/C in connection with crimes that include an element of discrimination, such as persecution. Such purposes are no longer included in crimes against humanity or torture in the Statute of the ICC.

---

[382] ICC Statute, article 13.
[383] Ibidem, article 15, para. 2.
[384] Other relevant provisions in this regard are article 54, para. 3(c) and (d) and article 87, para. 6.
[385] F. Pocar, op.cit.
[386] McDougall, *Final Report*, op.cit.
[387] The Celibici Indictment, op.cit.
[388] Ibidem, paras. 941 and 963.
[389] Ibidem, para. 495.

7.2.2.2 The question of evidence

A more delicate aspect is the possible co-operation in establishing the existence of a violation. CEDAW/C as well as the other UN treaty bodies currently have rather limited powers of investigation, but one should not underestimate their capability of establishing factual circumstances of a specific violation[390]. This capability, however, might be strengthened with the inquiry procedure in the Optional Protocol. Could the results from such investigations be used as evidence before the ICC? It should not be deemed impossible if they fulfil the procedural and evidential requirements[391]. The Prosecutor might benefit from the evidence collected by other international bodies. He is in no way bound by such evidence, however, as he is fully independent in evaluating and appreciating its value for a possible indictment. In addition, CEDAW/C might make use of the evidence collected by the Prosecutor in the exercise of its competence[392], e.g. in its reporting procedure. In connection with the individual complaints procedure, it is necessary to draw attention to the admissibility requirements in the Optional Protocol, in particular Article 4, para. 2(a) that considers a consideration inadmissible if the same matter has been examined under another procedure of international investigation or settlement. It is difficult to foresee if and how such a co-operation will develop in the future[393] and if it will cause a mutual enhancement of the two enforcement mechanisms[394].

---

[390] F. Pocar, op.cit.
[391] ICC Statute, part 5 on investigation and prosecution and part 6 on the trial. Rules of Procedure and Evidence, chapter 4, section I on evidence and chapters 5 and 6 on investigation and prosecution and the trial respectively.
[392] F. Pocar, op.cit. p. 74.
[393] Interview with A. Kuenyehia, ICC, op.cit.
[394] F. Pocar, op.cit. p. 74.

8. Conclusion

In the course of this thesis, I have considered possible ways of redressing the sexual grievances suffered by women in times of war. Significant progress has been achieved since the recognition of women's rights as human rights in Vienna in 1993. Women have achieved monumental advances in the three applicable bodies of law, i.e. international human rights law, criminal law and IHL, in recent years. The legal framework is in place and crimes against women are prosecuted on the international stage at levels unparalleled in history. The next decade must build on this trend, focus on the effective implementation of the legal framework, and develop innovative strategies to ensure that the prohibition against violence is a tangible reality for women all over the world.

The focal point above has been current and possible future contributions by various human rights and criminal organs in responding to the problem of sexual violence during armed conflict. I have highlighted the strengths and weaknesses of each organ, proposed possible improvements in this respect and considered the feasibility of an international co-operation in the area. Some of the significant points are outlined below.

CEDAW/C has contributed in numerous ways to the development of the normative understanding of women's rights in recent years. The Committee has reached an important juncture in its work. This offers opportunities to increase its impact and visibility, but like the treaty system as a whole, CEDAW/C faces a large number of challenges for the future. These include poor resourcing, a heavy workload, backlog of reports, a substantial number of reservations, and the lack of sanctions in cases of non-compliance by States parties to the Convention. If CEDAW/C does not overcome these challenges, it will prevent the Committee from realising its full potential, including its possible contributions to the problem of sexual violence against women.

As a consequence of its broad mandate, CEDAW/C is not able to focus exclusively on the problem of sexual violence. However, it does have the potential to become a more effective monitoring mechanism in addition to offering a better avenue of redress for victims of sexual violence in the context of the individual complaints procedure. It should continue to apply a dynamic interpretation of the provisions in the Convention in order to address contemporary violations of women' rights. The reporting procedure might be improved by focusing on a more limited range of issues relevant for the State in question, including the issue of sexual violence. Other possibilities include more formalised specialisation within the Committee or increased focus on country-specific issues. CEDAW/C need to explore the potential contributions of the inquiry procedure as well.

The UN system is an effective mechanism for focusing international attention on an issue and formulating a co-ordinated strategy in response. It is thus a promising forum for a comprehensive approach to sexual violence against women in armed conflict. The problem is witnessing heightened attention in organs such as CHR. The Special Rapporteurs on Violence against Women and Systematic Sexual Slavery play a pivotal role in this regard. Their reports have contributed significantly to the creation of awareness of various international crimes, including sexual slavery. The special procedures provide an opportunity for making cases relating to sexual violence against women visible by bringing them to the international forum where the state in question is under a certain amount of pressure. The urgent appeals procedure is essential for victims of sexual violence. The special procedures as ad hoc mechanisms do not provide an avenue of redress, however.

The Rome Statute of the ICC affirms the criminality of non-State actors and can hopefully become a useful deterrent to those who hitherto thought themselves beyond the reach of international law. It provides a workable framework for the prosecution of sexual violence against women despite certain shortcomings that may prove problematic in the future. A gender perspective is incorporated into all areas of the ICC Statute which reflects a new spirit of determination to tackle serious crimes of sexual abuse against women as well as a noticeable shift in sensitivity. Sexual violence can thus be expected to form an integral part of the ICC proceedings. The success of the ICC in this connection depends to a large extent on the human factor, i.e. the willingness of women to testify, the commitment to prosecuting the crimes, and the character and sensitivity of judges and attorneys. Hopefully the ICC will bring perpetrators of serious breaches of human rights and international humanitarian law to justice, where national justice fails to do so.

Calls are made for a more concerted action by the international community, including by way of a combination of mainstream and specialist institutions and procedures. CEDAW/C has a global leadership role when it comes to promoting and protecting human rights of women. The Committee needs to expand its efforts to collaborate with and influence other bodies and special procedures to incorporate a gender perspective in their human rights activities. An increased co-operation between the human rights treaty bodies would offer the opportunity to develop a common jurisprudence on the human rights of women, both in relation to certain specific rights and important areas such as discrimination and the responsibility of states for violations of women's human rights. CEDAW/C and the Special Rapporteur on Violence against Women need to co-ordinate their work as this could result in a mutual enhancement of both mechanisms and contribute to keeping the issue of sexual violence against women high on the international agenda.

Numerous efforts have been made to address the problem of sexual violence in armed conflict. These efforts are currently rather fragmented. It could be left with the Special Rapporteur on Vio-

lence against Women to pull these efforts together and highlight best practices from the various organs which could serve as future benchmarks for all actors involved. The High Commissioner for Human Rights is another possible co-ordinating institution.

The Rome Statute of the ICC might be seen as a means of narrowing the current gap between human rights and IHL as the Court includes both international human rights and IHL within its jurisdiction. In addition, ICC could serve as a complementary guarantee for the protection of human rights. CEDAW/C does not have any enforcement mechanisms if a State party does not comply with its request to provide redress and punish the perpetrators of sexual violence. Provided the crimes reach the severity threshold, the ICC could intervene to ensure that the perpetrators are brought to justice if the State fails to do so. If an act of sexual violence is directed against a woman because she is a woman, it is considered to be an act of discrimination as well as a criminal act. This understanding facilitates the possibility of a co-operation between CEDAW/C and the ICC in the preliminary stages leading up to the latter's exercise of jurisdiction and maybe even in connection with the collection of evidence. Mutual reference to the work of the other mechanism is another possible way of co-operating. Time will tell whether such a co-operation will be established and whether it might cause a mutual enhancement of the two mechanisms.

It is an important challenge for the world to remain united in its efforts to eradicate sexual violence against women. As it is now, the activities undertaken to combat sexual violence against women in armed conflict do not form a synergy as the mechanisms have different mandates and working methods. It is imperative that they supplement and complement each other instead of competing. This thesis has considered the problem of sexual violence from a legal perspective. Legislation is an essential component in the fight against violence but it cannot stand on its own. A holistic approach is needed in the recognition that sexual violence is a multifaceted problem requiring a multipronged response and that strategies must be devised with co-operation from all sectors and implemented at all levels of society.

9. Bibliography

Academic literature

- Alfredsson, G. and Tomaševski, K. (eds.), *A Thematic Guide to Documents on Human Rights of Women*, The Raoul Wallenberg Institute Human Rights Guides, vol. 1, the Hague, Boston, London, Kluwer Law International, 1995.
- Alston, P., *Beyond 'them' and 'us': Putting treaty body reform into perspective*, in Alston, P. and Crawford, J. (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000, pp. 509-512, 512-13.
- Askin, K., *Prosecution in International War Crimes Tribunals*, The Hague, Martinus Nijhoff Publishers, 1997, pp. 204-205, 215-403.
- Askin, K., *Women and International Humanitarian Law* in Askin, K. and Koenig, D. (eds.), *Women and International Human Rights Law*, New York, Ardsley, vol. 1, 1999, pp. 41-87.
- Bayefsky, A., *How to Complain to the UN Human Rights Treaty System*, Kluwer Law International, 2003, pp. 22-26, 107-127, 135-146.
- Brautigam, C., *International Human Rights Law: The Relevance of Gender* in Benedek W., Kisaakye, E. and Oberleitner, G. (eds.), *The Human Rights of Women: International Instruments and African Experiences*, World University Service Austria, 2002, pp. 3-29.
- Bustelo, M., *The Committee on the Elimination of Discrimination Against Women at the Crossroads* in Alston, P. and Crawford, J. (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000, pp. 79-111.
- Byrnes, A., *The Convention on the Elimination of All Forms of Discrimination against Women* in Benedek W., Kisaakye, E. and Oberleitner, G. (eds.), *The Human Rights of Women: International Instruments and African Experiences*, World University Service Austria, 2002, pp. 119-129.
- Byrnes, A., *Using International Human Rights Law and Procedures to advance Women's Human Rights* in Askin, K. and Koenig, D. (eds.), *Women and International Human Rights Law,* New York, Ardsley, vol. 2, 1999, pp. 79-118.
- Cartwright, D., *The Committee on the Elimination of Discrimination Against Women* in Askin, K. and Koenig, D. (eds.), *Women and International Human Rights Law*, New York, Ardsley, vol. 2, 1999, pp. 165-181.
- Clark, R., *Crimes Against Humanity and the Rome Statute of the International Criminal Court* in Politi, M. and Nesi, G. (eds.), *The Rome Statute of the International Criminal Court. A challenge to impunity*, Chippenham, Wiltshire, Antony Rowe LtD, 2001, pp. 75-92.
- Cook, R., *Enforcing Women's International Human Rights* in Yotopoulos-Marangopoulos, A (ed.), *Women's Rights Human Rights*, Athens, Estia Publications, 1994, pp. 29-52.
- Coomaraswamy, R. and Kois, L., *Violence against Women* in Askin, K. and Koenig, D. (eds.), *Women and International Human Rights Law*, New York, Ardsley, vol. 1, 1999, pp. 177-217.

- Flinterman, C. and Henderson, C., *Special Human Rights Treaties* in Hanski, R. and Suksi, M. (eds.), *An Introduction to the International Protection of Human Rights: A Textbook,* Åbo, Åbo Akademi University, 1999, pp. 129-135.
- Flinterman, C., *Extra-Conventional Standard-Setting and Implementation in the Field of Human Rights* in Hanski, R. and Suksi, M. (eds.), *An Introduction to the International Protection of Human Rights: A Textbook,* Åbo, Åbo Akademi University, 1999, pp. 143-150.
- Gardam, J. and Jarvis, M., *Women, Armed Conflict and International Law*, Kluwer Law International, 2001.
- Gaudart, D., *Charter-based Activities Regarding Women's Rights in the United Nations and Specialized Agencies* in Benedek W., Kisaakye, E. and Oberleitner, G. (eds.), *The Human Rights of Women: International Instruments and African Experiences*, World University Service Austria, 2002, pp. 50-64.
- Gierycz, D., *Human Rights of Women at the Fiftieth Anniversary of the United Nations* in Benedek W., Kisaakye, E. and Oberleitner, G. (eds.), *The Human Rights of Women: International Instruments and African Experiences*, World University Service Austria, 2002, pp. 30-49.
- Koenig, D. and Askin, K., *International Criminal Law and the International Criminal Court Statute: Crimes against Women* in Askin, K. and Koenig, D.(eds.), *Women and International Human Rights Law,* New York, Ardsley, vol. 2, 1999, pp. 3-29.
- Meron, T., *Crimes under the Jurisdiction of the International Criminal Court,* in von Hebel, Lammers and Schuking (eds.), *Reflections on the International Criminal Court*, The Hague, T.M.C. Asser Press, 1999, pp. 47-55.
- Meron, T., *Introductory Remarks* in Politi, M. and Nesi, G. (eds.), *The Rome Statute of the International Criminal Court. A challenge to impunity*, Chippenham, Wiltshire, Antony Rowe LtD, 2001, pp. 65-66.
- Paust, J., *Women and International Criminal Law Instruments and Processes* in Askin K. and Koenig D. (eds.), *Women and International Human Rights Law*, New York, Ardsley, vol. 2, 1999, pp. 349-372.
- Pocar, F., *The Rome Statute of the International Criminal Court and Human Rights* in Politi, M. and Nesi, G. (eds.), *The Rome Statute of the International Criminal Court. A challenge to impunity*, Chippenham, Wiltshire, Antony Rowe LtD, 2001, pp. 67-74.
- Reilly, N. (ed.), *Without reservation: the Beijing Tribunal on Accountability for Women's Human rights*, pp. 22-44, Beijing, 1995.
- Steains, C., *Gender Issues* in Lee, R. (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results,* The Hague, London, Boston, Kluwer Law International, 1999, chapter 12, pp. 357-390.
- Steiner, H.J. and Alston, P, *International Human Rights in Context, Law, Politics, Morals*, Second edition, Oxford University Press, 2000, pp. 158-236, 592-778, 1131-1198.
- Swart, B. and Sluiter, G., *The International Criminal Court and International Criminal Cooperation* in von Hebel, Lammers and Schuking (eds.): *Reflections on the International Criminal Court*, The Hague, T.M.C. Asser Press, 1999, pp. 91-97.

- von Hebel, H. and Robinson, D., *Crimes within the Jurisdiction of the Court*, in Lee, R. (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results,* The Hague, London, Boston, Kluwer Law International, 1999, chapter 2, pp. 79-126.

Journals

- Evatt, E., *Eliminating Discrimination against Women: the Impact of the UN Convention*, «Melbourne University Law Review», vol. 18, 1991, pp. 435-449.
- Gallagher, A., *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System*, «Human Rights Quarterly», The Johns Hopkins University Press, vol. 19, 1997, pp. 283-333.
- Gardam, J. and Charlesworth, H., *Protection of Women in Armed Conflict,* , «Human Rights Quarterly», The Johns Hopkins University Press, vol. 22, 2000, pp. 148-166.
- McDonald, A., *Prosecuting IHL Violations against Women*, «Nemesis», No. 5, 1998, pp. 132-142.
- Meron, T., *Rape as a Crime under International Humanitarian Law,* «The American Journal of International Law», vol. 87:424, 1993, pp. 424-428.
- Niarchos, C., *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, «Human Rights Quarterly», The Johns Hopkins University Press, vol. 17, 1995, pp. 649-690.
- O'Hare, U., *Realizing Human Rights for Women,* «Human Rights Quarterly», The Johns Hopkins University Press, vol. 21, 1999, pp. 364-402.

UN Documents

- *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, Action for Equality, Development and Peace, UN Doc A/Conf.177/20, 1995
- Charter of the International Military Tribunal, Nuremberg, 8 August 1945
- Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946
- *Charter of the United Nations and Statute of the International Court of Justice,* Office of Public Information, United Nations, New York
- Commission on Human Rights resolution 2002/50, *Integrating the human rights of women throughout the United Nations system,* UN Doc E/CN.4/2002/50, 23 April 2002.
- Commission on Human Rights resolution 2003/45, *Violence Against Women,* UN Doc. E/CN.4/2003/45, 23 April 2003.
- *Compilation of General Comments and General Recommendations* adopted by the human rights treaty bodies dated 26 April 2001, UN Doc HRI/GEN/1/Rev.5.
- *Convention Concerning the Laws and Customs of War on Land* (Hague IV), signed at The Hague October 18, 1907.
- *Convention on the Elimination of All Forms of Discrimination against Women,* adopted by General Assembly resolution 34/180 of 18 Dec 1979.

- *Convention on the Prevention and Punishment of the Crime of Genocide*, General Assembly Resolution 2670, 9 December 1948.
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by General Assembly resolution 39/46 of 10 December 1984.
- Coomaraswamy, R., Special Rapporteur, *Preliminary Report on Violence Against Women, its Causes and Consequences*, UN Doc E/CN.4/1995/42, 22 November 1994.
- Coomaraswamy, R., Special Rapporteur, *Report on Violence Against Women, its Causes and Consequences,* UN Doc E/CN.4/1998/54, 26 January 1998.
- Coomaraswamy, R., Special Rapporteur, *Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict,* UN Doc E/CN.4/1998/54/Add.1, 4 February 1998.
- Coomaraswamy, R., Special Rapporteur, *Final Report on Violence Against Women, its Causes and Consequences,* UN Doc E/CN.4/2003/75, 6 January 2003.
- Coomaraswamy, R., Special Rapporteur on Violence against Women, its Causes and Consequences, *Statement on Violence against Women* delivered to the Commission on Human Rights, 9 April 2003.
- *Declaration on the Elimination of Violence against Women,* General Assembly resolution 48/104 of 20 December 1993, UN Doc A/RES/48/104, 23 February 1994.
- *Elements of Crimes,* ICC-ASP/1/3, available online on www.un.org/law/icc.
- *General Recommendation No. 19*, CEDAW, Eleventh Session, UN Doc CEDAW/C/1992/L.1/Add.15, 1992.
- *Geneva Convention No. VI Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949.
- Grandits, M., *Women and War*, United Nations Economic Commission of Europe, Background paper for the Regional Intergovernmental Meeting Beijing+5.
- Human Rights Committee, *Equality of rights between men and women (article 3)*, CCPR General Comment 28, UN Doc CCPR/C/21/Rev.1/Add. 10, 29 March 2000.
- *International Covenant on Civil and Political Rights*, adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966.
- *International Covenant on Economic, Social and Cultural Rights*, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.
- Mazowiecki, T, Special Rapporteur, *Report on the situation of human rights in the territory of the former Yugoslavia*, UN Doc. A/48/92-S/25341, 1993.
- McDougall, G. Special Rapporteur, *Final Report on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict,* UN Doc E/CN.4/Sub.2/1998/13, 22 June 1998.
- McDougall, G. Special Rapporteur, *Update to the Final Report on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict,* UN Doc E/CN.4/Sub.2/2000/21, 6 June 2000.

- *Optional Protocol to the Convention on the Elimination of Discrimination against Women,* Adopted by General Assembly resolution A/54/4 on 6 October 1999. Entry into force 22 December 2000.
- *Optional Protocol to ICCPR*, adopted by the General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976.
- *Protocol [I] Additional* to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.
- *Protocol [II] Additional* to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.
- Rodley, N., Special Rapporteur, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, submitted pursuant to CHR Resolution 1999/32, U.N. Doc. E/CN.4/1995/34, 12 January 1995.
- *Rome Statute of the International Criminal Court*, Adopted on 17 July 1998, UN Document A/CONF.183.9.17 July 1998.
- *Rules of Procedure and Evidence*, ICC-ASP/1/3, available online on www.un.org/law/icc.
- *Statute of the International Tribunal for the former Yugoslavia,* UN Doc S/25704, annex, 1993.
- *Statute of the International Criminal Tribunal for Rwanda,* UN Doc S/INF/50, annex, 1994.
- Sub-Commission on Human Rights resolution 2000/13, *Systematic Rape, Sexual Slavery and Slavery-like Practices,* UN Doc E.CN.4/Sub.2/2000/13, 17 August 2000.
- United Nations, Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, 1992, UN Doc S/1994/674, 1994,
- *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
- *Vienna Convention on the Law of Treaties*, adopted 23 May 1969, UN Doc A/CONF.39/27
- *Vienna Declaration and Programme of Action,* UN Doc A/CONF.157/23, 12 July 1993.

Table of cases

- Aydin v. Turkey, European Court of Human Rights, Judgement of 25 September 1997.
- Prosecutor v. Akayesu, Judgement, ICTR-96-4-T, September 2, 1998.
- Prosecutor v. Delalic and others ('Celebici'), Indictment, IT-96-21, March 21, 1996
- Prosecutor v. Delalic and others ('Celebici'), Judgement, IT-96-21-T, November 16, 1998.
- Prosecutor v. Gagovic and others, ('Foca'), Indictment, IT-96-23-I, June 26, 1996.
- Prosecutor v. Furundzija, Judgement, IT-95-17/I-T, December 10, 1998.
- Prosecutor v. Musema, Judgement, ICTR-96-13-T, 27 January, 2000.
- Prosecutor v. Tadic, 2nd Amended Indictment, IT-94-I-T, December 14, 1995.
- Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-I-AR72, October 2, 1995.

Compilations

- *Basic Human Rights Instruments*, published by the Office of the High Commissioner for Human Rights, Geneva and the International Centre of the ILO, Turin, Third edition, 1998.
- *Human Rights, A Compilation of International Instruments,* vol. 1, second part. New York and Geneva, United Nations Publications, 1994.

Web sites

- Bora Laskin Law Library, University of Toronto, http://www.law-lib.utoronto.ca/diana/docs.htm.
- Division on the Advancement of Women, http://www.un.org/womenwatch/daw.htm.
- The Women's Caucus for Gender Justice in the International Criminal Court, http://www.iccwomen.org.
- Office for the High Commissioner for Human Rights, http://www.unchch.ch.
- The United Nations, www.un.org.
- The International Criminal Court, www.un.org/law/icc.

Other materials

- Interview with Mrs. A. Kuenyehia, Vice President of the International Criminal Court, delivered to Helle Dahl Iversen, The Hague, 30 June 2003.
- Advisory Council on International Affairs, *Violence against women, Legal developments*, No. 18, February 2001.