



DATE DOWNLOADED: Wed Jul 9 00:56:19 2025

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Wasantha Seneviratne, *International Legal Standards Pertaining to Sexual Violence Against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR*, 20 SRI LANKA J. INT'L L. 1 (2008).

ALWD 7th ed.

Wasantha Seneviratne, *International Legal Standards Pertaining to Sexual Violence Against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR*, 20 Sri Lanka J. Int'l L. 1 (2008).

APA 7th ed.

Seneviratne, Wasantha. (2008). International legal standards pertaining to sexual violence against displaced women in times of armed conflict with special reference to the emerged jurisprudence at the icty and the ictr. Sri Lanka Journal of International Law, 20(2), 1-28.

Chicago 17th ed.

Wasantha Seneviratne, "International Legal Standards Pertaining to Sexual Violence Against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR," Sri Lanka Journal of International Law 20, no. 2 (2008): 1-28

McGill Guide 10th ed.

Wasantha Seneviratne, "International Legal Standards Pertaining to Sexual Violence Against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR" (2008) 20:2 Sri Lanka J Int'l L 1.

AGLC 4th ed.

Wasantha Seneviratne, 'International Legal Standards Pertaining to Sexual Violence Against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR' (2008) 20(2) Sri Lanka Journal of International Law 1

MLA 9th ed.

Seneviratne, Wasantha. "International Legal Standards Pertaining to Sexual Violence Against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR." Sri Lanka Journal of International Law, vol. 20, no. 2, 2008, pp. 1-28. HeinOnline.

OSCOLA 4th ed.

Wasantha Seneviratne, 'International Legal Standards Pertaining to Sexual Violence Against Displaced Women in Times of Armed Conflict with Special Reference to the Emerged Jurisprudence at the ICTY and the ICTR' (2008) 20 Sri Lanka J Int'l L 1

x Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation

INTERNATIONAL LEGAL STANDARDS PERTAINING TO SEXUAL VIOLENCE AGAINST DISPLACED WOMEN IN TIMES OF ARMED CONFLICT WITH SPECIAL REFERENCE TO THE EMERGED JURISPRUDENCE AT THE ICTY AND THE ICTR

Wasantha Seneviratne *

ABSTRACT

Displaced women are vulnerable to all forms of violence at every stage of their flight, not only when fleeing a battlefield but also on arrival at a refugee camp. In situations of armed conflict, acts of sexual violence against displaced women are more common and widespread. This article focuses on the problem of sexual violence against displaced women and examines the strengths and weaknesses of the international legal standards that have been formulated on the issue. It further evaluates the jurisprudence emerged at the ICTY and ICTR on this problem and the future work of the ICC.

1. INTRODUCTION

Violence against women in times of armed conflict has been a widespread and persistent practice over the centuries, and in such a setting displaced women are highly exposed, both during and after displacement. In some cases, sexual and other gender-based violence has been the cause of forced displacement.¹ These forms of violence are a serious violation of women's fundamental right to personal security recognized in various international human rights and humanitarian law instruments. Fresh waves of human displacement are apparent all over the world

* LL.B (Hons)(Colombo), M.Phil(Colombo), Attorney-at-Law. Senior Lecturer, Faculty of Law, University of Colombo.

¹ See UNHCR, 'Sexual Violence against Refugees: Guidelines on Prevention and Response', UNHCR, Geneva, 1995, p.85.

mainly due to internal or international armed conflict situations. In addition to the remained internally displaced populations in the camps Sri Lanka again shoulders new masses of IDPs (internally displaced persons) who escaped from the custody of the LTTE.² Considering the aptness of this premise to the contemporary world this article converses the issue of sexual violence against displaced women in the context of armed conflict and examines the strengths and weaknesses of the international legal standards that have been formulated on the issue.

Although innumerable forms of violence exist against displaced women in times of war, this article concentrates mainly on rape and other types of sexual violence, because sexual violence is the commonest and the gravest form of violence against displaced women in times of conflict. Rape, sexual assault, sexual slavery and other forms of sexual violence are increasingly used as weapons of war, and displaced women are easy targets. They are subjected to sexual violence in all phases of displacement,— before, during and after.³ Although during armed conflict sexual violence sometimes affects men as well, it is evident that women are more likely to be subjected to it. They are targeted for different reasons than men, and are affected in different ways.⁴ In fact, the impact of sexual violence on women is enormous — victims are physically, emotionally and psychologically traumatized. Additionally, they are often shunned or ostracized by their society and considered unmarriageable. Therefore they live in silence with the knowledge and consequences of the atrocity committed against them.⁵

² LTTE stands for Liberation Tigers of Tamil Ealam in this article.

³ In some situations they flee to escape from it. In the places where they settled temporarily or during the repatriation or reintegration phases they may be subjected to sexual violence. See Preamble, Refugee Protection and sexual Violence, UNHCR Executive Committee conclusion No.73 (XLIV), 1993.

⁴ Women victims are subjected to the added risk of pregnancy as a result of rape in contrast to men. They may be compelled to bear a child of their perpetrators, which is also another form of violence against them. See United Nations Division for the Advancement of Women, 'Sexual Violence and Armed Conflict: United Nations Response', United Nations, Geneva, April 1998.

⁵ Because of the fear of ostracism or retaliation by their family or community victims are often reluctant to report the violation or seek help. See Radhika Coomaraswamy, Preliminary Report on Violence Against Women, its Causes and Consequence, Charlotte Lindsay, 'Women facing war: ICRC Study on the Impact of Armed Conflict on Women', ICRC, Geneva, 2002.

2. PROBLEM OF SEXUAL VIOLENCE IN CONFLICT RELATED DISPLACEMENT

The term ‘sexual violence’ refers to many different crimes including rape, sexual mutilation, sexual humiliation, forced prostitution and forced pregnancy. The UNHCR Guidelines on Prevention and Response to Sexual violence against Refugees explain the nature of sexual violence as a gross violation of fundamental human rights, and when committed in the context of armed conflict, as a grave breach of humanitarian law.⁶ The term ‘sexual violence’ is used in these Guidelines to cover all forms of sexual threat, assault, interference and exploitation, including statutory rape and molestation without physical harm or penetration.⁷ Various scholars have defined rape as a crime of extreme violence.⁸ However, rape is considered the commonest form of sexual violence in situations of conflict related displacement.

The Declaration on the Elimination of Violence Against Women (DEVAW)⁹ states that violence against women constitutes a violation of the rights and fundamental freedoms of women, and impairs or nullifies their enjoyment of them.¹⁰ It further notes that refugee women and women in situations of armed conflict are especially vulnerable.¹¹ Accordingly, a broad interpretation of this provision will include displaced women in conflict situations, and thus also internally displaced women.¹²

⁶ See UNHCR Guidelines on Prevention and Response to Sexual violence against Refugees, p.1.

⁷ *Ibid.*

⁸ The Special Rapporteur for former Yugoslavia, Tadeusz Mazowiecki, 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’. Tadeusz Mazowiecki, Report on the Situation of Human Rights in the territory of the former Yugoslavia, 1993, UN Doc. A/48/92-5/25341, Annex, p. 20. Nevertheless, the legal definition of rape varies from country to country.

⁹ This Declaration is the first set of international standards dealing specifically with violence against women. See Declaration on the Elimination of Violence against Women, GA/ RES 48/104 of 23 February 1994, UN. Doc. A/48/49, 1993.

¹⁰ See the Preamble of the Declaration on the Elimination of Violence Against Women.

¹¹ *Ibid.*

¹² Article 1 of the Declaration defines the term ‘violence against women’ as any act of gender-based violence that results in, or is likely to result in, physical, sexual or

Although this Declaration is lacking a genuine enforcement mechanism and penal sanctions¹³ it can be considered a major contribution to women's human rights, providing significant initiatives toward combating gender related violence.

The Convention on Elimination of All Forms of Discrimination against Women (CEDAW)¹⁴ declares that States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women, and the exploitation of prostitution of women.¹⁵ However, this Convention is criticized for not addressing the issue of violence against women, notwithstanding the impact of the issue on them.¹⁶ Filling this lacuna in the CEDAW, the Committee on the Elimination of Discrimination against Women established under this Convention, issued a General Recommendation No.19 to deal exclusively with 'violence against women'.¹⁷ Therein, the Committee states that gender-based violence is a form of discrimination that seriously inhibits a woman's ability to enjoy rights and freedoms on an equal basis with men, and is directed against a woman because she is a woman, or which affects women disproportionately. The Committee included 'sexual harm or suffering and threats of such acts' as constituting gender-based violence.¹⁸ The responsibility of States Parties under the Convention extends to

psychological harm or suffering to women, including threats of such acts whether occurring in public or private life. Article 2 stipulates further that violence against women encompasses the physical, sexual and psychological violence occurring in the family, within the general community including rape, sexual abuse and sexual harassment. Article 4 significantly obliges States to condemn violence against women and pursue by all appropriate means and without delay a policy of eliminating violence against women.

¹³ Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, (The Hague- Boston: Martin Nijhoff Publishers, 1997), p.238.

¹⁴ Convention on Elimination of All Forms of Discrimination against Women, Open for signature 18 December 1979, entered into force on 3 September 1981.

¹⁵ See Article 6 of the CEDAW and earlier discussion on this Convention.

¹⁶ See K.D.Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, J.Gardam, 'Women and the Law of Armed Conflict: Why the silence?', (1997) 46 *International and Comparative Law Quarterly*, p. 74.

¹⁷ Committee on the Elimination of Discrimination against Women, 16th Session, General Recommendation No. 19, CEDAW/C/1992/L.1/15, 1992.

¹⁸ See 'Sexual Violence against Refugees: UNHCR Guidelines on Prevention and Response'. It is defined in para.6 "violence directed at a woman because she is a

eliminating gender-based discrimination by any person, organization or enterprise. Therefore, State responsibility may be invoked not only when a public official is involved in an act of gender-based violence, but also when the State fails to act with due diligence to prevent violations of rights committed by private persons, or to investigate and punish such acts of violence and to provide compensation.¹⁹ In the same General Recommendation, the Committee called on States Parties to take all measures necessary to prevent gender-based violence.²⁰ Such measures would include legal sanctions, civil remedies and avenues for compensation, but also preventive measures such as public information and education programmes, as well as protective measures, including support services for victims of violence. Displaced women are more susceptible to all forms of gender-based violence existing in everyday life of society than women who live normal lives. States are required to submit reports that include information about violence against women to this Committee on a periodic basis, and the measures taken to eliminate such violence. The Committee is one of the most effective mechanisms set up to address this issue, and gave the necessary impetus by including it in the international agenda of human rights.

2.1 Rape as the Most Widespread Form of Sexual Violence during Conflict Related Displacement

Historically, rape and other forms of sexual violence against women were regarded as an inevitable aspect of armed conflict, and were hardly ever prosecuted.²¹

woman or that affects women disproportionately includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless whether those provisions expressly mention violence”.

¹⁹ The Committee affirmed that violence against women constitutes a violation of her internationally recognized human rights regardless of whether the perpetrator is a public official or a private person. See ‘Discrimination against Women: The Convention and the Committee’, Fact Sheet No.22, The Office of the High Commissioner for Human Rights. < <http://www.unchr.ch/html/menu6/2/fs22.htm> >, visited on 03.03.2004.

²⁰ See para. 24 (t) of General Recommendation No. 12.

²¹ Christine Chinkin, ‘Rape and Sexual Abuse of Women in International Law’, 5 (3) *European Journal of International Law*, 1994, p. 326.

However, at present, this horrific practice has been documented, and as a result the law pertaining to the issue is well established. The ravages of armed conflicts in countries such as Rwanda, Bosnia, Kosovo, Sierra Leone, Sudan, Algeria, Cambodia, East Timor, Cyprus, Haiti, Liberia, Somalia and Uganda made the world aware of the realities of systematic sexual violence, placing rape as a war crime within international jurisprudence.

In several of the countries mentioned, displaced families frequently cite rape, or the fear of rape, as a key factor for their displacement. In Bosnia alone, the organized and systematic rape of at least 20,000 women and girls by the Serbian military, and the murder of many of the victims subsequently, were horrifying. Many women were raped before displacement. They left their homes as they were afraid of being repeatedly raped or sexually abused. In this way, many women and girls became internally or externally displaced due to the massive scale of sexual violence in Bosnia and Herzegovina.²² This situation provides an excellent example that when sexual violence is committed in a systematic manner, it causes whole communities to abandon their homes and flee to seek shelter elsewhere. However, displaced women may find that the flight itself may actually increase their exposure to the threat of sexual abuse, because border guards, police officers, military personnel and camp officials quite frequently exploit their position of power by demanding sex from displaced women and girls, and by forcing them into prostitution. In addition, displaced women may find themselves at risk of sexual violence from members of their own community due to the deterioration of social structures and values.

During the period from 1999 to 2000 there was widespread violence against women in East Timor after an UN sponsored referendum, which resulted in Indonesia relinquishing its claim to the territory. Pro-Indonesian militia and Indonesian soldiers in particular initiated a policy of terrorizing the population, committing widespread abuses, including the rape of women and girls. Threats, intimidation and attacks caused the internal displacement of tens of thousands of people in the months

²² Catherine N. Niarchos, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, (1995) 17(4) *Human Rights Quarterly*, p. 671-673.

preceding the ballot. Internally displaced women were especially vulnerable to sexual violence during this period.²³ Not only women in East Timor, but also refugee women who sought asylum in West Timor, were regularly taken from the camps and raped by soldiers and militia members.²⁴ Although the Government of Indonesia failed to disarm and disband the militia, or to investigate reports of sexual assault and hold the perpetrators accountable, a Special Panel, consisting of two international and one East Timorese judge, had been set up to hear cases of mass killings and forced deportation as well as individual offences of murder, rape, torture, and other crimes committed in East Timor between January 1, 1999 and October 25, 1999.²⁵ The East Timorese Commission for Reception, Truth and Reconciliation (CRTR) was also established in January 2002 to document human rights violations committed in East Timor and to facilitate community reconciliation.²⁶ In 1993 in Somalia and Somali refugee camps of northeast Kenya, a number of rape victims were found as a result of the civil war, the rapes being committed by both Somali bandits and local security personnel. In the case of Rwanda, many internally displaced women who survived the heinous incident of genocide, were subsequently raped. As many as 1.2 million refugee women, who returned to Rwanda in 1997, were sexually exploited in the camps in then-Zaire, and some returned pregnant or with babies.²⁷

Complaints of rape in displacement and custody in war-torn areas of Sri Lanka increased significantly before the cease-fire agreement was signed between the

²³ Amnesty International, Annual Report 2000, AI Index POL10/001/00, p. 129.

²⁴ Report of the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy, addendum: mission to Indonesia and East Timor on the issue of violence against women E/CN.4/1999/68/Add.3, para. 71.

²⁵ The International Commission of Inquiry appointed by the UN Secretary-General called on the United Nations to establish an independent and international body charged with conducting systematic investigations, identifying and prosecuting perpetrators, and ensuring reparations to victims of the violence in East Timor. See 'UN: Women and Human Rights report - Timor sections', E/CN.4/2001/73 23 January 2001.

²⁶ See Human Rights Watch, World Report 2003.

²⁷ See 'Beijing Plus 5, Refugee and Internally Displaced Women: Advocating for Accountability through the Beijing Platform for Action', p.p.9-10, <<http://www.theric.org/wcrwc/reports/beijing0601.html>>, visited on 14.01.2007.

two warring parties. Among the victims of rape are many internally displaced women. Most of these rapes have occurred in the context of internal armed conflict, and the army, police and navy are responsible.²⁸ In Kosovo too, rape and other forms of sexual violence were used as weapons of war and instruments of systematic ethnic cleansing to terrify the civilian population, extort money from families, and push people to flee their homes.²⁹ In Sierra Leone, during armed conflict, girls and women were brought to rebel command areas and exposed to systematic, organized and widespread sexual violence. Many displaced women were included. According to human rights workers in Sierra Leone, the rebels' rape campaign was as widespread and systematic as similar incidents in the 1992-1995 Bosnian war. However, these incidents have received far less attention.³⁰

The list of massive scale sexual violence against displaced women is not limited to these countries, but is a wide-spread, dreadful phenomenon.

3. INTERNATIONAL LAW PERTAINING TO SEXUAL VIOLENCE IN CONFLICT RELATED DISPLACEMENT

At present there is a remarkable development in international law with regard to the issue of sexual violence against women. Protection is based on international humanitarian law, human rights law and other treaty law, customary international law and the practices of war crime tribunals. This vast body of law applies to displaced women in the context of armed conflict. Therefore, these developments in law will be analyzed in this study.

²⁸ See 'Sri Lanka: Rape in custody', Amnesty International Report on Sri Lanka, AI index: ASA 37/001/2002. The situation of Sri Lanka will be specifically discussed later.

²⁹ See 'Beijing Plus 5, Refugee and Internally Displaced Women: Advocating for Accountability through the Beijing Platform for Action', p.10.

³⁰ *Ibid*, p.12.

3.1 Sexual Violence under International Humanitarian Law

Sexual violence is a grave violation of human rights as well as a serious violation of humanitarian law (IHL).³¹ However, in the context of armed conflict, IHL is more applicable than human rights law to displaced women. Sexual violence in all its forms is prohibited under IHL and thus rape, enforced prostitution, sexual slavery and enforced impregnation must be treated as serious violations of this law, and vigorously prevented.

Article 46 of the Hague Regulations Annexed to the Hague Convention No. IV of 1907 states “family honour and rights, the lives of persons and private property, as well as religious convictions and practice. . . . must be respected by warring parties”.³² Under a broad interpretation, Article 46 can be considered to cover rape, but in actual practice it has seldom been interpreted in this manner.³³ Four Geneva Conventions of 1949 and their two Additional Protocols of 1977 contain a number of important provisions relating to rape and other forms of sexual violence against women in times of war. However, there is confusion over the interpretation of some provisions of these instruments, and they have been subjected to commentary among scholars. These critiques will be further discussed.

3.2 ‘Rape’ under Humanitarian Law

Although rape is a crime of violence, it has been characterized as a crime against honour and dignity, based on the wording of Article 27(2) of the Fourth Geneva Convention relating to the protection of civilians in armed conflict of 1949. This stipulates that women shall be especially protected against any attack on their

³¹ IHL provisions pertaining to the protection of women from sexual violence include treaty law, customary international law and the practices of international war crime tribunals.

³² See Hague Regulations Respecting the Laws and Customs of War on Land Annexed to Hague Convention No. IV of 1907.

³³ See Theodor Meron, ‘Rape as a Crime under International Humanitarian Law’, (1993) 90 *American Journal of International Law*, p.424.

honour, in particular against rape, enforced prostitution or any form of indecent assault.³⁴ The phrase ‘women shall be especially protected against any attack on their honour’ of this Article has been subjected to criticism.³⁵ It is of course arguable that all attacks on a person’s honour constitute inhuman treatment, but this categorization does not reflect the seriousness of the offence of sexual violence.³⁶ In fact, the phrase ‘women’s honour’ implies that the victim of the sexual violence is somehow ‘dishonoured’ in the attack. This implication is based on the belief that honour is something lent to women by men, and that a raped woman is thereby dishonoured.³⁷ According to this criticism, Article 27(2) has failed to identify the serious nature of rape as a violent crime. Instead, it reflects the trivialization of such offences,³⁸ and ignores the fact that the only party without honour in a rape or any situation of sexual violence is not the victim but the perpetrator. While rape is truly an assault on human dignity and bodily integrity, it is first and foremost a crime of violence.³⁹ Catharine Nicholas states that rape should be recognized as an assault motivated by gender, but not as a crime against honour.⁴⁰ Although Article 27 thus provides special protection for women against any attacks on their honour, and in particular against rape, it could not prevent the rape of countless women in conflicts. Defining rape as a crime against the ‘honour and dignity’ of women under IHL is thus a serious weakness in law.

³⁴ See Article 27 of the Fourth Geneva Convention of 1949.

³⁵ The commentary to the Geneva Convention explains that Article 27(2) was intended to denounce widespread abuse of women and children, including rape, mutilation and forced prostitution during World War II. See J. Gardam, ‘Women and the Law of Armed Conflict’, p. 74.

³⁶ *Ibid.*

³⁷ See United Nations Division for the Advancement of Women, ‘Sexual Violence and Armed Conflict: United Nations Response’.

³⁸ *Ibid.*

³⁹ Gay J. Mc Dougall, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery Like Practices During Armed Conflict, Final Report, E/CN.4/Sub.2/1998/13, 22 June 1998, para 8.

⁴⁰ Catherine N. Niarchos, ‘Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia’, (1995) 17 (4) *Human Rights Quarterly*, p.672, see further J. Gardam, ‘A Feminist Analysis of Certain Aspects of International Humanitarian Law’, (1992) 12 *Australian Year Book of International Law*, pp. 265-267. She describes IHL as a gendered legal regime.

Theoretically, rape and other forms of sexual violence are serious violations under this law. However, IHL provisions are not strong enough to recognize the heinous nature of these crimes, because acts of sexual violence fall outside the system of grave breaches of IHL. The Geneva Conventions and Additional Protocol I contain certain crimes designated as grave breaches. Classification of a particular crime as a grave breach is significant, because States then have a duty to search for persons who are alleged to have committed them and, if found within their territory, to bring them before their courts, or alternatively to extradite them for prosecution. Article 147 of the Fourth Geneva Convention identifies grave breaches.⁴¹ In fact, rape and other forms of sexual violence should be identified explicitly as grave breaches under IHL, considering the grave nature of the crime, and its impact upon the victims. This failure proves that although sexual violence is generally regarded as one of the worst phenomena of armed conflict, the law has not always shared this perception,⁴² and thus IHL has addressed the issue of sexual violence against women in times of armed conflict inconsistently and inadequately. Although it does not explicitly designate rape or other forms of sexual violence as a grave breach, sexual violence can be construed as falling within other categories of grave breaches, such as ‘wilfully causing great suffering or serious injury to body and health’, and ‘torture or inhumane treatment’.⁴³ In line with this argument, rape appears to be included within the general clauses of Article 147. The Commentary on the Geneva Conventions indicates that the grave breach of ‘inhuman treatment’ includes violations of Article 27 too⁴⁴. However, the failure to specify rape or sexual violence as a grave breach is distressing. The ICRC and the State Department of the United States recently declared that rape is a grave breach under Article 147 of the Geneva Conventions,⁴⁵ and the phrase ‘wilfully causing great suffering or serious injury to body and health’ of Article 147 can be

⁴¹ See Article 147 of the Fourth Geneva Convention, which includes willful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health *inter alia* as grave breaches under the Convention.

⁴² J. Gardam, ‘Women and the Law of Armed Conflict: Why the silence?’, p. 76.

⁴³ See Commentary on Fourth Geneva Convention p. 598, cited by J. Gardam, ‘Women and the Law of Armed Conflict: Why the silence?’, p. 76.

⁴⁴ *Ibid.*

⁴⁵ See T. Meron, ‘Rape as a crime under International Humanitarian law’, pp. 426-427.

construed to cover rape. The ICRC has further declared that this phrase obviously covers not only rape, but also any other attack on woman's dignity.⁴⁶ Moreover, the Commission of Experts in relation to War Crimes in the former Yugoslavia has also adopted this broad interpretation.⁴⁷ However, this is an exercise in interpretation. Therefore an amendment is needed to designate rape as a grave breach of IHL rather than leaving this significant issue to be dealt with as a matter of interpretation.

Two Protocols of 1977 to the Geneva Conventions of 1949 represent a slight improvement in this regard. Article 75(2) (b) of Protocol I prohibits 'outrages upon personal dignity in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault'. This Article further prohibits torture of all kinds, whether physical or mental, at any time and in any place. Article 76 of the same Protocol provides a comprehensive treaty provision in relation to rape in respect of all situations of armed conflict, with women and their protection against rape, forced prostitution and any other form of indecent assault as the main focus.⁴⁸ Nevertheless, Catherine Niarchos comments that although 'dignity' is a more germane reference than honour, still, it does not adequately express the fact that sexual assault is a violent crime.⁴⁹

Articles 27 and 147 of Fourth Geneva Convention and Articles 75(2) and 76(1) of Protocol I apply only in the context of international armed conflict. As a result, internally displaced women who are subjected to sexual violence due to internal armed conflict, cannot claim protection under these provisions. In situations of non-international armed conflicts both Common Article 3 of the four Geneva

⁴⁶ See ICRC, Update on Aide-Memoire of 3 December 1992.

⁴⁷ This Commission declared that rape and other sexual assaults constitute both 'torture and inhumane treatment' and also 'acts wilfully causing great suffering or serious injury to body and health' mentioned in Article 147.

⁴⁸ See Article 76(1) of Protocol I of 1977.

⁴⁹ C. N. Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', p.675, Article 75(2) (b)) of the Protocol II and Article 4 (2) (a) of the Protocol I condemn "violence to the life, health or physical or mental well-being of persons", including murder, torture, corporal punishment or mutilation. Article 75 (2) (a) of the Protocol I and Article 4(2)(a) of the Protocol II discuss outrages upon personal dignity separately.

Conventions and Article 4(2) (e) of Protocol II provide protection for displaced women against acts of sexual violence, including rape. Article 4(2) (e) covers acts of sexual violence and rape committed in internal conflict, prohibiting ‘outrages upon personal dignity and in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’. In the *Nuclear Weapon* case it was held that all States were bound by the rules in Protocol I, which were merely the expression of the pre-existing customary law such as Article 1 of Protocol I and the Preamble to Protocol II.⁵⁰ Unfortunately, Common Article 3 does not expressly prohibit rape. Nevertheless, Common Article 3 prohibits the following acts against non-combatants:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Outrages upon personal dignity, in particular humiliating and degrading treatment.⁵¹

Although, Common Article 3 of the Geneva Conventions does not specifically mention rape, its prohibition of “outrages upon personal dignity, in particular humiliating and degrading treatment” would nowadays be regarded as including rape.⁵² In the *Nicaragua v US* case the International Court of Justice held that Common Article 3 is an accepted part of customary international law in addition to being a treaty provision, and thus binds all parties to a conflict, whether State or non-State actors, irrespective of whether they are a party to the Geneva Conventions.⁵³ The Court found that the prohibitions contained in Common Article 3 constitute ‘elementary considerations of humanity’ that must be respected in all armed conflicts.⁵⁴ The Appeals Chamber of the International Criminal Tribunal for former Yugoslavia has recently confirmed this position in the *Tadic* case, ruling that Common Article 3 as well as all of the provisions of the Hague Conventions

⁵⁰ See The Advisory Opinion of the Legality of the threat or use of Nuclear Weapons, ICJ Reports, 1996.

⁵¹ See Common Article 3 of Geneva Conventions of 1949 for details.

⁵² J. Gardam, ‘Women and the Law of Armed Conflict: Why the silence?’, p.76.

⁵³ *Nicaragua V The United States of America*, (Merits) 1986 ICJ Reports, 4 June 27, 1986.

⁵⁴ Common Article 3 has generally become part of customary law, applicable to both internal and international armed conflicts. See Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Oxford: Clarendon Press, 1989), p.35.

apply broadly as customary law in all international, as well as internal armed conflict.⁵⁵ This can be considered as a landmark development in law, and has helped to cover sexual violence against displaced women in situations of internal armed conflict. Although both Common Article 3 and Article 4(2) (e) of the Protocol II provide protection for displaced women in the context of non-international armed conflicts for acts of sexual violence, including rape, the Geneva Conventions are criticized as failing to identify the level of conflict or internal strife that may be necessary to trigger the application of the provisions of Common Article 3.⁵⁶

However, none of the provisions discussed above pertaining to sexual violence against women seriously consider the actual impact of such crimes upon the victim, and none has designated it as a grave breach of the law of armed conflict. In fact, it would have been preferable if rape of women had been designated as a grave breach, rather than leaving it as a question of interpretation.⁵⁷ All these progressions in law cover women who become displaced in conflict situations. Therefore, if displaced women encounter any form of sexual violence in the context of conflict they are able to claim the protection of this body of law. In addition to these provisions, the jurisprudence of recent International Criminal Tribunals illustrates a further progression in this area.

4. THE JURISPRUDENCE OF RECENT INTERNATIONAL CRIMINAL TRIBUNALS

Grave breaches of the Geneva Conventions, crimes against humanity and genocide are crimes of universal jurisdiction.⁵⁸ Although few nations in practice provide for

⁵⁵ See *The Prosecutor v Tadic*, Appeals Chamber decision, IT-94-1, para. 84-89.

⁵⁶ Theodore Meron, *Human Rights in Internal strife: Their International Protection*, (Cambridge: Grotiken Publications, 1987), pp.44-50.

⁵⁷ In 1993, the Final Declaration of the International Conference for the Protection of War Victims expressed alarm at the marked increased in acts of sexual violence directed notably against women and children and reiterated that such acts constituted grave breaches of IHL. See Final Declaration of the International Conference for the Protection of War Victims, (1993) 296 *International Review of Red Cross*, p. 377.

⁵⁸ They are universally recognized as being so abhorrent that it is in the interests of the entire international community to suppress them, and any nation may prosecute the

such a broad exercise of jurisdiction in their domestic laws, both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are specifically empowered to prosecute rape and sexual assault as crimes against humanity. To date, the Tribunals have successfully prosecuted rape and sexual assault as genocide, crimes against humanity, torture and war crimes. This will be discussed.

4.1 The International Criminal Tribunal for former Yugoslavia

The International Criminal Tribunal for Yugoslavia (ICTY) was established as a response to the findings of widespread violations of IHL in the former Yugoslavia.⁵⁹ The incidents of rape and other forms of sexual violence which occurred there caused people to seek internal or external displacement.⁶⁰ The stipulated functions of the Tribunal were to try those accused of violating international law. Article 2 of the Statute of the ICTY creates jurisdiction of the Tribunal over grave breaches of the Geneva Conventions of 1949 and includes acts ‘wilfully causing great suffering or serious injury to body or health’, but rape is not explicitly included as a grave breach in this Article.⁶¹ Article 5 creates jurisdiction over crimes against humanity committed in armed conflicts. It states that the Tribunal has the power to prosecute persons responsible for specific crimes including enslavement, rape, torture and other inhumane acts when committed in armed conflict, whether international or internal in character, and directed against any civilian

perpetrators, regardless of their nationality, the nationality of the victims or where the crime took place. See ‘Kosovo Background: Sexual Violence as International Crime’, Human Rights Watch World Report, Chapter on the Federal Republic of Yugoslavia, May 1999.

⁵⁹ The Security Council, acting under Chapter VII of the United Nations Charter, decided to establish the ICTY to prosecute persons responsible for such acts. The Tribunal was established in February 1993. See SC/RES 808, 1993 and SC/RES 827, 1993.

⁶⁰ See UN General Assembly Resolution on Rape and Abuse of Women in the Areas of Armed Conflict in the former Yugoslavia, GA/RES 48/143, 1993, p. 10 for details.

⁶¹ Yet it has been recognized as falling within the definition of one grave breach (inhuman treatment) and would seem to qualify under two others (torture and wilfully causing great suffering or serious injury to body or health).

population.⁶² However, the Statute makes no reference as to whether the conflict in the former Yugoslavia is international or internal.⁶³

In this Statute there is no universal consensus on the elements required for constituting crimes against humanity. Conversely, a common interpretation is found in the Secretary-General's Yugoslav Tribunal Report, which states that crimes against humanity refer to inhumane acts of a serious nature committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.⁶⁴ In line with this statement sexual violence can be interpreted as constituting crimes against humanity.

Although the contents of the Statute of the ICTY have been subjected to much analysis,⁶⁵ legal scholars of all persuasions have agreed that the Statute of the ICTY was able to break the traditional silence of the law on how rape could constitute a war crime. Thus the Tribunal has established precedents relevant to all women suffering from sexual violence in times of war. This remarkable move would combine relevant rules of humanitarian law with human rights of women in times of war, and could be applied to women who become displaced due to armed conflict. In addition to the statutory provisions, the landmark indictments and

⁶² However, according to Article 5 rape is only specifically punishable as a crime against humanity when committed in armed conflict and directed against any civilian population. This necessarily means that incidents of rape, taking place on an individual basis, are insufficient to constitute a crime under this Article. Therefore, this approach confuses the issue as to whether non-systematic and non-mass rapes should also be treated as grave breaches and prosecuted under the law of armed conflict.

⁶³ Theodore Meron states that the Statutes of the Yugoslav and Rwandan Tribunals provided a major impetus to the application of IHL to internal armed conflicts. See Theodore Meron, 'International Criminalization of Internal Atrocities', (1995) 89 *American Journal of International Law*, p.554.

⁶⁴ Report of the UN Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, 1993, 32 ILM 1163, 1993. <<http://www.un.org/Docs/SG>>.

⁶⁵ Judith Gardem considers the approach of the Statute of the ICTY as illustrating a continuing failure of the law to deal equally with the unique ways in which women experience warfare, because in accordance with the wordings of Article 5 rape would constitute a crime against humanity only if 'directed against the civilian population'. This approach obscures the fact that non-systematic and non-mass rapes should also be treated as grave breaches and prosecuted under the law of armed conflict. See Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence', p. 76.

decisions made by the ICTY caused the emergence of a new jurisprudence over the issue of rape and sexual violence against women.

Most of the indictments in the ICTY contain some form of gender-based violence, particularly sexual violence.⁶⁶ However, certain indictments i.e. *Tadic*, *Furundzija*, *Foca* and *Celebici* led to historic judgments, establishing very important principles on the law pertaining to sexual violence against women. In the *Tadic* case,⁶⁷ Dusko Tadic was charged with grave breaches, violation of the laws and customs of war and crimes against humanity, including his participation in several gang rapes, sexual assaults and other physical and psychological abuse. However, in the trial proceedings the Prosecutor was compelled to withdraw the rape charges against him because witnesses were frightened to testify. As a result, most reports incorrectly assert that all sexual assault allegations were withdrawn, and that the decision did not consider crimes of sexual violence. Nevertheless, Tadic was convicted of sex crimes, and many of the holdings and dicta in the trial chamber's decision have considerable relevance to gender issues.⁶⁸ Although it was not proven that Tadic himself had committed sexual violence, the chamber held him responsible for his participation in a general campaign of terror, including rape and sexual assault.⁶⁹ In the *Foca* case⁷⁰ the ICTY found three men guilty of rape, torture and sexual enslavement in March 2001,⁷¹ marking the first time in history that an

⁶⁶ Kelly Dawn Askin, 'Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', (1999) 93 (1) *American Journal of International Law*, pp.99-100.

⁶⁷ *The Prosecutor v Tadic* opinion and judgment IT-94-1, May 7, 1997.

⁶⁸ See Kelly Dawn Askin, 'Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan tribunals: Current Status', p.101.

⁶⁹ See *The Prosecutor v Tadic* judgment, paras. 660-690.

⁷⁰ *The Prosecutor v Kunarac*, Kovac IT-96-23 "Foca", and Vukovic IT-96-23/1 "Foca". The indictment of eight Bosnian Serb military and police officers in this case in connection with sexual offences based on the brutal regime of gang rape, torture and enslavement against the Muslim Women in Foca is of major legal significance, as it is the first time that sexual assaults have been diligently investigated for the purpose of prosecution under torture and enslavement as a crime against humanity.

⁷¹ The Tribunal convicted Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic in this case.

international tribunal brought charges exclusively for crimes of sexual violence against women. Although rape charges had been included in other cases, this historic judgment gave organized rape and other sexual offences their due place in international law as crimes against humanity. This fills a major gap in the case law jurisprudence in relation to wartime sexual violence.⁷²

The ICTY recognized rape as a violation of the laws or customs of war in the *Furundzija* decision.⁷³ The Tribunal found Anto Furundzija, a local Bosnian Croat military commander, guilty of aiding and abetting a war crime, namely the rape of a Bosnian Muslim woman. He was found to have provided “assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime” when his subordinate orally, anally and vaginally raped a Bosnian Muslim woman. This judgment also serves to provide legal protection for victims of sexual violence. In the *Celebici* case, the ICTY characterized the rape of Bosnian Serb women prisoners at the Celebici prison camp as acts of torture.⁷⁴ In the trial it was held that sexual violence strikes at the very core of human dignity and physical integrity. This decision emphasized that rape inflicts the severe physical and psychological pain and suffering that characterizes torture.⁷⁵ The trial chamber emphasized that when such violence is committed against a woman because of her gender, in addition to rape because of her ethnicity, the perpetrator’s intent triggers the prohibited purpose of gender discrimination as an element of the crime of torture.⁷⁶ In the *Celebici* decision, command responsibility for rape was also

⁷² However, there are weak points in this decision such as that the responsibility was not placed at the commander level, and other suspects indicted for rape and other crimes of sexual violence in the *Foca* case were not arrested. Bosnian Serb wartime leader Radovan Karadzic and Ratko Mladic remain at large, although both men have been indicted for crimes committed under their command.

⁷³ *The Prosecutor v Furundzija* IT-95-17/1 “Lasa Valley”.

⁷⁴ *The Prosecutor v Mucic et al.* IT-96-21 “Celebici Camp”.

⁷⁵ The Tribunal found Hazim Delic, a Bosnian Muslim deputy camp commander, guilty of a grave breach of the Geneva Conventions (torture) and war crimes (torture) for the rapes he committed. Zdravko Mucic, the Bosnian Croat camp commander, was found to have command responsibility for crimes committed at Celebici, including crimes of sexual assault.

⁷⁶ See *The Prosecutor v Mucic et al.*, para. 1254.

highlighted.⁷⁷ The tribunal stated that the crimes committed in the Celebici prison-camp were so frequent and notorious that there was no way that Mucic could not have known or heard about them. Those crimes included rapes and sexual assaults committed by Mucic's subordinates.

4.2 The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR)⁷⁸ was established after having commissioned a number of reports on the situation in Rwanda. The quality of the decisions of this Tribunal has been generally praised, and most of the trial chamber decisions have been upheld when appealed against. Those decisions create a substantial body of case law jurisprudence, which is already being used by the ICTY and by national courts all over the world. The relevant provisions of the Statute of the ICTR provide the necessary jurisdiction to the Tribunal to prosecute perpetrators of sexual violence against women in Rwanda. Article 3 of the Statute, which includes 'crimes against humanity', states the Tribunal's power to prosecute persons responsible for the crimes specifically mentioned therein, including 'rape' when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.⁷⁹

Countless cases of rape and other types of sexual violence occurred, mainly against women including the displaced, in Rwanda in the midst of massive scale massacres leading to genocide. Between April and June 1994, hundreds of displaced civilians

⁷⁷ The ICTY found Zdravko Mucic guilty on the basis of command responsibility for the violations of IHL committed by guards at the camp.

⁷⁸ The Security Council established the ICTR in its Resolution 955 of 8 November 1994. See S/RES/955(1994), 8 November 1994 on establishment of the ICTR.

⁷⁹ The Statute of the ICTR discards the unreal division between international armed conflicts and non-international armed conflicts by providing that rape is punishable as a crime against humanity under Article 3 of the Statute of the ICTR, as well as under Common Article 3 of the Four Geneva Conventions specifically designating 'rape and enforced prostitution' as crimes therein. This is highly valued because breaches of Common Article 3 have not traditionally been regarded as constituting war crimes. See Article 4 of the Statute of the ICTR.

of Rwanda sought refuge at the 'bureau communal'.⁸⁰ While seeking refuge at the bureau communal, female displaced civilians were taken regularly by armed local militia and/or communal police, and subjected to multiple acts of sexual violence on or near the bureau communal premises. The female displaced civilians lived in constant fear, and their physical and psychological health deteriorated as a result of the sexual violence, beatings and killings. The *Jean Paul Akayesu* case⁸¹ broke new ground in defining rape in international law at the ICTR. Akayesu knew of the acts of sexual violence, and that beatings and murders were taking place, and he facilitated the commission of these crimes as 'bourgmestre' who was in charge of executive functions and the maintenance of public order within his commune.⁸² It is not alleged that Akayesu personally committed any acts of sexual violence, but rather that he was responsible for such acts committed by others, but failed to take action to prevent them. In this case, the ICTR defined both rape and sexual violence in a broad and progressive way:

*The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.*⁸³

In the sentencing decision against Akayesu, he was convicted of genocide, three counts of crimes against humanity including rape, genocide, torture and other inhumane acts, and for murder. In this judgement, the trial chamber of the ICTR held that when rape was used as a method to destroy a protected group by causing serious bodily or mental harm to the members of the group, it constituted an act of genocide.⁸⁴ In addition, it explained that rape also could be used as a way to prevent births within a group. The Akayesu case charged the defendant with rape

⁸⁰ A public institution situated in the same territory.

⁸¹ *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, 2 September 1998.

⁸² Akayesu was the mayor of the Taba Commune in Rwanda during the genocide.

⁸³ *The Prosecutor v Jean-Paul Akayesu*, p. 598.

⁸⁴ In the Akayesu decision, the ICTR described a situation in which a rapist might deliberately impregnate his victim with the intent to force her to give birth to a child who would, because of patrilineal social conventions, not belong to its mother's group.

as a war crime during Rwanda's civil war. Akayesu was acquitted of this charge, as the prosecution did not satisfactorily establish that he was a member of the armed forces or charged with military duties.

This decision marks a very significant development in the law relating to sexual violence. It covers acts of sexual violence committed against internally displaced women in the context of internal armed conflict, and will enhance the justice jurisprudence in wartime military tribunals. However, in the beginning the ICTR lacked a comprehensive approach in the inclusion of sexual violence charges in its cases.⁸⁵ There were no indictments for sexual violence until *amicus curiae* from legal academics and practitioners pointed out the available evidence to include charges on sexual violence. Only after such heavy international pressure were the indictments amended to include incidents of rape and sexual assault.⁸⁶ However, the progressive steps of the Tribunal that translate the rules of the Statute into practice, making sexual violence against women in internal armed conflicts a crime against humanity and of genocide, are commendable.

4.3 An Appraisal of the Jurisprudence emerged at the ICTY and ICTR

The ways in which the Prosecutor charged perpetrators of rape and other forms of sexual violence in ICTY and ICTR was a considerable contribution in applying the provisions of their respective Statutes, and in the broader sense creating new case law jurisprudence therein. Although rape was not included in the relevant sections on war crimes or grave breaches in the Statutes of ICTY and ICTR, the Prosecutor has charged specific defendants with sexual violence as a war crime, a crime against humanity, genocide, enslavement, a grave breach and enforced prostitution. The Prosecutor has charged defendants with rape as a war crime under Common Article 3. Even if Common Article 3 does not specifically bring in rape, "torture" has been interpreted to include rape, especially in cases of multiple

⁸⁵ Even in the cases where the Office of the Prosecutor has witness testimony or evidence of sexual violence, he has failed to include these charges in the original indictments or to seek amendments to prosecute these crimes against women.

⁸⁶ Radhika Coomaraswamy, Report of the Special Rapporteur on Violence Against women, Its Causes and Consequences, UN Doc. E/CN.4/1998/54, 26 January 1998.

and repetitive instances, causing serious bodily harm or suffering. Moreover, rape has also been charged under Common Article 3 in isolated cases, and other instances of sexual assault, and sexual mutilation as “cruel treatment”, an “outrage upon human dignity” and “humiliating and degrading treatment”.⁸⁷ This is of real value in the context of internal armed conflict and internal displacement, because common Article 3 applies to such situations, and rape was not explicitly included therein. In future, therefore, this broad interpretation would serve internally displaced women who become victims of rape or any other form of sexual violence in the context of non-international armed conflict.

Furthermore, the Prosecutor has charged defendants with grave breaches of the Geneva Conventions in cases of multiple and repetitive instances of rape, causing serious bodily harm or suffering. Defendants have been charged with ‘torture’ and, in isolated incidents, with rape and other forms of sexual violence; also with ‘wilfully causing great suffering or serious injury to body or health’. When there was no physical injury such situations were covered under ‘inhumane treatment’.⁸⁸ It has long been recognized in the context of women’s human rights that to be effective, any enforcement regime for prohibitions on sexual violence in armed conflicts must incorporate procedural reforms.⁸⁹ This was proved by laying down victim-friendly rules of procedure and evidence both in ICTY and ICTR, besides the ground-breaking indictments brought in by the Prosecutor. In fact, these rules of procedure helped the Prosecutor to successfully charge the perpetrators of sexual violence against women.⁹⁰

All these revolutionary steps will help to fill major gaps in international law pertaining to wartime sexual violence against women. The developments initiated at these

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Judith Gardam, ‘Women Human Rights and International Humanitarian Law’, p.431. These rules of procedure and evidence will not be discussed in detail as the scope of this study is limited.

⁹⁰ See Theodor Meron, ‘Rape as a crime under International Humanitarian Law’ and Radhika Coomaraswamy, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, 1998 for further information about the rules and procedures used by the Tribunal.

tribunals will provide exemplary paradigms for the future work of the International Criminal Court in order to eradicate and minimize gender-based sexual violence against women, including the displaced in the context of armed conflict. However, much more remains to be done to bring wartime abuses against women to a halt, and the future work of the International Criminal Court is expected to be most valuable in this context.⁹¹

4.4 Jurisdiction of the International Criminal Court in relation to the crime of sexual violence

The Statute of the International Criminal Court (ICC) has incorporated imperative provisions to ensure that women who are victims of the gravest crimes under international law have access to justice. The Statute gives the ICC jurisdiction over genocide, crimes against humanity, war crimes and crime of aggression. Now Article 7 defines ‘crimes against humanity’ for the first time in an international treaty. Article 7(1) (g) expressly includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity as crimes against humanity.⁹² It also expressly recognizes that the crime of enslavement includes trafficking of women. In addition, Article 7(1) (h) states that “persecution against any identifiable group or collectivity, on gender grounds, among others, if committed in connection with any other crime within the jurisdiction of the ICC, is a crime against humanity”. These crimes must have been committed “as part of a widespread or systematic attack directed

⁹¹ See Kelly Dawn Askin, ‘Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status’, p.97. She states “Much remains to be done. Victims and witnesses need to be ensured adequate protection and support. The Tribunals must guarantee that the violent, gendered and sexual nature of the crimes is not lost in broad, vague catchall phrases used in treaties and the respective statutes. Sentences must be commensurate with the gravity of the crime, reflecting the fact that crimes of sexual violence are as grave as other crimes of violence.”

⁹² The inclusion of ‘forced pregnancy’ was debated when the Statute was drafted, but finally included. See Mahnoush H. Arsanjani, ‘Developments in international criminal law: The Rome Statute of the International Criminal Court’, (1999) 93 (1) *American Journal of International Law*, p.22.

against a civilian population, pursuant to or in furtherance of a state or organized policy to commit such an attack”.⁹³

In fact, Article 7 (1) (g) contains a much broader definition of crimes against humanity than those in the Statutes of ICTY and ICTR. This broader and more detailed definition seems to reflect most of the positive developments identified by recent authorities. For example, the definition does not require any nexus to armed conflict, and does not require proof of a discriminatory motive. As a result, women who become displaced for any other reason except armed conflicts are also covered by this Article. Nevertheless, as every inhuman act does not amount to a crime against humanity, a more stringent test is required satisfying the terms ‘widespread’ and ‘systematic’. Thus, single or random acts that do not rise to the level of crimes against humanity, cannot be prosecuted as such. Moreover, these acts must have been committed pursuant to “a State or organizational policy”.⁹⁴ Significantly, the Statute distinguishes ordinary crimes from crimes against humanity over which the ICC has jurisdiction. In fact, Article 7 is a contribution to the refinement of international criminal law, as it is the first instance of a definition of crimes against humanity developed by multilateral negotiations among 160 States, and provides a sound basis for international criminal prosecution in the future.

Article 8 of the Statute gives the ICC jurisdiction over a wide range of war crimes. It provides that individual acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence constitute a grave breach of the Geneva Conventions or serious violations of common Article 3 of the Geneva Conventions. They can be prosecuted as war crimes if they occur during international or internal armed conflict. The definitions of these war crimes are essentially the same as those of the analogous crimes against humanity of sexual violence. Unlike crimes against humanity, a war crime can be a single or random act. There is no requirement for the act to be widespread or systematic.⁹⁵

⁹³ See Article 7 of the Statute of the ICC.

⁹⁴ Darryl Robinson, ‘Developments in International Criminal Law: Defining Crimes against Humanity at the Rome Conference’, (1999) 93(1) *American Journal of International Law*, p. 43.

⁹⁵ See Article 8 of the ICC Statute for details.

Thus Article 8 reaffirms recent developments in international law by giving the ICC the power to try war crimes committed in internal armed conflicts. Accordingly, displaced women are protected against war crimes included in Article 8, which occur during international or internal armed conflict.

One of the problems in prosecuting persons accused of these grave crimes against women is, that some women who have suffered such violence are reluctant to come forward to testify.⁹⁶ As a result, Article 68(1) requires that the ICC take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, in particular where the crimes involve sexual or gender violence. In doing so, it must have regard to all relevant factors, including age, health and the nature of the crime, including whether the crime involves sexual or gender violence. However, such measures must not be prejudicial to or inconsistent with the rights of the accused, and a fair and impartial trial. Article 68 (2) also provides special protection for women victims and witnesses, in particular in the case of a victim of sexual violence.⁹⁷ In addition, Article 21 (3) incorporates the fundamental principle that the interpretation and application of the Statute, the elements of crimes, the rules of procedure and evidence and relevant law “must be consistent with internationally recognized human rights, and be without any adverse distinction on such grounds as gender”. Thus the Statute of the ICC includes a gender-sensitive approach and victim-friendly rules of procedure in relation to crimes committed against women in the context of crimes against humanity or war crimes, within the ambit of the Statute, and this includes displaced women as well.

The creation of a gender-sensitive International Criminal Court is considered a timely development in international human rights and humanitarian law. At present three cases are submitted to the ICC, by State parties to the Statute, namely, Uganda, Democratic Republic of Congo, and Central African Republic and the United Nations Security Council has referred a situation of a non- State party that the war crimes and crimes against humanity perpetrated in Darfur in Sudan to the

⁹⁶ See ‘Ensuring justice for women’, The International Criminal Court Fact Sheet 7, Amnesty International, AI Index: IOR 40/008/00.

⁹⁷ See Article 68 of the ICC Statute for details.

ICC. Though there are no charges yet based on crime of sexual violence for the first time in the history arrest warrants are issued against a head of a State in office.⁹⁸

Although the ICC came into force recently⁹⁹ it is important that all States should ratify its Statute. Moreover, all the State Parties should enact effective implementing legislation to cooperate fully with the court for investigation and prosecution of war crimes, crimes against humanity and genocide, consistent with the standards set in this Statute. Now the ICC has permanent jurisdiction over the most serious breaches of international humanitarian law and human rights law, specifically over crimes against humanity, war crimes and genocide. This will end an era of impunity by punishing the perpetrators, and affording redress to victims and their families. The ICC will be able to remedy the deficiencies of ad hoc tribunals and to take over, when national criminal justice institutions are unwilling or unable to act. This may act as a deterrent against the commission of future war crimes.¹⁰⁰ This is of particular importance in relation to the phenomenon of internal displacement, because States are primarily responsible for those citizens who become displaced within their territorial boundaries. When the States are unable or unwilling to accept their responsibility the ICC can take over.

5. CONCLUSION

This article examined the strengths and weaknesses of the international legal standards relating to the problem of sexual violence against displaced women. Accordingly, it was highlighted some initiatives introduced through international

⁹⁸ Arrest warrants are issued against the present President of Sudan Omar Al Bashir

⁹⁹ The ICC came into force formally on 11th of April 2002 after sixty countries ratified the Statute of the ICC.

¹⁰⁰ National courts always have jurisdiction over the crimes stated in this Statute. Under the principle of “complementarity”, the ICC will only act when the national courts are unable or unwilling to do so. For example, a government may be unwilling to prosecute its own citizens if they are high ranking, or, where the criminal justice system has collapsed as a result of an internal conflict, there may be no court capable of dealing with this type of crime.

instruments and judgments to address the issue positively. However, it also revealed the need for taking supplementary action to protect displaced women from sexual violence in the context of armed conflict.

As we observed the Statute of the ICC includes a gender-sensitive approach and victim-friendly rules of procedure in relation to crimes committed against women and thus take in crime of sexual violence against displaced women to its jurisdiction. Therefore, it is important that all States should ratify the ICC Statute without delay. Moreover, all the State Parties should enact effective implementing legislation to cooperate fully with the court for investigation and prosecution of war crimes, crimes against humanity and genocide, consistent with the standards set in this Statute. This will end an era of impunity by punishing the perpetrators, and affording redress to victims and their families. The ICC will be able to remedy the deficiencies of ad hoc tribunals and to take over, when national criminal justice institutions are unwilling or unable to act. This may act as a deterrent against the commission of future war crimes.¹⁰¹

States should make every effort to end impunity for criminal acts including crimes of sexual violence that occur within their borders and by their security forces. According to the recommendations made by the Special Rapporteur on Violence against Women this should include preventive measures, punishment and prosecution of perpetrators of such crimes. States must provide redress for victims, including compensation for injuries, appropriate support services within national mechanisms, and should provide economic, social and psychological assistance to victim-survivors.¹⁰² However, not only States actors but also non-State actors, should remain within the bounds of international humanitarian and human rights law, recognizing that they are liable for individual crimes against international

¹⁰¹ National courts always have jurisdiction over the crimes stated in this Statute. Under the principle of “complementarity”, the ICC will only act when the national courts are unable or unwilling to do so. For example, a government may be unwilling to prosecute its own citizens if they are high ranking, or, where the criminal justice system has collapsed as a result of an internal conflict, there may be no court capable of dealing with this type of crime.

¹⁰² Radhika Coomaraswamy, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, 1998.

humanitarian law, and that, under universal jurisdiction, they may be prosecuted for such crimes in any court of law.

Unlike the past no one is prepared to believe that sexual violence against women in times of war as unfortunate but inevitable reality of war. Therefore, this heinous crime should be eliminated and the perpetrators should be punished without amnesty.