SEXUAL VIOLENCE AS A WEAPON OF WAR: ENSURING EFFECTIVE REDRESS FOR VICTIMS IN POST-CONFLICT SITUATIONS

A Thesis Submitted in Fulfilment of the Requirements for the Degree of Doctor of Philosophy

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AUTHOR'S DECLARATION

I, **Jean de Dieu Sikulibo**, declare that this research has been carried out and the thesis composed by me and has not been accepted in fulfilment of the requirements of any other degree or professional qualification.

DEDICATION

I dedicate this thesis to my wife Yvonne and our beloved daughter Iliza Gaju, with love and immense gratitude for their patience, and also to my loving parents, with a special feeling of appreciation for their constant encouragement and push for tenacity.

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ABSTRACT

All too often in situations of armed conflicts, rape and other acts of sexual violence are used as a military tactic. The use of sexual violence as an element of war strategies is distinctively destructive, and not only leaves victims with significant challenges to cope with their victimisation but also tears apart the fabric of families and affected communities. Challenges facing victims in post-conflict settings are often compounded by the socio-cultural contexts in which such crimes are committed. In fact, the dynamics of conflict-related sexual violence are often highly entrenched within local contexts, making these crimes not only an effective weapon for destroying the lives of individual victims but also add a new component to the social disruption, and exacerbate the devastating impact of armed conflicts on affected communities. This research contributes to the current debate on mechanisms to ensure effective redress for victims of sexual violence as a weapon of war. It adds to the growing literature on the issue in two ways: First, it explores the distinct aspects of these crimes to understand the nature and extent of the needs of the victims in post-conflict settings. Second, it examines the challenges and limitations of international criminal justice in dealing with a wide range of the victims' needs, and provides critical insight into how such limitations can be addressed through domestic transitional justice processes.

This study demonstrates that, despite recent developments in international criminal justice with respect to victims, the international criminal justice system is faced with significant limitations in its effort of providing justice and redress to victims of sexual violence as a military tactic, requiring alternative transitional justice processes to complement it domestically. It argues that effective redress for victims of sexual violence as a weapon of war demands more than addressing the victims' justice and reparative needs but also to attend to the complex social dimensions of these crimes. The study, therefore, further explores the strengths and weaknesses of an increasing range of domestic transitional justice approaches to accountability and reconciliation and demonstrates their potential in advancing effective redress for victims of such crimes. The thesis advances an argument that, considering the nature and patterns of sexual violence as a weapon of war, a full range of transitional justice processes must be considered to address the dynamics and complex impact of these crimes on victims and affected communities. The pursuit of redress must include an element of societal change to empower victims and breakdown a myriad of social impacts on them after conflicts. This study is a significant contribution toward understanding of a holistic response to the needs of victims and societies torn apart by mass sexual violence as a weapon of war.

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ABREVIATIONS

Art.	Article
ASF:	Avocats Sans Frontières
CDF:	Civil Defence Forces
CEDAW:	Convention on the Elimination of Discrimination against Women
CRC:	Convention on the Rights of the Child
DRC:	Democratic Republic of the Congo
ECCC:	Extraordinary Chambers in the Courts of Cambodia
ECHR:	European Court of Human rights
FIDH:	International Federation for Human Rights
IACHR:	Inter-American Court of Human Rights
ICC:	International Criminal Court
ICCPR:	International Covenant on Civil and Political Rights
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia
IMT:	Nuremberg International Military Tribunal
IMTFE:	International Military Tribunal the Far East
NGOs:	Non-Governmental Organisations
OPCV:	Office of Public Counsel for Victims
RPE:	Rules of Procedure and Evidence
RUF:	Revolutionary United Front
S.O.P:	Standard Operating Procedure
SCSL:	Special Court for Sierra Leone
TC:	Trial Chamber
TRC:	Truth and Reconciliation Commission
UN:	United Nations
UNICEF:	United Nations Children's Fund
UPC :	Union des Patriotes Congolais pour la Réconciliation et la Paix
V.	Versus
VRWG:	Victims' Rights Working Group

CHAPTER ONE

INTRODUCTION

> When rape is employed instead of a bullet, the weapon continues to wield its power beyond the primary victim, while the battlefield may be the body, but the target is civil society.[1]

> Broken bodies, torn lives, spoiled identities, ruined families, trauma, isolation, material destitution, and in some cases death are all too common legacies of armed conflict for thousands of victims of sexual and reproductive violence worldwide.[2]

1.1 Research Statement

This thesis is centrally concerned with exploring mechanisms to achieve effective redress for victims of rape and other forms of sexual violence as an element of broader war strategies. It engages with distinct aspects of these crimes and their implications for the victims' needs to highlight the challenges and limitations of international criminal justice in ensuring effective redress for victims and how such limitations can be addressed through a growing range of domestic transitional justice processes. The thesis advances an argument that the strategic use of sexual violence during conflict situations arises from a set of complex circumstances, with myriad and interrelated effects on victims and communities, profoundly entrenched in local contexts that require a holistic approach to securing effective redress for victims. Effective redress for the victims necessitates victims redress efforts beyond consideration of the justice and material reparations needs of victims but also to draw attention to the complex social effects of such crimes on victims in post-conflict settings and the legacy of such crimes in affected communities. In other words, the pursuit of redress must encompass measures to address the dynamics and multidimensional nature of effects of these crimes on victims and societies, including the challenges and barriers to the victims' social reintegration.

The view taken within the thesis is that redress for victims of sexual violence as a weapon of war must be sought in an integrated manner, covering all dimensions of these crimes such as the dynamics through which various cruel forms of sexual violence are employed as a tactic of war and their impact on victims. Effective redress must therefore include a measure of

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[1] See C. Clifford, 'Rape as a Weapon of War and its Long-term Effects on Victims and Society', Paper presented at the 7th Global Conference Violence and the Contexts of Hostility, held at Budapest on 5th May - 7th May 2008, at p. 4, available at https://www.inter-disciplinary.net/ptb/hhv/vcce/vch7/Clifford%20paper.pdf (Accessed on 14 June, 2014).

[2] See United Nations Population Fund, Report on The international Symposium on Sexual Violence in Conflict and Beyond, Cited in R. Rubio-Marín (2012), 'Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue', *William & Mary Journal of Women and the Law*, Vol. 19, N° 1, p.70.

societal transformation to breakdown a myriad of social challenges facing victims in post-conflict societies. This is critical to empowering victims and enabling changes of pre-existing structural conditions that often facilitate these crimes and exacerbate their impact on victims after conflicts. It is also relevant to the enormous task of rebuilding the torn social fabric of families and communities and lay groundwork for a truly new beginning in affected societies.

1.2 Research Background and Context

The fact that mass sexual violence often serve as a weapon of war is now widely accepted. Despite the growing awareness and constant global condemnation of such crimes as well as significant strides made in international criminal justice, acts of sexual violence continue to be used as a weapon of war. In its Resolution 1820 (2008) on acts of sexual violence against civilians in armed conflicts, the United Nations(UN) Security Council noted that '…women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group'.[3] A growing body of empirical studies and UN reports as well as reports of various organisations reveal how these crimes have become a viable part of war strategies.[4] Whilst sexual violence have often been used to achieve clearly defined political or military ends,[5] recent studies underline how the scale and enormity of these crimes 'appear to be on the rise' in recent conflicts.[6] In fact, cruel acts of sexual violence have been reported in almost every conflict with significant variation of the scale and characteristics,[7] and such violence continues to be inflicted on a massive scale during conflicts across the globe.[8]

Sexual violence as a weapon of war refer to the deliberate and systematic use of rape and other brutal forms of sexual violence in war zones for specific military or political ends.[9] In some settings, rape and other forms of sexual violence involve an explicit ethnic targeting as

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[3] See the Preamble of the UN Security Council Resolution 1820 (2008) on Acts of Sexual Violence against Civilians in Armed Conflicts adopted on 19 June 2008, (S/RES/1820 (2008).

[4] See, for example, the 2015 UN Secretary-General Report on Conflict-Related Sexual Violence submitted to the UN Security Council on 13 April 2015 (S/2015/203).

[5] See, for instance, K. D. Askin (2003) 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, Vol. 21, N° 2, p.10.; B. Diken and C. Bagge Laustsen (2005), 'Becoming an Abject: Rape as a Weapon of War', Body & Society*: SAGE Publications,* Vol. 11, N° 1.

[6] See K. Farr (2009), 'Extreme War Rape in Today's Civil War-Torn States: A Contextual and Comparative Analysis', *Gender Issues*, Vol. 26, p. 1.

[7] See E. J. Wood (2006), 'Variation in Sexual Violence during War', *Sage Publications, Politics & Society*, Vol. 34, N° 3, p. 307.

[8] See S. Shteir (2014), 'Conflict-Related Sexual Violence and Gender-based Violence: An Introductory Overview to Support Prevention and Response Efforts', *Australian Civil-Military Occasional Papers*, p. 9.

[9] See A. R. Reid-Cunningham (2008), 'Rape as a Weapon of Genocide', *Genocide Studies and Prevention*, Vol. 3, N° 3, p. 279.

a weapon of genocide and ethnic cleansing.[10] For instance, like in Rwanda where rape comprised a form of genocide according to the International Criminal Tribunal for Rwanda (ICTR),[11] the International Criminal Tribunal for the former Yugoslavia (ICTY) established a link between rape and ethnic cleansing in the context of systematic sexual violence during the conflict in Bosnia-Herzegovina.[12] In other conflicts, mass rapes and other acts of sexual violence are used as part of military strategies indiscriminately aimed at civilian population to spread terror, inflict trauma and public humiliation and, ultimately destroy group solidarity within the enemy side. In this connexion, the Special Court for Sierra Leone (SCSL), in *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* case, noted that the manner in which rape and other forms of sexual violence have been used by the Revolutionary United Front (RUF) 'portray a calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror'.[13]

Sexual violence in conflict situations takes various forms. This includes rape, sexual abuse, forced pregnancy, forced sterilisation, forced abortion, forced prostitution, trafficking, sexual enslavement, forced circumcision, castration and forced nudity.[14] The fact that rape and other acts of sexual violence serve as weapons for political or military ends is even more reflected in the extreme brutality of methods used. Studies indicate several accounts of gang rape, rape in which victims are forced to rape each other and 'often of incestuous nature' whereby people are forced to rape their mothers, sisters or daughters.[15] The strategic use of systematic sexual violence as a military tactic also involves the use of sharp sticks, machetes, knives and boiling water in women's vaginas to perform non-penetrating sexual assault such as sexual mutilation.[16] Several accounts further emphasise how many victims are often raped in public settings in front of their children, husbands, and members of the community witnessing their

[10] See R. Branche *et al*.,'Writing the History of Rape in Wartime', in R. Branche and F. Virgili (Eds.), *Rape in Wartime*, (Palgrave Macmillan, 2012), p.3.

[11] See *Prosecutor v. Jean Paul Akayesu*, Case N° ICTR-96-4-T, Judgment of September 2, 1998), § 731.

[12] See *Prosecutor v. Radislav Krstić,*Case N° IT-98-33-T, ICTY,Trial Chamber, Judgement of 02 August, 2001, § 509.

[13] See *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case N° SCSL-04-15-T, Judgment of 2 March 2009, § 1347.

[14] See The Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice, Report of the Office of the UN High Commissioner for Human Rights submitted to UN General Assembly on 30 June 2014, § 3, (A/HRC/27/21).

[15] See Harvard Humanitarian Initiative, 'Now, The World is Without Me: An Investigation of Sexual Violence in Eastern Democratic Republic of Congo', A report published in April 2010 available at https://www.oxfam.org/sites/www.oxfam.org/files/DRC-sexual-violence-2010-04.pdf (Accessed on 20 January 2015), p. 24.

[16] See C. Brown (2012), 'Rape as a Weapon of War in the Democratic Republic of the Congo', *Torture Review*, Vol. 22, N° 1, p. 27; See also R. Manjoo and C. McRaith (2011), 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas', *Cornell International Law Journal*, Vol. 44, N° 11, p. 12.

neighbours being raped in streets or taken as sex slaves, etc…[17] While females make up the majority of victims, studies reveal accounts of brutal acts of sexual violence against males such as rape, enforced sterilisation, genital mutilation, enforced nudity and masturbation.[18]

Widespread and systematic sexual violence in conflict situations are uniquely destructive, physically, psychologically and socially. These crimes not only affect victims but also have direct consequences for families and affected communities. Victims experience a wide range of short-and long-term physical and psychological effects, often compounded by ostracism and stigmatisation in their families and communities.[19] Fionnuala Ní Aoláin, Catherine O'Rourke and Aisling Swaine rightly note that even after conflict has ended, the impacts of sexual violence persist, including long-term physical and mental harms as well as a myriad of social issues within their families and communities.[20] A growing body of research further underlines how the strategic use of mass sexual violence as a military tactic has societal consequences that extend beyond individual victims.[21] These crimes strike at the heart of communities by destroying family and larger social bonds and force victims into isolation.[22] In most cases, mass sexual violence often represent an attack on the social values and safety of affected communities which results in 'an ethical vacuum' and set the scene for a general social collapse in post-conflict societies.[23]

While rape and other forms of sexual violence in situations of conflict were for long considered as a by-product of war and not as a violation of international law, significant strides have been registered in international criminal prosecution of these crimes over the recent years.[24] More significantly, building on progress made by the ICTY and ICTR in this regard, the Statute of the International Criminal Court (ICC) provides a broader basis upon

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[17] See B. Nowrojee (2005), "Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?, *United Nations Research Institute For Social Development*, p.7.

[18] See S. Sivakumaran (2007), 'Sexual Violence against Men in Armed Conflict', *European Journal of International Law*, Vol. 18, N° 2, p. 253.

[19] See R. Branche *et al*., *Supra* note 10, p. 11.

[20] See F. Ní Aoláin, C. O'Rourke & A. Swaine (2015), 'Transforming Reparations for Conflict-Related Sexual Violence', *Harvard Human Rights Journal*, Vol. 28, N° 1, p. 99.

[21] See, for instance, S. Shteir, *Supra* note 8, p. 23; C. Brown, *Supra* note 16, p. 31; C. Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, International Humanitarian Law Series, (Martinus Nijhoff Publishers, 2012), p. 6; I.Skjelsbæk, *The Political Psychology of War Rape: Studies from Bosnia and Herzegovina*, (Routledge, 2012).

[22] See R. Branche *et al*., *Supra* note 10, p. 11; See also A. Maedl (2011), 'Rape as a Weapon of War in the Eastern DRC? The Victims' Perspectives', *Human Rights Quarterly*, Vol. 33, pp. 128–147.

[23] N.E. J. Dijkman, C. Bijleveld and P. Verwimp (2014), 'Sexual Violence in Burundi: Victims, perpetrators, and the Role of Conflict', *Households in Conflict Network Working Paper*, pp. 33.

[24] See Chapter Two *infra*; See also J.D.D. Sikulibo (2014), 'The Evolving Status of Conflict-Related Rape and other Acts of Sexual Violence as Crimes under International Law', *Journal of International Law of Peace and Armed Conflicts*, Vol. 27, N° 2.

which conflict-related sexual violence can be prosecuted.[25] Further, as well as a growing recognition of the impact of mass crimes on victims and communities, victims' right to, and need for justice and redress have become an important consideration in international criminal justice. As such, the challenge of addressing the needs of victims of international crimes has been subject of increasing normative development in recent years. This can be evidenced by the incorporation of a regime of victims' redress in the framework of the recent international [ised] criminal justice institutions, most notably the ICC. In addition to victims' rights to respect and dignity, information about proceedings and measures to protect their physical and psychological wellbeing,[26] this framework enshrined unprecedented right for victims to present their views and concerns in the course of the criminal proceedings,[27] and the right to reparations.[28] Regarding conflict-related sexual violence in particular, the UN Secretary-General lately issued a Guidance Note on Reparations for Conflict-Related Sexual Violence providing policy and operational guidance for the UN engagement in this regard.[29] This note expands and strengthens the UN policy commitment stated in the recent Security Council Resolutions that stress the need to ensure access to justice for survivors of sexual violence in conflicts and redress for their suffering.[30]

Despite recent international, legal and policy advances toward justice and redress for victims of sexual violence in conflict situations, the problem persists, not only in broadening redress beyond the immediate physical and psychological harms of victims of conflict-related sexual violence but also extending victim redress efforts to accounting for the social dimension of effects of these crimes, including challenges and barriers to the victims' social reintegration. Given the diverse effects of widespread and systematic sexual violence on the victims' personal and social lives, their needs in post-conflict settings encompass more than the need for material reparations but also the need to ensure the restoration of their human and civic dignity. Moreover, considering the way in which mass sexual violence as a warfare strategy

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[25] See Art. 7 (1) (g) and 8(2) (b) (xxii); (e) (vi) of the ICC Statute (Rome Statute) adopted in Rome on 17 July 1998. Entry into force on 1 July 2002 in accordance with Article 126, (UN Doc. A/CONF.183/9).
[26] See Art. 68(1) of the Rome Statute.
[27] See Art. 68 (3) of the Rome Statute. See also Rule 23 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and Art. 17 of the Statute of the Special Tribunal for Lebanon (STL).
[28] See Art. 75 of the ICC Statute and Rule 85 of the Rules of Procedure and Evidence adopted on 09 September, 2002.
[29] See UN Secretary-General, Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence, June 2014, available at http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf (Accessed on 10 September 2014).
[30] See, for instance, Resolution 1888 (2009), Adopted by the Security Council at its 6195th meeting, on 30 September 2009, § 6, (S/RES/1888 (2009)); Resolution 2106 (2013), Adopted by the Security Council at its 6984th meeting, on 24 June 2013, § 2, (S/RES/2106 (2013)); Resolution 2122 (2013), Adopted by the Security Council at its 7044th meeting, on 18 October 2013, §10, (S/RES/2122 (2013)).

are used as ‘an effective weapon in societal breakdown’,[31] effective redress for these crimes demands flexible approach to not only address the harm inflicted on individual victims but also to account for the broadest spectrum of effects of these crimes in affected societies. This should be done in ways which are adequate to the societal contexts with a view to empowering victims and promoting changes of structural conditions impacting upon victims.

This study therefore sets out to examine appropriate mechanisms for ensuring effective redress for victims of sexual violence as a weapon of war. The most important step consisted in comprehensively analysing distinct aspects of these crimes in conflict situations and their effects on victims and affected communities. Significantly, the study focuses on the implications of the unique nature of sexual violence as a weapon of war for the victims’ needs in post-conflict situations and how these needs can be effectively addressed. I aim to understand and explain challenges and limitations in addressing a wide range of victims’ needs within the context of international criminal justice and the potential contribution of a growing range of domestic transitional justice processes to advancing effective redress in situations where sexual violence serve as a military tactic. Despite energetic debate occurring in academic and professional circles about the prevalent use of sexual violence as a weapon in armed conflicts, there are scant in-depth studies to understand the implications of distinct aspects of these crimes for the victims’ needs and how post-conflict justice processes can provide effective responses to needs of victims and societies destroyed by such crimes.

1.3 Research Motivations and Rationale

This study is motivated by two factors. First, the rising scale and systematic nature of rape and other brutal acts of sexual violence as a weapon in recent conflicts and the growing awareness of the devastating effects of these crimes on victims and affected communities. Second, the growing global recognition of the victims’ right to, and need for redress, which is a significant component of justice responses to mass atrocities in an effort to lay strong foundations for communities attempting to rebuild after mass violence. Over the recent few years, addressing the needs of victims has therefore become an important consideration in transitional justice. Considering the unique nature of rape and other forms of sexual violence as a weapon of war, how do the needs of victims of such crimes differ or go beyond relatively established needs of victims of crimes? What are the challenges and limitations of international criminal justice in addressing these needs and how the limitations can be

[31] C. Clifford, *Supra* note 1, p. 4.

addressed? The study of distinct aspects of widespread sexual violence as a tactic of war and their implications for the victims' needs is an opportune area in which to gain an insight into how appropriate mechanisms for securing effective redress for victims can be developed.

Given the fact that rape and other acts of sexual violence in conflict situations have been recently defined in international criminal law,[32] much of the scholarly attention has been directed towards the criminal prosecution of these crimes and ensuring access to justice for victims.[33] Though the strategic use of mass sexual violence as a weapon of war has featured on the international agenda throughout the past two decades, the direct effects of these crimes on victims and affected communities and their implications for the victims' needs in post-conflict justice process have received relatively little attention until fairly recently. The growing global recognition of the rising scale and enormity of these crimes as a weapon in modern warfare[34] has fuelled scholarly attention to effects of these crimes on victims and safety of affected communities which contributed to increasing awareness of realities prevailing in post-conflict societies affected by these crimes.[35] This influenced remarkable progress at the UN policy[36] and civil society levels[37] underlining the need to ensure effective redress for victims of conflict-related sexual violence for the harm suffered. A significant amount of literature has focused on highlighting the negative effects of widespread and systematic sexual violence on victims and challenges in addressing the harm suffered by victims. Although considerable empirical studies have contributed to shedding light on

[32] See Chapter Two *infra*.
[33] See, for instance, H. M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals*, (Oxford Univ. Press, 2014); A. M. De Brouwer *et al*. (Eds.), *Sexual Violence as an International Crime*: *Interdisciplinary Approaches*, (Intersentia, 2012); K. D. Askin (2012) 'Prosecuting Wartime Rape and other Gender-Related Crimes Under International Law: Extraordinary advances, Enduring Obstacles', *Berkeley Journal of International Law*, Vol. 21; A. M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR*, (Intersensia, 2005); R. Goldstone (2002), *Prosecuting Rape as a War Crime*, Journal of International Law, Vol. 34.
[34] In 2008 the UN Security Council acknowledged that rape has been used as a tool of war. See the Preamble of the UN Security Council Resolution 1820 (2008) on Acts of Sexual Violence against Civilians in Armed Conflicts adopted on 19 June 2008, *Supra* note 3. See also See *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, *Supra* note 13, § 1347.
[35] See, among others, R. Branche *et al*., *Supra* note 10, D. Pankhurst (Ed.), *Gendered Peace: Women's Struggle for Post-War Justice and Reconciliation*, (Routledge, 2009); D. Buss *et al.*, *Sexual Violence in Conflict and Post-Conflict Societies: The International Agendas and African Contexts*, (Routledge, 2014); R.C. Carpenter (Eds.), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*,(Kumarian Press, 2007); T. K. Hagen (2010), 'The Nature and Psychosocial Consequences of War Rape for Individuals and Communities', *International Journal of Psychological Studies*, Vol. 2, N° 2;
[36] The UN has adopted a number of resolutions calling for access to justice for survivors of sexual violence in conflicts and redress for their suffering. See, for example, Resolution 1888 (2009), *Supra* note 30, § 6; Resolution 2106 (2013), *Supra* note 30, § 2; Resolution 2122 (2013), *Supra* note 30, §10.
[37] See, for instance, International Federation of Human Rights, Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, adopted at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007, available at https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf (Accessed on 10 July, 2014).

devastating effects of conflict-related mass sexual violence on victims and affected communities,[38] the literature on redress for victims largely focuses on challenges in ensuring access to justice for victims and addressing their immediate reparative needs. For instance, based on wide-ranging interviews among victims and judges of international criminal tribunals, Sara Sharratt has explored and exposed the complexities in addressing conflict-related sexual violence in the criminal justice process in a way that is sensitive to the needs of victims.[39] The key concern for Sharratt, and other scholars such as Julie Mertus,[40] Nicola Henry[41] and Inger Skjelsbæk,[42] is the disempowering effect that that criminal trials tend to have on victims of such crimes. The literature extensively explains how victims struggle to share their traumatic stories, and how such trials have often contributed to their disempowerment rather than helping them come to terms with their traumatic experiences.

Most of the issues impeding access to justice for victims of sexual violence as a weapon of war and, particularly their ability to seek redress within the criminal prosecution are even more relevant for understanding limits of international criminal justice in ensuring effective redress for victims. Research on limits of international tribunals in producing a narrative that reflects the experiences of victims of such crimes and address their needs indicates that, in addition to dearth of appropriate support to enable victims share their experiences, victims of wartime sexual violence often suffer under the constrains of international criminal process in ways that compound their victimisation.[43] In studies on victims of these crimes before international criminal tribunals, Louise Chappell[44] and Nicola Henry[45] have shed light on challenges facing victims that leave open the possibility of re-victimisation. As Nancy

[38] See T. K. Hagen, *Supra* note 35; J. Trenholm (2013), 'Women Survivors, Lost Children and Traumatized Masculinities: The Phenomena of Rape and War in Eastern Democratic Republic of Congo', *Acta Universitatis Upsaliensis Uppsala,* A. K. Eirienne (2009), 'Responding to Rape as a Weapon of War in the Democratic Republic of Congo: CIDA's Actions in an Evaluative Framework', *International Student Journal*, Vol. 1.

[39] See S. Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals*, (Ashgate Publishing Limited, 2011).

[40] J. Mertus (2004), 'Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women's Agency', *International Feminist Journal of Politics*, Vol. 6.

[41] N. Henry (2010), 'The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice', *Violence against Women,* Vol. 16, N° 10.

[42] I. Skjelsbæk (2006), 'Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina', *Feminism & Psychology,* Vol. 16, N° 4.

[43] See, for instance, N. Henry (2009), 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence', *The International Journal of Transitional Justice*, Vol. 3; M. S. Kelsall and S. Stepakoff (2007), ''When We Wanted to Talk about Rape': Silencing Sexual Violence at the Special Court for Sierra Leone', *The International Journal of Transitional Justice*, Vol. 1; A. M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, (Intersentia, 2005), Vol. 20.

[44] L. Chappell (2014), '"New," "Old," and "Nested" Institutions and Gender Justice Outcomes: A View from the International Criminal Court', *Politics & Gender*, Vol. 10.

[45] See N. Henry, *Supra* note 41, p. 121.

Amoury Combs explains, the reality of mixed outcomes of international criminal trials for victims of these crimes often made many victims to decline to testify.[46] In addition to significant contribution to analysing shortcomings of international criminal tribunals in terms of the treatment of victims of such crimes and accommodating their traumatic experiences by other scholars such as Patricia Wildermuth and Petra Kneuer,[47] Valerie Oosterveld,[48] Amanda Beltz,[49] studies further highlight difficulties in collecting and verifying evidence for conflict-related sexual violence due to the socio-cultural implications of these crimes,[50] which has given rise to few successful prosecutions before international criminal tribunals.

With the rising scale and enormity of rape and other forms of sexual violence as a warfare strategy in recent conflicts, there is a growing awareness of the effects that these horrors have on victims, their families and communities.[51] As noted above, this awareness has impacted debates on the need for redress for victims in a growing literature on the issue. This debate occurs in the context of recent advances intended to improve the plight of victims of international crimes. This includes the adoption of Basic Principles on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005,[52] representing the first comprehensive codification of the rights of victims of international crimes to reparations, remedies and access to justice, and the unprecedented victim participation in criminal proceedings in the ICC legal framework.[53]

With such advances in integrating reparative and restorative elements in the global pursuit of justice for victims of mass crimes, the growing scholarship on conflict-related sexual

[46] See N. A. Combs, *Fact-finding Without Facts: The Uncertain Evidentiary foundations of International Criminal Convictions*, (Cambridge University Press, 2010), p. 86.
[47] P. Wildermuth and P. Kneuer, 'Addressing the Challenges to Prosecution of Sexual Violence Crimes before International Tribunals and Courts', in M. Bergsmo and A. Butenschon Skre (Eds.), *Understanding and Proving International Sex Crimes*, (Torkel Opsahl Academic EPublisher, 2012).
[48] V. Oosterveld (2005), 'Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court', *New England Journal of International and Comparative Law*, Vol. 12, N° 1.
[49] A. Beltz (2008), 'Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused', *Journal of Civil Rights and Economic Development*, Vol. 23, N° 1.
[50] See, for instance, H. M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals*, (Oxford University Press, 2014); B. Van Schaack (2009), 'Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson', *American University Journal of Gender and Social Policy and the Law*, Working paper N° 09-02.
[51] See *Supra* note 35.
[52] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Resolution adopted by the General Assembly 60/147 of 16 December 2005, (A/RES/60/147), Available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement (Accessed on 10 June, 2014).
[53] See Art. 68 (3) of the Rome Statute.

violence focuses on the complexities in defining the harm suffered by victims of such crimes for reparations purposes. Ruth Rubio-Marín takes issue with what she considers as the 'inadequate' recognition of victims of conflict-related sexual violence and the harm they experienced in reparations programs.[54] Inadequate reparation for victims of conflict-related sexual violence stems from a combination of different factors. First, despite recent progress in this regard as explained above, scholars have critiqued the ways in which victim redress-related frameworks under international law have developed without reference to sexual violence in conflict, and especially the harms experienced by victims.[55] Second, scholars such as Anne-Marie de Brouwer have critically called attention to reparative schemes that meet the immediate physical, psychological needs of victims rather than reparation once the accused has been found guilty considering that victims of such crimes find themselves in dire need for support much earlier.[56] A further complicating factor emerging from discussions in academic and professional cycles is that crimes committed in conflict settings involve a sheer numbers of victims, which makes effective redress not only difficult but also leads to undervaluation of the harm suffered by victims of sexual violence among a broader list of violations.[57]

Recent empirical accounts indicate that forms and dynamics of the strategic use of sexual violence as a military tactic in modern warfare make these crimes an extremely effective weapon in not only destroying the lives of individual victims but also tear communities apart.[58] Consequently, as some studies further explain, such direct consequences of these crimes on societies add 'another component of social disruption'[59] in ways that compound challenges for the rebuilding process in post-conflict situations. Significantly, the use of widespread and systematic sexual violence as a military tactic has direct social ramifications

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[54] See R. Rubio-Marín (2012), 'Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue', *William & Mary Journal of Women and the Law*, Vol. 19, N° 1, p.84. see also R. Rubio-Marín, ' The Gender of Reparations in Transitional Justice Societies', in R. Rubio-Marín (Eds.), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, (Cambridge University Press, 2009), p. 79.

[55] See F. Ní Aoláin, C. O'Rourke & A. Swaine, *Supra* note 20, p. 100.

[56] See A. M. de Brouwer, 'Supranational Criminal Prosecution of Sexual Violence', in A. Grear et *al*. (Eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 209.

[57] R. Rubio-Marín, *Supra* note 54, p. 83. See also J. Guillerot, 'Linking Gender and Reparations in Peru: A Failed Opportunity', in R. Rubio-Marín (Eds.), *What Happened to the Women: Gender and Reparations for Human rights Violations*, (Social Sciences Research Council, 2006), p. 78.

[58] See, for instance, J. Kelly et *al.* (2011), 'Hope for the Future Again: Tracing the Effects of Sexual Violence and Conflict on Families and Communities in Eastern Democratic Republic of the Congo', *Harvard Humanitarian Initiative*; K. T. Hagen (2010), 'The Nature and Psychosocial Consequences of War Rape for Individuals and Communities', *International Journal of Psychological Studies*, Vol. 2; A. K. Eirienne (2009), 'Responding to Rape as a Weapon of War in the Democratic Republic of Congo: CIDA's Actions in an Evaluative Framework', *International Student Journal*, Vol. 1.

[59] See S. Hirschauer, *The Securitisation of Rape: Women, War and Sexual Violence*, (Palgrave Macmillan, 2014), p. 11. See also N.E. J. Dijkman, C. Bijleveld and P. Verwimp, *Supra* note 22.

that serve to destroy larger social community and family networks that would support the reconstruction process after conflicts.

The overall motivation for this thesis is therefore grounded in the conviction that without full consideration of the effects of these crimes on victims and communities and pre-existing structural conditions impacting upon victims in affected communities, there would be a shortcoming in ensuring effective redress for victims of conflict-related sexual violence. As earlier pointed out, the literature on sexual violence in war has yet to provide comprehensive analysis of the implications of distinct aspects of these crimes for the needs of victims in post-conflict justice processes, especially how these needs can be effectively addressed to lay strong basis for the rebuilding process of affected societies. Recent scholarly contributions seeking the recognition and definition of the specificity of the harm suffered by victims of such crimes are dedicated to exposing the complexity of the victims' experiences and challenges in implementation of growing legal and policy frameworks for gender-sensitive reparations.[60] Whilst the significance of reparations for victims cannot be overstated, the unique nature of sexual violence as a weapon of war encompasses more than the need for reparations for victims but also the need to ensure changes in affected societies with a view to facilitating their social reintegration. In other words, the quest for effective redress cannot be limited to reparative needs of victims, but must be integrated with mechanisms to address the dynamics and complex effects of these crimes on affected communities. This is particularly relevant for the empowerment of victims in post-conflict societies, and especially to promote changes and improve victims' social circumstances. This is arguably one of the critical elements of effective redress in situations where sexual violence served as a weapon of war.

This thesis endeavours to take account of the complexity of victims' experiences and realities prevailing in post-conflict societies enduring the legacy of sexual violence to investigate how transitional justice can provide effective responses to victims' needs. This analysis is carried out on the basis of the growing awareness of the long-lasting devastating effects of sexual violence as a tactic of war on victims and communities to present a deep understanding of the needs of victims and how these needs can be effectively addressed in the context of the fledgling multi-dimensional field of transitional justice. The thesis therefore aims to present a

[60] See, for instance, F. Ní Aoláin, 'International Law, Gender Regimes and Fragmentation: 1325 and Beyond', in C. M. Bailliet (Eds.), *Non-States Actors, Soft Law and Protective Regimes: From the Margins,* (Cambridge University Press, 2014); A. Saris and K. Lofts, 'Reparations Programmes: A Gendered Perspective', in C. Ferstman *et al.*(Eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, (Martinus Nijhoff Publishers, 2009); See F. Ní Aoláin, C. O'Rourke & A. Swaine, *Supra* note 20; R. Rubio-Marín, *Supra* note 2; R. Rubio-Marín, *Supra* note 54.

deep understanding of mechanisms to advance effective redress for victims in societies enduring legacies of widespread and systematic sexual violence as a weapon of war.

1.4 Research questions

The central research question to be addressed in this thesis is:

In light of distinct aspects of sexual violence as a weapon of war and their effects on victims and societies, how can the needs of victims be effectively addressed to lay strong foundations for the rebuilding of affected societies?

This necessitates three secondary questions:

1. What are the implications of the distinct aspects of sexual violence as a weapon of war for the victims' needs after conflict situations?
2. What are the challenges and limitations of international criminal justice system in addressing the needs of victims and affected societies in post-conflict situations?
3. How can the limitations of international criminal justice be addressed to ensure effective redress for victims of conflict-related sexual violence?

1.5 Research objectives

The following are thus the objectives of this research:

1. To investigate the needs of victims of sexual violence as a weapon of war in light of the complexity of the victims' experiences and the legacy of these crimes in communities;
2. To highlight challenges and limitations of international criminal justice processes in addressing the needs of victims of conflict-related sexual violence;
3. To analyse how such limitations of international criminal justice system in redressing these crimes can be addressed through an increasing range of domestic transitional justice processes;
4. To make a contribution to a growing literature on redress for victims by providing significant insights into the understanding of a holistic response to the legacy of sexual violence as a weapon of war.

1.6 Methodology and Scope

The analysis draws heavily on the existing writings, mainly the existing body of empirical studies and other secondary sources, about widespread and systematic sexual violence in

conflict situations as well as the growing body of literature around transitional justice processes and post-conflict societies. Specifically, I aim to understand and explain distinct aspects of the strategic use of mass rapes as a weapon and how such aspects are profoundly reflected in the victims' needs in transitional justice process after conflicts. The study further takes a detailed look at enduring challenges and limits in the process of redressing these crimes in the context of international criminal justice, and expose how effectively designed locally-embedded quasi- or non-judicial transitional justice approaches can complement and extend victim redress efforts to transforming societal effects of these crimes and provide effective responses to the needs of victims.

Much has been documented in the literature about the scale and enormity of these crimes in recent conflicts, the plight of victims during and after conflicts as well as the realities prevailing in post-conflict societies enduring the legacy of these crimes, including work carried out by UN bodies and various organisations such as Amnesty International, Human Rights Watch, Harvard Humanitarian Initiative and International Federation for Human Rights over the recent years. Also, there is a great deal of interest in the literature in exploring the growing judicial, and quasi- or non-judicial transitional justice mechanisms designed to provide some level of justice and redress for victims of mass crimes. As a result, the research for this thesis did not involve any field work as the insights drawn from the literature review assisted in understanding and explaining what the legacy of sexual violence as a military tactic entails in-depth and the implications of this for the victims' needs. An analysis of the extant literature on effects of these crimes on victims and affected communities also assisted in highlighting enduring challenges and limitations of international criminal justice in providing redress for the victims as well as ways forward to a more comprehensive approach to ensuring effective redress in situations where sexual violence served as a weapon of war.

As indicated above, the thesis's key contribution lies in the comprehensive analysis of appropriate mechanisms to achieve effective redress for the prevalent use of mass rapes and other acts of sexual violence as a weapon of war. This is done in light of the complexity of the victims' experiences and dynamics surrounding their victimisation. The thesis uses the well documented range of complex effects of these crimes on victims and communities, especially how such effects adversely impact upon the rebuilding process of affected communities. Engaging with the unique nature of these practices as a weapon of war and implications of this for the victims' needs will substantiate and improve our

understanding of integrated mechanisms to extend victim redress efforts to transforming societal effects of these crimes and facilitate the victims' reintegration in communities.

In aiming to move beyond consideration of immediate reparative, physical and psychological support needs of victims of mass rapes in conflict zones, it is germane to think about the broader idea of addressing the full dimensions of these crimes in communities to restore the victims' human and civic dignity stripped away. This is also critically important to ensure the restoration the torn social fabric of communities. The study thereby demonstrates that the search for effective redress should give primordial attention to a multidimensional nature of effects of these crimes on victims and affected communities, and do so in ways which are fully sensible to the often challenging societal contexts. Whilst acknowledging the significance of emerging trend in international criminal justice system intended to provide some sense of justice and redress for victims of mass atrocities,[61] the thesis considers its weaknesses and limits in addressing the needs of victims of war-related sexual violence. It will be argued that the inescapable challenge for international criminal justice to draw upon the often fragile societal contexts and dynamics surrounding conflict-related sexual violence underlies vexing problems in the pursuit of effective redress for victims.

It is important to stress that this study will not discuss the needs of victims of conflict-related sexual violence and mechanisms to respond to these needs from the standpoint of victims or from victims' perspectives. It rather draws on the unique experiences of victims of these crimes during and after conflicts as well as the dynamics surrounding their victimisation and realities prevailing in post-conflict societies enduring the legacy of such crimes. Further, underlying the discussion of mechanisms to advance effective redress for victims of sexual violence in conflict situations will also be an investigation of the challenges these victims face such as pre-existing structural inequalities and deep-rooted taboos about these crimes in some societies making it difficult for victims to engage with the criminal justice and seek redress. As the Human Rights Watch cogently explained, in reference to Rwanda, perpetrators of sexual violence in war 'often explicitly link their acts to a broader social degradation'[62] to extend the effects of these crimes far beyond victims. As discussed later in chapter four, a copious amount of recent empirical studies lend credence to this finding by describing mass sexual violence in conflict situations as 'a bomb that continue to explode' in

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[61] See details in Chapter 3 *infra*.

[62] See Human Rights Watch, 'Sexual Violence Crimes during the Rwanda Genocide, June 2004, Available at http://www.rwandadocumentsproject.net/gsdl/collect/mil1docs/archives/HASHc834.dir/doc52025.pdf (Accessed on 10 March, 2014), at p. 4.

affected communities[63] or an effective weapon against individuals and communities,[64] often leading to what Robin May Schott[65] and Jill Trenholm[66] describe as the 'social death' of victims. Achieving redress therefore demands a holistic approach to not only address reparative needs of victims but also the resulting general social degradation in affected societies with the view to elevating the status of victims in a particular social context.

While the thesis acknowledges the relevance of reparations for victims of mass sexual violence as a weapon of war as stated above, its primary preoccupation lies with demonstrating how the dynamics and complex consequences of such crimes encompass more than the need for practical reparations. This study therefore does not address issues pertaining to implementation of the growing reparation regimes for victims of mass atrocity within the context of international criminal justice. Rather, the thesis advances a strong argument that effective redress in situations where sexual violence served as a weapon of war must be sought in an integrated manner, encompassing measures to address full dimension of these crimes in affected societies, including an element of societal transformation to empower victims and breakdown the challenges as well as barriers to their social reintegration.

1.7 Structure and Outline of this Thesis

This thesis is divided into seven chapters. These introductory comments represent the first chapter which consists of setting the concerns of this study within the field of a fast-paced literature around transitional justice processes and conflict-related mass atrocities, and discuss the rationale, motivations and aims as well as objectives of this study. This chapter also explains the methodological approach to addressing the research questions.

Chapter two concerns itself with strides made in defining and conceptualising sexual violence as crimes in international criminal law. It questions whether rape and other acts of sexual violence, crimes that are endemic in conflicts but were neglected over the

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[63] J. Trenholm, *Supra* note 38.

[64] See, for instance, A. F. Simon, Susan A. Nolan and C. T. Ngo, 'Sexual Violence as a Weapon of war', in J. A. Sigal and F. L. Denmark (Eds.), *Violence against Girls and Women: International Perspectives*, (Praeger, 2013). C. Matheis *et al*. 'Selecting Targets: The Influence of Judgements, Mobility, and Gender on Intergroup Violence among Tamil Refugees, in J. Hawdon (Ed.), *The Causes and Consequences of Group Violence: From Bullies to Terrorists*, (Lexington Books, 2014); R. Schott (2011), 'War Rape, Natality and Genocide, *Journal of Genocide Research*, Vol. 13.

[65] See R. M. Schott, 'Wartime Violence against Civilians: Philosophical Reflections on War Rape', in G. Lind (Ed.), *Civilians at War: From the Fifteenth Century to the Present*, (Museum Tusculanum Press, 2014), p. 192. See also R. M. Schott,'War Rape and the Political Concept of Evil, in K. J. Norlock and A. Veltman (Eds.), *Evil, Political Violence, and Forgiveness: Essays in Honour of Claudia Card*, (Lexington Books, 2009); R. Schott (2001), 'War Rape, Social Death and Political Evil', *Development Dialogue*, Vol. 55, pp.47-61.

[66] See J. Trenholm, *Supra* note 38, p. 39.

history until fairly recently, have gained recognition and firmly established as crimes in international criminal law. The analysis presented in this chapter demonstrates that, after a long period of neglect of these crimes, wartime sexual violence appears to be firmly established as crimes in international law. It evidences the considerable contribution of the ICTY and the ICTR to the current shift in thinking of international law regarding conflict-related sexual violence. Significantly, the author argues that the explicit criminalisation of different forms of sexual violence by the Rome Statute is a critical step forward in this regard. The chapter shows, however, that the effective prosecution of these crimes is still hindered by many challenges despite increasing legal tools.

In Chapter three, the study moves from the legal basis upon which these crimes can be prosecuted to victim-oriented approaches in the criminal justice system. It critically examines the emerging trend of victims-centred approach in international criminal justice system and especially how developments in some domestic systems have informed the growing trend to address the needs of victims in international criminal justice. The discussion in this chapter indicates that the relatively new idea of justice for victims of international crimes suggests that the international criminal justice process should attend to victims' needs, thereby contributing in the rebuilding of war-torn communities. The author argues that while the relatively new victim-centred approach to international crimes remains a significant component of comprehensive victim-focused responses, the complex realities of victims of sexual violence in conflict situations provide a unique range of challenges in addressing the needs of victims in the context of international criminal justice system. This is taken forward with an evaluation of the needs of victims of sexual violence as a weapon of war in light of the victims' experiences and the legacy of these crimes in affected communities.

Chapter four reflects on distinct aspects of the strategic use of sexual violence as a weapon of war to evaluate the needs of victims. It draws upon the growing body of empirical studies around the complexity of the victims' experiences during and after conflicts and the direct social consequences of these crimes on affected communities. This analysis helps me to understand and explain the implications of the unique nature of sexual violence as a weapon of war for the needs of victims. The discussion in this chapter suggests that what makes the phenomenon of widespread and systematic sexual violence distinctive from ordinary crimes is the way in which these crimes destroy the social fabric of families and communities, thereby setting the scene for a general social collapse within affected communities. It indicates how the complex realities of victims of such crimes and their legacy in affected

communities result in more acute and extensive needs for the victims and affected societies compared with victims of other crimes committed in conflict situations. This investigation provides a framework for the succeeding in-depth analysis of the limitations and challenges in addressing the victims' needs in the context of international criminal justice.

Chapter five elaborates upon the framework set forth in the preceding chapter about the unique nature of sexual violence as a tactic of war and implications of this for the victims' needs to examine the limitations and challenges in addressing these needs within the context of the international criminal trials. The discussion offers a critical evaluation of the effectiveness of the growing victim-oriented approach in international criminal justice in responding to the needs of victims of conflict-related mass sexual violence. It presents an in-depth analysis of the procedural, legal and practical aspects of the growing trend of victims' participation in international criminal justice proceedings, as currently being developed by the ICC, highlighting issues impeding its effectiveness in advancing effective redress for victims of sexual violence in conflict situations. This chapter argues that, while the growing victims' inclusion in the international criminal process remains a significant component of comprehensive victim-focused responses, it risks failing to consider the contextual dynamics surrounding the plight of victims of conflict-related sexual violence during and after conflicts, thereby falling short of providing effective responses to the needs of victims.

So, chapter six turns to the potential contribution of quasi- or non-judicial post-conflict justice processes in complementing international criminal justice for addressing the needs of victims of conflict-related sexual violence. Drawing on insights from previous chapters, the chapter first analyses how effective redress for victims of sexual violence in post-conflict settings should be conceived in light of the complexity of victims' experiences and the legacy of these crimes in communities. The analysis shows that, given the dynamics and complex effects of conflict-related sexual violence on victims and communities, there is the need to attend to social dimensions of these crimes to enable changes of pre-existing structural conditions that often facilitate these crimes during conflicts. Despite the perceived benefits of truth-seeking processes as transitional justice mechanisms in accounting for the past and ensuring societal transformation, the chapter indicates that sexual violence tend to be neglected or marginalised in domestic transitional justice approaches to accountability and reconciliation. It shows, however, that recent developments in some countries which have integrated these crimes into the quest for truth in post-conflict situations provide some valuable lessons as to how these processes can effectively complement the criminal justice

processes for addressing a wide range of victims' needs. The discussion emphasises the potential transformative effects of truth-seeking processes and other community-based transitional justice measures on the often challenging social dimension of sexual violence as a weapon of war. Providing a comprehensive account of the nature and patterns of harms suffered by victims can be instrumental for addressing the existing structural conditions that not only often facilitate such crimes in conflict situations but also exacerbate their devastating impact on victims in post-conflict settings. This is relevant to promoting societal level transformation which is a critical component of effective redress for victims of mass sexual violence. The analysis in this chapter further indicates, however, that victims face enormous challenges to adequately engage in these processes. Therefore, the author argues that whilst it is necessary to integrate these crimes into domestic transitional justice processes; this should be done alongside embedding appropriate measures to facilitate the participation of victims without running the risk of being exposed to further ham such as the re-traumatisation of reliving their traumatic experiences or further stigmatisation by the community.

Chapter seven, the conclusion, brings together all the major conclusions made in the study on mechanisms to ensure effective redress in situations where mass sexual violence serve as a weapon of war. Arguing for enhancement of the engagement of victims of such crimes with locally-embedded transitional justice processes, the thesis argues a case for coordinated and collective transitional justice approaches to improve the victims' position both at international trials and within communities. It emphasises that, in most contexts, recovering the voices and stories of victims of sexual violence through truth-seeking processes is by no means a straightforward process. Victims of such crimes face serious challenges and obstacles that inhibit their abilities to effectively convey their ordeals during conflicts. The study thus underlines that the way in which these processes are designed to effectively facilitate adequate engagement of victims of sexual violence without being exposed to further harm is key to their effectiveness in advancing effective redress. In any truth-seeking processes designed to account for the dark past, it is vital to create a comfortable and enabling environment for victims of such crimes with a view to empowering them and guaranteeing their privacy and confidentiality in the often challenging societal contexts. This is critically pertinent for these processes to better account for the extreme vulnerabilities of victims of these crimes in order to ultimately provide a comprehensive account of their experiences and set out appropriate measures for social change. Throughout this chapter, the limitations of the study and implications for future research and practice are also discussed.

CHAPTER TWO

INTERNATIONAL CRIMINAL PROSECUTION OF RAPE AND OTHER FORMS OF SEXUAL VIOLENCE: PROGRESS AND PERSISTENT CHALLENGES

> Before the 1990s, sexual violence in war was, with rare exception, largely invisible. If not invisible, it was trivialised; if not trivialised, it was considered a private matter or justified as an inevitable by-product of war, the necessary reward for the fighting men.[67]

2.1 Introduction

The systematic and widespread nature of sexual violence in conflict situations is by no means a recent phenomenon. History offers too many examples of rape and other acts of sexual violence as an element of broader war strategies.[68] During armed conflicts, the body of civilians, mainly females, has regularly been treated as an extension of the battleground, where acts of sexual violence are perpetrated in various brutal forms.[69] For centuries, coordinated use of rape and various forms of sexual violence as a weapon or tactic of war has been an integral aspect of warfare. As the growing studies around sexual violence in conflict situations indicate 'the prime aim of war rape is to inflict trauma and thus to destroy family ties and group solidarity within the enemy camp'.[70] While horrific data on the systematic use of rape have been reported in almost every conflict over the history, such violence gained particular prominence in recent conflicts as a deliberate tactic of war.

Despite evidence of mass rapes and other acts of sexual violence committed during conflicts over the past centuries, historically very little attention has been paid to these crimes.[71] However, following massive atrocities in the 1990s, especially with the war in the former

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[67] R. Copelon (2000), 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law', *McGill Law Journal*, p. 3.

[68] See, for instance, R. Branche *et al*., 'Writing the History of Rape in Wartime', in R. Branche and F. Virgili (Eds.), *Rape in Wartime*, (Palgrave Macmillan, 2012); E. D. Heineman, 'Introduction: The History of Sexual Violence in Conflict Zones, in E. D. Heineman (Ed.), *Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights*, (University of Pennsylvania Press, 2011).

[69] See S. Randi (2009), 'Sexual Violence in War: Civilians as Battleground', *Development Dialogue*, N° 53. See also C. Enloe, *Maneuvers: The International Politics of Militarizing Women's Lives*, (University of California Press, Berkeley, 2000).

[70] See, for instance, B. Diken and C. Bagge Laustsen (2005), 'Becoming an Abject: Rape as a Weapon of War', *SAGE Publications,* Vol. 11, No 1, p.111. See also the Preamble of the UN Security Council Resolution 1820 (2008) on Acts of Sexual Violence against Civilians in Armed Conflicts adopted on 19 June 2008, (S/RES/1820 (2008).

[71] See, for instance, A. Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present and Future*, (Martinus Nijhoff Publishers, 2011); A. M. De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of ICTY and ICTR*, (Intersensia, 2005); K. D. Askin (2003), 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, Vol. 21, N° 2.

Yugoslavia and the genocide in Rwanda where rape was systematically used as part of ethnic cleansing and genocidal campaigns respectively, these crimes ultimately got legal traction before international criminal tribunals. Until the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY)[72] and its sister for Rwanda (ICTR)[73] as *ad hoc* tribunals, rape and other forms of sexual violence in conflict situations had never been defined. Despite the development of international humanitarian law proscribing sexual offenses in war,[74] there had been no legal provisions on these offenses as specific crimes in international law. The limited attention on these crimes can be explained by the fact that rape has for too long been deemed as attached to the very nature of war.

Despite being proscribed by the law of the war, these crimes have thus been rarely prosecuted. Whereas sexual related offenses were committed in World War II, it is important to note that no rape prosecution was undertaken by any of the courts established in the wake of World War II to prosecute leaders for crimes against peace, war crimes and crimes against humanity.[75] Except in the Control Council Law N° 10 where slight reference was made to rape to define crimes against humanity,[76] neither the Charter of the Nuremberg International Military Tribunal (IMT),[77] nor that for the Far East (IMTFE)[78] provided for rape as a crime. However, these crimes were explicitly included in the statutes of the ICTY, ICTR as forms of other international crimes.[79] The Rome Statute of the International Criminal Court (ICC) built on advances made by previous tribunals and significantly contributed toward an international law norm on these crimes by defining rape and other acts of sexual violence not simply as a means of committing other international crimes but also independently as war crimes or crimes against humanity.[80]

Indeed, within the last two decades, significant progress in addressing these crimes has been registered by the international criminal tribunals and courts. However, it is true to affirm that the effective international criminal prosecution of these crimes is still hindered by several

[72] The ICTY was formally established by the United Nations Security Council on 25 May 1993 (S/RES/827).
[73] Created by the Security Council Resolution 955 (1994) of 8 November 1994.
[74] Article 4(2) (e) of the 1997 Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977.
[75] See A. Cole, 'International Criminal Law and Sexual Violence: An overview', in C. Mcglynn and V. E. Munro (Eds.), *Rethinking Rape Law: International and Comparative Perspectives*, (Routeledge, 2010), pp.47-91.
[76] See Article 2 (c) Allied Control Council Law N° 10 for the Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity, adopted on 20 December 1945.
[77] Charter of the International Military Tribunal adopted on 8 August 1945: Annexe of the London Agreement.
[78] Charter of the International Military Tribunal for the Far East, adopted on 19 January 1946.
[79] See Articles 5(g), 3 (g) and of the Statutes of the ICTY, ICTR respectively.
[80] See Article 7 (1) (g), 8 (b) (xxii) of the ICC Statute.

challenges, despite an increasing legal benchmark in this regard. Since these crimes were only given cursory treatment in the post-World War II trials, the issue here is whether such crimes have now gained recognition as international crimes. In this perspective, what is the contribution of international criminal tribunals and courts in this regard and what are the challenges still hindering the effective international criminal prosecution of these crimes?

This chapter critically explores this, and begins the analysis by demonstrating how the prohibition of rape and other forms of sexual violence developed both within international humanitarian and international criminal law. It further considers the advances registered by international criminal institutions. In this regard, the author first looks at the failure to address these crimes in the first international criminal prosecutions in the wake of World War II. The discussion in this chapter further provides an in-depth analysis of the contribution of the international criminal tribunals and courts in the development of international criminal law in this regard. The author finally looks at the persistent challenges faced international criminal tribunals and courts in effectively prosecuting these crimes to ensure justice for victims.

2.2 Wartime Sexual Violence in International Humanitarian Law

The most important objective of international humanitarian law is the protection of people who are not or no longer directly taking part in the hostilities during war. To this end, a broad range of humanitarian law sets out detailed general principles. These include the four Geneva Conventions namely Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field[81], Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea[82], Geneva Convention relative to the treatment of Prisoners of War[83] and Geneva Convention relative to the Protection of Civilian Persons in Time of War[84]. These instruments coupled with the two Additional Protocols to the Geneva Conventions[85] as well as The Hague Conventions and Regulations[86] constitute the core of humanitarian law. The Geneva Conventions enjoy universal adherence today and their provisions are now considered to

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[81] Geneva Convention I was adopted on 12 August 1949, UN Treaty Series, Vol. 75, N° 970.
[82] Geneva Convention II was adopted on 12 August 1949, UN Treaty Series, Vol.75, N° 971.
[83] Geneva Convention III was adopted on 12 August 1949, UN Treaty Series, Vol. 75, N° 972.
[84] Geneva Convention IV was adopted on 12 August 1949, UN Treaty Series, Vol. 75, N° 973.
[85] See Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts and Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, Adopted on 8 June 1977, come into force on 7 December 1979.
[86] The Hague Conventions are a group of international treaties that were adopted during the Hague conferences in 1899 and 1907.

reflect customary international law.[87] Moreover, it is worth noting that these instruments are complemented by a number of recent treaties on particular matters including prohibitions of specific weapons and the protection of certain category of vulnerable people such as children. These include in particular the Convention on Certain Conventional Weapons[88] and its five Protocols,[89] the Ottawa Convention on the Prohibition of Anti-Personnel Landmines,[90] the Optional Protocol on the Involvement of Children in Armed Conflict,[91] and the Convention on the Cluster Munitions.[92] Overall, international humanitarian law comprises a set of rules aimed at balancing military necessity with humanitarian considerations.

More specifically regarding sexual violence, these instruments embody a range of principles that explicitly proscribe rape and other forms of sexual violence while others can be interpreted as implicitly condemning these offenses. For instance, Geneva Convention IV generally provides for protected persons to be treated humanely. In addition, special protection is afforded to women against rape and some other forms of sexual violence in war.[93] In this way, its Article 27 reads that: '…women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'. Since the Hague conventions of 1899 and 1907 do not explicitly mention rape or enforced prostitution as unacceptable practices in conflicts, Geneva Convention IV may be regarded as the first international legal instrument to explicitly outlaw rape in war.

Similarly, this prohibition of rape and various forms of sexual violence in conflict situations is also echoed in the two Additional Protocols to the Geneva Conventions. According to Additional Protocol I (Protocol Relating to the Protection of Victims of International Armed Conflicts) 'women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'.[94] Indeed, the wording of Additional Protocol I resonates with the provision of Additional Protocol II

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[87] See J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (Cambridge University Press, 2009), p. 10.

[88] The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate effects, adopted on 10 October 1980 and entered into force on 2 December 1983.

[89] Protocol I on Non-Detectable Fragments, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Protocol IV on Blinding Laser Weapons, and Protocol V on Explosive Remnants of War.

[90] The Convention on the Prohibition of the Use, Stocking, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Adopted on 18 September 1997, and entered into force on 1 March 1999.

[91] The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, Adopted on 25 May 2000, and came into force on 12 February 2002.

[92] The Convention on Cluster Munitions, Adopted on 30 May 2008, and came into force on 01 August 2010.

[93] Article 27 of the Geneva Convention IV.

[94] Article 76(1) of the Additional Protocol I.

(Protocol Relating to the Protection of Victims of Non-International Armed Conflicts), which explicitly includes rape, enforced prostitution on the list of acts prohibited at any time and in any place whatsoever.[95]

Apart from this explicitly granted protection, other provisions might be interpreted as implicitly outlawing these practices in conflict situations. For instance, as Mahmoud Sherif Bassiouni has rightly observed, cruel treatment and outrages upon person dignity as well as humiliating and degrading treatment, prohibited under common Art. 3 of the Geneva Conventions[96], might be interpreted as implicitly prohibiting acts of rape in conflicts.[97] In similar vein, the provision for respect of 'family honours and rights' under Article 46 of the Annex to the 1907 Hague Convention can also been construed as tacitly proscribing acts of rape or other forms of sexual violence.[98]

However, despite such developments, it is important to note that none of the provisions both under the Hague law or Geneva law provides a definition of rape or various other forms of sexual violence. The Hague law for instance uses what many scholars have interpreted as an indirect way of protecting women during armed conflicts. For instance, as has earlier been pointed out, the provision on protection of 'family honour and rights' under the regulations attached to the 1907 Hague Convention has been understood to include rape as against family honour.[99] However, as Theodor Meron has rightly pointed out, the Hague and Geneva Conventions as well as Additional Protocol I made reference to rape but failed to provide a definition of what constitutes rape.[100] An analytical look at the Hague and Geneva law shows that rape and other forms of sexual violence are depicted as harming women's honour rather than specific crimes or acts against the physical integrity or autonomy of the person.

It is against this background that the ICTR, in *Prosecutor v. Jean Paul Akayesu,* recognised that there was no commonly accepted definition of rape in international law[101] and, for the

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[95] Article 4 (2) (e) of the Additional Protocol II.
[96] Common Article 3 of the 1949 Geneva Conventions govern non-international armed conflicts, i.e. those conducted between state armed forces and non-state armed groups or between such groups.
[97] M. S. Bassiouni, *Crimes against Humanity in International Criminal Law*, Second Edition, (Kluwer Law International,1999), p.360.
[98] The Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex concerning Regulations Respecting the Laws and Customs of War on Land, Adopted on 18 October 1907.
[99] See for instance Y. Aksar*, Implementing International Humanitarian Law: From the ad hoc Tribunals to a Permanent International Criminal Court*, (Routledge, 2004) p. 157.
[100] T. Meron, 'Rape as a Crime under International Humanitarian Law', *The American Journal of International Law,* Vol. 87, N° 3, 1993, p. 425.
[101] *Prosecutor v. Jean Paul Akayesu* (Trial Chamber), Case N^{o}. ICTR-96-4-T, Judgment, 2 September, 1998, § 598.

first time in history, provided a definition of rape in the context of international law.[102] The ICTR definition was further elaborated by the ICTY in *Prosecutor v. Anto Furundžija*[103] which, due to international *lacuna* on the matter, drew upon the general concepts and legal institutions common to all major legal systems across the world.

A closer look at the above humanitarian instruments reveals that, though reference is explicitly or implicitly made to rape and enforced prostitution as condemnable acts in war, the scope of prohibition of these crimes during conflict situations is rather limited. Furthermore, rape falls outside the wide range of grave breaches of international law as listed by the Geneva Conventions and Additional Protocols. According to articles 50 Geneva Convention I, 51 Geneva Convention II, 130 Geneva Convention III, 147 Geneva Convention IV, 11, 85 and 86 Additional Protocol I, serious violations of the international humanitarian law constitute a 'grave breach' and shall be prosecuted as war crimes. All the acts explicitly recognised as 'grave breaches' have the common objective to protect the most important values recognised under the laws and customs of war. Indeed, as some commentators assume, failure to include rape among 'grave breaches' of international humanitarian law may be considered as one of the reasons that these crimes were disregarded concerning the prosecutions of various crimes committed during World War II.[104] It is worth noting that rape was not listed as a war crime in the Nuremberg Charter nor prosecuted during Nuremberg trials, despite the available evidence. The omission of rape and other forms of sexual violence might be regarded as an indication of the lack to express the seriousness of these crimes on the part of the international community.

Moreover, according to certain commentators such as Lindsey Crider, disregarding rape and other various forms of sexual violence during prosecutions that followed World War II set a flawed precedent to the extent that it took a long time for these crimes to gain recognition.[105] An explanation for this might be partly connected to the fact that, in many instances, the Nuremberg and Tokyo trials constituted a historic moment in the development of international law. As it might be expected, these trials gave rise to a new system of

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[102] Ibid. § 686.

[103] See *Prosecutor v. Anto Furundžija,* Case No IT-95-17/1-T, ICTY, Trial Judgement of 10 December 1998, §§ 178-185.

[104] See the UN: Sexual Violence and Armed Conflict: United Nations Response, A report published in 2000 to promote the goals of the Beijing Declaration and the Platform for Action April 1998, at p. 6 Available at http://www.un.org/womenwatch/daw/public/cover.pdf (Accessed on 6 June 2013).

[105] See L. Crider, 'Rape as a War Crime and Crime against Humanity: The Effect of Rape in Bosnia-Herzegovina and Rwanda on International Law', *Paper presented at the Auburn University*, 30-31 March, 2012, p. 2.

international criminal justice as a response to the atrocities of the World War II. Quite significantly, this legacy is also built on the fact that the Tribunals were set up after the acts to deal with crimes that had never before been addressed under international law.

Following the war in the former Yugoslavia and the genocide in Rwanda, the understanding of wartime sexual crimes changed fundamentally. This shift in understanding lead to the effect that these practices were addressed not as side-effects of wars but as tactics of war. While such developments have brought new conceptualisations and responses regarding wartime rape, it is worth questioning whether they have also led to establishment of a range of tools with which to effectively combat and prosecute perpetrators of such crimes.

2.3 Wartime Sexual Violence before International Criminal Tribunals and Courts

Since World War II, for humankind to be deterred from most heinous crimes, there was a compelling need of pursuing criminal justice at the supranational level. As a response to massive crimes committed during World War II, judicial measures were put in place at Nuremberg and Tokyo to punish these crimes.

The establishment of the Nuremberg and Tokyo Tribunals was seen as a step forward towards the establishment of the permanent International Criminal Court. Though the Cold War prevented the establishment of any international criminal court for long, the international criminal justice got momentum with the establishment of the ICTY and ICTR in the 1990s, later followed by different supranational criminal tribunals, known as 'internationalised or mixed' tribunals.[106]

International criminal justice has been an evolutionary process which culminated with the establishment of the ICC[107], as the world's first permanent court to deliver international criminal justice. This is of course not a substitute for national courts as it was established in order to fill in *lacunae* of accountability derived from States' unwillingness or inability to prosecute.[108] Its primary mission is to help put an end to impunity for the perpetrators of the most serious crimes of concern to international community as a whole, and therefore contribute to the prevention of such crimes.

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[106] They are also called "hybrid international tribunals" as they were established not under Chapter VII of the United Nations Charter, but rather based on an agreement between the national government concerned and the United Nations.

[107] The Statute of the ICC (Rome Statute) was signed on 17 July 1998, UN Doc. A/CONF.183/9. Entry into force on 1 July 2002 in accordance with Art. 126.

[108] The ICC is subject to the principle of complementarity, that is, it can act only if States are unwilling or unable to carry out criminal proceedings. See Article 17 of the ICC Statute.

The focus of the abovementioned criminal justice institutions mainly lay on crimes committed in the context of armed conflicts. Against this background the question arises about what happened within this global trend shifting from impunity to individual accountability with regard to wartime sexual crimes. In answering this question, the discussion in this chapter seeks to critically analyse how the fundamental shift in addressing sexual violence in conflict situations not as mere 'by-product of war' but rather as systematised weapon of warfare contributed to the development of international law on these crimes. In so doing, it appears appropriate to firstly look at the Nuremberg and Tokyo trials, where these crimes were only given cursory treatment where referred to in some indictments.

2.3.1The Position of the Post-World War II International Military Tribunals Regarding Wartime Sexual Violence

That large-scale, well-organised and systematic rapes and various other forms of sexual violence took place during World War II is indisputable.[109] However, despite the available evidence of rape and various forms of sexual violence such as sexual slavery, sterilisation and mutilation were committed during World War II, both the 1945-46 International Military Tribunal in Nuremberg and the 1946-48 International Military Tribunal for the Far East failed to adequately prosecute rape and sexual violence. Contrary to what might be expected, rape was not explicitly codified as a war crime in neither of their Charters.

A closer look at the Nuremberg Charter shows that it did not make any specific reference to wartime sexual offenses as punishable crimes under international law.[110] There is also no explicit reference to these offenses as specific crimes in the judgement of the tribunal as well. Kelly Dawn Askin has aptly observed that, whilst the Nuremberg trial transcripts contain extensive evidence of wartime sexual violence, neither the notion of 'rape' nor that of 'women' is included in the 732 page index of the Nuremberg trials' record.[111]

Indeed, the Nuremberg proceedings opened up a new era of supranational justice, shortly after the coming into force of the UN Charter[112]. However, to ignore wartime sexual crimes inflicted during World War II may be considered as the principal shortcoming of the trials which failed to hold wartime sexual offenses' status as internationally wrongful practices.

[109] See K. Wachala (2012), 'The Tools to Combat the War on Women's Bodies: Rape and Sexual Violence against Women in Armed Conflict', *The International Journal of Human Rights*, Vol. 16, N° 3, p. 534.
[110] See Article VI of the Nuremberg Charter adopted on 8 August 1945, Annexed to the London Agreement.
[111] K. D. Askin, *Supra* note 71, Vol. 21, p. 8.
[112] The UN Charter was adopted on 26 June 1945, largely as a result of two devastating world wars, and was ratified by 50 members and became the active governing document of the UN in October of that same year.

This is notwithstanding the fact that the subsequent Nuremberg trials against surviving members of the leadership[113] did refer to rape as a crime against humanity. As such, a number of war-related sexual offenses such as enforced prostitution, forced pregnancy, sexual slavery and enforced sterilisation as well as sexual mutilation to name but a few were included into the charges but largely ignored by the Tribunal.

Similarly, the Nuremberg trials were later followed by the International Military Tribunal for the Far East (Tokyo Tribunal) trial which, like the Nuremberg Charter, did not include any explicit reference to wartime sexual offenses as crimes in its Charter.[114] Contrary to the Nuremberg proceedings, wartime sexual crimes were included, albeit to a limited extent, in the Tokyo indictments.[115] In this way, some the Tokyo Tribunal's indictments accused the defendants of torture, mass murder, rape, and many other barbaric acts upon civilian people.[116] Though not explicitly listed as prosecutable offenses in its founding instrument, including such crimes in the descriptive list of crimes charged before the Tokyo Tribunal can arguably be interpreted as a strong indication of the illegality of these practices.

It is obvious that the horrors of World War II led to the establishment of the International Military Tribunals, which laid the groundwork for a precedent of individual criminal accountability for international crimes. It is worth noting that some offenses listed under the jurisdiction of these tribunals were in many instances denounced as having no solid foundation in international law.[117] As a result, the Nuremberg and Tokyo trials not only led to the evolution of the concepts of crimes against peace, crimes against humanity and crimes of genocide but also greatly influenced the adoption of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War[118] and, most importantly, the birth of the human rights movement. That said, the approach of these first ever international criminal trials to rape and other forms of sexual violence in conflict situations has set strongly flawed precedent to the extent that it took much longer for these crimes to become a part of

[113] As opposed to the major war criminals held under the auspices of the Control Council N° 10. See Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), available at http://www1.umn.edu/humanrts/instree/ccno10.htm (Accessed on 26 June 2013).
[114] The Charter of the International Military Tribunal for the Far East adopted on 19 January 1945 (Annexed to the Special Proclamation by the Supreme Commander for Allied Powers at Tokyo).
[115] See A. Cole, *Supra* note 75, p. 49.
[116] See K. D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, (Kluwer Law International, 1997), p. 202.
[117] For details see C. Tomuschat (2006), 'The Legacy of Nuremberg', *Journal of International Criminal Justice*, Vol. 4, pp. 830-844, at p. 832.
[118] The Fourth Geneva Convention was adopted on 12 August 1949 in order to define humanitarian protection in conflict situations: UN Treaty Series, Vol. 75, N° 973

international criminal law. In any event, to ignore these crimes or giving them superficial treatment where referred to in some indictments did not contribute to strengthening the illegality of such practices in armed conflicts. However, the widespread evidence of sexual violence as an integral aspect of broader war strategies in the former Yugoslavia and the genocide against the Tutsi population in Rwanda led to ground-breaking jurisprudence which paved the way for the effective international criminal prosecution of such crimes.

2.3.2 Approaching Conflict-Related Sexual Violence as 'Weapon of War' and its Contribution in the International Prosecution of these Crimes

Though it appears slightly true to claim that the move towards criminalisation of wartime sexual offenses started with the Geneva Conventions and most especially their Additional Protocols, global impunity for too long prevailed. In the face of the systematic and extensive rapes of women during the war in Bosnia and Herzegovina, the founding documents of the ICTY explicitly listed these practices as crimes against humanity, alongside other crimes such as torture and extermination.[119] Also in the aftermath of the genocide against Tutsi in Rwanda, in which systematic use of rape occurred on a daily basis[120], the Statute of the ICTR included rape as a prosecutable crime before the Tribunal.[121]

Drawing from the jurisprudence of the ICTY and ICTR, the ICC statute provides a broader basis for prosecuting sexual crimes.[122] As will be elaborated in detail below, these offenses now have a normative framework under international criminal law, and can be prosecuted as part of the international laws on war crimes, genocide and crimes against humanity. While the ICC Statute does not include rape and other forms of sexual violence as genocidal acts, it expanded the basis upon which these crimes can be prosecuted by defining sexual violence crimes including rape and sexual slavery independently as war crimes (if committed in the context of an armed conflict) and crimes against humanity (if committed as part of a widespread or systematic attack against civilians). Furthermore, under the Rome Statute, like the ICTR Statute, there is no requirement of nexus to an armed conflict for persecuting crimes against humanity as in the ICTY statute.[123] Thus, the establishment of the

[119] See Art. 5(g) of the ICTY Statute.
[120] See Rene Degni-Segui: The UN Special *Rapporteur* of the Commission on Human Rights*, Report on the Situation of Human Rights in Rwanda*, 16, U.N. Doc. E/CN.4/1996/68 (January 29, 1996).
[121] See Art. 3(g) of the ICTR Statute.
[122] See Art. 7 (1) (g) and 8(2) (b) (xxii); (e) (vi) of the ICC Statute.
[123] The ICTY held however that this requirement is purely jurisdictional as 'there is no logical or legal basis for this requirement….' See *Prosecutor v. Dusko Tadic*, Case N° IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1999, § 140.

jurisdiction of the ICC regarding rape and other forms of sexual violence as crimes against humanity does not demand a connection to war.

A. Rape and other Forms of Sexual Violence as a Constituent Act of Genocide

The ICTR, tasked with prosecuting those being responsible for the atrocities committed in the genocide against the Tutsi population in Rwanda, handed down a landmark case defining rape as an act of genocide. For the first time in history, the Tribunal held an individual accountable of genocide on the basis of, among others, acts of rape and sexual violence. The case *Prosecutor v. Jean-Paul Akayesu*[124] was not only the first time an international criminal tribunal punished a perpetrator on the grounds of sexual violence but also the first time that rape was found to be an act of genocide, i.e. an act committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.[125] In *Akayesu* case, The Trial Chamber of the ICTR stated that:

> The Chamber wishes to underscore the fact that in its opinion, rape and other acts of sexual violence constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways to inflict harm on the victim as he or she suffers both bodily and mental harm.[126]

The Trial Chamber of the ICTR further explained that rape and other forms of sexual violence were an integral aspect of the process of destruction of Tutsi people in Rwanda.[127] Such interpretation has led many scholars such as Alex Obote-Odora[128] and Kelly Dawn Askin[129] to hailing this decision as a breakthrough reading of international law by the Tribunal as far as sexual crimes are concerned. It should be noted that the ICTR subsequently

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[124] *Prosecutor v. Jean Paul Akayesu*, *Supra* note 101, §§ 731-34.

[125] The 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide defines the crime of genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

a. Killing members of the group;
b. Causing serious bodily or mental harm to members of the group;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group.

[126] See *Prosecutor v. Jean Paul Akayesu*, *Supra* note 101, § 731.

[127] Ibid.

[128] See A. Obote-Odora (2005), 'Rape and Sexual Violence in International Law: ICTR Contribution', *Journal of International and Comparative Law*, p. 135.

[129] K. D. Askin (1999), 'Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', *Journal of International Law*, Vol. 93.

handed down a number of other convictions for genocide where sexual violence played an important part[130] and that were echoed in the ICTY jurisprudence.[131] Indeed, finding defendants guilty of genocide based partly on acts of rape can be described as one of the important legacies of the *ad hoc* Tribunals.

In the context of the genocide in Rwanda, the ICTR held in the *Prosecutor v. Mikaeli Muhimana* that he has 'personally targeted Tutsi civilians by shooting and raping Tutsi women with the intent to destroy the Tutsi people'.[132] Keeping with the Genocide Convention,[133] the Tribunal held that rape and other acts of sexual violence can be inflicted with the intent of killing members of a group,[134] can constitute serious bodily or mental harm,[135] can be part of measures intended to prevent births within the group such as sexual mutilation,[136] and can also be intended to forcibly transferring children of the group to another group.[137] As to the specific aspect of causing serious bodily harm, the ICTR found in *Prosecutor v. Sylvestre Gacumbitsi* that the accused incurs responsibility for the crime of genocide by instigating the rape of Tutsi women and girls.[138]

In the context of the war in Bosnia and Herzegovina, during which systematic and widespread sexual violence were committed as a weapon of war and instruments of ethnic cleansing,[139] judges of the ICTY have also reasoned that these rape and other forms of sexual violence can amount to the crime of genocide. Though, there have been no prosecutions for genocidal sexual violence before the Yugoslavia tribunal, in its discussion about rape and other forms of sexual violence the Tribunal held in the *Prosecutor v. Anto Furundžija* that "…Rape may also amount to […] an act of genocide, if the requisite elements are met, and may be prosecuted accordingly".[140]

On the specific aspect of causing serious bodily or mental harm, the ICTY held on the ICTR's conceptual description of rape and other forms of sexual violence as genocide. The

[130] See *Prosecutor v. Alfred Musema,* Case N° ICTR-96-13,Judgment and Sentence, 27 January, 2000, §§ 156, 804, 861; *Prosecutor v. Sylvestre Gacumbitsi*, Case N° ICTR 2001-64-T, Judgment, 17 June 2004, §§ 291-293.
[131] *Prosecutor v. Anto Furundžija*, *Supra* note 102,§ 172
[132] *Prosecutor v. Mikaeli Muhimana*, Case N° ICTR-95-1B-T, Judgment, 28 April 28, 2005, § 15.
[133] Article II of the UN Convention on Genocide.
[134] See *Prosecutor v. Akayesu*, *Supra* note 101, § 733.
[135] Ibid. § 731.
[136] Ibid. § 507.
[137] Ibid. § 509.
[138] *Prosecutor v. Sylvestre Gacumbitsi, Supra* note 138, § 292.
[139] See T. A. Salzman (1998), 'Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia', *Human Rights Quarterly*, Vol. 20, pp. 348-378; A. Stiglmayer, *Mass Rape: The War against Women in Bosnia-Herzegovina*, (University of Nebraska Press, 1994).
[140] *Prosecutor v. Anto Furundžija, Supra* note 102, § 172.

Tribunal highlighted in *Prosecutor v. Radislav Krstić* that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.[141] The *ad hoc* tribunals' judges hold on to this view in many other cases such as the *Stakic*[142] at the ICTY and the *Kajelijeli*[143], *Kayishema and Ruzindana*[144], *Kamuhanda*[145] and *Musema*[146] at the ICTR. In *Prosecutor v. Kayishema and Ruzindana* for instance, the ICTR referred to evidences of sexual mutilations and rapes in support of the crime of genocide on the ground of causing serious bodily or mental injury to the victim.[147]

As the foregoing suggests, depending on circumstances of a case and satisfying all other sub-requirements for the crime of genocide,[148] rape and other forms of sexual violence can indeed be prosecuted as a constituent violation under the crimes of genocide. During the war in the former Yugoslavia, for instance, acts of rapes were largely intended to have the effect of impregnating the victims so that they would have a child that would be identified a member of the perpetrators' ethnicity.[149] The overall objective of the perpetrators was therefore to render the area ethnically homogeneous by eliminating members of other ethnicities. Although rape can amount to an act of genocide irrespective of whether pregnancy resulted as held by the ICTR,[150] commentators such as Siobhan Fisher rightly observe that rape with the intent to impregnate 'is something more than just rape', which definitely constitutes genocide.[151] This can adequately demonstrate a resolute and specific intent to destroy wholly or in part a particular group of people, which in turn constitutes genocide.

Moreover, in the wording of the 1948 Genocide Convention causing serious bodily or mental harm to members of the group and/or deliberately imposing the group conditions of life aimed at leading to its physical destruction in whole or in part constitute genocide.[152] Considering rape to be one of the constituent acts of genocide is definitely one of the positive breakthroughs in addressing these crimes. Indeed, such an interpretation on the part of the *ad*

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[141] See *Prosecutor v. Radislav Krstić*, Case N° IT-98-33, Judgment of August 2, 2001, §§ 509, 513.
[142] *See Prosecutor v. Milomir Stakic*, Case N° IT-97-24, the Judgment of July 31, 2003, § 516.
[143] See *Prosecutor v. Juvénal Kajelijeli*, Case N° ICTR-98-44A-T, Judgment of December 1, 2003, § 815.
[144] See *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case N° ICTR-95-1-T, Judgment and Sentence of 21 May, 1999, § 108.
[145] *Prosecutor v. Jean de Dieu Kamuhanda*, Case N° ICTR-97-23-S, Judgment of September 4, 1998, § 634.
[146] *Prosecutor v. Alfred Musema*, *Supra* note 54, § 156.
[147] *Prosecutor v. Clément Kayishema and Obed Ruzindana, Supra* note 67, § 547.
[148] See The 1948 UN Convention on genocide, *Supra* note 125, for the requirements of the crime of genocide.
[149] See R. Copelon, 'Gendered War Crimes: Reconceptualising Rape in Time of War', in J. Peters & A. Wolper (Eds.), *Women's Rights, Human Rights: International Feminist Perspectives*, (Psychology Press, 1995) pp. 205-206.
[150] See *Prosecutor v. Jean Paul Akayesu*, *Supra* note 101.
[151] S. K. Fisher (1996), *Occupation of the Womb: Forced Impregnation as Genocide*, Duke Law Journal, p. 125.
[152] See Article II (b and c) of the UN Convention of the Prevention and punishment of Genocide.

hoc tribunals is a firm recognition that sexual crimes can cause the infliction of serious bodily and mental harm to the victims[153], and constitute the crime of genocide, when inflicted with the specific intent to destroy a particular group. However, as Rhonda Capelon rightly notes, proving for 'the intent to destroy a particular group'[154] regarding sexual crimes is very demanding.[155] Genocide is a crime with a double mental element, i.e. a general intent as to the underlying acts, and an additional intent to destroy a particular group wholly or partially,[156] the latter was found lacking in various rape cases at the *ad hoc* tribunals.[157]

The legacy of the *ad hoc* tribunals has resonance on the future of international criminal justice regarding these crimes. In this way, lately the ICC has issued a number of indictments in which rape and other forms of sexual violence are part of the factual bases of the charge of genocide.[158] In the on-going indictment *Prosecutor v. Omar Hassan Ahmad Al Bashir* for instance, the Pre-Trial Chamber I of the ICC considered that there are reasonable grounds to believe that, subjecting thousands of civilian women belonging primarily to the Fur, Masalit and Zaghawa groups to acts of rape, was part of Omar Hassan Ahmad Al Bashir's genocidal campaign.[159] Further, in its decision on the Prosecution's Application for a Warrant of Arrest of Omar Hassan Ahmad Al Bashir, the Pre-trial Chamber of the ICC held that:

> The Chamber is therefore satisfied that there are reasonable grounds to believe that acts of rape, torture and forcible displacement were committed against members of the targeted ethnic groups. Accordingly, the Chamber finds that there are reasonable grounds to believe that the material element of the crime of genocide by causing serious bodily or mental harm, as provided for in article 6(b) of the Statute, is fulfilled.[160]

One might argue that the implications concerning the arrest warrants issued by the ICC in which rape is alleged as part of a genocidal plan can be interpreted as highlighting the exceptional gravity of these offenses. Although rape is not listed by the ICC Statute as a constituent violation under the crime of genocide, the author argues that the Court will be

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[153] Ibid. Article II (b).
[154] See Article II of the 1948 UN Genocide Convention, *Supra* note 125.
[155] See R. Copelon, 'Surfacing Gender: Reconceptualising Crimes against Women in Time of War', in A. Stiglmayer (Ed.*), Mass Rape: The War against Women in Bosnia-Herzegovina*, (University of Nebraska Press, 1994), p. 98.
[156] See K. Ambos, 'What Does the Intent to Destroy Mean in Genocide*?*', *International Review of the Red Cross*, Vol. 91, N° 876, 2009, pp. 833- 858.
[157] See, for instance, *Prosecutor v. Ildephonse Hategekimana*, Case N° ICTR-00-55B-T, Judgment of December 6, 2010, §§ 30 & 725.
[158] See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case N° ICC-02/05-01/09, Pre-Trial Chamber I, Second Decision on the Prosecution's Application for a Warrant of Arrest, July 12, 2010.
[159] Ibid. § 6.
[160] Ibid. § 30.

able to rely on the jurisprudence of the *ad hoc* tribunals in prosecuting genocide on the ground of sexual violence inflicted with the specific intent to destroy a particular group.

There are two reasons why recognising that rape can be a form of genocide is important. Firstly, this highlights the exceptional gravity of these offenses which can be inflicted for political ends, and such recognition that these crimes can amount to acts of genocide can therefore be understood as a powerful warning to all those who commit or tolerate sexual violence. Secondly, to label rape and other forms of sexual violence, offenses that are seen all too often in conflict situations but have received relatively little attention, as form of genocide will attract consistent and vigorous prosecution as well as severe sanctions since the crime of genocide is regarded as the most egregious of all international crimes.[161] According to the ICTY in the *Prosecutor v. Goran Jelisić*[162], and to the ICTR in the *Kambanda*[163] and *Niyitegeka*[164] cases, genocide is considered as the 'crime of crimes'. The crime of genocide is 'unique because of its element of special intent [….], hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence'.[165] This approach underscores the need for effective prosecution for this crime as well as severe punishment for perpetrators.

Rape and other acts of sexual violence as genocide can take different forms depending on the context. For Instance, while the forced impregnation[166] was a distinctive feature of rape as a strategy of ethnic cleansing in the former Yugoslavia, the genocide against Tutsi in Rwanda has witnessed the deliberate transmission of HIV to victims.[167] In both scenarios, as earlier stated, the overall objective of the perpetrators was to render the area ethnically homogeneous by eliminating members of other ethnicities.

The finding that rape and other forms of sexual violence can be constituent acts of genocide underpins the understanding of these practices as not sexual in nature, and thereby represents

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[161] See K. E. Carson (2012), 'Reconsidering the Theoretical Accuracy and Prosecutorial Effectiveness of International Tribunals' ad hoc Approaches to Conceptualizing Crimes of Sexual Violence as War Crimes, Crimes against Humanity, and Acts of Genocide', *Fordham Urban Law Journal*, Vol. 39, p. 1297. See also O. Ben-Naftali and Y. Shany, *International Law between War and Peace*, Tel Aviv University, 2006, p. 272.

[162] See *Prosecutor v. Goran Jelisić*, Case N° IT-95-10-A, Judge Patricia Wald's Dissenting Opinion, Appeal Chamber Decision of July 5, 2001, § 2.

[163] *Prosecutor v. Jean Kambanda,* Case N° ICTR 97-23-S, Judgement and Sentence, 4 September, 1998, § 16.

[164] See also *Eliezer Niyitegeka v. Prosecutor*, Case N° ICTR-96-14-A, Appeal Chamber Decision of July 9, 2004, § 53.

[165] See *Prosecutor v. Jean Kambanda, Supra* note 163.

[166] According to the ICTR, forced impregnation could be seen as genocide when intended to prevent births within a group, particularly within patriarchal societies. See *Prosecutor v. Akayesu*, *Supra* note 101, § 507.

[167] See L. Sharlash, 'Rape as Genocide: Bangladesh, the Former Yugoslavia and Rwanda', *New Political Science*, Vol. 22, N° 1, p. 99.

a significant advance in international prosecution of these crimes. Since genocide retains the crime of crimes status, recognising that these offenses can constitute genocide, if the requisite *dolus specialis* to exterminate a particular group is proven, reflects their appalling nature and should thus be prosecuted as one of the most serious crimes of international concern.

B. Rape and other Acts of Sexual Violence as Crimes against Humanity

The growing understanding of international law regarding rape and other forms of sexual violence has also led to conceptualisation of these offenses as crimes against humanity. Crimes against humanity involve the perpetration of certain prohibited acts[168], committed as part of a systematic or widespread attack[169] against a civilian population. In addition to this, the perpetrator must know of the broader context in which his actions occur.

For prosecution of rape and other forms of sexual violence to come under the category of crimes against humanity, they must have been perpetrated as part of a widespread or systematic campaign against civilians. Unlike the crime of genocide, the legal basis of the ICTY[170], ICTR[171] and the Special Court for Sierra Leone (SCSL)[172] as well as of the ICC[173] specifically list rape as a constituent act of crimes against humanity. While not specifically enumerated within the jurisdictional mandates of its predecessor tribunals, the ICC explicitly enumerates sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and any other form of sexual violence of comparable gravity as within its jurisdiction as crimes against humanity.

As many scholars such as the former chief prosecutor of the ICTY Richard Goldstone[174] and Alison Cole[175] have rightly observed, the inclusion of rape as one of the enumerated crimes against humanity in the Statutes of the international criminal tribunals and courts could be seen as an important step forward in addressing these crimes. As such, a number of convictions of rape and other acts of sexual violence as crimes against humanity have been

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[168] Articles 7 (1), 5 and 3 of the ICC, ICTY and ICTR Statutes respectively.

[169] While the ICTY Statute requires the attack to be committed in the context of an armed conflict, and the ICTR Statute requires the discriminatory element, neither of these elements is required for the definition of crimes against humanity under the ICC Statute.

[170] See Article 5(g) of the Statute of the ICTY.

[171] See Article 3(g) of the Statute of the ICTR.

[172] See Article 2 (g) of the Statute of the SCSL, Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, adopted on January 16, 2002.

[173] Article 7 (g) of the Rome Statute, *Supra* note 38. It should be noted that while there are several pending cases at the ICC which do not contain charges for sexual crimes The ICC has brought a range of sexual violence charges arising from various Situations.

[174] R.J. Goldstone (2002), 'Prosecuting Rape as a War Crime', *Journal of International Law*, Vol. 34, p. 279.

[175] See A. Cole, *Supra* note 75, p. 52.

handed down not only providing the first consideration of the elements of these offences in this regard, but more importantly setting a precedent for the prosecution of these practices as crimes against humanity. For instance, as further elaborated below, the *ad hoc* tribunals defined rape and other forms of sexual violence as inhumane acts, persecution, enslavement or torture, all of which are constitute elements of a crime against humanity.[176]

Formerly, in various cases such as *Abdullah Aydin v. Turkey*[177] and *Raquel Martí de Mejía v. Perú*[178], the European Court of Human rights (ECHR) and the Inter-American Court of Human Rights (IACHR) respectively held that the rape of the applicants in detention was torture. In the *Mejía* case, the IACHR found that rape could rise to the level of torture which is considered as an aggravated form of inhumane treatment given the severity of the physical and psychological scars that rape leaves with a victim.[179]

These cases have contributed to the evolution of the jurisprudence in the interpretation of the law prohibiting rape at the supranational level. Though the ECHR and the IACHR, unlike international criminal tribunals, have no power to punish individuals, standards set out for rape and other forms of sexual violence to rise to torture have often been referred to in subsequent international trials.[180] There are many examples of this approach in the *ad hoc* tribunals' jurisprudence. Rape has also been described by the *ad hoc* tribunals as torture depending on the circumstances in which they are committed. Torture is one of the constitutive elements of a crime against humanity that requires intentional infliction of severe pain and suffering. The ICTY recognised rape as a form of torture, defined as 'intentionally inflicted severe physical or mental pain and suffering' in the United Nations Convention against Torture[181] and referred to the ECHR and IACHR precedent to set out elements for rape to be prosecuted as such.[182] It follows from the ICTY finding in *Prosecutor v. Zejnil Delalić et al.* known as '*Ćelebići Camp'* case that torture on the ground of rape and other forms of sexual violence, which entails criminal responsibly as a crime against humanity, can

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[176] See for instance *Prosecutor v. Jean Paul Akayesu*, *Supra* note 101, §§ 597-598; See also *Prosecutor v. Kunarac et al.*, Case N[os] IT-96-23/1-T & IT-96-23/1-T, Trial Judgement(ICTY), §§738-739, 742.
[177] See *Abdullah Aydin v. Turkey*, Case N° 42435/98, Judgment of the European Court of Human Rights of September 25, 1997, § 86.
[178] See *Raquel Martí de Mejía v. Perú*, Case N° 10.970, Report N° 5/96, Decision of the IACHR, 1996 OEA/Ser. L/V/II.91 Document 7, 157.
[179] Ibid.
[180] [180] See *Prosecutor v. Zdravko Mucic aka "Pavo" et al.,* Case N[o] IT-96-21-T, Trial Chamber Judgement, 16 November 1998, §§ 495-496
[181] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GA Res. 39/46, UNCATOR, 1984, UN Treaty Series, Vol. 1465.
[182] See *Prosecutor v. Zejnil Delalić et al.,* Case N[o] IT-96-21-T, Trial Chamber Judgement of 16 November 1998, §§ 495-496.

be committed in various ways.[183] In *Prosecutor v. Zejnil Delalić et al.*, the Trial Chamber of the ICTY held that:

> The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. [...] The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting… [i]t is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict. Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet these criteria.[184]

An analytical look at the ICTY's finding in *Ćelebići Camp* case indicates that, in considering whether rape and other acts of sexual violence rise to the level of torture, one must not only look at their physical consequences, but also at their psychological and social consequences. While certain elements must be met in order for rape and other forms of sexual violence to be included within the offence of torture[185], the accused's awareness[186] of an attack against civilian population of which the victim is part must also be proven for these crimes to constitute crimes against humanity. In the ICTY's landmark case *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* case known as *Foča* case or ' Rape Camps' case, the Trial Chamber convicted two of the accused of torture on grounds of their involvement in the rapes of several women.[187]

This case concerns the atrocities committed in the municipality of *Foča*, in Bosnia and Herzegovina in April 1992. Bosnian Serb paramilitary fighters *Dragoljub Kunarac, Radomir Kovac* and *Zoran Vuković* were accused of raping Muslim girls and women detained at various localities in the municipality of *Foča.* As the Prosecution explained, during the armed

[183] Ibid. §§ 484-486.
[184] See *Prosecutor v. Zdravko Mucic aka "Pavo" et al.,* Case N° IT-96-21-T, Trial Chamber Judgement of 16 November 1998, §§ 495-496
[185] An intentional act through which physical or mental pain and suffering is inflicted on a person; such suffering must be inflicted for a purpose, and it must be inflicted by a public official or by a private person acting at the instigation of a public official. See *Prosecutor v. Delalić et al., Supra note* 182, § 483.
[186] The accused need not share the purpose behind the attack. The mental element for crimes against humanity relates to knowledge of the context that the accused's criminal act comprises part of that attack against civilian population, not motive. See *Prosecutor v. Dusko Tadić*, Case N° IT-94-1-A, Appeals Chamber, 15 July 1999, §§ 271-272.
[187] See *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković*, Case N° IT-96-23&23/1, Judgment, February 22, 2001, § 654.

conflict between Bosnian Serbs and Bosnian Muslims in the spring of 1992, the city and municipality of *Foča* were taken over by Serb forces by 16 or 17 April 1992.[188] Muslim Girls and women, some of them as young as 12,[189] as well as some elderly men[190] were detained in houses, apartments, and detention centres where they were subjected to widespread and systematic rape and other acts of sexual violence.[191] These detention centres were known as 'rape camps'[192] where Serb soldiers would freely enter and select their victims from among the female prisoners and take them away for rape and other brutal forms of sexual violence, some of them forced to dance nude in public.[193]

Before the ICTY, the alleged activities included gang-rapes, enslavement of Muslim girls and women detained at 'rape camps' in *Foča* from April 1992 to February 1993. *Prosecutor v. Kunarac, Kovac and Vuković* was the first case before international criminal tribunal based solely on charges of sexual violence. The accused were convicted of rape not only as violation of the laws or customs of war according to Article 3 of the Statute of the ICTY but also as a crime against humanity under Article 5 (g) of the Statute. The ICTY convicted *Kunarac*, a commander of a Bosnian Serb Army Unit in *Foča*, of torture on grounds of sexual violence after finding that the rapes resulted in severe mental and physical pain and suffering for the victims, while *Kunarac's* co-accused *Vuković*, who was a sub-commander, was also convicted of torture based on acts of rape.[194] The Trial Chamber II held that:

> The acts of the accused caused his victims severe mental and physical pain and suffering. Rape is one of the worst sufferings a human being can inflict upon another. This was abundantly clear to the accused *Dragoljub Kunarac*, as he stated during his testimony concerning the rape of D.B., when he admitted the fact that he had done something terrible, even though he maintained that it had happened with the consent of D.B.[195]

This case made significant contributions to the development of international law on sexual violence in situations of conflicts. This judgement elevated the crime of rape to a crime against humanity whose gravity, as earlier stated, is second only to the crime of genocide.

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[188] See *Prosecutor v. Kunarac, Kovac and Vuković,* § 2.
[189] See also *Prosecutor v. Dragan Zelenović*, Case N° IT-96-23/2-S, Joint submission of annex to the Plea Agreement, Amended Indictment of 17 January 2007, § 5.
[190] *Prosecutor v. Kunarac, Kovac and Vuković*, § 28.
[191] See I. Skjelsbaek, *The Political Psychology of War Rape: Studies from Bosnia and Herzegovina*, (Routledge, 2012), p. 63.
[192] See S. J. Scholz, 'War Rape's Challenge to Just War Theory', in M. Sellers (Ed.), *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*, (Springer, 2007), p. 280.
[193] See *Prosecutor v. Kunarac, Kovac and Vuković*, *§§* 29-39.
[194] Ibid. §§ 655, 593-782 & 783-822.
[195] Ibid.§ 655.

More significantly, this case marked the first time that an international tribunal had convicted defendants exclusively for sexual violence or prosecuted sexual slavery at all. It should be noted that rape and other forms of sexual violence as torture, which entails criminal responsibility as a crime against humanity, has been upheld by the ICTY in other cases such as *Prosecutor v. Furundžija*[196]and *Prosecutor v. Miroslav Kvocka et al.*[197], in which the accused have been prosecuted for sexual violence as torture, under the category of crimes against humanity.

Discrimination is not a requirement for prosecution of crimes against humanity in general, except only on the ground of persecution.[198] For rape and other forms of sexual violence to come under crimes against humanity need not be committed because of discriminatory grounds. However, the ICTY has found that various patterns can make the crimes discriminatory on multiple levels. In the context of the ethnic cleansing in the former Yugoslavia, the Tribunal ruled in *Prosecutor v. Miroslav Kvocka et al.* that acts of rape and other forms of sexual violence purposefully inflicted by *Mladjo Radić* were discriminatorily against non-Serb detainees in the camp, and committed exclusively against women.[199]

The Rome Statute of the ICC, building on the *ad hoc* tribunals' jurisprudential developments regarding conflict-related sexual violence, recently expanded the legal basis upon which these practices can be prosecuted. It explicitly lists the separate offences of rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization as war crimes (further discussed in the next section),[200] and as crimes against humanity.[201] The Rome Statute further lists any form of sexual violence under acts constituting a grave breach of the Geneva Conventions,[202] serious violations of Common Art. 3, or acts of comparable gravity enumerated as a basis of prosecution as crimes against humanity. Moreover, regarding whether rape and other forms of sexual violence in conflict situations can equal torture, the ICC held, in its decision pursuant to Art. 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against *Jean-Pierre Bemba Gombo,* that 'the act of torture is fully subsumed by the count of rape'.[203] This finding reflects the approach taken in *Prosecutor v.*

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[196] *Prosecutor v. Anto Furundžija,* Case N° IT-95-17/1-7 10, Judgement of 10 December 1998, § 163 & 176.
[197] *Prosecutor v. Miroslav Kvocka et al.,* Case N° IT-98-30/1-T, Trial Judgement of 2 November 2001.
[198] Ibid. § 282-305.
[199] *Prosecutor v. Miroslav Kvocka et al., Supra* note 197, § 560.
[200] Art. 8 (2) (b) (xxii), 8 (2) (e) (vi).
[201] Art. 7 (g).
[202] Art. 8 (2) (b) (xxii).
[203] See *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Situation in the Central African Republic, case N° ICC-01/05-01/08, Pre-Trial Chamber II, Decision of 15 June 2009, § 205.

Kayishema and Ruzindanda[204] at the ICTR and *Prosecutor v. Delalić et al.*[205] as well as *Prosecutor v. Pavle Strugar*[206] at the ICTY, in which the specific material elements of torture are considered inherent to nature of rape and other forms of sexual violence. This approach marked a breakthrough development in the conceptualisation of rape and other forms of sexual violence in international criminal law by recognising that, in light of the destructive effects of rape, torture as a crime against humanity on the grounds of rape does not require any additional material element not already contained in a rape charge.

To label wartime rape as crimes against humanity certainly adds momentum to the international prosecution of these crimes and will set a new tone in fighting the prevalent use of sexual violence as an element of broader war strategies. Although the international criminal tribunals are still faced with outstanding challenges especially regarding the investigation, collection and presentation of evidence in sexual violence cases as discussed later in this chapter, the jurisprudential developments on rape as a crime against humanity will significantly contribute to effective prosecutions of these crimes.

C. Prosecuting Conflict-Related Rape and other acts of Sexual Violence as War Crimes

Like the Statutes of its predecessor tribunals,[207] the Rome Statute grants the ICC jurisdiction over war crimes.[208] Art. 8(2) (a) of the Statute concerns grave breaches of the Geneva Conventions, Art. 8(2) (b) addresses other serious violations of the laws and customs applicable in international armed conflict, Art. 8(2) (c) concerns serious violations of Art. 3 common to the four Geneva Conventions for non-international armed conflicts and Art. 8(2) (e) addresses other serious violations of the laws and customs applicable in non-international armed conflicts.

Under Art. 8 of the ICC Statute[209] and the ICC Elements of Crimes[210], rape is a crime falling within the jurisdiction of the ICC as a war crime along with other forms of sexual violence such as sexual slavery, forced pregnancy, enforced prostitution, enforced sterilisation, persecution based on gender, and other sexual violence. The ICC built on advances made by the *ad hoc* tribunals in this regard and sets out wide range of sexual offenses as war crimes in

[204] *Prosecutor v. Clément Kayishema and Obed Ruzindana, Supra* note 67, § § 577 & 625-650.
[205] See *Prosecutor v. Zejnil Delalić et al., Supra* note 182, § 412.
[206] See *Prosecutor v. Pavle Strugar*, Case N° IT-01-42-PT, The Decision on Defence Preliminary Motion Concerning the Form of the Indictment of 28 June 2002.
[207] See Art. 2 & 3 of the ICTY Statute and Art. 4 of the ICTR Statute.
[208] Art. 8 of the Rome Statute.
[209] Art. 8(2) (b) (xxii) of the ICC Statute.
[210] The ICC Elements of Crimes adopted on 9 September 2002.

both international and internal armed conflict.[211] The Rome Statute explicitly proscribes a wide range of sexual offenses as constituting a grave breach of the Geneva Conventions[212], and a serious violation of Art. 3 common to the four Geneva Conventions.[213]

As Anne-Marie de Brouwer rightly notes, this marks the first time in history a treaty has explicitly provided for such a wide range of acts of sexual violence as war crimes.[214] Indeed, the inclusion of sexual crimes in the ICC Statute, as a permanent court, represents a milestone in the international prosecution of these crimes. The ICTY and ICTR have handed down historical advances arguing that rape and other forms of sexual violence constitute violations of the laws and customs of war. For instance, in its discussion of rape as a violation of the laws or customs of war in *Prosecutor v. Furundžija*, the ICTY found the accused to have committed outrages upon personal dignity on the ground of sexual violence as a war crime.[215] The ICTY Appeals Chamber in *Prosecutor v. Kunarac et al.*, in which the accused were charged of various acts of sexual violence such as holding young women in an apartment and forcing them to dance naked, held that those acts amount to the outrages upon personal dignity.[216] Also, in *Prosecutor v. Delalić et al.,* in which the defendants were accused of inhuman treatment, torture, and wilfully causing great suffering or serious injury to body or health for rapes and various acts of sexual violence, the ICTY convicted the accused for sexual violence as violation of the laws and customs of war as well as grave breach of the Geneva Conventions.[217]

This finding reflects the ICTR decision in *Prosecutor v. Semanza* which convicted the accused for cruel treatment as a violation of the laws and customs of war.[218] The ICTY furthermore held that depending upon the circumstances, rape may also amount the grave breach of the Geneva Conventions.[219] Although rape and other acts of sexual violence are not explicitly identified by the 1949 Geneva Conventions as a class of grave breaches[220] of the Geneva Conventions as earlier discussed, this development suggests that these crimes are

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[211] Art. 8(2) (b) (xxii) and 8(2) (e) (vi).
[212] Art. 49, 50, 129 and 146 of the Geneva Convention I, II, III and IV respectively.
[213] See Article 8(2) (e) (vi) of the ICC Statute.
[214] A.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICC*, (Intersensia, 2005), p. 177
[215] *Prosecutor v. Anto Furundžija*, *Supra* note 196, § 172.
[216] *Prosecutor v. Dragoljub Kunarac et al.*, Case N° IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgement of 12 June 2002, § 163.
[217] *Prosecutor v. Zejnil Delalić et al.*, *Supra* note 182, §§ 936-43, 955-65.
[218] *Prosecutor v. Laurent Semanza*, Case N° ICTR-97-20-A, Judgment of May 20, 2005, § 371.
[219] *Prosecutor v. Zejnil Delalić et al.*, *Supra* note 182, §§ 936-43, 955-65.
[220] See Art. 147 of the Geneva Convetion IV, Art. 50 of Geneva Convention I, Art. 51 of the Geneva Conventions II & III.

subsumed in offenses that are explicitly identified as 'grave breaches'. It should be borne in mind that the provisions on the grave breaches of the 1949 Geneva Conventions were copied verbatim into the ICTY and ICC Statutes.[221] According to the ICC Elements of Crimes, conflict-related rape and other acts of sexual violence may rise to torture as grave breach of the Geneva Conventions and prosecuted as such.[222] In light of these jurisprudential developments before the *ad hoc* tribunals and the framework set forth in the ICC Statute on rape and other forms of sexual violence, it is plausible to argue that the normative benchmark under which the use of sexual violence in conflict situations can be prosecuted as war crimes is firmly established in international criminal law.

2.4. Challenges to the Effective Prosecution of Conflict-Related Acts of Sexual Violence

Despite the development of international humanitarian law proscribing sexual violence in war,[223] and various national codes historically prohibiting rape, impunity for these crimes prevailed until fairly recently. As the foregoing indicates, one remarkable failure in criminalising rape and other acts of sexual violence in the context of international criminal justice system was the omission of such crimes from jurisdiction of the international Military tribunals of Nuremberg and Tokyo.[224] The inclusion of rape and other acts of sexual violence in the Statutes of international (ised) criminal tribunals established since 1993 onwards reflects the fundamental shift in addressing these crimes in conflict situations not as mere 'by-product of war' but rather as systematised method of warfare.

The ICTY and ICTR have played a historic role in defining and conceptualising rape and other acts of sexual violence as crimes under international criminal law, and have indeed paved the way for an effective prosecution of such crimes worldwide. The relatively recent trend towards the international prosecution of conflict-related sexual violence continued with the establishment of the ICC. Undoubtedly, the progress made by the *ad hoc* tribunals as described above was very influential in the drafting of both ICC Statute and its Elements of Crimes. Considering the impact of the progress made by the *ad hoc* tribunals on the work of the ICC, relatively recent decisions involving conflict-related sexual violence are built upon the jurisprudential progress registered by the *ad hoc* tribunals. As such, a number of charges of rape and other forms of sexual violence as part of the factual bases of the charge of

[221] See Art. 2 and 8 (2) (a) of the ICTY and ICC Statutes respectively.
[222] Art. (2) (a) (ii)-1 of the ICC Elements of Crimes.
[223] Art. 4(2) (e) of the 1997 Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977.
[224] See *infra* § 2.3.1.

genocide,[225] and rape constituting torture as constitutive element of both crimes against humanity and war crimes.[226] The groundwork laid by the *ad hoc* tribunals and latterly endorsed by the ICC will make a lasting impact on how these crimes are addressed before international criminal courts and tribunals. Currently, there are many cases before the ICC where rape and other acts of sexual violence are being charged as crime against humanity and war crimes that will certainly take this development forward.

Yet despite this development, there are challenges and obstacles to the effective international prosecution of rape and other forms of sexual violence. The challenges facing the international criminal tribunals and courts in prosecuting these crimes can be presented in a twofold picture. In addition to the challenges and difficulties in investigating and collecting necessary evidence to secure convictions for the perpetrators, establishing the intent to destroy a particular group wholly or partially by rape as a constitutive element of genocide or the accused's knowledge of the context in which these offences have been committed as constitutive element of a crime against humanity is a major challenge for prosecution of these crimes.

Furthermore, as have been indicated, rape and other forms of sexual violence charges have thus far been brought before international tribunals and successfully prosecuted as constitutive element of a crime against humanity and, at times, as an act of genocide but also as a war crime. In the latter instance, conflict-related sexual offenses have been effectively prosecuted not only as constituting a grave breach of the Geneva Conventions but also as a violation of laws and customs of war.[227] It can therefore be seen from the foregoing that sexual offenses can be prosecuted under each of these crime categories whilst, in certain instances, the underlying acts qualify for either category or all categories simultaneously. The author suggests here that obtaining convictions for perpetrators of sexual violence should be fundamental under either crime category.

The crucial question arises as to whether, depending on the circumstances, it is better to prosecute rape and other forms of sexual violence as a crime against humanity, an act of genocide and war crimes category. One possible assertion that cannot straightforwardly be

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[225] See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, *Supra* note 158.

[226] See, among other cases before the ICC including charges of rape and other acts of sexual violence, *Prosecutor v. Jean-Pierre Bemba Gombo, Supra note* 203. *See* also *Prosecutor v. Germain Katanga*, Case N° ICC-01/04-01/07, Warrant of Arrest for Germain Katanga, 2 July, 2007; *Prosecutor v. Mathieu Ngudjolo*, Case N° ICC-01/04- 01/07, Warrant of Arrest for Mathieu Ngudjolo Chui, 6 July, 2007.

[227] See *Prosecutor v. Anto Furundžija, Supra* note 196, §§ 162 and 172. See also *Prosecutor v. Zejnil Delalić et al., Supra* note 182, §§ 936-43 & 955-65.

excluded is that charging sexual violence under the crime against humanity or genocide category is more demanding than as a war crime. A glance at recent convictions of crimes against humanity or genocide on the ground of rape and other forms of sexual violence paints a highly demanding picture for the prosecutor prospects of proving beyond reasonable doubt particular criteria attached to these crimes. Prosecutors face difficulties proving the requisite intent for genocide through rape and the systematic and widespread nature and the accused's awareness of the context for crimes against humanity. One might thus argue that the explicit criminalisation of different forms of sexual violence as war crimes in international or non-international armed conflicts in and of themselves by the Rome Statute is a step forward for the prosecution of these crimes.

These challenges of having to prove the multiple elements involved where sexual violence is charged as a crime within a crime coupled with difficulties in investigating and collecting evidence, due to cultural, religious or societal factors, stigma for victims that make them reluctant to report these crimes and talk about their experiences, may even make sexual violence in conflicts zones remain unpunished. Given the sensitive nature of these crimes, challenges persist in collecting and verifying information. This leads to lack of sufficient evidence to support charges of rape and other sexual offenses before international criminal tribunals. For instance, recently the ICC in *Prosecutor v. Germain Katanga*, who was accused with sexual slavery and rape both as a crime against humanity and a war crime,[228] acquitted the accused for rape and sexual slavery as a crime against humanity and the war crimes of using children under the age of fifteen years to participate actively in hostilities, sexual slavery. Although the Court established that sexual slavery as a war crime and a crime against humanity under the ICC Statute[229] were intentionally committed, it held that the evidence presented in support of the accused's guilt did not satisfy it beyond reasonable doubt of the accused's responsibility for these crimes.[230]

This decision reflects ongoing challenges in the international prosecution of conflict-related sexual violence as this was the case containing charges of sexual violence to reach trial before the ICC. The prosecution of conflict-related sexual violence remains one of the most challenging tasks for the international tribunals. The author argues that to successfully address these crimes and ultimately provide deterrence for the future, the international

[228] See the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case N° ICC-01/04-01/07, Situation in the Democratic Republic of the Congo, Decision on the Confirmation of Charges, 30 September 2008, § 26.
[229] See Art. 8(2) (e) (vi) and 7(1) (g) of the Rome Statute.
[230] See *Prosecutor vs. Germain Katanga*, Case N° ICC-01/04-01/07, Trial Chamber II, 7 March 2014, § 1023.

criminal tribunals and courts should consider specific means to address these persistent investigative and evidentiary challenges to ensure effective prosecution of these crimes. Addressing outstanding issues in collecting and verifying information regarding the use of sexual violence in conflict zones would enable the international tribunals and courts to deliver fair judgements while breaking inconsistent prosecutions and shortcomings in addressing these crimes in the context of international criminal justice system.

2. 5 Chapter Summary and Concluding Remarks

Despite accounts of wars indicating that widespread and systematic sexual violence have always been an integral aspect of armed conflicts throughout history, the impunity for these crimes prevailed. However, following massive atrocities in the 1990s, especially with the war in the former Yugoslavia and the genocide in Rwanda where rape was systematically used as part of ethnic cleansing and genocidal campaigns respectively, these crimes ultimately got legal traction before international criminal tribunals and significant developments have been registered in the prosecution of these crimes.

The discussion in this chapter showed that the ICTY and the ICTR have considerably contributed to the current shift in thinking of international law regarding conflict-related sexual violence. The legal framework of the ICC, recently established as the first permanent international criminal body, reflects significant historical advances made in the investigation and prosecution of rape and other acts of sexual violence before previous international criminal tribunals. The Rome Statute of the ICC, largely building on the *ad hoc* tribunals' jurisprudential developments regarding these crimes, expanded the legal framework on the prosecution of these crimes. The Rome Statute significantly contributed toward an international law norm on these crimes by defining rape and other acts of sexual violence not simply a means of committing other international crimes but also independently as war crimes or crimes against humanity. This is a significant step forward for the prosecution of these crimes that will set a new tone in fighting the prevalent use of sexual violence as an element of broader war strategies.

Although the prosecution of sexual violence before international tribunals does not reflect the prevalence of these crimes in modern warfare, the analysis presented here reveals that, after a long period of disregard, the legal basis upon which these crimes can be prosecuted is firmly established in international criminal law. However, notwithstanding the above noteworthy norms and jurisprudential developments, the prosecution of these crimes remains a

challenging task for the international tribunals. Analysis of the available precedents regarding rape and other forms of sexual violence reveals that charging rape and other forms of sexual violence as constitutive elements of a crime against humanity or an act of genocide is a challenging task, due to difficulties in proving beyond reasonable doubt particular multiple elements attached to these crimes. In any event, to ensure effective and successful investigation and prosecution of these crimes, and ultimately provide deterrence for the future, the ICC will have to overcome the enduring difficulties and obstacles in securing convictions for perpetrators.

The ongoing trend towards the international criminal prosecution of conflict-related sexual crimes can only progress. Ultimately, the ICC, having provided for a wide range of sexual related crimes under its jurisdiction, will not only be able to build upon the milestones realised by the previous international criminal tribunals in this regard, but will also certainly take this development forward. This task is particularly significant given the fact that rape and other forms of sexual violence continue to be inflicted on a massive scale during armed conflicts. These crimes serve clearly defined strategic military and political agenda with appalling legacies on victims, and their communities in general. The trials of these crimes before international criminal tribunals and courts coupled with a growing amount of reports and empirical studies around the prevalent use of sexual violence as a weapon of warfare have increased awareness even more of the consequences these crimes have on victims and their communities and the importance of justice for their deterrence. The struggle for justice should thus not just be a struggle for prosecutions but rather a comprehensive approach to ensure effective redress for victims, thereby providing a solid basis for the re-building of affected nations. This shall be the task of the next chapters of this study.

CHAPTER THREE

VICTIMS OF CRIME IN THE CRIMINAL JUSTICE SYSTEM: THE NEW PROMISE OF INTERNATIONAL CRIMINAL JUSTICE

> The overriding interest must be that of the victims, and of the international community as a whole ... The eyes of the victims of past crimes, and of the potential victims of future ones, are fixed firmly upon us. Former UN Secretary-General Kofi Annan.[231]

3.1 Introduction

Until recently, victims of crimes have for too long been described as forgotten parties in the criminal justice system. An explanation for this can arguably be connected to the fact that the primary mission of criminal justice has always been the punishment of the guilty or acquittal of the innocent in order to achieve justice while providing fair procedures for the suspects.[232] Criminal justice proceedings ought to be solely between the prosecutor on one hand and the offender on the other hand as well as the judge who determines the accused's guilt in order to determine his/her sentence, if found guilty. In this sense, there were virtually no concerns about victims as the introduction of a private party into the process was deemed incompatible with the need to preserve fair trial rights for the accused. In various parts of the World, the scepticism as to the inclusion of victims in the criminal justice process was largely based on concerns that this approach could introduce a subjective voice into the proceedings, especially as regards guilt and sentencing considerations.[233] The domestic conventional legal view has thus generally been suspicious of victims as party to the criminal justice process[234], and virtually absent in the international context.[235]

Overtime and with increasing attention paid to the plight of victims in the criminal justice system by legal scholars and various human rights advocacy groups, victims have been subject of extensive legal reforms at the domestic level. While examples of the growing development in this regard may be drawn from all continents, the extent to which victims have a role in domestic criminal system depends on each jurisdiction criminal justice model.

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[231] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC), Rome, Italy, 15 June - 17 July 1998, at p. 62.

[232] See J. Doak (2005), 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of Law and Society*, Vol. 32, N° 2, pp. 294-316, p. 295. See also S. Martsui (2011), 'Justice for the Accused or Justice for Victims? The Protection of Victims' Rights in Japan', *Asian-Pacific Law and Policy Journal*, N° 13, p. 95.

[233] D. N. Nsereko (2010), 'The Role of Victims in Criminal Proceedings: Lessons National Jurisdictions can Learn from the ICC', *Criminal Law Forum*, Vol. 21, pp. 399-415.

[234] R. Zauberman, 'Victims as Consumers of the Criminal Justice System?' In A. Crawford and J. Goodey (Eds.), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, 2000), p. 38.

[235] I. Bantekas, *International Criminal Law*, 4 Edition, (Hart Publishing, 2010), p. 550.

In countries with adversarial models, emphasis is put on the equality between prosecution and defence, and therefore limiting victim participation in the criminal proceedings. On the other side, countries with civil law jurisdictions, under their inquisitorial models, their jurisdictions have provided substantial participatory rights for victims. That said, the last years have witnessed instances of countries with adversarial models also gradually moving towards this victim participation paradigm practiced in many civil law jurisdictions. For instance, some common law jurisdictions have afforded crime victims with the right to participate in the criminal process by expressing their views and concerns at the sentencing level. In various common law countries, this is done in the form of victim impact statements or victim personal statements addressed to the judges for consideration in sentencing.

Despite limitations and persistent challenges, the success of the victim rights movement at domestic level encouraged victim rights advocates to launch campaigns at the international level. The growing discourse of victims' rights has thus prompted the adoption of a number of international instruments aimed at improving the plight of victims. These include the UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[236] and the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[237] While the UN Declaration of Basic Principles of Justice for Victims served as foundation for victims' rights in the international arena, the Rome Statute's provision on a general right of victims to present their 'views and concerns' at different stages of Court proceedings[238] represents a milestone in the development of victims' rights in international criminal justice. Given the weaknesses of the previous tribunals, the ICC's inclusion of victim participation in the criminal process and certain rights of reparations[239] is a historical advance in this regard.[240]

Many people would agree with the active involvement of victims in the criminal justice process since the victim is the person directly affected by the crime. Implicit in Kofi Annan's

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[236] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly Resolution 40/34 of 29 November 1985, UN Doc. GA Res.40/34 (1985).

[237] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Resolution adopted by the General Assembly the General Assembly 60/147 of 16 December 2005, (A/RES/60/147).

[238] See Art. 68(3) of the Rome Statute of the ICC (Rome Statute) signed on 17 July 1998, UN Doc. A/CONF.183/9. Entry into force on 1 July, 2002 in accordance with Article 126 of the Statute.

[239] See also Rules 85 and 89-93 of the ICC Rules of Procedure and Evidence.

[240] See P. Dixon and C. Tenove (2013), 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', *The International Journal of Transitional Justice*, Vol. 7, N° 3, p. 17.

argument of victims' 'overriding interest' in the international criminal justice system is the recognition of the need to attend to victims' needs over the course of the criminal justice process. As Peter Dixon and Chris Tenove as well as Patricia McGowan Wald, former Judge at the ICTY, have rightly argued victims of international crimes are cornerstones of international criminal justice since trials operate around them.[241] The relatively new idea of justice for victims in international criminal justice system suggests that the criminal justice process should attend to victims' needs, thereby contribute to post-conflict recovery process. Yet, the growing approach of victims-focused responses to international crimes faces copious challenges owing to the nature of international criminal justice system and crimes under its jurisdiction. Far less clear is to determine the extent of participation of victims and how this should be done in ways that respond to the needs of victims and not prejudicial to the rights of the accused. This is fundamentally important since legal instruments giving standing to victims in ICC proceedings provide little guidance to the essence of this approach.[242]

This chapter critically interrogates this. In articulating a theoretical framework, the discussion in this chapter considers two critical issues. First, recognising the nature of international criminal justice and complexity of crimes under its jurisdiction, what does the relatively new victim-centred approaches to international crimes entail? Secondly, what are the challenges of the emerging trend of victims-centred approach to international crimes and promise for victims of such crimes? The chapter highlights that while the growing trend of victim-focused responses to international crimes is a major step forward in the development of victims' rights and post-conflict reconstruction process, it could lead to myriad challenges and shortcomings, especially for mass atrocities that not only affect victims but also strike at the heart of affected communities such as the use of sexual violence as weapon in conflict situations. The discussion thus advances the argument that victims' needs reflect the nature of their victimisation and are shaped by particular features of the crime and dynamics of victimisation. It suggests that distinct aspects of mass sexual violence as a weapon of warfare would lead to further overriding challenges in providing justice and redress for victims of mass atrocities in the context of international criminal justice.

In so doing, the discussion in this chapter proceeds in different steps. It first analyses how victims are generally dealt with both within domestic and international criminal justice

[241] Ibid. p. 16. See also P. M. Wald (2002), 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', *Yale Human Rights & Development Law Journal*, Vol. 5, p. 238.
[242] S. Mouthaan (2013), 'Victim Participation at the ICC for Victims of Gender-Based Crimes: A Conflict of Interest', *Cardozo Journal of International Law and Comparative Law*, Vol. 21, p. 620.

jurisdictions, and how developments in domestic systems have informed the growing trend of victim-focused justice responses to international crimes. It sheds some light on the issue of who is a victim of crime, identifying different categories of victims before going on to examine victim's standing within various domestic legal systems. This analysis focuses on different legal systems that have afforded victims with some forms of participatory rights in criminal proceedings. The relevance of this step is based on the fact that various reasons for allowing crime victims to participate in domestic criminal process arguably stand as justifications for permitting victim participation in international tribunals. Secondly, the chapter critically considers the concept of victim and norms regarding victims' rights in the international criminal justice context. Thirdly, the discussion looks at the possible challenges of the growing trend of victims' participation in international criminal justice process. The analysis focuses on the complex and extensive range of modalities for victims' participation in the ICC justice proceedings as currently being developed by the Court.

3.2 Understanding the Concept of a 'Victim of Crime'

First, understanding who should be considered as victims of crimes is crucial for any initiative designed to address their needs such as economic compensation or medical, psychological and social treatment as well as rehabilitation, etc...[243] The issue of who should be afforded the victim's status has over the years fired debate to the extent that there is no generally agreed upon definition thereon. The extent of victimisation depends on a number of factors that include the type of crime, the nature or circumstance in which crimes have been committed.[244] In this sense, each crime is unique in ways that profoundly shape forms of victimisation and, as a result the needs of victims in the criminal justice process. An important question is what the concept of crime victim entails? In his study of complexities around the notion of crime victim, Jonathan Doak argues that 'the task of designating an individual as a victim is more complex than it might prima facie appear'.[245] Crimes generate various faces of victimhood, each one adversely affected by the crime in one way or another.

The general description of what the concept of 'crime victim' represents is narrowed to a physical person directly harmed by the commission of a criminal offense. However, such

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[243] M. Lindgren and V. Nikolić Ristanović, *Crime Victims: International and Serbian Perspective*, (Tryggare Sverige, 2011), p. 19.

[244] See H. Rombouts (2002), 'Importance and Difficulties of Victim-Based Research in Post-Conflict Societies', *European Journal of Crime, Criminal Law and Criminal Justice, Vol. 10/2–3, pp. 216–232,* p. 220. See also I. Waller, *Rebalancing Justice: Rights for Victims of Crime*, (Rowman & Littlefield Publishers, 2011), 29.

[245] J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, (Hart Publishing, 2008), p. 20.

description of victims of crimes, though often regarded as the most fundamental legal definition of crime victims,[246] seems not complete as it excludes other categories of victims. Given the different nature of crimes, they can lead to various sorts of victims. These include those who directly suffer the effects of crime (direct victims or primary victims), those who are linked in such a way that they too suffer because of that link (indirect victims), as well as some collective victims depending on the nature of the crime.

Various legal instruments in which victims of crimes are referred to do not set common features on identification of crime victims or who should be classified as crime victim. This leads to no uniform description of what the concept of 'victims' means. Mikaela Heikkilä argues that an explanation to this may be connected to the fact that 'there has traditionally been intense discussion on who qualifies as criminals or offenders with no equivalent debate over who qualifies as a victim'.[247] As earlier stated, many scholars have described victims of crimes as forgotten participant in the criminal justice process.[248] This is largely because crimes have traditionally been seen as against the State than violations of victims' rights. Such an approach led to criminal justice being understood as matter between the Prosecutors against suspects, leaving no role for a third party.[249]

There are a myriad of factors which can be connected to identification of crime victims or what the concept of crime victims represents. The description of crime victims is influenced by many factors including social norms, culture and customs developed in different parts of the World. This arguably explains the lack of commonly agreed description of what the concept of crime victims embraces. Richard Quinney claims that a 'basic weakness in victimology literature is that it is not entirely clear who is referred to by the term victim'.[250] Quinney, who examined the origins of victimology, argues that the notion of a victim is a 'social construction based on underlying values and beliefs'.[251] Recognising the complexity around the concept of crime victim, scholars such as Jo Goodey and Antony Pemberton and

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[246] See M. Lindgren and V. Nikolić-Ristanović (2011), 'Crime Victims: International and Serbian Perspective', Available at http://www.osce.org/serbia/85268?download=true (Accessed on 15 June, 2013), p. 19.
[247] M. Heikkilä, *International Criminal Tribunals and Victims of Crime*, (Institute for Human Rights, 2004), p.14.
[248] See P. Rock, 'On Becoming a Victim', in C. Hoyle and R. Young (Eds.), *New Visions of Crime Victims*, (Hart Publishing, 2002), p. 1; I. Bantekas, *Supra* note 235, p. 550; S. Walklate, *Imagining the Victim of Crime*, (Open University Press, 2007), p.8; A. Pemberton and I. Vanfraenchen, 'Victims' Victimasation Experiences and their Need for Justice' in I. Vanfraenchen *et al.*(Eds.), *Victims and Restorative Justice*, (Routledge, 2015).
[248] M. Heikkilä, *Supra* note 247, p. 14.
[249] See J. Doak, *Supra* note 245, p.1.
[250] R. Quinney, 'Who is the Victim?' In J. Hudson, & B. Galaway (Eds.), *Considering the Victim*, (1975), pp. 189-197.
[251] Ibid.

Inge Vanfraenchen argue that the term 'survivor' is often used in preference to 'victim' as an appropriate term and therefore not considering the latter as an appealing term.[252]

In fact, the social construction of victimisation makes it more difficult to fully grasp the notion of crime victims or who should be classified as crime victims. The social problem in question is thus key to understanding the patterns of victimisation and the extent of suffering. Whilst victimisation is as old as humanity itself, it was not until after World War II that the scientific study of crime victims emerged.[253] Victims being described by many scholars as the forgotten parties in criminal justice process, they have been mostly playing an incidental role in many criminal justice systems.[254] As mentioned above, criminal justice was considered as a matter between the states and the offender.

Increased attention on the plight of victims by many scholars has brought many developments since the 1980s. Probably concerned with the impact of crimes in societies, a number of scholars began to advocate for the change of the isolation of victims from criminal justice process. This increased attention on the plight of victims has brought significant and concrete gains to victims in various parts of the World. Over the last the last two decades, scholars are increasingly keen to advocate for the promotion of victims' rights in the criminal justice process. Arguing that 'prosecutions and punishments do not seem to control crimes', Kent Roach suggests that the future of criminal justice will depend on the development of victims' rights.[255] While acknowledging the importance of criminal sanctions in controlling crimes, Roach further put emphasis on due process and victims' rights, advocating for measures to address victims' needs over the course of the criminal justice process.[256] Implicit in Roach's analysis on victims' rights is the recognition of the need to give victims a proper standing in the criminal justice process. Some scholars such as Joanna Shapland argues however that such active involvement of victims should not be extended to issues pertaining to guilt of offenders and sentencing considerations.[257] Over the last decades, as a result of increases in violent crimes and the growing interest by many scholars in the plight of victims,

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[252] J. Goodey, *Victims and Victimology: Research, Policy and Practice*, (Criminology Series, 2005), p. 11; see also A. Pemberton and I. Vanfraenchen, *Supra* note 248, p. 16.

[253] See E. A. Fattah (2000), 'Victimology: Past, Present and Future', *in Criminologie*, Vol. 33, n° 1.

[254] M. Heikkilä, *Supra* note 247, p. 14.

[255] K. Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, (University of Toronto Press, 1999), p. 5. See also T. Kirchengast, 'The Victim in Criminal Law and Justice', (Palgrave Macmillan, 2006), pp. 272.

[256] Id. p. 33.

[257] J. Shapland, 'Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies', in A. Crawford and J. Goodey (Eds.), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, 2000), pp.147-164, p.148, see also D. N. Nsereko, *Supra* note 233.

legal reforms pertaining to interests of victims in the criminal justice process have been growing, although this progress has not followed the same route.

At the domestic level, victims have been subject of extensive legal reforms and examples of the growing development in this regard may be drawn from all continents. However, as will be discussed below, the extent to which victims have a role in criminal proceedings depend on each jurisdiction criminal justice model. Policies and legislation relating to victims of crime vary widely on the domestic level. For instance, the choice of predominantly adversarial or inquisitorial procedural models, for example, may determine the form of victim participation and, more generally, the role of victims in the criminal trial. Criminal justice systems across the globe have developed in diverse legal traditions, and as a consequence there are significant differences in their approach to victims of crime.

At the international level, as earlier stated, a growing body of international instruments have drawn general and comprehensive principles aimed at improving the treatment of victims of crimes in the criminal justice process. More crucially, regional judicial institutions such as the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR) have upheld a number of victim-friendly principles. Indeed, the adoption of various international legal instruments pertaining to victims was one of the most significant developments for victims of crimes. However, the issue of who should be attributed the status of victim is addressed differently in these instruments. Furthermore, while the active involvement of victim in the criminal justice process within many domestic jurisdictions is relatively not a novel concept[258], since the after World War II trials[259] the role of victims in international criminal justice process has been only limited to that of witnesses. The *ad hoc* Tribunals for the former Yugoslavia[260] and for Rwanda[261] established in the 1990s did not change this position. However, the ICC[262], the international(ised) Extraordinary Chambers in

[258] Ch. P. Trumbull IV (2008), 'The Victims of Victim Participation in International Criminal Proceedings', Vol. 29, *Michigan Journal of International Law*, pp. 777- 826.
[259] These include the Nuremberg trials, other trials governed by the Control Council Law N° 10 in December 1975, and the International Military Tribunal for the Far East established to prosecute Japanese defendants. See P. Heberer and Jurgen Matthaus (Eds.), *Atrocities on Trial: Historical Perspectives on Politics of Prosecuting War Crimes*, (The Board of Regents of the University of Nebraska, 2008).
[260] International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1 January 1991 was formally established by the UN Security Council on 25 May 1993 (S/RES/827).
[261] Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States was adopted on 8 November, 1994.
[262] Art. 68 (3) of the Rome Statute, *Supra* note 238.

the Courts of Cambodia[263] and the Special Tribunal for Lebanon[264] that, for the first time in history, provide for some form of participatory rights for victims that enable victims to participate, to different extents, in the criminal justice proceedings. It should be noted, however, that these institutions give victims standing in the criminal justice process without explaining what this approach entails in their procedural rules, leaving this task to judges.

3.3 The Normative Basis for Victims' rights and their Status in Criminal Justice Process

As stated above, over the past decades, concern for the victims of crimes has been growing and prompted significant policies reform in many countries across the globe. Arguably, the increased awareness at domestic level of the role of the victim in the criminal process, and that victim' rights should be at the heart of criminal justice policies informed the growing initiatives at the international level. Although rights of crime victims have been developed and expanded in various domestic criminal justice systems, their standing in the criminal justice system and especially the rights afforded to them vary from state to state.

3.3.1 The Rights and Standing of Victims of Crimes in Various Domestic Jurisdictions

Justice for victims of crime is by no means a novel concept in domestic criminal justice systems. Several states have made significant progress in raising awareness of victims' rights, setting out the legal framework and establishing institutions and formal and informal mechanisms for providing crime victims with protection, redress and justice.[265] As Rianne Letschert and Marc Groenhuijsen rightly observe, 'victim's rights legislation, be it through provisions in criminal codes or complete victims' rights charters, and policies have been developed, although mostly in the more affluent countries of the World'.[266] The victims' rights movement started with the aim of shedding more light on victims' experiences and advocating for an enhancement of their role in the criminal justice process.[267]

In Europe for instance, the Committee of Ministers of the Council of Europe adopted a 'Recommendation' on the Position of the Victim in the Framework of Criminal Law and

[263] The Extraordinary Chambers in the Courts of Cambodia were created to prosecute the senior leaders of the Khmer Rouge and other people most responsible for atrocities committed in Cambodia from 17 January 1979.
[264] Art. 17 of the Statute of the Special Tribunal for Lebanon established to try all those responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons.
[265] See J. Carlos Ochoa, 'The Rights of Victims in Criminal Justice Proceedings for Serous Human Rights Violations', (Koninklijke Brill NV, Leiden, 2013), p. 134.
[266] R. Letschert and M. Groenhuijsen (2011), 'Global Governance and Global Crime: Do Victims Fall in Between?' In R. Letschert and J. Van Dijk (Eds.), *The New Faces of Victimhood: Globalisation, Transitional Crimes and Victims' Rights*, (Studies in Global Justice, 2011), pp. 15-40.
[267] Ch. P. Trumbull IV (2008), *Supra* note 258, p. 812.

Procedure.[268] This was part of its campaign to improve the treatment of victims of crime and to reduce instances of secondary victimization. Even though the recommendation is not a binding document to European governments, it stresses the necessity to have more consideration to the physical, psychological, material and social harm suffered by the victims, and appropriate measures to address their needs in the criminal justice process.[269] To this end, the recommendation put forward 16 guidelines for the way the police, prosecution services and courts of the member states of the Council of Europe should deal with victims of crime.[270] Though there are a number of other factors of influence e.g. public discussion or pressure to improve the position of victims, or other factors such as international and national instruments, the impact of this recommendation in the improvement of the victims' standing within criminal justice systems in Europe cannot be understated.

Moreover, the 2001 European Union Council framework decision on the standing of victims in criminal proceedings requires all European Union states to afford victims basic level of services and support in an effort to reduce secondary victimisation.[271] The framework decision provides that victims' needs should be considered and addressed in a comprehensive, coordinated manner, avoiding partial or inconsistent solutions which may give rise to secondary victimisation.[272] Though its provisions cover certain measures aimed at assisting victims in criminal proceedings which might mitigate the effects of the crime,[273] the framework decision does not impose an obligation on Member States to ensure that victims be treated in a manner equivalent to that of a third party in criminal justice proceedings. This Decision sets out minimum standards as regards victims' rights not only during criminal proceedings but also before and after proceedings. Member States should adapt their laws in line with the Decision's requirements in an effort address the effects of crime on victims.

In similar vein, recently the European Parliament and the Council of Europe adopted a directive establishing minimum standards on the rights, support and protection of victims of

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[268] The Recommendation N° R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure Adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=605227&SecMode=1&DocId=686736&Usage=2 (Accessed on 27 December 2012).

[269] The Preamble of the Recommendation N° R (85) 11.

[270] The Recommendation N° R (85) 11 of the Committee of Ministers to Member States of the Council of Europe A-G.

[271] Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings, adopted pursuant to Title VI of the Treaty on European Union, 2001/220/JHA, (Official Journal of the European Communities).

[272] See the Preamble of the Council Framework Decision, N° 5.

[273] Ibid. N° 6.

crime, and replacing the 2001 Council framework decision.[274] This Directive was adopted in an attempt to put forward a legislative package to strengthen the framework on victims' rights within the European Union. This directive highlights the fact that:

> Crime is a wrong against society as well as a violation of the individual rights of victims, and therefore victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.[275]

From a practical point of view, one may argue that this Directive has added significant strength to the existing framework on victims due to its provisions on basic procedural rights in criminal proceedings. As earlier pointed out, even with the requirement by the European Union for Members states to establish and guarantee a comparable high level of protection for victims, the involvement of victims in criminal proceedings still vary from state to state. Some states provide for a high level of victim involvement while there is no evidence for victims to play an active role in other states' criminal justice systems. On the other hand, a number of other states provide for a possibility for victims to apply to the court to participate in the proceedings by making statements or otherwise appear in court only as a witness.

With respect to the role of victims in the criminal justice process, there are remarkable differences between the Common Law and Civil Law traditions.[276] In countries with common law legal systems, victim's roles have traditionally been far more limited than in countries with civil law jurisdiction.[277] In their study of the position of victims of crime in 22 European Criminal Justice Systems, Brienen and Hoegen note that on a procedural level, the opportunities for the victim to participate actively in the criminal proceedings have always been much more extensive in the civil law and Nordic jurisdictions than in common law ones.[278] Carlos Ochoa argues that while civil law countries allow participation of victims as a party, common law states limit their role to reporting crimes and serve as witnesses.[279] An explanation for this can be connected to the fact that unlike countries with civil law jurisdictions, common law jurisdictions have adversarial systems that 'pit prosecutor against

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[274] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Official Journal of the European Union, L 315/57. Entered into force on 15-11.2012.

[275] Directive 2012/29/EU of the European Parliament and of the Council, *Supra* note 80, Article 9.

[276] See J. Carlos Ochoa, *Supra* note 265, p. 134.

[277] Ch. P. Trumbull IV, *Supra* note 258.

[278] See M. E.I Brienen and E.H. Hoegen, Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) of the Council of Europe*, (Wolf Legal Productions, 2008), p. 3.

[279] See J. Carlos Ochoa, *Supra* note 265.

defendant', leaving no role for a third party.[280] This could be considered as the remarkable difference between the English Common Law criminal justice system and the civil law system since in the former victims of crimes have *no locus standi* in the criminal justice process.

In civil law countries, victims have a significant role in the criminal justice proceedings as a party in the process. Unlike in many common law countries where victims can only be called to testify as witness, a number of civil law countries afford victims with rights to join criminal proceedings as civil parties '*parties civiles*' or a subsidiary prosecutor.[281] This participation of the victim as an independent civil party, allows the victim to initiate a prosecution, to participate and be heard as a party in any prosecution, and to pursue a claim for civil damages in the criminal action[282]. According to Christodoulos Kaoutzanis 'participating in this way ensures that the victim is a full-fledged contributor to the proceedings, on equal footing with both the prosecution and the defence'.[283] As such, victims may even question witnesses or bring evidence before the court.

In France for instance, besides various procedural rights such as the right to be regularly informed of how the process proceeds, victims are even afforded with the right to summon the accused before the court when no public prosecution has been initiated. It should be noted, however, that this right is restricted to certain less serious crimes.[284] This procedure known as '*partie civile'* was primarily adopted through the provision of financial assistance from the state for lawyers who would represent indigent victims in seeking reparation or protection of their interests in the case.[285] This means that victims are not only represented by lawyers in criminal courts in France, but receive reparation in many cases before any sentence is decided or imposed.[286]

A glance at other civil law countries such Germany, Spain, Argentina, etc... indicates that, much like in France, their jurisdictions have provided substantial participatory rights for

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[280] See D. Neubaver and S. Meinhold, *Judicial Process: Law, Courts, and Politics in the United States*, (Wadsworth Cengange Learning, 2007), p. 28.

[281] See J. Doak (2005), *Supra* note 232, p. 296; R. Loman and C. Murtaugh (2010), 'The Rights of Victims in Criminal and Civil Proceedings', *International Network to Promote the Rule of Law Consolidated Response*.

[282] Ibid.

[283] C. Kaoutzanis (2011), 'Two Birds with One Stone: How the Use of the Class Action Device for victim Participation in the international Criminal Court can improve both the Fight against Impunity and Victim Participation', *U.C Davis Journal of International Law & Policy,* Vol. *17,*, p.114.

[284] M. Heikkilä, *Supra* note 247, p. 53.

[285] See I. Waller (2003), 'Crime Victims: Doing Justice to their Support and Protection', *European Institute for Crime Prevention and Control, Publications Series*, N° 39, p. 9.

[286] Ibid.

victims in the criminal justice process. In Germany for instance, victims of certain serious offenses or the relatives of a murder victim may even act as subsidiary prosecutors.[287] Interestingly, victims are even afforded with the right to appeal the prosecutor's decision not to prosecute.[288] Similarly, the rights recognised to the victims in Spain allow them not only to participate in the criminal proceedings but also to launch a prosecution as in France. In Argentina, victims can retain legal representation to act on their behalf as 'victim-prosecutor' and he/she can make recommendations to the investigative magistrate, review evidence against the accused submit declarations, present evidence, cross-examine witnesses, and make closing arguments.[289] It can be argued that these developments regarding victims' rights in the criminal proceedings under civil law countries are primarily connected to their inquisitorial system whereby judges are actively involved in finding the truth through extensive investigation and examination of all evidence. In such a process, the system also invites victims of crime to get actively involved both at the investigation level and during the court proceedings.

In the common law countries, victims do not enjoy a similar kind of involvement in criminal proceedings. Generally under the adversarial system, victims may be called to appear in court as 'witnesses'. While many other victim friendly policies have been adopted by many common law countries, the only policy regarded as close to civil victim participation model is the notion of victim impact statements. Perhaps concerned with the rise of crimes and especially the negative impact of crimes to victims as well as to their communities, some common law countries have adopted the victim impact statement model allowing victims to address a court regarding the impact that a crime have had on them while the court considers sentencing. One may argue that the lack of active involvement of victims in criminal proceedings is fundamentally explained by the adversarial justice model whereby the prosecutor, as a representative of the state and the entire society, is required to consider the collective benefit of initiating a criminal prosecution.[290]

In the United Kingdom (UK)[291], different programmes aimed at improving support, services and rights afforded to victims of crimes have been growing.[292] However, increased calls for victims' active role in the criminal justice process have also given voice to increased concern

[287] J. Doak, *Supra* note 232.
[288] C. Kaoutzanis, *Supra* note 283, p. 115.
[289] Ch. P. Trumbull IV, *Supra* note 258.
[290] C. Kaoutzanis, *Supra* note 283, p. 115.
[291] The UK consists of three separate jurisdictions of England and Wales, Scotland and Northern Ireland.
[292] See M. Hall, *Victims and Policy Making: A Comparative Perspective*, (Willan Publishing, 2010), p. 2.

by some scholars that promotion of victims' rights and measures intended to address their needs in the criminal justice process could come at the expense of defendants' rights.[293] As a result, legislation pertaining to victims' rights to participate in criminal proceedings has not developed at the same pace as for continental countries with inquisitorial justice model.

In England and Wales for instance, in contrast to continental systems where the victim may actively participate as civil party in the criminal proceedings, victims of crime have no right to participate in criminal procedures as in civil law countries.[294] Under the adversarial system, only the prosecution and the defendant are the proper actors and victims have no status other than providing evidence during criminal justice proceedings. Doak explains that under common law, crime victims are widely perceived as 'private parties' whose role in the processing of their cases should be confined to that of witnesses.[295] He further observes that one of the major obstacles to victim participation in the criminal process persists under a highly structured two-sided system that does not allow for significant participation by a third party.[296] As Carlos Ochoa argues, in most common law systems victims are seen as would be any other witness with a role limited to answering questions.[297]

It must be stressed, however, that measures aimed at reinforcing 'social' or 'service' rights of the victim, such as improved access to information and entitlements to compensation have been significantly developed.[298] In their comparative study on treatment of victims in various European jurisdictions, Brienen and Hoegen note that though victims have no *locus standi* in the English and Welsh criminal justice system, other aspects of English victim policy 'compare favourably with developments in the civil law jurisdictions'.[299] For instance, England was the first European jurisdiction to introduce state compensation to victims for injuries they have suffered. Explaining the development of victim-friendly legislation in the English and Welsh criminal justice system, Goodey points out that victims are 'constructed as consumers' of services, be these public services such as the police, or non-governmental services such as victim support'.[300] The consumer-based conception of the notion of victims of crimes has brought significant and concrete gains to victims, especially in the development

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[293] See J. Goodey, *Supra* note 252, 3.
[294] See M. E.I Brienen and E.H. Hoegen, *Supra* note 278, pp. 243-286.
[295] J. Doak, *Supra* note 245.
[296] Ibid.
[297] See J. Carlos Ochoa, *Supra* note 265, p. 135.
[298] See R. Zauberman, 'Victims as Consumers of the Criminal Justice System?' in A. Crawford and J. Goodey (Eds.), *Integrating a Victim Perspective within Criminal Justice*, (Ashgate, 2000).
[299] M. E.I Brienen and E.H. Hoegen, *Supra* note 278, 244. See also M. Hall, *Supra* note 292, p.175.
[300] See J. Goodey, *Supra* note 17, p. 131.

of victim-centred responses to crimes.[301] Though victims appear not to play an active and integral role during criminal proceedings as practiced in many civil law jurisdictions, remarkable victim-friendly reforms have been registered in recent years.

In Scotland, under a mixed legal system[302], the rights of victims within its justice system have been considerably extended in recent years, with the adoption of comprehensive programmes that effectively provide adequate treatment to victims. For instance, the Scottish Government published in May 2012 a consultation paper on a Victims and Witnesses Bill with the central aim of making justice work for victims and witnesses.[303] It draws attention on victims of crime by stressing the fact that how victims are treated must be a measure of the success of the Scottish criminal justice system as a whole. It further highlights that 'victims should not simply be seen as passive spectators of proceedings or recipients of services but people who have legitimate interests and needs'.

Besides, the Scottish legal system has adopted various victim friendly policies. In particular, the Scottish Strategy for Victims[304] that sets out an action plan for victims is based on three core principles viz., victims should be provided with generic and case specific information, that they should receive appropriate support, and that they should have their voice heard. Also, the National Standards for Victims of Crime[305] set out the level of service that victims and witnesses should expect in their dealings with the criminal justice and children's hearing systems. The analysis of the Scottish jurisdiction shows that protection for the victims can be provided in several ways. Recently the Victim and Witnesses (Scotland) Bill was passed by the Parliament on 12 December 2013 and received Royal Assent on 17th January 2014.[306] The Act primarily seeks to improve and increase rights and support for victims and witnesses. The Victims and Witnesses (Scotland) Act 2014 makes provision for certain rights and support for victims and witnesses, including provision for implementing Directive

[301] J. Doak, *Supra* note 245, p. 10.
[302] It should be noted that the Scottish legal system is a 'mixed legal system' made up of elements of both the Common law and the Civil law traditions. See M. E.I Brienen and E.H. Hoegen, *Supra* note 278, pp. 805-838.
[303] The Scottish Government, Making Justice Work for Victims and Witnesses: A consultative Paper on Victims and Witnesses Bill, 2012 available at http://www.scotland.gov.uk/Resource/0039/00393452.pdf (Accessed on 5 January 2013).
[304] The Scottish Executive Justice Department, Scottish Strategy for victims, 2001 available at http://www.scotland.gov.uk/Resource/Doc/158900/0043165.pdf (Accessed on 5 January 2013).
[305] The Scottish Executive, National Standards for Victims of Crime, 2005, available at http://www.scotland.gov.uk/Resource/Doc/36496/0024967.pdf (Accessed on 5 January 2013).
[306] The Victim and Witnesses (Scotland) Bill was introduced in the Scottish Parliament on 6 February 2013 by the Cabinet Secretary for Justice Kenny MacAskill MSP, SP Bill (2013) and was passed by the Parliament on 12th December 2013 and received Royal Assent on 17th January 2014. The Victims and Witnesses (Scotland) Act 2014 is available at http://www.legislation.gov.uk/asp/2014/1/pdfs/asp_20140001_en.pdf (Accessed on 10 June, 2015).

2012/29/EU of the European Parliament and the Council. It further specifies certain categories of victims deemed vulnerable who should be given special treatment when giving evidence.[307] Crucially, in its general principles on general rights for victims and witnesses in relation to a criminal investigation or criminal proceedings, the Victims and Witnesses (Scotland) Act 2014 states that 'in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings'.[308] This suggests that the Scottish criminal justice system appears to be gradually moving towards the civil law paradigm of active involvement of victims in the criminal justice process.

In similar vein, and moving beyond Europe, countries like Canada and the United States, though victims play no further role other than testifying as witnesses or make impact statements, have gradually adopted victims' friendly legislation. In the United States, individual states have been inclined to incorporate victims of crimes within state constitutions, or to provide separate victim's bills of rights.[309] Victim issues have become a major constitutional issue, a majority of states having adopted constitutional amendments granting rights to victims, primarily in the area of procedural rights.[310] At federal level, in order to enhance measures intended to address the needs of victims, the Unites States established an Office for Victims of Crime.[311] This Office together with the Office of Justice Programs and the Office on Violence against Women[312] coupled with various measures embodied in the Victims of Crime Act of 1984 provide support to victims of crime in all levels of the criminal justice in the United States.

In addition, several amendments to existing laws have also been adopted at the state level with the aim to provide greater rights and protection to victims of crime. Some of the remarkable protections shared at state and at the federal level include the right of victims to be informed about the legal process, the right of victims to be present during the criminal proceedings and the right of victims to be notified of all judicial proceedings.[313] However, as mentioned above, victim is not a party to the proceedings and has no formal legal

[307] See the Victims and Witnesses (Scotland) Act 2014, §§ 10- 22.
[308] Ibid. § 1 (3) (d).
[309] M. Hall, *Supra* note 292, p. 143.
[310] See L. Sebba (2011), 'Victimhood, Dignity, and the Criminal Justice System: A Comment', *Israel Law Review*, Vol. 44, 302.
[311] The Unites States Office for Victims of Crime was constituted under a 1988 amendment to the previously adopted Victims of Crime Act 1984.
[312] The Office of Justice Programs and the Office on Violence against Women was created in 1995.
[313] American Non-Governmental Organisation Coalition for the International Criminal Court, *The rights of Victims in the United States Criminal Proceedings and the ICC*, a paper published in august 2009, at 2. Available at http://www.amicc.org/docs/VictimsUS.pdf (Accessed on 14 January 2013).

representation but s/he may read or submit impact statements[314] to be considered at sentencing. Victims are therefore not dependent on the prosecution requesting them to appear in court as mere witnesses as they are afforded an automatic right to express their views and concerns at sentencing.

In Canada, victim-focused principles in the criminal justice process have been gradually put in place.[315] The Canadian Statement of Basic Principles of Justice for Victims of Crime embodies a comprehensive list of principles on how victims should be treated, particularly during the criminal justice process. In addition to a detailed list of support and protective measures for victims, these principles stress that 'the views, concerns and representations of victims are an important consideration in criminal justice processes and should be considered in accordance with prevailing law, policies and procedures'.[316] From 1988, the Canadian system moved gradually towards giving victims more active role in criminal proceedings. For instance, victims were guaranteed the right to present their victim impact statements, though only at the time of sentencing just like in many other common law countries. Victims can therefore participate in the sentencing process by providing information about the impact of the crime. Also, the Corrections and Conditional Release Act adopted in 1992[317] gives victims the right not only to attend federal parole hearings but also to submit written victim impact statements to the parole board.

A close look at many other countries' criminal justice systems reveals that they are becoming much more receptive to the needs of victims, and are progressively moving towards ensuring that victims' needs are effectively addressed throughout the criminal justice process. South Africa for instance, in an effort to ensure that victims have their rights respected during the course of criminal proceedings, has enacted the Service Charter for Victims of Crime in South Africa.[318] As it is clearly indicated in its preamble, the Charter's overall objective is to ensure that victims remain central to the criminal justice process and eliminate secondary victimisation in the process. This Charter affords victims with a number of rights namely the right to be treated with fairness and with respect for dignity and privacy, the right to offer

[314] In 1991 the United States Supreme Court overturned its previous decision of 1987 precluding victim impact statements in death penalty cases.
[315] See, for instance, Department of Justice, Canadian Statement of Basic Principles of Justice for Victims of Crime adopted in 1988, and renewed in 2003. Available at http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/03/princ.html (Accessed on 16 June, 2014).
[316] Ibid.
[317] The Corrections and Conditional Release Act adopted in 1992 came into force on 1 November 1992.
[318] The Service Charter for Victims of Crime in South Africa was approved by the Cabinet in 2004 and officially launched on 21 November 2007 by the Department of Justice and Constitutional Development.

information, the right to receive information, the right to protection, the right to assistance, the right to compensation and the right to restitution.[319] Moreover, the Child Justice Act adopted in 2008 as well as the (Criminal Law) Sexual Offences and Related Matters Act adopted a year before represent an important evolution in the approach to criminal justice that protects the rights of vulnerable victims in South Africa.

It is worth noting that in addition to victim-focused policies at the institutional levels and initiatives on the part of civil society, many other countries across the world have also adopted victim-friendly legislation in order to enhance victims' standing in their engagement within criminal justice process. For instance, in an attempt to address the needs and protect rights of crime victims in the context of the criminal justice process in India, the Indian legal regime has progressively paid attention to issues pertaining to victims' rights. Particularly, the Law Commission of India has recently emphasised the need for legislation on witness protection, victim compensation, and especially victim participate in police investigations.[320]

In sum, while there are considerable differences in the way victims are treated in criminal justice process under various domestic jurisdictions analysed, concern for addressing the needs of victims throughout the criminal justice process has been growing. As shown above, with respect to the role of victims in the criminal justice process, there are remarkable differences between the Common Law and Civil Law traditions. The choice of predominantly adversarial or inquisitorial procedural models, for example, may determine the form of victim participation and, more generally, the role of victims in the criminal trials. Despite difference in the treatment of victims, there is a growing recognition of the need to integrate victims into the criminal justice proceedings and have their needs addressed throughout the process. Mathew Hall argues that most of the victims' legislation across domestic jurisdictions constitute not only 'a list of services and/ or rights for victims to expect, but also an official acknowledgement of their traditional neglect and dismissal at the hands of criminal justice actors'.[321] As a result, there are increasing initiatives intended to bolster the victims' standing in the criminal justice system, and evidence of this can be drawn across all jurisdictions.

As the foregoing indicates the extent to which victims are accommodated within domestic criminal justice systems depend on each jurisdiction criminal justice model. This again

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[319] Ibid. (1-7).
[320] See the Law Commission of India, the 198th Report on Witness Identity Protection and Witness Protection Programme, August 2006 available at http://www.commonlii.org/in/other/lawreform/INLC/2006/7.html (Accessed on 5 September, 2013).
[321] M. Hall, *Supra* note 292, p. 144.

impacts their level of participation in criminal justice process. While many civil law countries permit crime victims to initiate a prosecution, to participate and even be heard as a third party in any prosecution, under the adversarial model victims can initiate a prosecution but victims play a solely witnesses role if the prosecutor decides to carry on with proceedings.[322] The adversarial criminal justice model is led by a prosecutor against a defendant, leaving no role for a third party unlike inquisitorial model which actively involve many people, including victims through a judge-driven fact finding process.

However, in an effort to address the needs and protect rights of crime victims in the context of criminal justice, various measures have been adopted in various common law jurisdictions. For instance, all common law jurisdictions analysed here have afforded victims with the opportunity to participate in the sentencing process in the form of Victim Impact Statement or Victim Personal Statement as it is known in England and Wales. Often seen as empowering to victims,[323] Victim Impact Statements are also particularly important in victims' healing and rehabilitation.[324] Victim impacts statements procedures enable victims to make their voices heard throughout the proceedings, describing the consequences of the criminal act on them and expressing their needs.[325] One of the key common developments in domestic jurisdictions is the recognition that the exclusion of victims from the criminal proceedings by paying no attention to their needs can itself constitute a secondary victimisation, and ultimately lead to increasing resentment and dissatisfaction with the criminal justice system altogether.

The development of victims' rights or the growing attention to the plight of victims was largely influenced by the increased awareness of the effects of crimes on victims and the prevailing neglect of victims in the criminal justice processes.[326] The above discussion reveals growing initiatives intended to address the needs of victims in the criminal justice process in domestic jurisdictions. Arguably, the success of the victim rights movement at

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[322] See A. Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings*, in A. Cassese et P. Gaeta and J.R.W.D. Jones (Eds.), *A commentary*, (Oxford University Pres, 2002), 1439-1495, See also A. Cassese, *International Criminal Law,* (Oxford University Press, 2003), p. 372, M. E. Wojcik (2010), 'False Hope: The Rights of Victims Before International Criminal Tribunals', *in l'Observateur des Nations Unies*, Vol. 28, N° 1, pp. 63-92, p. 5.

[323] See E. Erez (1999), 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice', *Criminal Law Review* 545, p. 551.

[324] See S. Horovitz, 'The Role of Victims' in L. Carter and F. Pocar (Eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, (Edward Elgar Publishing Limited, 2013), p. 169.

[325] M. Rauschenbach and D. Scalia (2008), 'Victims and International Criminal Justice: A Vexed Question?', *International review of the Red Cross*, Vol. 90, N° 870, p. 445. See also J. Goodey, *Supra* note 252, p. 131.

[326] R. Kelly (2009), 'Taking Victims Seriously?: The Role of Victims' Rights Movement in the Emergence of Restorative Justice', *Current Issues in Criminal Justice*, Vol. 21(2), pp.302-320.

various domestic systems encouraged victim rights groups to launch campaigns at the international level, even more significantly it informed the growing victims-focused approach to crimes within the context of international criminal justice system. The rest of this chapter's discussion therefore critically examines the rights and standing of victims within the framework of international criminal justice process before going on to analyse the promise and challenges of the relatively new idea of justice for victims in the international criminal justice system.

3.3.2 International Concept of Victims and the Legal Framework on their Rights

A. The Notion of Victims in the International Context

There is a growing recognition of victims in the context of criminal justice processes slightly departing from being regarded as mere witnesses. However, even though in the 1980's the victims' rights movement started to gain momentum, there are arguably still a number of limitations as regards victims and criminal justice, especially at the international arena. Apart from limited right for victims to have access to criminal justice proceedings, there are still unresolved issues over the concept of victims, especially with regards to identification of crime victims or who should be classified as crime victims. A close look at various instruments, international or regional, indicates that these instruments not only characterise differently the concept of victims but also embody disparate list of rights to which victims falling within particular category are entitled to. While it is true that up to this point there is no general international treaty on victims, these instruments provide specific victims' features that can help to conceive common concept of a 'victim' in international context.

As has been earlier noted, the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[327] was the first in this regard. In this Declaration, different measures aimed at improving access to justice, fair treatment, restitution, and assistance for victims of crime are outlined.[328] The Declaration further provides for different measures aimed at preventing victimisation in connexion with the abuse of power, and how these victims should be assisted.[329] It is worth stressing that despite being a 'soft law'[330], this Declaration has laid down ground-breaking principles as regards victims of crimes and those

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[327] See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *Supra* note 236.
[328] Ibid. Annex A (4-17).
[329] Ibid. Annex B (18-21).
[330] This expression is used in international law to identify instruments that contain provisions of a non-binding legal nature, with the character of recommendations. This Declaration is therefore non-binding, and it is only an attempt to guide governments.

of abuse of power. This Declaration is of course not binding as it was adopted in an effort for the UN to assist governments and the international community with guidelines on treatment of victims with a view to ensuring justice and assistance for victims of crime and victims of abuse of power.

In similar vein, in an effort to provide assistance for victims of disappearance, the UN has also addressed the issue of victimisation linked to the enforced disappearance by enacting a declaration on the protection of all persons from enforced disappearance.[331] This declaration served as the basis for the adoption of an International Convention aimed at protecting all persons from enforced disappearance.[332] This Convention outlines different elements for a person to be considered as victim of enforced disappearance viz., any form of deprivation of liberty conducted by a state agent, the refusal to acknowledge the deprivation of liberty, and ultimately putting someone outside of the protection of law.[333] This Convention's definition of victim is highly protective in way that it accords victim status not only to any person but also to any other individual who has suffered harm as direct result of an enforced disappearance.[334] This is the result of an arduous effort to put in place legal measures aimed at protecting people who have been subjected to enforced disappearance.

To complete this description on different categories of victims as laid down in different international instruments adopted at the UN level to date, it is worth noting that in 2005 the UN has also consolidated the already existing obligations aimed at assisting victims of gross violations of international human rights law and serious violations of international humanitarian law. This consolidation resulted into the resolution on the basic principles and guidelines of the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (hereafter the UN principles on the right to a remedy).[335] The primary aim of this resolution was to address to issue of reparation in the context of international human rights which comprises of individual and collective measures to address the wrongs suffered by victims of human rights abuse. As it is clearly indicated in its preamble, the UN principles on the right

[331] Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the UN General Assembly on 18 December 1992, (A/RES/47/133).
[332] The International Convention for the Protection of all Persons from Enforced Disappearance adopted by the UN General Assembly on 20 December, 2006 (A/RES/61/177).
[333] Ibid. Art. 2.
[334] Ibid. Art. 24 (1).
[335] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Resolution adopted by the General Assembly, 16 December 2005 (A/RES/60/147).

to a remedy adopted a victim-oriented perspective as far as this category of victims is concerned, and more crucially it has clarified the scope of the right to a remedy by outlining what can be done to realise it.[336] Further, as discussed in the next section, this resolution has also brought up the notion of collective victimisation among other various forms of victimisation. Arguably, this was influenced by the fact that gross and systematic violations of human rights involve large numbers of victims, and particularly that groups of persons are most often targeted collectively.

Apart from instruments adopted at the UN level, there are a number of regional instruments on victims' rights. In Europe for instance, apart from some resolution and recommendations aimed at improving the plight of victims, the Council of Europe has adopted the Convention on the Compensation of Victims of Violent Crimes.[337] Whilst this Convention only addresses the issue of victimisation linked to violent crimes, it is important to note that the Convention's overall objective was to harmonise the European's existing crime victims' compensation schemes by setting forth guidelines for the treatment of crime victims.[338] This was a major step forward on the part of the Council to ensure equal treatment of victims in all member states. The Convention contains uniform minimum rules for all member states to focus their attention on addressing the victims' needs. This informed a number of Declarations and Directives on victims' rights at the European Union and within the Inter-American human rights system intended to properly support and protects victims of crimes.

Despite the growing and far-reaching framework on victims' rights, it is fair to say that up to this point there is no evidence of a uniform description of what the concept of victims means or who should be classified as victims. A look at the instruments analysed above and some others such the Guidelines on the Protection of Victims of Terrorist Acts in Europe[339] reveals that 'victims' are slightly defined in different ways. Although there is no general international treaty on victims[340], a general description of victims or who should be given the status of victims can be built up based on common elements present in these instruments. Victims can

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[336] See the UN Principles on the Right to a Remedy, Preamble, § 11.

[337] The European Convention on the Compensation of Victims of Violent Crimes adopted by the Council of Europe on 24 November 1983. Available at http://conventions.coe.int/Treaty/EN/Reports/HTML/116.htm (Accessed on 20 August, 2014).

[338] N. C. Katsoris (1990), 'The European Convention on the Compensation of Victims of Violent Crimes: A decade of Frustration', *Fordham International Law Journal*, Vol. 14, p. 1.

[339] Guidelines on the Protection of Victims of Terrorist Acts adopted by the Council of Europe on 2 March, 2005 at the 917th meeting of the Ministers' Deputies, available at https://wcd.coe.int/ViewDoc.jsp?id=829533 (Accessed on 10 June, 2013).

[340] See C. F. de Casadevante Romani (2010), 'International Law on Victims', in A. Von Boddandy & R. Wolfrum (Eds.), *Max Planck Yearbook of United Nations Law*, Vol. 14, pp. 219-272, p. 226.

thus be generally conceptualised as people who have personally or collectively suffered, a direct or indirect harm, through acts or omissions that are in violation of specific laws.

As earlier stated, the general description of what the concept of 'crime victim' represents is basically narrowed to a physical person directly harmed by the commission of a criminal offense. However, gross and large-scale violations of human rights across the globe led to the notion of collective victims as opposed to individual victims which, in in turn, led to the notion of collective reparations for victims. This development is linked to the fact that human rights violations affect many more people than solely the direct victims. As will be discussed in the next Chapter in particular reference to the use of mass rapes in war, not only individuals and their families but also their communities are adversely affected. Some judicial bodies have thus made reference to this newly coined concept of collective reparations. For instance, while this has been well developed in the Inter-American human rights system, the recent decision on the principles and procedures to be applied to reparations for victims in the *Lubanga case* at the ICC in which judges followed this trend of providing collective reparations to victims confirms the notion of collective victimisation in international criminal law.[341] This development can be explained by the fact that while primarily crimes are directed against individuals, the nature of contemporary gross human rights indicates that mostly groups of people are targeted collectively.

A close look at the instruments adopted since the mid-1980s, a period during which a number of legal instruments on victims have been adopted, shows that many international, regional and even national legal instruments on victims mostly refer to victims as people who directly suffer the effects of crime (direct victims or primary victims), those who are linked in such a way that they too suffer because of that link (indirect victims), as well as some collective victims depending on the nature of the crime. It is probably worth recalling that rights of victims of crimes were not internationally codified until 1985 when the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted the UN General Assembly. This Declaration, generally hailed by some scholars as the foundation for Victims' rights[342], offers a comprehensive definition of victims, which among other things, includes indirect victims, i.e. the immediate family or dependants of the direct victim and

[341] See *Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06, Public Decision Establishing the Principles and Procedures to be Applied to Reparations: Situation in the Democratic Republic of the Congo, 7 August 2012, § 187.
[342] See, among other commentators, D. Contreras-Garduña (2012), 'Defining Beneficiaries of Collective Reparations: The Experience of the Inter-American Court of Human Rights', *Amsterdam Law Forum*, Vol. 4, N° 3, p. 53.

persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation. Part of the Declaration reads as follows:

> [Victims] means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power…A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[343]

This broad definition of victims encompassing direct, indirect and collective victimisation was substantially upheld by the 2005 UN principles on the right to a remedy[344], and in various subsequent instruments and court decisions.[345] However, this definition was not included in the ICC Statute, but rather in the Rules of Procedure and Evidence (ICC RPE)[346] with a vague and an inexplicit formulation that does not clearly mention indirect victims. According to the ICC Rules of Procedure and Evidence 'victims' are described as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC'.[347] Unlike the 1985 Declaration of Basic Principles of Justice for Victims and the 2005 UN principles on the right to a remedy, the ICC RPE expands the definition of victims beyond natural persons. Rule 85 reads that 'victims may include organisations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.[348]

Although the ICC RPE does not explicitly mention 'indirect victims' in the definition of victims, the court has offered a broad interpreted of the Rule to include 'indirect victims'. For instance, the ICC Trial Chamber held that 'while Rule 85(b) requires that legal persons must

[343] See Declaration of Basic Principles of Justice for Victims, *Supra* note 236, Annex A (1, 2).
[344] See the UN principles on the right to a remedy, *Supra* note 237, Art. 8.
[345] See, for instance, *the Juvenile Reeducation Institute vs Paraguay*, the Inter-American Court of Human Rights, Judgement of 2 September 2004, at § 106.
[346] See Rule 85 of the ICC Rules of Procedure and Evidence available at http://untreaty.un.org/cod/icc/asp/1stsession/report/english/part_ii_a_e.pdf (Accessed 8 November 2012). The ICC Rules of Procedure and Evidence entered into force when adopted by consensus by all the members of the Assembly of States Parties in September 2002 (see Articles 51 and 112, Rome Statute).
[347] Rule 85 (a) of the ICC RPE
[348] Rule 85(b) of the ICC RPE.

have suffered 'direct harm' to be defined as a victim, *the absence of such a requirement in Rule 85(a) for natural persons means*[349], applying a purposive interpretation, that 'people can be the direct or indirect victims of a crime within the jurisdiction of the Court'.[350] This conclusion was subsequently held by the ICC Appeals Chamber which confirmed that the harm suffered by victims applying for participation in the criminal justice proceedings must be personal, but not necessarily direct.[351]

It is important to note that the ICC definition of victims, to some extent, departs from the one given by the ICTY and ICTR, which is restricted to a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed. While the definition of victims in ICTY[352] and ICTR[353] respective Rules of Procedures and Evidence seem to be restrictively linked to the person directly affected by the crime, the ICC definition is centred on harm suffered whether directly or indirectly. For instance, Rule 2 of the ICTY and that of the ICTR RPE both provide for the same definition of victims as 'a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed'. Providing a harm-centred definition of victims can arguably be considered as a positive development by the ICC since only a direct or indirect link to the harm, whether material or psychological, is required for someone to be classified as victim.

B. The International Legal Framework on Victims' Rights

The growing instruments on victims' rights together have set standards for the treatment of victims in national and international criminal proceedings. As concerns the types of rights of victims of crime, although the 1985 Declaration is principally concerned with the position of victims before national criminal justice systems, a number of its general principles are similarly applicable to the international system. The principles set out in this Declaration affirm the necessity of adopting national and international measures in order to secure the universal and effective recognition of victims. Furthermore, the victim-oriented perspective of the 2006 UN principles on the right to a remedy and reparation for victims indicates that addressing the needs of victims and protection of their rights should always be at the

[349] Emphasis added.
[350] *The Prosecutor vs. Thomas Lubanga Dyilo*, The Decision on Victims' Participation (ICC-01/04-01/ 06-1119), Trial Chamber, Decision of 18 January 2008, §§ 41, 44
[351] *The Prosecutor vs. Thomas Lubanga Dyilo*, Appeals Chamber, (ICC-01/04-01/06-1433), Decision of 11 July 2008, §§ 32, 39.
[352] The ICTY Rules of Procedure and Evidence was adopted pursuant to Article 15 of the Statute of the Tribunal, and come into force on 14 March 1994.
[353] The ICTR Rules of Procedure and Evidence was adopted pursuant to Article 14 of the Statute of the Tribunal, and come into force on 29 June 1995.

forefront of laws and practices in all States.[354] While these instruments stress the need for the appropriate recognition and respect for who is categorised as a victim, they also underline that this must not be done in ways that undermine the rights of the accused. These principles have also informed the adoption of similar instruments aimed at setting forth victims' rights both in the domestic and international contexts. Despite their nonbinding status, principles embodied in these instruments provide guidance on how best to protect and promote victims' rights and address their needs. Such principles have been upheld not only in various legislative frameworks on victims, but also in some court decisions.

Although some binding international instruments such as the International Covenant on Civil and Political Rights (ICCPR),[355] the Convention on the Elimination of Discrimination against Women(CEDAW),[356] and the Convention on the Rights of the Child touch on victims' rights(CRC),[357] the 1985 Declaration of Basic Principles of Justice for Victims is regarded as the most comprehensive instrument on victims' rights.[358] This declaration provides for a number of victims' rights ranging from victim restitution and compensation, appropriate assistance toward recovery as well as putting the onus on states to create standards on victims' access to justice and fair treatment in every stage of criminal proceedings. This was a major step forward towards recognition of victims' needs in the criminal justice process. As earlier discussed, with the increased focus at the UN level, national jurisdictions have increasingly put focus on measures intended to ensure that all victims have access to the justice system as well as support throughout the criminal justice process.

Both UN instruments focus on the necessity of treating victims with humanity and respect for their dignity and human rights. As well detailed in the Handbook on Justice for Victims: on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power as well as in the abovementioned 1985 UN victim Declaration, victims should be treated with compassion and respect for their dignity which respect

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[354] See Implementing Victims' Rights: the Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation by REDRESS [Seeking reparation for torture survivors], March 2006, p. 7 available at http://www.redress.org/downloads/publications/Reparation%20Principles.pdf (Accessed on 5 May 2013).

[355] International Covenant on Civil and Political Rights, Adopted on December 16, 1966 entered into force on March 23, 1976. (UN Doc. A/6316(1966)999 UNTS 171).

[356] Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1).

[357] Convention on the Rights of the Child touch on victims' rights, Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with Article 49.

[358] See Human Right Watch, 'Mixed Results: US Policy and International Standards on the Rights and Interests of Victims of Crime, Report Published in September, 2008, p. 3.

includes keeping them informed at all stages of the proceedings of the developments in the case that concerns them.[359] These instruments further provide for a number of material, medical, psychological and social assistance and support measures which must be guaranteed to victims before, during and after the criminal justice proceedings. These instruments further stress the necessity not only to provide victims with monetary compensation, but more significantly to enhance their cooperation with the criminal proceedings to enable them to rebuild their lives by addressing their needs.

While the focus of the 1985 victim Declaration was on victims of domestic crimes, the 2006 Guidelines address the rights of victims of international crimes; more particularly, gross violations of international human rights law and serious violations of international humanitarian law. The 2006 Principles and Guidelines can therefore be considered as an international bill of victims' rights. As indicated in the preamble,[360] these Principles and Guidelines stress the right to remedy for victims of violations of international human rights law enshrined in various international and regional instruments such as the Universal Declaration of Human Rights,[361] the ICCPR,[362] the International Convention on the Elimination of All Forms of Racial Discrimination,[363] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[364] the Convention on the Rights of the Child,[365] the Hague Convention IV,[366] article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, the Rome Statute of the ICC,[367] the African Charter on Human and Peoples' Rights,[368] the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[369]

The fact that the Principles and Guidelines are restricted to the gross violations of international human rights law and serious violations of international humanitarian law does

[359] See the UN Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, at 35. See also The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *Supra* note 236, Principle 4 and 6(a).
[360] See the Preamble 1& 2 of the UN principles on the right to a remedy, *Supra* note 237.
[361] Art. 8.
[362] Art. 2.
[363] Art. 6.
[364] Art. 14.
[365] Art. 39.
[366] Art. 3.
[367] Art. 68 and 75.
[368] Art. 7.
[369] Art. 25.

not mean that the right to remedy enshrined in this instrument is limited to the most serious or systematic violations cases. Principle 26 reads that:

> Nothing in these Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Principles and Guidelines are without prejudice to special rules of international law.

This provision suggests that there is a right to an effective remedy and adequate forms of reparation for any breach of human rights or international humanitarian law. So far, the ICC has made a number of decisions on critical issues regarding victims' rights either at the Pre-Trial, Trial or Appeals levels, including issues regarding the status of victims. While critics of the ICC definition of victims claim that the inclusion of indirect victims significantly broadens the possible number of victims,[370] some scholars argue that it is the correct approach in light of the huge collateral effects of international crimes on indirect victims.[371] The ICC's position on the concept of victims has crucial bearing on victims' participation in criminal justice proceedings. Initial ICC proceedings were characterised by numerous complexities on this issue given the fact that Court's founding instrument provide little guidance in this regard. Even so, it is fair to argue that the ICC victims' rights regime, to some extent reflecting principles adopted in the previous instruments, is a clear evidence of the growing recognition of the victim' rights in criminal justice proceedings. More significantly, the ICC is the first international criminal tribunal to allow victims to participate actively and independently in criminal justice proceedings.

3.3.3 The Standing and Role of Victims in the International Criminal Justice Process

A. Victims of Crimes as Forgotten Parties: From Nuremberg to The Hague

After World War II, the international criminal justice has become an increasingly important factor in world affairs. The World witnessed a fundamental change in understanding that for certain rules to be effective they must be enforced by prosecutions. That means, for humanity to be deterred from most serious crimes, there were a compelling need of pursuing criminal

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[370] See J. Doak, *Supra* note 245, p. 24.

[371] See, for instance, K. Ambos (2012), 'The first Judgement of the International Criminal Court (Prosecutor vs. Lubanga): A Comprehensive Analysis of the Legal Issues', *International criminal Law review*, Vol. 12, p.126.

justice at the supranational level. As a result, the International Military Tribunal in Nuremberg (NIMT)[372], and the International Military Tribunal for the Far East in Tokyo (IMTFE)[373] were established. The Nuremberg and Tokyo trials were also followed by several trials governed by the Control Council Law N° 10 adopted in December 1975.[374] In fact, there were three main sources of law at the aftermath of the World War II namely the NIMT and the IMTFE tasked with prosecuting Japanese defendants as well as several subsequent trials governed by the Control Council Law N°10.

The establishment of the post-World War II criminal justice institutions was a crucial step towards the establishment of a permanent supranational criminal tribunal. However, as some commentators observe, the Cold War prevented the establishment of such an institution, despite serious crimes committed around the globe.[375] International criminal justice got momentum shortly after end of the Cold War with the establishment of the *ad hoc* international tribunals for the former Yugoslavia[376] and Rwanda.[377] The international community has also cooperated with national governments to create international [ised][378] tribunals to prosecute international crimes such as Extraordinary Chambers in the Courts of Cambodia[379], the Special Court for Sierra Leone,[380] and the Special Tribunal for Lebanon.[381] While all these courts deal with specific matters, in a specific country within a specific period of time, the establishment of the ICC can be considered as an ultimate step in an effort to establish a permanent international criminal body. Despite differences in their nature and operational procedures, these courts have all been assigned with the leading objective to ensure that the perpetrators of international crimes do not escape justice.

However, some reservations about the role of the tribunals form the perspective of victims must be expressed. Since the Nuremberg, victims have, in fact, been sidelined and their role

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[372] Nuremberg International Military Tribunal was established on 8 August, 1945.
[373] The International Military Tribunal for the Far East was established on 19 January, 1946.
[374] Control Council Law N° 10 for the punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity established on 20 December, 1945.
[375] P. Kirsch (2005), 'Applying the Principles of Nuremberg in the International Criminal Court', *Washington University Global Studies Law Review*, Vol. 6, pp. 501-509, p. 503.
[376] See *Supra* note 260.
[377] See *Supra* note 261.
[378] These courts are also called 'hybrid' or 'mixed' courts because they were established based on agreement between the national governments and the United Nations. They therefore lack the UN Chapter VII powers of the ICTY and the ICTR.
[379] The Extraordinary Chambers in the Courts of Cambodia, *Supra* note 263.
[380] The Special Court for Sierra Leone was established to deal with serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. See Security Council Resolution 1315 (2000) of August 2000, S/RES/1315 (2000).
[381] The Special Tribunal for Lebanon, *Supra* note 264.

has been largely limited to that of witnesses. When the ICTY and ICTR were established, no provision was made for victims outside of their support and protection as witnesses. A close review of the Statutes of the ICTY and ICTR shows that victims were not given any active role in the proceedings of the courts. The Statutes and the Rules of Procedures and Evidence of the two *ad hoc* tribunals do mention victims only as regards various protective measures to which they are entitled to during the course of proceedings. The statutes bear no provisions on victims' participation in proceedings. Rights of victims to play an active role in the process and, if appropriate, to obtain compensation was put aside and the Prosecution was tasked to represent the victims at all stages of the justice process.

In contrast to an active role that victims could be expected to play in the quest of reconciliation and the truth, victims were only allowed to be part of the proceedings simply as witnesses. Victims were afforded with protective measures in their quality as witnesses, if the prosecutor so requests. According to Articles 20 (1) and 19 (1) of the ICTY and ICTR respectively 'the Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses'. The Statutes add that the Tribunal shall provide for protection of victims and witnesses with measures that shall include, but not limited to, the conducting of in camera proceedings and the protection of the victim's identity.[382] Over the course of proceedings, both tribunals cannot allow victims to present their views and concerns to be considered at any stages of the process. Though victims may speak in the context of examination and cross-examination, they are not allowed to call witnesses or even make closing arguments.

While it is clear that the founding documents of both *ad hoc* tribunals did not provide for any room for victims to address their views to the courts, the courts themselves seem to have recognised this problem and tried to move forward by allowing *amicus curiae*.[383] Some representatives of victims' associations or interested human rights Non-Governmental Organisations (NGOs) were therefore allowed to present the *amicus curiae* briefs before the courts to be considered during the proceedings. The briefs cover all issues under scrutiny

[382] Article 22 of the ICTY Statute and Article 19 of the ICTR.
[383] Amicus Curiae is a procedure commonly known in some domestic legal systems such the Supreme Court of the United States where third parties who are not actual litigants in a case may occasionally appear as "friends of the court". See M. M. C. Roberts (2009), *The Amicus Curiae at Oral Argument: New Evidence of How and Why Third Parties Shape Supreme Court Decisions*, Unpublished PhD thesis completed at the University of Minnesota. Available at http://conservancy.umn.edu/bitstream/57307/1/Roberts_umn_0130E_10622.pdf (Accessed on 10 May 2013).

before the courts regarding a specific case.[384] It is argued that through *amicus curiae* procedures, victims' associations or varied interested groups could bring to the attention of *ad hoc* tribunals relevant matter not already brought to their attention by the parties (Prosecutor and Defense counsel). It could also be argued that apart from being important to the Court, *amicus curiae* procedures may be considered as an indirect way through which victims could express their perspectives to be addressed by the court. It should be noted that various NGOs such as Human Rights Watch, leading victims' rights organizations in the Former Yugoslavia and Rwanda as well as many other interested groups of experts acting as amicus curiae have specifically appeared before the ICTY and ICTR in that regard.

Furthermore, as the courts have not granted victims standing as party into the criminal justice process, victims cannot seek reparation for the harm suffered. This fundamental right for victims was put aside despite commendable precedents in this regard in the practice of the European Courts of Human rights (ECHR)[385] and the Inter-American Courts of Human rights (IACHR).[386] According to Articles 24(3) and 23(3) of the Statutes of the ICTY and ICTR respectively "…..the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner." It is important to note that the fact that the court may decide on restitution does not give victims any role in the proceedings because this has to be requested by the prosecutor. As clearly stated in the Rules of Procedure and Evidence of both *ad hoc* tribunals for the former Yugoslavia and Rwanda, the request for restitution cannot be initiated by the victim but must be presented by the Prosecutor or the Chamber.[387]

The exclusion of victims in the practice of the *ad hoc* international tribunals was subject to much criticism, which in turn culminated in the issue being addressed during the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[388] Probably influenced by development of victims' rights in various domestic legal systems, the growing awareness of the impact of international crimes on victims, victims were granted a number of important roles to play before the Court, including the role of independent participant. Arguably, this development was intended to ensure that international criminal justice is not purely symbolic for victims and shortcomings of the *ad hoc* tribunals

[384] See T. Trevers *et al.*, *Civil Society, International Courts and Compliance Bodies*, (T.M.C Asser Press, 2005), pp. 116-120.

[385] See the ECHR, *Papamichalopoulos et al. v. Greece*, Judgment of 31 October 1995, Series A. No. 330-B.

[386] The IACHR in the case *Velásquez Rodriguez vs. Honduras*, Judgement of 29 July 1988, Serie C N° 4 (1988).

[387] Rule 105 of the ICTY and ICTR Rules of Procedures and Evidence.

[388] This is a five-week diplomatic conference held in Rome, Italy, from 15 June to 17 July 1998.

for the former Yugoslavia and Rwanda provided the drafters of the Rome Statute reasons to include in the Statute provisions aimed to address the needs of victims before the ICC.

B. The Recognition of Victims as Actors in Criminal Proceedings beyond Mere Witnesses

1. Overview of the ICC Victim Participation Framework

In the recent ICC's report on its strategy in relation to victims, the ICC stresses its 'recognition of victims as actors within the international justice scheme greater than any previous international criminal tribunal'.[389] As stated earlier, unlike the ICTY and the ICTR, the ICC founding documents have afforded victims with the right to participate in criminal proceedings beyond their traditional role of witnesses. According to the Rome Statute:

> …where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[390]

The broad wording of this provision on victim's participation before the ICC leaves the Court's judges with a complex task of designing how victims will be accommodated into the criminal proceedings in a manner which must be consistent with the rights of the accused.[391] The drafters of the Rules of Procedure and Evidence elaborated on this framework by providing the definition of victims and outlining the parameters by which victims would participate in the court's proceedings.[392] According to the Rome Statute and Rules of Procedure and Evidence, participation of victims also consists of the right to make representations. This suggests that victims' 'views and concerns' may be presented by the legal representatives of the victims where the Court considers it appropriate.

In so doing, and in line with the Rules of Procedures and Evidence, victims can choose a common legal representative or representatives where there are a number of victims. Legal representatives of a victim or common legal representatives of victims are entitled to attend and participate in the hearings unless, in the circumstances of the case, the court is of the

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[389] See the International Criminal Court's Report on the Strategy in Relation to Victims, ICCASP/8/45, 18-26 November 2009, § 1, Available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf (Accessed on 20 July, 2014).

[390] Article 68(3) of the Rome Statute, *Supra* note 7.

[391] See M. Pena and G. Carayon (2013), 'Is the ICC Making the Most of Victim Participation?, International Journal of Transitional Justice', Vol. 7, N° 3, p. 3; E. Baumgartner (2008), 'Aspects of Victim Participation in the Proceedings of the International Criminal Court, International Review of the Red Cross', Vol. 90, N° 870, p. 411.

[392] See the ICC Rules of Procedure and Evidence, Art. 89-93.

view that the representative's intervention should be confined to written observations or submissions.[393] While the ICC Statute and the Rules of Procedure and Evidence do not clearly address the closing stage of the proceedings(especially as regards the content of the closing statements), a close look at the ICC practice on victims' participation shows that victims may make opening and closing statements at the proceedings.[394] The ICC Rules of Procedure and Evidence vaguely provides that after the presiding judge declares when the submission of evidence is closed, s/he shall invite the Prosecutor and the defence to make their closing statements.[395] While this Rule does not mention victims or their legal representatives, this issue has been extensively dealt with by the Court. In the *Lubanga* trial, the Court held that victims may be allowed with the Chambers to present closing statements despite the fact that participating victims are not specifically mentioned under Rule 141.[396] This is in accordance with the Rule of Procedures and Evidence that allows the Chamber to specify the proceedings and manner in which participation can be deemed appropriate, which may include making opening and closing statements.[397]

Further, while it is not clear whether victims participating in the ICC proceedings are afforded with the right to introduce evidence during trials, the Trial Chamber in the situation on the Democratic Republic of the Congo has also dealt with this matter, and accorded victims the right to introduce evidence during court proceedings. In the *Lubanga* case, the appeals Chamber of the ICC upheld the decision of Trial Chamber to grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence.[398] This suggests that victims participating in the court proceedings may be permitted to introduce and examine evidence if the court considers that it can assist in the determination of the truth.

The decision to permit victims to tender and examine evidence constitutes a positive development for the Court since it is always necessary for any court of justice to avoid error in the interests of justice. As such, victims can help the court to reach a more accurate judgement by introducing evidence pertaining to the guilt or innocence of the accused or even

[393] See Rule 91 (2) of the Rules of Procedure and Evidence.
[394] See *The Prosecutor v. Thomas Lubanga Dyilo*, the Decision on Victims' Participation, *Supra* note 350, § 117.
[395] See Rule 141(1 & 2).
[396] See *The Prosecutor v. Thomas Lubanga Dyilo*, *Supra* note 350, § 117.
[397] See Rule 89(1) of the Rule of Procedure and Evidence.
[398] See *Prosecutor vs. Thomas Lubanga Dyilo*, Case N^{o} ICC-01/04-01/06-1432 OA9 OA10, (Appeals Chamber), Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, §§ 104-105.

by challenging the admissibility or the relevance of evidence presented by the Prosecutor or the defence Counsel. This right is also important for victims since their interests may be affected by evidence presented at the Court's proceedings.

It should be noted, however, that although the Rome Statute and Rule of Procedures and Evidence allow victims to participate in the criminal justice proceedings, participation of victims in the ICC justice process is not a straightforward right for all victims. The ICC legal framework has left to the judges the onus not only to determine the appropriateness of victims' participation in a specific case but also which victims will be allowed to participate in relation to a specific case. According to the Rule of Procedure and Evidence '…the Chamber shall specify the proceedings and manner in which participation of victims is considered appropriate'.[399] Further, the Court can reject the application if it considers that the person does not fulfil the requirement to be granted the status of a victim or that her/his personal interests are not affected.[400] This means that victims who wish to participate in proceedings must prove that they are victims of crimes under the jurisdictions of the Court and that their personal interests are affected by the proceedings.

While the inclusion of victims in the ICC justice process can be hailed as a significant step in the development of victims' rights at the international level, the Court's legal framework does not provide guidance on how this should be done in a manner that is beneficial for victims and consistent with the accused' rights. While it is true that the progressive development of victims' rights in international criminal justice draws on development in domestic jurisdictions as earlier discussed, some commentators rightly argue that it is not clear whether victims will participate in criminal proceedings in 'a judge-driven fact finding (inquisitorial-type) process' or in a 'party-driven fact finding (accusatorial-type) process'.[401] Much about this newly introduced approach to international crimes was left for judicial interpretation, and its procedural aspects are still under development before the ICC.

2. A Critical Analysis of the Implementation of a Victim-Centred Approach for the ICC

Although it is true that the newly coined victim-centred approach in addressing international crimes represents a positive advance in the recognition of victims' rights, it also presents the Court with significant challenges. It is important to stress that the Rome Statute together with

[399] See Rule 89(1) of the Rules of Procedure and Evidence.
[400] Ibid. Rule 89(2).
[401] See S. Zappalà (2010), 'The Rights of Victims v. the Rights of the Accused', *Journal of International Criminal Justice*, Vol. 8, p. 139.

the Rules of Procedure and Evidence do not give victims an absolute right to participate in criminal justice proceedings as this right is subject to the guarantees of protection of the accused' rights. The ICC judges are thus tasked with developing modalities for victims' participation in a manner that is responsive to the victims' needs, and consistent with the accused' rights to a fair and impartial trial. Recognising that the right to a fair trial and impartial is, and should always be the benchmark of any criminal trial, whether in domestic or international,[402] participation of victims cannot be inconsistent with these principles. Additionally, addressing the needs of victims of crimes, which is arguably the prime reason for allowing victims to participate in criminal proceedings, demands an attention to the nature of victimisation and circumstances in which it occurred. In order to critically examine challenges in implementing this approach currently under development before the ICC, and its promise for victims, it is thus relevant to first look at the challenge of addressing victims' needs within the context of international criminal justice.

2.1 Addressing the Needs of Victims within the Context of International Criminal Justice

Different crimes produce different effects not only on direct victims but also on those who were not themselves the victims of a specific crime but who are adversely affected by that crime. The effects of some crimes are both psychologically and physically devastating, and as a result have long-term effects on victims. The needs of victims are therefore reflected in the nature of victimisation. The wording of the UN Declaration of Basic Principles of Justice for Victims seems to avoid any generalisation about the needs of crime victims. Part of the Declaration reads that:

> Victims should be treated with compassion and respect for their dignity…… [but] in providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3.[403]

The wording of the UN Declaration of Basic Principles of Justice for Victims implies the disparate nature of victims' needs and mechanisms to address these needs. Some scholars' observation on needs of victims and responses to victimisation lends itself to this phenomenon. For instance, in his analysis of the current understanding on the concept of a crime victim and criminal justice responses to victimisation, Jo Goodey explains that

[402] P. Robinson (2009), 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY', *Berkeley Journal of International Law*, Vol. 3, p. 10.
[403] The UN Declaration of Basic Principles of Justice for Victims, *Supra* note 236, Annex A (4-16-17).

'victims' needs can be both immediate and long term, and can range from practical assistance such as reparation, through to counselling over a period of time'.[404] Goodey further argues that these needs can be, but not limited to practical and material, emotional and social and can include among others reassurance and counselling, medical assistance, financial and practical assistance, information about case progress and appropriate guidance as well as opportunity to have their voices heard.[405] In fact, the extent of and nature of victims' needs depend on a variety of factors and are not only rooted in the way crimes affect victims in different ways but also in different reactions of victims to crimes. Scholars have, for instance, established a close link between the unequal impacts of crimes and the victims' social status.[406]

The multifaceted nature of victimisation and their unequal impact on victims and people around them can even be more significant in the context of conflict-related mass crimes. The enormity of certain crimes committed in conflict situations, and different circumstances in which they are committed distinguish them from ordinary crimes and have implications for the needs of victims in criminal justice. In this sense, Heidy Rombouts rightly argues that 'even within the terms of the same conflict, victims are not a homogeneous pool'.[407] Although it is relatively established that victims' needs can be summarised to informational, emotional and practical needs,[408] the extent of these needs can be quite diverse depending on the consequences of victimisation.

As will be further discussed in chapter four regarding distinct aspects of mass sexual violence as a weapon of war and their implications for the victims' needs in post-conflict justice processes, victims' needs can be particularly acute and more extensive for some victims depending on the extent of and nature of victimisation. As Luke Moffett explains, in the context of international crimes, victims' practical needs may even be more pressing than issues of justice, and in most cases, their informational needs extend to understanding the general context in which such mass crimes were committed.[409] Further, acknowledgement of their lived experiences or the prospects of reconciliation may be crucial elements of their concerns in the wake of conflicts. In some cases, the context in which conflict-related mass

[404] J. Goodey, *Supra* note 252, p. 122.
[405] Ibid.
[406] See, for instance, B. Williams, *Working with Victims of Crimes: Policies, Politics and Practice*, (Kingsley Publishers Ltd, 1999).
[407] See H. Rombouts, *Supra* note 244*,* p. 220.
[408] See, for instance, M. Maguire (1991), 'The Needs and Rights of Victims of Crimes', *Crime and Justice*, Vol. 14, pp.454-551; S. Walklate, *Victimology: The Victim and the Criminal Justice Process*, (Unwin Hyman, 1989), pp.133-136.
[409] See L. Moffett, *Justice for Victims before International Criminal Court*, (Routledge, 2014), p. 28.

atrocities are perpetrated not only makes these crimes destroy the lives of victims but also leave the social fabric of affected communities torn apart. In such instances, the extent and nature of needs of victims are amplified by the effects of these crimes on wider communities and, particularly the social-construction of their victimisation in their communities.

In fact, the multidimensional nature of international crimes that underpins the distinct and often complex effects of these crimes and the needs of victims arguably explains the scepticism prevailing on the promise of the newly coined victim-centred paradigm in international criminal justice system. For example, examining the emerging mandate for international courts on delivering victims-centred remedies, Thomas Antkowiak constructs his scepticism on effectiveness of this approach on wide range of varied effects of international crimes and so the needs of victims.[410] Arguing for measures that respond to victims' needs in the pursuit of victims' redress, Antkowiak emphasises that the process by which such redress is delivered greatly influences its effectiveness.[411] Generalisation about what victims need, and set out measures aimed to respond to their needs in general terms are therefore of limited values.[412] Several empirical accounts emphasise how the extent of victimisation depends on a variety of factors, for instance the type of crimes and circumstances in which they are committed, and it is often amplified by the post-victimisation circumstances. As the author argues throughout this chapter, this is the perception of international criminal victimisation that should underpin progressive responses to the needs of victims and ultimately makes the growing victim-centred model feasible and effective.

2. 2 Challenging Procedural Aspects of the ICC's Victim-Oriented Scheme and its Promise for Victims

As victim-oriented approach has become increasingly entrenched in the normative framework of international criminal law, it has generated a heated debate in academic and professional cycles. The bulk of the debate focuses on it feasibility within the context of the 'relatively fragile international criminal justice system',[413] and its promise for victims of such crimes. Whilst there has been much dissention among scholars, this evidently divisive debate on the

[410] See T. M. Antkowiak (2011), 'An Emerging Mandate for International Courts: Victim-Centred Remedies and Restorative Justice', *Stanford Journal of International Law*, Vol. 47.
[411] Ibid. p. 283
[412] See Centre for the Study of Democracy, 'Final Study of Member States' Legislation, National Policies, Practices and Approaches Concerning the Victims of Crime in the European Union, July 2009, p. 21. Available http://ec.europa.eu/justice/news/consulting_public/0053/bg_study_on_victims_07_2009_final_en.pdf (Accessed on 5 May 2013).
[413] See A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction*, (Oxford University Press, 2008), p. 75.

essence of this approach, contributed to exposing a multitude of complex legal and practical issues and their implications on its feasibility and potential for victims within the context of international criminal justice. More significantly, loosely defined in the ICC's Statute and its subsidiary instruments, the Court has delivered several cases on the procedural aspects of victim participation in criminal proceedings.[414] Although modalities for the implementation of the victim-centred approach are still under development, a close analysis of the victim participation scheme gives an idea of its complexities and challenges facing the Court.

Although the relatively recent idea of justice for victims within the context of international criminal justice can only be praised as a critical step forward for the entrenchment of victims' rights, there are procedural constraints as well as various limitations and challenges to achieving intended objectives. Due to unique nature of international criminal justice and crimes under its jurisdiction, giving victims a standing in criminal proceedings beyond their traditional role of witnesses raises fundamental issues about the interplay between victims' and defendants' rights in the process, but also the prospects of victim-focused justice responses to international crimes. On one hand, victims' rights to present their opinions and concerns and have them considered when their personal interests are affected, if not properly defined, can generate unnecessary conflict with the rights of the accused. On the other hand, this approach presents the various elements that need to be considered to achieve its presumed benefits for victims of mass crimes.

As earlier discussed, whilst the Rome Statute and Rule of Procedure and Evidence provide little details on participation of victims in the ICC proceedings, the Court has thus far made important jurisprudential development on modalities for this approach. Victims can participate in a trial by making opening and closing statements, consulting the record of proceedings, receiving notification of all public and confidential filings that affect their

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[414] See among other decisions on victims' participation, *Prosecutor v. Thomas Lubanga Dyilo*, *Supra* note 350 & 398; The *Prosecutor v. Joseph Kony et a*l., Case N° ICC-02/04, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Situation in Uganda, Pre-Trial Chamber II, 10 August 2007. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case N° ICC-01/09-01/11, Decision on the Request to Present Views and Concerns of Victims on their Legal Representation at the Trial Phase, Trial Chamber V, 13 December 2012; *The Prosecutor v. Charles Blé Goudé*, Case ICC-02/11-02/11, Situation in the Republic of Côte d'Ivoire, Decision on Victims' Participation in the Pre-Trial Proceedings and Related Issues, Pre-Trial Chamber I, 11 June 2014; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case N° ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, Trial Chamber I, 22 January 2010; *Prosecutor v Francis Kirimi Muthaura et al*., Case N° ICC-01/09-02/11, Trial Chamber V, Decision on Victims' Representation and Participation, 3 October 2012; *Prosecutor v Laurent Gbagbo*, Case N° ICC-02/11-01/11-138, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June, 2012; *Prosecutor v. Laurent Gbagbo*, Case N° ICC-02/11-/01/11-138, Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in Related Proceedings, 6 February 2013.

personal interests, victims can tender and examine evidence if the Chamber considers it useful in exposing the truth. Moreover, the legal representative of victims can attend and participate in proceedings, as well as question witnesses, experts and the accused.

Along with the growing recognition of the importance of such participation both for victims and for the Court, participatory rights for victims in the prosecution and punishment of mass crimes at international level raise lots of mixed perceptions, and are still subject to intense scepticism. One argument in favour of this approach has been that victims derive therapeutic benefit and vindication from participating in criminal proceedings, which in turn boosts satisfaction with the criminal system and may achieve restorative ends.[415] As Douglas Beloof argues, the exclusion of victims from the criminal process led to victims experiencing increasing resentment to criminal justice system.[416] These concerns are rooted in the fact that it is not morally justified to exclude people affected by crimes from the criminal justice process. Some scholars rightly argue for instance that participation is essential 'for the healing process of victims' and can help empower and bring recognition to victims.[417] Whilst the ICC's early jurisprudence recognises that victims have an interest in participating in criminal process and can indeed contribute to the Court's truth-finding mandate,[418] there are concerns that this approach could adversely affect the court proceedings.[419]

Despite challenges in the implementation of victim participation as evidenced by early cases before the Court, the move towards addressing the needs of victims over the course of criminal proceedings can have positive impact for victims, and in particular, support the post-conflict rebuilding process which is a supremely challenging task in the aftermath of mass violence. In this regard, by affording victims with active role in proceedings, victims gain sense of justice by lessening their isolation and ultimately re-join their communities. The legitimacy of international criminal justice can be enhanced by making trial process more inclusive to victims.[420] Arguably, lack of specific post-conflicts justice mechanisms aimed at including victims in the process, prevent them from having their voices heard and have their

[415] See J.A Wemmers (2010), 'Victims' Rights and International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate', *Leiden Journal of International Law*, Vol. 23, pp.629-643.
[416] D. E. Beloof, *Victims' Rights: A documentary and Reference Guide*, (ABC-CLIO, 2012), p. 5.
[417] See, for instance, M. Goetz, 'The International Criminal Court and Its Relevance to Affected Communities,' in N. Waddell and P. Clark (Eds.) *Courting Conflict? Justice, Peace and the ICC in Africa*, (Crisis States Research Centre, 2008); M. Heikkila, *Supra* note 247, p. 141.
[418] See *Prosecutor v. Katanga and Ngudjolo*, Case N° ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of a Case, 13 May 2008, §§ 31–36.
[419] C. Van den Wyngaert (2011), 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', *Case Western Reserve Journal of International Law*, Vol. 44, p. 477.
[420] M. Rauschenbach and D. Scalia, *Supra* note 325, p. 444.

needs addressed during the criminal proceedings. In other words, as Mark Findlay rightly observes, this approach enables victims to better achieve 'their legitimate aspirations in the trial context'.[421] According to Weinstein and Stover, individuals need some form of acknowledgement of wrongs done to them 'just as societies need it to establish boundaries by which individuals can be held responsible for their behavior toward their fellow citizens'.[422] Thus, acknowledgement of victimisation and accountability become central to the process of ensuring justice for victims and thus support the re-building process of a functioning society.

Furthermore, as earlier stated, participation of victims in the justice process may also arguably prove significant for the court to attain its overall objective i.e. in its facts-finding mission which leads to the truth. In this sense, victims can help the court to reach a more accurate judgement by introducing evidence pertaining to the guilt or innocence of the accused or even by challenging the admissibility or the relevance of evidence presented by the prosecutor or the defence Council. Thus, criminal justice initiatives for victims, such as participating in the justice process, do not simply serve some victims' needs to have a voice, but also serve the court through public exposure of the truth. Two points can be made at this stage. First, providing victims with a voice at criminal trial is viewed as an effective way of ensuring acknowledgement of victim's suffering and hence facilitates their healing process. The integration of victims' perspectives into the process can therefore boost victim satisfaction with the criminal justice, and can serve in building lasting reconciliation in the affected areas. Second, the introduction of victims in criminal justice process serves in the public exposure of the truth. This is particularly fundamental in the context of large-scale violence for these proceedings to not only curtail impunity but also deter future crimes.

While it is safe to argue that giving victims the right to 'express their views and concerns' in international criminal proceedings can be beneficial for victims and the Court, this approach has its limitations that are aired in debates with respect to its function and generally its compatibility with the fairness requirement of criminal justice. Some arguments against victims' role in international criminal justice on a par with both the prosecutor and the defence are driven by concerns that this approach may jeopardise the right to a fair trial.[423] For Richard Goldstone, former Chief Prosecutor of the ICTY and Adam Smith, the challenge

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[421] M. Findlay (2009), 'Activating a Victim Constituency in International Criminal Justice', *International Journal of Transitional Justice*, Vol. 3, p. 185.

[422] H. M. Weinstein and E. Stover (2004) 'Introduction: Conflict, Justice, and Reclamation' in E. Stover and H. Weinstein (Eds.), *My Neighbor, my Enemy: Justice and Community in the Aftermath of Mass Atrocity,* (Cambridge University Press, 2004) 11.

[423] See J. Doak, *Supra* note 245, p. 248.

is not whether victims can be allowed to participate in international criminal proceedings but how this should be done 'with the recognition that victims' justice may be as problematic as victors' justice'.[424] Implicit in Goldstone and Smith's argument is that this approach could add an overly subjective voice into the proceedings, thus impeding a fair and impartial trial. Other scholars further warn that the international criminal justice system is a 'fragile system that should stay clear of experiments'.[425] In this sense, explicit reference is made to the sheer number of victims of international crimes and how their participation in criminal proceedings could enhance the complexity of the proceedings, causes delays and deficiencies that affect the proper running of justice.

Although some of the presumed benefits of victim participation for victims have already been referred to in the above discussion, whether introducing victims in the criminal process does or can have generally restorative effects to the victims and serves the general interests of justice is however still far from being fully accepted. Several empirical accounts indicate that the trend towards including victims in international criminal justice proceedings does not seem to bring justice to victims, and could instead lead to 'false hope of justice'.[426] Luke Moffett, for instance, explains through an in-depth analysis of the ICC's impact on victims in northern Uganda that justice for victims at the ICC has been 'largely symbolic'.[427] This suggests that the approach taken by the ICC towards victim participation has only an expressive function in the context of mass crimes, and therefore have no practical implications in advancing justice to victims. This argument accords nicely with Mohdev Mohan's observation regarding victim participation at the Khmer Rouge Tribunal that tough this approach is meant to be beneficial to victims, 'the promise of empowerment through participation in the context of the extra ordinary Chambers of the Courts of Cambodia is a rhetorical device'.[428] The nature of international criminal justice and that of crimes under its jurisdiction stand in the way of providing real justice for victims through this approach.

Indeed, the relatively recently coined victim-focused justice in the international criminal justice system is a major step forward in the development of victims' rights and post-conflict reconstruction process. However, the implications of this cannot be worked through without a

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[424] R.J. Goldstone and A.M. Smith, *International judicial Institutions: The Architecture of International at home and abroad*, (Routledge, 2009), p. 142.
[425] See, for instances, A. Zahar and G. Sluiter, *Supra* note 413, 75; K. Ambos, *Supra* note 371, p. 120.
[426] See M. E. Wojcik, *Supra* note 322, p. 30.
[427] See L. Moffett, *Supra* note 409.
[428] See M. Mohan (2009), 'The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal', *International Criminal Law Review*, Vol. 9, p. 756.

consideration, on the one hand, the interplay between accused's and victims' rights over the course of the criminal proceedings, and, on the other hand, the extent to which, through a victim-centred approach, particular consideration is focused on effectively addressing the needs of victims of mass atrocities as well reducing the possible secondary victimisation throughout the process. Accordingly, if not properly defined, victims' rights to present their opinions and concerns and have them considered when their personal interests are affected hold the potential to weaken the protection of the rights of accused within the context of international criminal proceedings. As Salvatore Zappalà and Lucia Catania[429] rightly note, while introducing victims within international criminal justice, specific measures to avoid the risk of unfair and delayed trials should be a prerequisite. In fact, in order to ensure that victims' participation in criminal proceedings does not turn out to be detrimental to the rights of the accused, it is crucial that its modes and boundaries in international criminal proceedings are appropriately defined in light of the defendants' rights. This implies that an effective justice, either for offenders or for victims, can only come as a result of a fair trial.

The author's perspective does not purport to suggest here that victims' 'views and concerns' should be overlooked, but it clearly recommends that an enhanced international legal recognition and protection of the rights of victims should not come at the expense of the accused. Secondly, our viewpoint does not suggest that victims of mass crimes are better off staying out of the international criminal justice process; it however warns that the victims' rights for participation in international criminal proceedings may not serve to effectively address the needs of victims within the context of mass atrocity. As discussed above, recent research indicate that, given the limitations of international criminal justice system and characteristics of mass crimes, granting victims the standing of a legal party has nothing more than a 'symbolic value' for the victims.[430] While the 'symbolic' dimension of victims' participation in international criminal justice process do have significant benefits for victims as discussed above,[431] it however risks failing to draw upon the context and dynamics surrounding mass crime victimisation in conflict situations. This is particularly significant in

[429] See S. Zappalà, *Supra* note 401, p. 145; L. Catania (2012), 'Victims at the International Criminal Court: Some lessons Learned From the Lubanga Case', *Journal of International Criminal Justice*, Vol. 10, pp. 905-922, p. 1.

[430] See, for instance, L. Moffet, *Supra* note 409. See also C. Van den Wyngaert, *Supra* note 419, p. 489; E. Hoven and S. Scheibel (2015), ''Justice for Victims' in Trials of Mass Crimes: Symbolism or Substance?' *International Review of Victimology*, Vol. 21, p.181; E. Hoven, M. Feiler and S. Scheibel, *Victims in Trials of Mass Crimes: A Multi-Perspective Study of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia*, (Institute of International Peace and Security, 2013), p. 85.

[431] See, for example, Jo-Anne Wemmers (2009), 'Where do we belong? Giving Victims a Place in the Criminal Justice Process', *Criminal Law Forum*, Vol. 20, p. 402; M. Pena and G. Carayon, *Supra* note 391, p. 534.

the context of mass atrocity that not only affects victims but also destroy the social fabric that would support the reconstruction process such as the strategic use of mass sexual violence as a weapon of warfare.

3.4 Chapter Summary and Concluding Remarks

The discussion in this chapter advances two key claims. First, that whilst the relatively recent victim-centred approach in international criminal justice is a critical step forward in the entrenchment of victims' rights, the implications of this cannot be worked through without a consideration of procedural constraints that can weaken the protection of fundamental principles of criminal justice. Second, given the limits of international criminal justice system and characteristics of particular crimes under its jurisdiction, victims' rights for participation in international criminal proceedings may not always serve to effectively address the needs of victims. The chapter argues that despite the presumed benefits of victim participation in criminal proceedings for victims, this approach however risks failing to draw upon the context and dynamics surrounding certain mass crime victimisation in conflict situations.

The analysis presented here demonstrates that, although there are considerable differences in the way victims are treated in criminal justice process under various domestic jurisdictions analysed, concern for addressing the needs of victims throughout the criminal justice process has been growing. In this sense, many countries across the world have adopted victim-friendly legislation in order to enhance victims' standing in their engagement within criminal justice process. The success of the victim rights movement at domestic systems encouraged victim rights groups to launch campaigns at the international level, even more significantly it informed the growing victims-focused approach to crimes within the context of international criminal justice system. This is evidenced in the relatively recent recognition of victims as actors in criminal proceedings before the ICC beyond their traditional role of witnesses.

As the discussion in this chapter indicates, the recognition of victims' rights to express their 'views and concerns' and have them considered when their personal interests are affected represent a monumental development in the entrenchment of victims' rights within the context of international criminal law. The recognition of victims as actors rather than mere witnesses in international criminal proceedings flows from increasing awareness of the impact of mass crimes on victims and the need to ensure redress for the harm suffered. The chapter argues that victims' participatory rights in the ICC proceedings can bring recognition to them which is a critical aspect for their empowerment and in their healing process. This

approach can also contribute to the Court's truth-finding mandate since the involvement of victims can help to understand and address the impact of crimes. Perhaps more significantly, the move towards addressing the needs of victims throughout the criminal justice proceedings can have a positive impact for victims, and in particular, support the post-conflict rebuilding process which is a supremely challenging task in the aftermath of mass violence.

Despite the presumed benefits of victims' participation for victims and in the search of the truth, there are however concerns not only over its compatibility with the fairness requirement of criminal justice but also over its effectiveness in addressing the needs of victims. As this chapter indicates, given the limitations of international criminal justice system and characteristics of mass crimes, several empirical accounts emphasise how granting victims the standing of a legal party has nothing more than a symbolic value for the victims. The author argues that while an expressive function of victim participation in international criminal process is indeed critical in the post-conflict rebuilding process, it however risks failing to draw upon the conditions and dynamics of the victimisation process for mass atrocity that not only affects victims but also destroy the social fabric that would support the reconstruction process such as the strategic use of mass sexual violence a weapon of warfare. Particularly, the conditions of victims of mass sexual violence as a weapon of war and the legacy of these crimes in affected areas could expose the international criminal bodies to unique challenges in effectively addressing the needs of victims.

The thesis now aims to move forward on the basis of this analysis of the growing victim-centred justice responses to international crimes, by critically assessing the needs of victims of systematic sexual violence as a weapon of war in light of the complexity of their experiences and legacy of these crimes in affected nations. This will provide a framework to the subsequent analysis of the challenges and limits in addressing the victims' needs in the context of international criminal justice system and potential solutions to these limits to ensure effective redress in situations where sexual violence serve as a weapon of war. This is now taken in turn in what follows, first with a critical evaluation of the distinct nature and extent of needs of victims of widespread and systematic sexual violence as a weapon of war in post-conflict transitional justice processes.

CHAPTER FOUR

DISTINCT ASPECTS OF SYSTEMATIC SEXUAL VIOLENCE AS A WEAPON OF WAR AND THEIR IMPLICATIONS FOR THE VICTIMS' NEEDS IN TRANSITIONAL JUSTICE

4.1 Introduction

> Using rape as a weapon of war destroys the fabric of society from within and does so more effectively than do guns or bombs. Melanne Verveer, The US State Department's Ambassador-at-Large for Global Women's Issues.[432]

Rape and other acts of sexual violence are today widely acknowledged as weapons of war. In its Resolution 1820 (2008) on acts of sexual violence against civilians in armed conflicts, the United Nations(UN) Security Council noted that '….women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group'.[433] As it will be discussed in this Chapter, a significant amount of empirical studies and reports reveal how these practices have become a viable part of military strategies directly used to achieve clearly defined political or military ends. Further, as the jurisprudence of the international (ised) criminal tribunals indicates, the nature of sexual violence as a weapon reflects one of the most brutal aspects of modern warfare. In this way, judges of the Special Court for Sierra Leone (SCSL)[434] in *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, known as the Revolutionary United Front (RUF) case[435] noted for instance that the manner in which rape and other acts of sexual violence have been used by RUF 'portray a calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror'.[436]

Sexual violence as a weapon of war refers to the deliberate and systematic use of rape and various other acts of sexual violence in war zones in furtherance of specific military or

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[432] Testimony before the US Senate Subcommittees on African Affairs, and Human Rights, Democracy, and Global Women's Issues, May 13, 2009, & 6. Available at http://m.state.gov/md123500.htm (Accessed on June 15, 2014).

[433] See the Preamble of the UN Security Council Resolution 1820 (2008) on Acts of Sexual Violence against Civilians in Armed Conflicts adopted on 19 June 2008, (S/RES/1820 (2008).

[434] The SCSL was set up by the agreement between the UN and the Government of Sierra Leone on 16 January, 2002, (The Statute establishing the Court entered into force on 12 April 2002, following its ratification by Sierra Leone).

[435] See *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case N° SCSL-04-15-T, Judgment of 2 March 2009, §§ 1347-1356.

[436] Id., § 1347.

political ends.[437] Armed conflicts provide a fragile environment for sexual violence. As Marsh, Purdin and Navani have rightly observed, these crimes are increasingly being committed in warfare settings than in non-conflict affected areas.[438] Horrific data on systematic sexual violence as a weapon in modern conflicts back up this assertion, and such violence even continues to be inflicted on a massive scale in current conflicts. As discussed in chapter Two, these practices of extreme violence have been described in international criminal tribunals' jurisprudence as inhumane acts constitutive of torture[439], acts of genocide or ethnic cleansing to destroy a specific group[440] or to change the ethnic make-up of the next generation by purposely impregnating the victims.

For the most part, the focus of the international criminal justice institutions namely the ICC[441], the *ad hoc* international criminal tribunals for the former Yugoslavia[442] and its sister for Rwanda[443], and to some extent the international(ised) criminal institutions has been on crimes committed in the context of armed conflicts. Indeed, over the recent years, international criminal tribunals and courts have contributed to a wealth of practical jurisprudential and normative developments upon which international crimes are prosecuted. Particularly, despite continued challenges highlighted in chapter two, these tribunals have issued judgments characterising systematic sexual violence crimes as war crimes, crimes against humanity, and even acts of genocide, setting out a significant framework for the effective prosecution of these crimes before international criminal tribunals. Moreover, as discussed in the previous chapter, the ICC has taken a more significant step in addressing mass crimes by introducing victims into the criminal justice process in an effort to deliver justice for those who suffered harm as a result of mass atrocities.

The relatively new idea of justice for victims in international criminal justice process suggests that the criminal justice process should attend to victims' needs, thereby contributing in the rebuilding process of war-torn communities. Addressing the needs of

[437] See A. R. Reid-Cunningham (2008), 'Rape as a Weapon of Genocide', *Genocide Studies and Prevention*, Vol. 3, N° 3, p. 279.
[438] M. Marsh, S. Purdin and S. Navani (2006), 'Addressing Sexual Violence in Humanitarian Emergencies', *Global Public Health*, Vol.1, N° 2, pp. 133–146.
[439] See *Prosecutor v. Zdravko Mucic aka "Pavo" et al.,* Case N° IT-96-21-T, 16 November 1998, §§ 495-496.
[440] See *Prosecutor v. Jean Paul Akayesu*, (Trial Chamber), Case N°. ICTR-96-4-T, Judgment of September 2, 1998), § 731. See also *Prosecutor v. Muhimana*, Case N° ICTR-95-1B-T, Judgment, § 15 (April 28, 2005), *Prosecutor v. Anto Furundzija*, Case N° IT-95-17/1-T, Judgment, § 172.
[441] The ICC was established in 2002 as the first permanent international court to prosecute international crimes. See the Rome Statute of 17 July 1998, UN Doc. A/CONF.183/9. Entered into force on 1 July, 2002.
[442] The ICTY was founded by the UN Security Council Resolution 827 of May 25, 1993, UN Doc. S/RES/827.
[443] The ICTR was established by the UN Security Council Resolution 955 of November 8, 1994, UN Doc. S/RES/955 (1994).

victims has become an important consideration in international criminal justice system. Whilst the significance of the growing victim-centred approach in international criminal justice cannot be overstated, as discussed in the previous chapter, whether and the extent to which this approach can enable the Court to effectively address the needs of victims of mass crimes is subject to lively and ongoing debate.

Despite the presumed benefits of the growing victims' needs based justice approach in international criminal justice, the conditions of victims of the strategic use of mass sexual violence as a weapon of war and the complex realities prevailing in communities enduring the legacy of these present a unique range of challenges in this regard. Systematic sexual violence as a military tactic arise in a set of complex circumstances, with multidimensional and devastating short-term and long-term effects on victims and communities, often highly entrenched in the local contexts in a way that set the scene for a broader social degradation in affected communities.[444] Despite the energetic debate occurring in academic and professional circles, there are scant in-depth studies to understand the implications of the distinct aspects of mass sexual violence as a military tactic in situations of conflicts for the victims' needs in transitional justice processes.

In considering the nature and extent of needs of victims of sexual violence as a weapon of war, this chapter examines the relevant literature, mainly the existing body of empirical research, to understand and explain the implications of the victimisation experience of victims of these crimes and their conditions during and after war as well as the complex realties in societies enduring the legacy of these crimes for the victims' needs in post-conflict transitional justice processes. The core of the discussion is in what way do the needs of victims of conflict-related sexual violence as weapon of war differ, or go beyond the common needs of victims of ordinary crimes. This investigation provides a framework for the subsequent in-depth analysis in chapter five of the limits and challenges in addressing these needs in the context of international criminal justice system and, perhaps more importantly, potential solutions to these limits to achieve effective redress for victims of these crimes (see chapter six). In so doing, the discussion in this chapter begins by examining the scale of these crimes as well the context in which they are committed in order to understand the extent of the challenge posed by mass rapes as a weapon in modern warfare. The chapter further

[444] See, for instance, A. K. Eirienne (2009), 'Responding to Rape as a Weapon of War in the Democratic Republic of Congo: CIDA's Actions in an Evaluative Framework', *International Student Journal*, Vol. 1, p. 2; J. Trenholm (2013), 'Women Survivors, Lost Children and Traumatized Masculinities: The Phenomena of Rape and War in Eastern Democratic Republic of Congo', *Acta Universitatis Upsaliensis Uppsala,* p. 39.

presents a brief critical analysis of the needs of victims of crimes and how these needs may be determined, the discussion reflects on the distinct aspects of systematic and mass rape and other forms of sexual violence as a weapon of war and their implications for the victims' needs in post-conflict transitional justice processes.

4.2 Sexual Violence as a Weapon: One of the Most Brutal Aspects of Modern Warfare

The use of rape and other acts of sexual violence in conflict situations is by no means a recent phenomenon. For so long considered 'an inevitable by-product of war'[445], these practices are now widely addressed as a weapon of war. The last two decades witnessed important progress in addressing these crimes at the UN institutional level[446] coupled with landmark strides on the part of the international criminal tribunals and, even more crucially, with the inclusion of a whole range of sexual crimes in the ICC Statute.[447] Rape allegations are included in various cases currently before the Court,[448] and these can be dealt with as potentially amounting to war crimes[449] or crimes against humanity[450]. Although remarkable development in this regard has been made by the *ad hoc* and mixed international tribunals, the inclusion of sexual crimes in the ICC's legal framework, as a permanent court, represents a milestone in the international prosecution of these crimes.

Despite the many advances made in cases involving sexual violence through the work of the ICTY, ICTR, SCSL and even the ICC,[451] such crimes continue to be inflicted on a massive scale as an element of broader war strategies. This is supported by evidence as highlighted in the recent 2015, 2014 and 2013 UN Secretary-General Reports on Conflict-Related Sexual Violence[452] and the 2013 UN Security Council Resolution 2106 on sexual violence in armed conflict.[453] This Security Council Resolution follows well documented crimes of sexual nature in the UN Secretary-General's reports on sexual violence in conflicts. Furthermore, the

[445] C. S. Snyder, W. J. Gabbard *et al.* (2006), *On the Battleground of Women's Bodies: Mass Rape in Bosnia-Herzegovina*, Journal of Women and Social Work, Volume 21, N° 2, pp. 184-195, p. 185.
[446] The UN has placed the use of rape and other forms of sexual violence in conflicts high on its agenda with the Secretary General's creation of the Special Representative on Sexual Violence in 2010.
[447] See Art. 7 (1) (g) and 8(2) (b) (xxii); (e) (vi) of the Rome Statute.
[448] These cases relate to violence in Uganda, Democratic Republic of the Congo, Darfur in Sudan, Central African Republic and Cote d'Ivoire.
[449] See Art. 7 of the Rome Statute.
[450] See Art. 8 of the Rome Statute.
[451] See Chapter Two *Supra.*
[452] See The 2014 UN Secretary-General Report on Conflict-Related Sexual Violence submitted to the UN Security Council on 13 March 2014 (S/2014/181); The 2015 UN Secretary-General Report on Conflict-Related Sexual Violence submitted to the UN Security Council on 13 April 2015 (S/2015/203); The 2013 UN Secretary-General Report on Sexual Violence in Conflicts of 14 March 2013, (A/67/792 - S/2013/149).
[453] The UN Security Council Resolution 2106 on Sexual Violence in Armed Conflict adopted on 24 June 2013, S/RES/2106 (2013).

recent Declaration on Preventing Sexual Violence in Conflict adopted by G8 foreign ministers in London highlights the fact that sexual violence in armed conflict continues to be inflicted on massive scale and in most cases at 'the appalling levels of brutality'.[454]

In order to get a deeper understanding of the victims' needs in the international criminal justice process and their implications in current efforts in the pursuit of redress for victims, in-depth investigation of the nature and scale of these crimes as a weapon of war as well as their effects on victims and affected communities is necessary. This provides a background that can guide our understanding of the particular needs of victims of these crimes in transitional justice processes.

4.2.1 The Nature and Scale of Sexual Violence as Weapon of War in Modern Armed Conflicts

A. The Scale of Widespread and Systematic Sexual Violence in Conflict Situations

> During my detention, political security officer, AM told me that he was holding 17 women prisoners in our home in Bab Al-Dreb neighbourhood (…) He said they were abducted during the raids he carried out and that he raped all of them. (...) When I asked about the crime that these girls committed, he said that he wanted to rape them and humiliate their families. He also said he allowed his men to gang-rape a woman and to videotape the "party" as he called it, so that he would send the video to her uncle, a well-known cleric and member of the opposition. Kholod, a woman abducted during the Syrian conflict.[455]

Ordeals like Kholod's are common for many women and girls who experience the strategic use of sexual violence in conflicts to exert control and spread terror through communities. In most conflicts, rape and other acts of sexual violence are systematic and widespread against not only females but also males,[456] to advance military or political goals.[457] As such, the use of systematic sexual violence as means of ethnic cleansing and/or genocide has been documented in various conflicts across the globe. In this sense, the systematic use of rape and

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[454] Declaration on Preventing Sexual Violence in Conflict, Adopted in London on 11 April 2013. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/185008/G8_PSVI_Declaration_-_FINAL.pdf (Accessed on 12 January, 2013).

[455] See S. Nasar (2013), 'Violence against Women: Bleeding Wound in the Syrian Conflict', *Euro-Mediterranean Human Rights Network*, p.12

[456] See S. Sivakumaran (2010), 'Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict', *International Review of the Red Cross*, Vol. 92, N° 877, p. 260.

[457] See, for instance, M. Eriksson Baaz and M. Stern, *Sexual Violence as a Weapon of War? Perceptions, Prescriptions, Problems in the Congo and Beyond*, (Radical International Publishing, 2013); J. K. Roth, *Rape: Weapon of War and Genocide*, (Paragon House, 2012); A. M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, (Intersentia 2005), pp. 9-14; See also I. Skjelsbaek (2001), 'Sexual Violence and War: Mapping out a Complex Relationship', *European Journal of International Relations,* Vol. 7, N° 2, p. 213.

other forms of sexual violence on Muslim or Croat women during the conflict in Bosnia-Herzegovina and Tutsi women during the genocide in Rwanda clearly exemplifies this.[458]

It is estimated for instance that up to 60,000 Bosnian Muslim or non-Serbian women were raped in the Serbian plan to create an ethnically homogenous Bosnia-Herzegovina.[459] As consequently noted by the ICTY in *Prosecutor v. Kunarac et al.* case, sexual violence was systematically used by the Bosnian Serb armed forces as an instrument of terror as part of their ethnic cleansing campaign.[460] Equally, the UN Special Rapporteur of the Commission on Human Rights on Rwanda estimated that between 250,000 and 500,000 Rwandan Tutsi women were raped as a component of the genocide against Tutsi in 1994.[461] Similarly, while the exact number is not known, the SCSL[462] found that rape was systematically committed during the armed conflict in Sierra Leone.

During the Sierra Leone's decade-long conflict between 1991 and 2002, characterised by an extraordinary level of human rights abuses, estimates suggest that up to 200,000 people were subjected to some form of brutal and systematic acts of sexual violence.[463] Equally, victims of rape during conflict situations were estimated to be over 40,000 in the Liberia civil war from 1989 to 2003[464], tens of thousands in the Darfur conflict[465] and more than 200,000 Bengali women in Pakistan[466], to name but few. These instances of rape and other forms of sexual violence during conflict situations, though perpetrated with significant variation of the scale and character[467], exemplify how these practices have become the defining characteristics of armed conflicts over the last years.

Despite the positive efforts in recent years by States, the UN, other governmental and non-governmental institution in preventing and addressing the use of sexual violence in situations

[458] See S. L. Russell-Brown (2003), 'Rape as an Act of Genocide', *Berkeley Journal of International Law*, Vol. 201, N° 2, pp. 350 -374.
[459] See L. Sharlach (2010), Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda, *New Political Science*, Vol. 22, N° 1, p. 96.
[460] See *Prosecutor v. Kunarac, Kovač and Zoran Vuković,* Case N° IT-96-23/1, Judgement of 22 February 2001.
[461] See Rene Degni-Segui: The UN Special Rapporteur of the Commission on Human Rights*, Report on the Situation of Human Rights in Rwanda*, § 16, (U.N. Doc. E/CN.4/1996/68, January 29, 1996).
[462] See *Prosecutor v. Sesay, Kallon & Gbao*, *Supra* note 435, §§ 1153, 1353-54.
[463] D. Keen, *Conflict and Collusion in Sierra Leone*, (Oxford: James Currey Publishers, 2005), p. 44.
[464] See the Final Report of the Truth and Reconciliation Commission of Liberia, Volume 1: Preliminary Findings and Determinations, available at http://trcofliberia.org/resources/reports/final/volume-one_layout-1.pdf. (Accessed on 12 January 2014).
[465] See the Human Rights Watch World Report 2007 on Sudan published on 11 January 2007, p. 47. Available at: http://www.refworld.org/docid/45aca2a72.html (Accessed 6 February 2014).
[466] See J. Gottschall (2004), 'Explaining Wartime Rape', *Journal of Sex Research*, Vol.41, pp. 129-136.
[467] See E. J. Wood (2006), 'Variation in Sexual Violence during War', *Sage Publications, Politics & Society*, Vol. 34, N° 3, p. 307.

of conflicts as earlier stated, these crimes have been a central component of recent conflicts, are even still systematically committed in currently active conflicts. In the Democratic Republic of the Congo (DRC), which was described by some scholars as the 'rape capital of the world'[468] or 'the worst place to be a woman'[469], rape and other acts of sexual violence have become notorious weapons of war in the ongoing conflicts.[470] In her study on atrocities committed in times of war in DRC, Kathryn Farr observes that rape and other acts of sexual violence have been inflicted on Congolese women on 'a scale never seen before', and to make matters worse, the majority of victims have been raped several times in different places by different armed forces.[471] In its report on sexual violence in conflicts, Amnesty International documented many instances of collective rape in which combatants physically violate multiple victims at once.[472] The Human Rights Watch, in reference to the high level of systematic sexual violence in the DRC conflict, described the extent and cruel nature of these acts in the country as 'the war within the war or sexual terrorism'.[473] Much like in many other conflicts, rape and other acts of sexual violence in the DRC conflict were designed as an instrument of terror to inflict trauma and humiliation and, as a result, tear apart the fabric of affected communities.

The deteriorating security situation in many war-torn countries such as the Central African Republic and Syria has created a context ripe for organised sexual violence by armed forces. In the context of the ongoing Syrian crisis for instance, the UN[474] and a number of advocacy groups such as the International Rescue Committee[475] highlighted that 'sexual violence has been a persistent feature of the conflict' since the beginning of the crisis in 2011. As Arielle

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[468] M. Clark, 'Congo: Confronting Rape as a Weapon of War', The Christian Science Monitor of 4 August, 2009. Available at http://www.csmonitor.com/World/Africa/2009/0804/p17s01-woaf.html (Accessed on 20 January, 2014).

[469] A. C. Grayson (2012), 'Delivering Justice for Sexual Violence in the D.R. Congo and Beyond: Cooperation, Education, and Capacity-Building through National and International Courts', *Journal of Global Citizenship & Equity Education*, Vol. 2, N° 2, p. 1.

[470] See The 2014 UN Secretary-General Report on Conflict-Related Sexual Violence, *Supra* note 452, § 27.

[471] See F. Kathryn (2010), 'No Escape: Sexual Violence against Women and Girls in Central and Eastern African Armed Conflicts', *Journal of Studies on Women' Memory*, N° 13, p. 1.

[472] See Amnesty International's Report on the Democratic Republic of Congo: Mass Rape; Time for Remedies, published in October 2004, p. 20. Available at http://www.amnesty.org/en/library/asset/AFR62/018/2004/en/63b10028-d57f-11dd-bb24 1fb85fe8fa05/afr620182004en.html. (Accessed on 15 February 2014).

[473] See Human Rights Watch, 'The War within the War: Sexual Violence Against Women and Girls in Eastern Congo', Report published in June 2002. Available at http://www.hrw.org/reports/2002/drc/Congo0602.pdf (Accessed on 15 January 2014).

[474] See for instance the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, submitted to Human Rights Council: Twenty-third session 4 June 2013, p. 16 (A/HRC/23/58).

[475] The International Rescue Committee Commission on Syrian Refugees Report on Syria: A regional Crisis published in January 2013, at p. 6. Available at http://www.rescue.org/sites/default/files/resource-file/IRCReportMidEast20130114.pdf (Accessed on 15 February 2014).

Eirienne has observed, organised sexual violence has become an effective weapon for 'societal degradation' in affected countries.[476]

In terms of this endemic problem in contemporary wars, records suggest however that the humanitarian disaster of the systematic and prevalent use of rape and other acts of sexual violence in conflicts since the early 1990s is no new phenomenon. As more fully discussed in Chapter II, whilst the war in the former Yugoslavia and the genocide against the Tutsi in Rwanda marked a turning point regarding the prosecution of these crimes[477], these practices have always been used as a military tactic. According to Kelly Dawn Askin, rape and many other forms of sexual violence were termed 'S.O.P (standard operating procedure)'[478] as they were rife and commonly perpetrated by all sides during World War II. Estimates suggest for instance that over 20,000 Chinese women were subject to acts of rape during the Nanking Massacre by Japanese troops.[479] Moreover, as earlier pointed out, rape was referred to, albeit to a limited extent and essentially ignored by the Tribunal, on the list of crimes charged during the Tokyo trials after World War II.

It is important to note that the acts of sexual violence are perpetrated in conflict situations with significant variation of the scale and methods used, especially depending on the overall objectives of the perpetrators. Thus, as Iris Chang has stated, the precise nature and magnitude of sexual violence in conflict situations cannot be easily determined.[480] However, some common acts of sexual violence in conflicts have been established. As noted in the recent Report of the Office of the UN High Commissioner for Human Rights, sexual violence in war includes 'rape, sexual abuse, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, forced circumcision, castration and forced nudity'.[481] It also involves the use of objects such as guns and knives in women's vaginas to perform non-penetrating sexual assault such as sexual mutilation.[482] In such settings, it is explicitly and exclusively intended for sexual torture to terrorise, prove absolute

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[476] A. K. Eirienne, *Supra* note 444, p. 2.
[477] See M. C. Bassiouni (1999), 'History of International Investigations and Prosecution', in M. C. Bassiouni (Ed.*), International Criminal Law*, (Transnational Publishers 1999), 2nd Edition.
[478] D. K. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, (Martinus Nijhoff 1997), p. 99.
[479] I. Chang (1997), *The Rape of Nanking: The Forgotten Holocaust of World War II*, Basic Books, p. 1.
[480] E. J. Wood, 'Sexual Violence during War: Variation and Accountability', in A. Smeulers (Ed.), *Collective Crimes and International Criminal Justice: An Interdisciplinary Approach*, (Intersentia, 2010), Vol. 8, p. 295.
[481] See The Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice, Report of the Office of the UN High Commissioner for Human Rights submitted to UN General Assembly on 30 June 2014, § 3, (A/HRC/27/21).
[482] See R. Manjoo and C. McRaith (2011), 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas', *Cornell International Law Journal*, Vol. 44, nº 11, p. 12

power over a population, and as a result destroy the social fabric of affected communities.[483] Sexual violence is also used some conflicts purposely as a weapon to reinforce policies of ethnic cleansing or genocide by forcibly impregnating women or perpetrating other violent and brutal acts such as forced miscarriages.[484] In this connection, rape in armed conflicts has been used for specific political ends,[485] primarily as part of a wider campaign to destroy a particular group. In Rwanda,[486] rape was a form of genocide[487] while the reported use of coordinated mass rape in the Bosnia- Herzegovina war demonstrated that rape was so systematic and widespread that it constituted a form of ethnic cleansing.[488] Similarly, there was an ethnic component to the acts of sexual violence committed in the Darfur conflict where being a non-Arab black woman (mainly from the Fur, Masalit and Zaghawa tribes) was a significant risk factor for rape and other brutal acts of sexual violence in Darfur.[489]

In summary, as the foregoing indicates, organised rape and other acts of sexual violence in conflict settings are constantly and primarily used as weapons and policies of war in furtherance of clearly defined political or military objectives rather than an attempt to satisfy sexual desire. Whilst rape and other acts of sexual violence are deeply devastating for victims regardless of whether they are committed during peacetime or wartime, as Kristine Hagen observes,[490] distinct characteristics of the use of mass sexual violence as a military tactic make these practices a particularly powerful weapon for not only destroying the lives of victims but also communities. Victims do suffer individually, but also their communities and, as the Human Rights Watch has observed in reference to the strategic use of sexual violence during the genocide in Rwanda, perpetrators of sexual violence in war 'often explicitly link their acts to a broader social degradation' in affected communities.[491] In this sense, in addition to forced impregnation or abortion and sexual violence with sharp sticks or machetes, acts are often committed in public occurrence in front of the victims' own children, parents and other members of their communities as well as forcing them to rape their

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[483] See Human Rights Watch, 'Sexual Violence Crimes during the Rwanda Genocide', *Supra* note 62, p. 4.
[484] See R. Manjoo and C. McRaith, *Supra* note 482.
[485] C. MacKinnon (1994), 'Rape, Genocide, and Women's Human Rights', *Harvard Women's Law Journal,* Vol.17, p. 10.
[486] For details on the use of rape in genocidal plan see U. Kaitesi (2014), *Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary Courts and Gacaca Courts*, (Intersentia 2014), Vol. 17.
[487] See *Prosecutor v. Jean Paul Akayesu*, *Supra* note 8, § 731.
[488] N. Dombrowski, *Women and War in the Twentieth Century: Enlisted With or Without Consent*, (Routledge, 2004), p. 246.
[489] See the Amnesty International Report 2004 on Sudan, published on 26 May 2004, pp. 3-4. Available at: http://www.refworld.org/docid/40b5a2014.html (Accessed on 6 February 2014).
[490] K. T. Hagen (2010), 'The Nature and Psychosocial Consequences of War Rape for Individuals and Communities', *International Journal of Psychological Studies*, Vol. 2, N° 2; p.15.
[491] See Human Rights Watch, 'Sexual Violence Crimes during the Rwanda Genocide, *Supra* note 62, p. 4.

mothers, sisters or daughters, to instil fear and humiliation on the victims' families and the whole community.[492] Additionally, the insertion of rats in women's vagina, as has been reported in the ongoing Syrian conflict[493], exemplifies the humanitarian disaster associated with the strategic use of sexual violence as a weapon in conflict situations across the globe.

B. Who Are the Victims and Perpetrators of Sexual Violence During Conflict Situations?

The fact that women and girls make up the majority of victims and that men comprise the majority of perpetrators is undisputed. However, reports of brutal acts of sexual violence against males have emerged from many conflicts. It should be noted that despite being the subject of various types of sexual violence in armed conflict such as rape, enforced sterilisation, genital mutilation, enforced nudity and masturbation,[494] sexual violence against males during conflict situations has received relatively little attention. Scholars such as Sandesh Sivakumaran and Dustin Lewis observe, in this connexion, that some international instruments almost exclude men in the category of potential victims of these crimes or often included in the general category of 'abuse or torture' rather than sexual violence, therefore virtually obliterating the sexual element of the violations.[495]

The lack of attention to acts of sexual violence against men in conflict settings stem from various reasons such as gender stereotypes and other social norms that often hinder the accurate assessment of the violations, thereby leading to false account on the extent of the issue. Although the UN Resolution 1820 (2008) on acts of sexual violence against civilians in armed conflicts holds that these acts affect primarily women and girls, it stresses that men and boys are also targets.[496] In its recent report on sexual violence in war, the Office of the UN High Commissioner for Human Rights demonstrates that men are also the subject of these violations, although the number of victims 'continue to be disproportionally women'.[497] For instance, in the context of the war in the former Yugoslavia in the early 1990s, some men were compelled to perform oral sex upon other men while other male detainees bit off their

[492] See, for example, F. Kathryn, *Supra* note 471, p. 1; S. Fabijanić Gagro (2010), 'The Crime of Rape in the ICTY's and the ICTR's Case-Law', *Scientific Review Paper*, Vol. 60, N° 3, p.1317.
[493] F. Keane (25-09-2012), Syria Ex-Detainees Allege Ordeals of Rape and Sex Abuse, *BBC World News: Middle East*, Available at http://www.bbc.co.uk/news/world-middle-east-19718075 (Accessed on 18-02-2014).
[494] See S. Sivakumaran (2007), 'Sexual Violence against Men in Armed Conflict', *European Journal of International Law*, Vol. 18, N° 2, p. 253.
[495] See Ibid. p. 254; D. A. Lewis (2009), 'Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law', *Wisconsin International Law Journal*, p. 2.
[496] The UN Security Council Resolution 1820 (2008) on Acts of Sexual Violence against Civilians in Armed Conflicts, *Supra* note 433, §§3-4.
[497] See the Report of the Office of the UN High Commissioner for Human Rights submitted to UN General Assembly on 30 June 2014, *Supra* note 481, § 5.

testicles in detention camps[498], yet others were castrated or otherwise sexually mutilated.[499] The Commission of Experts established pursuant to Security Council Resolution 780 (1992)[500] to gather information regarding allegations of sexual assault following the former Yugoslavia crisis concluded that 'men were castrated and sexually mutilated in various ways, forced to rape other men, and forced to perform fellatio or enforced masturbation and other sex acts'.[501]

As most of the literature focus on sexual violence against women, sexual atrocities against men have remained largely invisible. It is thus hard to provide the exact statistics on victims of rape and other forms of sexual violence in conflicts as little data have been gathered.[502] As Wynne Russell and Sivakumaran have observed, the lack of attention to conflict-related male sexual violence has made it 'under-reported'.[503] This has led to the misconception that the strategic use of sexual violence in conflicts is only a problem for females, despite the available evidence of its prevalence in various armed conflicts throughout the world.

It is important to note that the ICTY made key contributions in the international prosecution of these crimes by shedding light on the use of various cruel acts of sexual violence against men during the former Yugoslavia crisis. This paved the way for further study on such crimes in many other conflicts. In the *Prosecutor v. Duško Tadić* case, the first international war crime trial involving charges of sexual violence,[504] the accused was found guilty of different charges that include a wide range of participation in sexual violence toward men. The ICTY Trial Chamber noted that Prosecution witnesses gave evidence that a particular victim '…was made to jump into the pit with other victims and Witness H was ordered to lick his naked bottom and G to suck his penis and then to bite his testicles'.[505] Similarly, that various forms of sexual violence have been perpetrated against men has also been upheld in a number of

[498] V. K. Vojdik (2013), 'Sexual Violence against Men and Women in War: A Masculinities Approach', *Nevada Law Journal*, p. 2.
[499] L. Stemple (2009), 'Male Rape and Human Rights', *Hastings Law Journal*, Vol. 60, p. 613.
[500] UN Security Council Resolution 780 (1992) Establishing a Commission of Experts to Examine and Analyse Information Submitted Pursuant to Resolution 771(1992) on Violations of the Geneva Conventions in Bosnia and Herzegovina, (U N Doc. S/RES/780 (1992).
[501] See the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) on Sexual Assault Investigation, Submitted to the UN Security Council on 28 December 1994, §§ 20, 179-180 and 183, (S/1994/674/Add.2, Vol. V, Annex IX).
[502] See E. S. Carlson (2006), 'The Hidden Prevalence of Male Sexual Assault during War: Observations on Blunt Trauma to the Male Genitals', *British Journal of Criminology*, Vol. 46, pp. 16-25. See also E. S. Carlson (1997), 'Sexual Assault on Men in War', *The Lancet*, Vol. 349, N° 9045, p. 129.
[503] See W. Russell (2007), 'Sexual Violence against Men and Boys', *Forced Migration Review*, N° 27, pp. 22-23; S. Sivakumaran, *Supra* note 494, p. 254–55.
[504] *Prosecutor v. Duško Tadić*, Case N° IT-94-1-T, Trial Chamber Judgment of May 7, 1997.
[505] Ibid., § 206.

other cases such as the *Prosecutor v. Zejnil Delalic et al.*[506] for sexual crimes committed in the *Celebici* prison-camp, and the *Prosecutor v. Ranko Cesic*[507] case before the ICTY, as well as the *Prosecutor v. Issa Hassan Sesay et al*. before the SCSL commonly known as the *RUF* case.[508] Though, the main victims of wartime sexual violence remain women,[509] these findings indicate that systematic sexual violence as a weapon in war is not just a female issue.

It is also relevant to note the way in which rape and other forms of sexual violence are increasingly being deployed during conflict situations as an orchestrated combat tool against children. Studies on conflict-associated sexual crimes against children suggest that, in most cases, these acts occur by way of abduction of children for purposes of sexual slavery. Studies conducted on conflict-associated sexual violence in the Democratic Republic of the Congo claim that "girls and women of all ages, including those under one and those older than eighty, are victims of rape".[510] This reflects the way in which these acts are being used as a strategy of belligerence to intimidate and humiliate the communities, and ultimately destroy group solidarity within the enemy side.[511]

An important point which, arguably, makes the systematic use of sexual violence as a weapon of war a considerably more complex problem, is the fact that women and men as well as children[512] are not only victims of these crimes but also perpetrators. While women remain the majority of victims, and men the majority of perpetrators, conflict-related sexual violence against men has been documented, often implicating women as perpetrators with some of the most devastating forms of violence such as genital mutilation[513] or sexual violence on other women with objects such as guns and knives. In that context, cruel forms of sexual violence are used during war as instruments of terror which, in some cases, result in death of victims.

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[506] *Prosecutor v. Zejnil Delalic et al.*, Case N° IT-96-21-T, Trial Chamber Judgment of 16 November 1998, § 26.

[507] *Prosecutor v. Ranko Cesic*, Case N° IT-95-10/1-S, ICTY, Judgement of 11 March 2004, §§ 13-14.

[508] See *Prosecutor v. Issa Hassan Sesay et al.*, Case N° SCSL-04-15-T, Judgment of 2 March 2009, § 1067.

[509] See K D. Askin (2012), 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, Vol. 21, p. 297.

[510] See A. Maedl (2011), 'Rape as Weapon of War in the Eastern DRC?: The Victims' Perspectives', *Human Rights Quarterly*, Volume 33, Number 1, p. 138.

[511] See A. K. Eirienne, *Supra* note 444, p. 2. See also M. Pratt and L. Werchick (2004), 'Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of the Congo: An Assessment of Programmatic Responses to Sexual Violence in North Kivu, South Kivu, Maniema, and Orientale Provinces', *USAID/DCHA Assessment Report*, p. 7.

[512] See L. M. Kalisya *et al.* (2011), 'Sexual Violence toward Children and Youth in War-Torn Eastern Democratic Republic of Congo', *PLoS ONE*, Vol. 6, N° 1, p. 2.

[513] See, for instance, D. K. Cohen (2013), 'Female Combatants and the Perpetration of Violence: Wartime Rape in the Sierra Leone Civil War', *Journal of International Relations*, Vol. 65, N° 3, p. 385; N. Linos (2009), 'Rethinking Gender-based Violence during War: Is Violence Against Civilian Men a Problem Worth Addressing?', *Social Science & Medicine*, N° 68, pp. 1548–1551.

4.2.2 The Effects of Systematic Rape in Conflicts: An Effective Weapon for Societal Degradation

The victimisation process in conflict-related systematic and widespread rape and other acts of sexual violence is a complex, multidimensional phenomenon. Mass rape and other acts of sexual violence as a deliberate military tactic appear to be an effective weapon for destroying communities, since their effects extend far beyond the individual victims. Reflecting the enormity of this form of violence and its effects on the victims and the affected communities, the UN Secretary-General, recently addressing the Security Council open debate on sexual violence in conflict, convincingly observed that systematic acts of sexual violence as weapons in war are 'as destructive as any bomb or bullet'.[514] This remark echoes the finding of the ICTY and ICTR which have described the use of systematic sexual violence as a tactic in conflict situations as 'a step in the process of group destruction' in various ways.[515] In fact, mass sexual violence as a weapon of war not only destroys the lives of victims but also result in social and community consequences which tear at the fabric of communities.

In many conflicts, mass sexual violence are used in ethnic cleansing or genocide campaigns as well as an instrument to destabilise communities by creating terror in ways that construct these practices in war a powerful weapon for destroying larger social community bonds in affected nations. Moreover, in addition to intense mental and physical devastation often accompanied by trauma and stigmatisation, sexual violence in conflicts also lead to sexually transmitted diseases such as HIV/AIDS as well as unwanted pregnancies for women and young girls. The victims also often experience a wide range of psychological consequences such as post-traumatic stress disorder, feeling of indignation and shame.[516]

Scholars such as Chile Eboe-Osuji,[517] Sarah Shteir[518], Carly Brown[519] and Inger Skjelsbæk[520], in their studies on war sexual violence in different contexts, have rightly noted that the use of rape and other acts of sexual violence as a military tactic in conflict situations has societal

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[514] The UN Secretary-General's remarks at Security Council open debate on Sexual Violence in Conflict, New York, 25 April 2014. Available at http://www.un.org/sg/statements/index.asp?nid=7621 (Accessed on 10 September 2014).

[515] See, for instance, *Prosecutor v. Jean Paul Akayesu*, *Supra* note 440, § 731, *Prosecutor v. Muhimana*, *Supra* note 440, § 15, *Prosecutor v. Anto Furundzija*, *Supra* note 440, § 172.

[516] See S. Shteir (2014), 'Conflict-Related Sexual Violence and Gender-based Violence: An Introductory Overview to Support Prevention and Response Efforts', *Australian Civil-Military Occasional Papers*, p. 21.

[517] C. Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, (International Humanitarian Law Series, Martinus Nijhoff Publishers, 2012), p. 6.

[518] S. Shteir, *Supra* note 515, p. 23.

[519] C. Brown (2012), 'Rape as a Weapon of War in the Democratic Republic of the Congo', *Torture Review*, Vol. 22, N° 1, p. 31.

[520] I. Skjelsbæk, *The Political Psychology of War Rape: Studies from Bosnia and Herzegovina*, (Routledge, 2012).

consequences that extend beyond the victims and their families. These effects, in turn, adversely impact the affected communities' recovery after conflicts. It should be stressed that, in some contexts, conflict-related sexual violence has been used to clear affected nations of an unwanted population in order to create an ethnically homogenous state, considering the scale and forms as well as its direct and long-term effects on the victims and the wider community. As Lisa Sharlach aptly points out 'the Serbs' rape-until-pregnant campaign against Muslim and ethnically Croatian females in Bosnia-Herzegovina' clearly exemplifies the use of rape in ethnic cleansing or genocide.[521] Also, in addition to forced impregnations and abortions very much like during war in the former Yugoslavia, rape was used by HIV infected Hutu militia men during genocide in Rwanda against Tutsi women with intent to infect them with HIV/AIDS.[522]

The jurisprudence of the international criminal tribunals indicates that conflict-related sexual violence is also systematically perpetrated with the intent of ultimately causing the victim's death.[523] As such, brutal forms of sexual violence such as gun barrels into victim's vagina, mutilating victim's sexual organs or breasts are used.[524] Sharlach notes, in her study of sexual violence during genocide against Tutsi in Rwanda, that 'Hutu men diagnosed with HIV raped Tutsi women, and then told the women that they would die slowly and gruellingly from AIDS'.[525] In this instance, a genocide survivor in Rwanda relates her tragic experience:

> I was raped by two gendarmes …one of the gendarmes was seriously ill, you could see that he had AIDS, his face was covered with spots, his lips were red, almost burned, he had abscesses on his neck. Then he told me 'take a good look at me and remember what I look like. I could kill you right now but I don't feel like wasting my bullet. I want you to die slowly like me'.[526]

The humanitarian disaster associated with the use of mass sexual violence as a weapon in conflict situations is indeed profound, and these practices in war leave highly fragmented societies. Alongside the long-term ramifications for the future of the victims, mass sexual

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[521] See L. Sharlach (2010), 'Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda', *New Political Science*, Vol. 22, N° 1, p. 92.
[522] See I. Chowdhury, M. M. Lanier (2012), 'Rape and HIV as Methods of Waging War: Epidemiological Criminology's Response', *Advances in Applied Sociology*, Vol. 2, N° 1, p. 47.
[523] See for instance *Prosecutor v. Jean Paul Akayesu*, *Supra* note 8, § 733.
[524] See, for example, *Prosecutor v. Gacumbitsi*, Case N° ICTR-2001-64-T, Trial Judgment of 17 June 2004, §§ 215, 261; *Prosecutor v. Kayishema & Ruzindana*, Case N° ICTR 95-1-T, Trial Judgment of 21 May 1999, §§ 446, 470 and 564; *Prosecutor v. Dusko Tadic´*, *Supra* note 82, §§ 198, 206 and 238; *Prosecutor v. Blagoje Simic´, Miroslav Tadic´ and Siom Zaric´*, Case N° IT-95-9-T-ICTY, Judgement of 17 October 2003, § 728.
[525] See L. Sharlach, *Supra* note 521, p. 99.
[526] See F. Nduwimana (2004), 'The Right to Survive: Sexual Violence, Women and HIV/AIDS', *International Centre for Human Rights and Democratic Development*, at p. 19.

violence also has a wide range of social and community consequences. In this regard, reports point out the awful fate awaiting children born of war rape, women facing an 'unmarriageable status' or spouses walking out of their marriages, the isolation of the victims from their communities and various other societal consequences related to the social identity of the victims.[527] The social rejection that children born of war rape face, often characterised by awful relationships between them and their mothers, sometimes led to cases of infanticide.[528] Describing the extremely complex relationship between these children and their communities, Elisa van Ee and Rolf J Kleber note that:

> These children are generally regarded with disdain by their communities-they are referred to by such names as "devil's children" in Rwanda, "children of shame" in Timor-Leste, "monster babies" in Nicaragua, "dust of life" in Vietnam, or "Chetnik babies" in Bosnia-Herzegovina.[529]

The most prominent examples of the crisis associated with children born of wartime rape are the cases of Rwanda and the former Yugoslavia, where rape was systematically used explicitly to impregnate women as part of genocide and ethnic cleansing campaigns respectively. Estimates suggest that up to 10,000 children were born of forced impregnation during the genocide in Rwanda while the Bosnian government estimated over 35,000 war pregnancies for Muslim and Croat women.[530] As a result of the extremely complex relationship with their mothers and communities, some of these children are sometimes killed, even by their own mothers, while most of those who survived are often ostracised, totally rejected by their families and communities. To the victims, these children represent the enemy and are the 'physical embodiment' of wartime violence that made them.[531]

Closely related is the social rejection that the victims and their families also face from their communities. It should be recalled that, in addition to strategic political and military objectives such as genocide or ethnic cleansing, rape and other acts of sexual violence in war are often committed in the public setting, in front of fathers, mothers, relatives and other members of the communities as part of military strategies to spread terror and public

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[527] See S. Hunt, *This Was Not Our War: Bosnia Women Reclaiming the Peace*, (Duke University Press, 2004), p. 49.

[528] See M. C. Mukarugendo, 'Caring for Children Born of Rape in Rwanda', in R. C. Carpenter (Eds.), *Protecting Children of Sexual Violence Survivors in Conflict Zones*, (Kumarian Press, 2007).

[529] E. Van Ee, R. J. Kleber (2012), 'The Art of Medicine: Child in the Shadowlands', *The Lancet*, Vol. 380, N° 9842, p. 642.

[530] See R. Charli Carpenter, *Supra* note 528.

[531] See D Delaet, 'Theorising Justice for Children Born of War' in R. Charli Carpenter (Ed.), *Supra* note 528, p. 138.

humiliation.[532] There are also instances of forced rape between victims, and 'often of incestuous nature' whereby people are forced to rape their mothers, sisters or daughters.[533] Indeed, the military logic of this widespread sexual violence in public occurrence in front of the victims' own children, parents, relatives and other members of their communities is to ultimately bring the resultant shame on the victims' families and their communities.[534] This leads to profound isolation of the victims from their communities, some females negatively labelled as not fit for marriages and others losing their marital status. In this connexion, some victims of sexual violence during conflict in the DRC recall their tragic experiences:

> I was at home with my husband and children when we were attacked. The assailants took turns raping me in the presence of my family. My husband and children abandoned me because of the shame caused by this rape.[535]

> My family and our neighbours were all sleeping in the same house. There were five women in total and we were all raped. Three of the assailants raped me in front of my children. They also forced my son to have sex with the neighbour in our presence.[536]

Although rape and other acts of sexual violence occur in almost every society and the effects of being raped are terribly devastating for the victims regardless of whether it is done in peacetime or during war as stated earlier, a key particular component to mass sexual violence in conflict situations is the power of these crimes in not only destroying the lives of victims but also the 'social capital on which communities are built'.[537]According to the United Nations Children's Fund (UNICEF) conflict-related sexual violence 'erodes the fabric of a community in a way that few weapons can'.[538] The victimisation process in conflict-related sexual violence is complex and its effects are often amplified by myriad accompanying societal consequences. The strategic use of mass rapes as a weapon exacerbates the already devastating effects of conflicts on victims and affected communities, and the implications of this for the victims' needs are profound. It is to these that the discussion should now turn.

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[532] See, for example, F. Kathryn, *Supra* note 471, p. 1; S. Fabijanić Gagro, *Supra* note 492, p.1317

[533] See Harvard Humanitarian Initiative, 'Now, The World is Without Me: An Investigation of Sexual Violence in Eastern Democratic Republic of Congo' A report published in April 2010 available at https://www.oxfam.org/sites/www.oxfam.org/files/DRC-sexual-violence-2010-04.pdf (Accessed on 20 January 2015), p. 24.

[534] See S. Fabijanić Gagro, *Supra* note 492, p.1317.

[535] Harvard Humanitarian Initiative, *Supra* note 533, p. 24.

[536] Ibid.

[537] See N. Jones *et al.* (2014), 'The Fallout of Rape as a Weapon of War: The Life-long and Intergenerational impacts of Sexual violence in Conflicts', Overseas Development Institute, available at http://www.refworld.org/pdfid/53cfa34e4.pdf, (Accessed on 14 January 2015), p.4

[538] UNICEF, 'Sexual Violence as a Weapon of War': The State of the World's Children 1996 Report available at http://www.unicef.org/sowc96pk/sexviol.htm (Accessed on 15 January, 2015), § 4.

4.3 Addressing Conflict-Related Sexual Violence in Post-Conflict Settings

> I was not pleased with the verdicts for those who committed sexual crimes and abuses. They would get 10 to 15 years in prison, and they would use that time to complete their studies and go to school or other things like that, while behind them are the women who were tortured. I do not think that justice in my sense of the word will be done. 'Emila', a victim of mass sexual violence during the Bosnia-Herzegovina conflict [539]

In his reflections on the effectiveness of conflict-related sexual violence in destroying communities in reference to the DRC, Jill Trenholm convincingly notes that mass rape in war is 'the bomb that continues to explode'.[540] As the foregoing indicates, mass rape and other acts of sexual violence as weapons of war have certain characteristics that distinguish them from other forms of violence. The scale and the enormity of these practices in times of war often lead to 'a social death' of the victims and are well-suited weapons in destroying the larger social fabric in affected communities.[541] While it is true that systematic sexual violence has always been a viable part of military and political schemes over the history of conflicts, studies indicate that the magnitude and cruel nature of these practices in times of war 'appear to be on the rise'.[542] As stated earlier, wartime rape is perpetrated in different socio-cultural contexts with significant variation of the scale and cruelty depending on the objectives of the perpetrators,[543] which makes it difficult to fully grasp the impacts of these crimes on victims and affected communities.[544] However, the way in which systematic sexual violence has been, and is still being, used in times of war as a weapon is the predominant lens through which its effectiveness in societal degradation and the complex realities prevailing in post-conflict societies enduring the legacy of these crimes can be understood.

As stressed in this chapter's introduction, this picture of the way in which mass sexual violence as a military tool damages the very social fabric that the affected communities depend provides us an essential framework to understanding the complexities involved in the process of addressing these crimes within the context of international criminal justice system. In addition to the challenges in building evidence in order to hold perpetrators accountable as was earlier discussed in chapter two, the conditions of victims of these crimes during and

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[539] I. Skjelsbæk, *Supra* note 457, p. 42.
[540] J. Trenholm, *Supra* note 444, p. 39.
[541] R. M. Schott (2001), 'War Rape, Social Death and Political Evil', *Development Dialogue*, Vol. 55, pp.47-61.
[542] K. Farr (2009), 'Extreme War Rape in Today's Civil War-torn States: A Contextual and Comparative Analysis', *Gender Issues*, Vol. 26, p. 1.
[543] See E. J. Wood, *Supra* note 480, p. 307.
[544] See K. T. Hagen, *Supra* note 490, p. 18.

after conflicts and their legacy in affected communities may present a unique range of challenges in the pursuit of redress for victims.

As previously mentioned in chapter three, the growing shift in understanding that crimes are not only against the state or the international community, but also against the individual's rights led to the recognition of the victim's right to, and need for sense of justice. This suggests that international criminal justice system needs to provide for the empowerment and inclusion of victims in proceedings. Various studies have found that victims have interest in having their voice heard and recognised as well as having an active role throughout the criminal justice proceedings.[545] Scholars such as Luke Moffett,[546] Mina Rauschenbach and Damien Scalia[547] maintain that attending to the needs of victims in the course of the international criminal justice process can enhance their satisfaction with the process, thereby significantly contributing in redress for victims. In similar vein, Miriam Cohen argues that 'a justice system cannot be complete without taking into account the existence of victims of crimes'.[548] Attending to victims needs in the course of the criminal justice process is indeed fundamental to the pursuit of justice for victims, and particularly in an effort to contribute in rebuilding war-torn societies after mass violence. With respect to this point, as discussed in previous chapter, the Rome Statute did not turn a blind eye, but explicitly allows victims to take active part in the proceedings,[549] though without clear guidance on how this should be done leaving the task to the judges to design a feasible approach.

A critical issue in our discussion, then, is to determine the nature and extent of victims' needs in light of their victimisation experiences in order to understand how mechanisms to address these needs can be considered. In this regard, the complex and the multidimensional nature of the victimisation process in conflict-related sexual violence can guide our understating of the needs of victims of such crimes and how these needs can be effectively addressed in the context of the fledgling multi-dimensional field of transitional justice.

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[545] See, for instance, B. Cook, F. David and A. Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims*, (Australian Institute of Criminology, Research and Public Policy Series, 1999), p. 40; S. Heather, *Repair or Revenge: Victims and Restorative Justice*, (Oxford University Press, 2002), p 12.

[546] See L. Moffett (2015), 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court', *Criminal Law Forum (*Springer Science + Business Media Dordrecht).

[547] M. Rauschenbach and D. Scalia (2008), 'Victims and International Criminal Justice: a Vexed Question?', *International Review of the Red Cross*, Vol. 90, N° 870, p. 444.

[548] M. Cohen (2008), 'Victims' Participation Rights within the International Criminal Court: A Critical Overview', *Denver Journal of International Law and Policy*, Vol. 37, N° 3, p. 377.

[549] See Art. 68 (3) of the Rome Statute.

4.3.1 Justice from the Perspective of the Unique Experience of the Victims of the Systematic Use of Mass Sexual Violence as a Weapon in Conflict Settings

Do victims of rape and other acts of sexual violence as weapons of war have needs in transitional justice process beyond common needs of victims of crimes? This complex question will be addressed in the following discussion of the needs of victims of crimes, how these needs can be determined, objectively or subjectively, and the challenges involved in the process of determining victims' needs, particularly in situations of mass atrocity. As discussed earlier, systematic acts of sexual violence have increasingly become a prevalent weapon of warfare with uniquely destructive effects on victims and the wider affected societies. With this in mind, underlying the discussion of the specific needs of the victims of these crimes will also be an analysis of the challenges these victims face when engaging with the criminal justice process, and particularly the unique characteristics of these crimes as a weapon of war as well as the context in which they are committed which compound these challenges.

In order to understand particular needs of victims of conflict-related sexual violence, I begin by considering how the victims' needs in the criminal process can be determined, before going on to present what are reasonably established as victims' needs as well as challenges in fully grasping these needs, particularly in the wake of mass victimisation. I then reflect on the unique aspects of rape and other cruel acts of sexual violence as a weapon of war, resulting in complex and appalling experiences for the victims and the affected communities, and their implications for the victims' needs in the international criminal justice process.

A. Understanding the Needs of Victims of Crimes in the Criminal Justice Process

1. An Objective or Relative Approach to Victims' Needs in the Criminal Justice Process?

It is useful to begin the analysis about the needs of victims of crimes in the criminal justice process by considering the nature of their needs and how these needs should be measured. Indeed, much has been documented in the literature about the importance of the role of victims in the criminal justice system and the need for mechanisms aimed at meeting their needs in the criminal process.[550] In this regard, recent years have seen an increased focus on mechanisms aimed to improve the plight of victims in the criminal justice process within the domestic systems. Although there are considerable differences in the treatment of victims in

[550] See S. Walklate (Ed.), *Handbook of Victims and Victimology*, (Willan Publishing, 2007); M. E.I Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems, (*Wolf Legal Productions, 2000).

various domestic jurisdictions as discussed earlier in chapter three, addressing the needs of victims throughout the criminal justice process has become an important consideration.

Attending to victims' needs across different stages of the criminal justice process is believed to hold benefits not only for those harmed by crimes but also for the criminal system. Some studies have suggested, for instance, that meeting the needs of victims in the criminal process improves their satisfaction with the proceedings.[551] This therefore fosters the victims' cooperation with the system by boosting their willingness to testify as witnesses and even report future crimes.[552] As Antony Bottoms and Julian Roberts have noted, if victims' needs are not appropriately considered in the course of the criminal process, 'victims and members of community would see little merit in participation'.[553] The question that arises here, however, is how to determine these needs, connect these needs to particular mechanisms within the criminal justice process, in light of the nature of crimes and other relevant factors, with a view to taking best account of their different needs.

The concept of needs of crime victims in the criminal justice process is indeed problematic, especially with respect to the measures that should be used to assess these needs in delivering justice for victims. Some criminologists such as Sandra Walklate and Lesley Simmonds have argued that, despite various initiatives aimed at improving the plight of victims, their needs in the criminal justice process remain difficult to define[554] which, by implication, underlies a myriad of challenges facing criminal justice systems in matching justice mechanisms to victims' needs. In her study of the developments on victims' rights in England and Wales, Walklate points out for instance that some 'developments were put in place on the basis of very little knowledge about victims' needs'.[555] Indeed, a proper assessment of the needs of victimised people in the criminal justice process is fundamental to establishing and strengthening effective approaches to addressing the victims' needs.

The concept of needs differ from the concept of wants. Some criminologists such as Christopher Bennett draw a distinction between victims' 'needs' and 'wants', and suggest

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[551] See B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersensia, 2011), p. 48.

[552] See J. Shapland, J. Willmore and P. Duff, *Victims in the Criminal System*, (Cambridge Studies in Criminology, Aldershot: Gower, 1985), p. 91.

[553] See A. Bottoms and J. Roberts (Eds.), *Hearing the Victim: Adversarial Justice, Crime Victims and the State*, (Willan Publishing, 2010).

[554] See, for instance, S. Walklate, *Imagining the Victim of Crime*, (Maidenhead: Open University Press, 2007), p. 105; L. Simmonds (2009), 'What Victims Want! Victim Support, and Objective or Relative Approach', *Social & Public Policy Review*, Vol. 3, N° 2.

[555] See S. Walklate, *Supra note* 550, p. 106.

that whereas the latter are concerned with individual's desires or feelings about the crime and the offenders, victims' needs are concerned with what is important and necessary.[556] In other words, while 'they are many things that victims may want or may say that they want' in the wake of crimes, as Bennett explains,[557] some criminologists observe that needs have a more general nature depending on the nature of crimes and circumstances in which they are committed.[558] This suggests that an objective measure can be used in determining victims' needs on the basis of the nature and circumstances of the crime in order design certain mechanisms for providing effective responses to these needs.

It goes without saying that victims respond differently to crimes and may have wide-ranging wishes or demands which change depending on a number of factors. Victims' responses to their experience of crimes vary considerably in the wake of crimes, and this variation may be influenced by particular factors such as their personal and social characteristics as well as their previous relationship with offenders. Some of the wishes or demands in the wake of crimes may even be 'vindictive and vengeful', thereby become 'inappropriate' as far as the objectives of the criminal justice process are concerned.[559] In his analysis of the victims' needs, Bennett credibly explains for instance that some victims may seek revenge by demanding for 'something very harsh' to be imposed on the offender such as castration for rape offenders.[560] Underlining that some of the victims' attitudes such as a possible wish for revenge are understandably 'inappropriate', Bennett's account on victims' needs rightly suggests that some of the victims' wants in the wake of crimes simply cannot be validated by the criminal justice system.

Indeed, the concept of needs of victims in the criminal justice process holds considerable complexity. As stated above, proper identification of these needs as 'what is necessary' or 'what is really important'[561] rather than individuals' desires or wishes in the aftermath of crimes, is vital to equally delineating how these needs should be met,[562] depending on particular pattern of victimisation. However, even where victims' needs are defined as what

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[556] See C. Bennett, 'Satisfying the Needs and Interests of Victims', in G. Johnstone and D. W. Van Ness (Eds.), *Handbook of Restorative Justice*, (Willan Publishing, 2007), p. 249.

[557] Ibid. p. 248.

[558] See, for instance, Mawby R. I, 'Victims' Needs or Victims' Rights: Alternative Approaches to Policy-Making', in M. Maguire and J. Pointing (Eds.), *Victims of Crime: A New Deal?* (Open University Press, 1988), p. 131.

[559] See C. Bennett, *Supra* note 556, p. 248.

[560] Ibid.

[561] Ibid.

[562] See R. I. Mawby and M. L. Gill, *Crime Victims: Needs, Services, and the Voluntary Sector*, (Tavistock Publications, 1987), p. 28.

is necessary or that is really important, there is no guarantee of fully capturing these needs, especially in context of mass victimisation during conflicts. The point here is that while an objective measure can be applied in identifying certain needs of victims, owing to the nature of crime and its known or presumed effects as will be discussed below, determining what is commonly necessary for victimised people is also fraught with difficulties.

Despite the complexities in fully grasping victims' needs even in case of similar crime types, as the foregoing suggests, some studies convincingly maintain that the nature of crimes and various effects with which certain crimes can be associated have a crucial bearing on the resulting victims' needs in the criminal justice process.[563] This suggests that, while some other factors such as the vulnerability of the victims, their previous experience of victimisation, their relationship with offenders can influence victims' responses to victimisation,[564] victims' needs in the criminal justice process tend to be offence-specific and, for that reason, certain common needs of victims with a similar victimising event can be fixed accordingly. Howard Zehr, for instance, places considerable emphasis on the nature of crime and its effects in his analysis of the victims' needs from the criminal justice process.[565] This view has also been supported by other scholars such as James Dignan[566] and Jo Goodey[567] who draw on the nature of crimes and various effects which certain crimes can be associated with to explain victims' responses to their victimisation. Understanding the victimisation process is central to establishing the resultant victims' needs in the criminal justice process.

In summary, the concept of needs of crime victims and how these needs should be identified, on the account of the nature of crimes and their effects on victims, is fundamental to the effectiveness of victim-focused mechanisms aimed at providing victim redress. A proper assessment of the victims' needs in the criminal justice process provides an important benchmark for appropriate mechanisms for delivering justice for victims. There is an increasingly large body of empirical studies on the ways in which victims respond to their victimisation, and what should account as victims' needs. The neglect of victims' needs in the criminal process is often associated with victims' frustration with the criminal system and, even more crucially, seen by some scholars as a major source of secondary victimisation for

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[563] See, for instance, See J. Goodey, *Victims and Victimology: Research, Policy and Practice*, (Longman Criminology Series, 2005), p. 122; H. Zehr, *Changing Lenses: A New Focus for Crime and Justice,* (Herald Press, 1990).
[564] See J. Goodey, *Supra* note 563, p. 122.
[565] See H. Zehr, *Supra* note 563.
[566] See J. Dignan, *Understanding Victims and Restorative Justice*, (Open University Press, 2005), p.31.
[567] See J. Goodey, *Supra* note 563, p. 145.

victims by their negative experience of the criminal proceedings.[568] The remainder of this chapter presents a critical review of the existing literature's account of victims' needs before reflecting on the complexity of experiences of victims of conflict-related sexual violence during and after conflicts, and its implications for the victims' needs in transitional justice.

2. Needs of Crime Victims in the Criminal Justice Process

In recent years, various legal instruments have been developed, both at the international and national levels, in order to respond to victims' needs, thereby improving their plight in the criminal justice system. As argued earlier, attending to victims' needs during the course of the criminal justice process is a critical component in delivering justice to victims. This is perceived as a major element in improving the victims' satisfaction with the criminal proceedings,[569] thereby fostering their cooperation with the system not only as witnesses, but also by boosting their willingness to report future crimes.[570] Admittedly, without the cooperation of victims by way of reporting crimes and providing evidence, most crimes would remain unpunished. Thus, attending to victims' needs has become an essential concept in the modern understanding of the criminal justice process.[571] It is certainly worth underlining, as was discussed in the previous chapters, delivering justice for victims of crimes demands justice mechanisms aimed to ensure that their needs are appropriately taken into account in all stages of the criminal justice process while at the same time ensuring the protection of the rights of the accused.

The growing concern on justice for victims sparked interests in victims' needs amongst scholars, and much is found in the literature detailing various needs of victims in the criminal justice process. Different kinds of harm arising either directly or indirectly from the commission of a criminal offence result in various needs for the victims, ranging from the need for information, recognition and participation in the criminal justice process to the need for emotional and material support. It is worth stressing here that victims' needs are not 'fixed entities' as Walklate rightly argues,[572] and may thus vary by type of crime and circumstances surrounding the victimisation process as well as the personal characteristics of

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[568] See, for instance, H. Reeves and K. Mulley, 'The New Status of Victims in the UK: Opportunities and Threats', in A. Crawford and J. Goodey (Eds.), *Integrating a Victim Perspective within Criminal Justice*, (Dartmouth Publishing, 2000), p. 127; U. Orth (2002), 'Secondary Victimization of Crime Victims by Criminal Proceedings', *Social Justice Research*, Vol. 15, N° 4, p. 314.
[569] See B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersensia, 2011), p. 48.
[570] Ibid. p. 48.
[571] See A. Bottoms and J. Roberts, *Supra* note 553.
[572] See S. Walklate, *Supra note* 550, p. 105.

victims. However, some empirical studies on victims' needs in the criminal justice process have shown that victims generally need to be informed about the progress of the case and participate in the process, treated in a fair and respectful manner, material reparation and, in some instances and on a varying degree, emotional restoration and apology.[573]

Victims' need for information, described as 'the most common need of all victims',[574] encompasses providing them with information about the progress of criminal investigations and the status of their cases as well as the general functioning of the criminal justice system. It is critical that victims receive information not only about the progress of investigations and prosecutions but also an explanation about their rights as well as other services available to them. The court procedures are often confusing and many victims are not familiar with general functioning of the criminal justice system. Lack of information from the criminal justice authorities on the progress of investigations and prosecutions as well as the outcome of their cases is viewed by some scholars as major source of frustration for victims.[575] Diane L. Green and Albert R. Roberts, in their study on helping victims of violent crimes,[576] found for instance that lack of information for victims about their rights and services available to them could compound the impact of crimes on victims and adversely impact their recovery process. Accurate and up-to-date information about the status of investigations into their cases is therefore critical to avoiding secondary victimisation of victims and the information provided should be easy to understand for crime victims.

Another very important need for victims in the criminal process is the need for participation in the processing of their cases. Victims need to be heard at all stages of the criminal justice process, and have the opportunity to tell their stories as part of the justice process.[577] According to Jo-Anne Wemmers and Katie Cyr, 'procedures that allow victims to be heard can effectively reduce the risk of secondary victimisation'.[578] A number of mechanisms have been developed to increase victims' role in the criminal process across different criminal justice systems. As noted in the previous Chapter, these mechanisms range from the right to

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[573] See, for instance, J.-A. M. Wemmers, *Victim in the Criminal Justice system*, (Kugler Publications, 1996); A. Ten Boom and K. F Kuijpers (2012), 'Victims' Needs as Basic Human Needs', *International Review of Victimology*, Vol. 18, N° 2, pp 155-179.
[574] J.-A. M. Wemmers, *Supra* note 573, p. 19; See also Ten Boom and K. F. Kuijpers, *Supra* note 573, p. 163.
[575] H. Strang and L. W. Sherman (2003), 'Repairing the Harm: Victim and Restorative Justice', *Utah Law Review*, Vol. 15, p. 20.
[576] D. L. Green and A. R. Roberts, *Helping Victims of Violent Crime: Assessment, Treatment, and Evidence-Based Practice*, (Springer Publishing Company, LLC 2008), p. 8.
[577] J. A. M. Wemmers, *Supra* note 573, p. 20.
[578] J.-A. Wemmers and K. Cyr (2006), 'What Fairness Means To Crime Victims: A Social Psychological Perspective on Victim-Offender Mediation', *Applied Psychology in Criminal Justice*, Vol. 2 N° 2, p. 124.

join the criminal proceedings as civil parties; "*parties civiles*" or a subsidiary prosecutor in civil law countries to an opportunity for victims to participate in the process by expressing the effects of crimes on them in the form of victim impact statements in common law jurisdictions. Victim's voice has thus become an important aspect in the criminal justice process, not only at the national level but also at international arena with the recently established ICC.[579]

Another commonly expressed need of crime victims is linked to emotional and psychological effects of some crimes upon victimised people. Certain crimes result in 'psychological and emotional effects upon victims including depression, anxiety and fear'[580] which need to be taken into account over the course of the criminal justice process. Some victimology literatures also show that victims need to be treated with fairness and respect. For Heather Strang and Lawrence Sherman, victims' satisfaction with the criminal process is significantly related to their perceptions of fair process and outcomes in their cases.[581] Fair treatment of victims entails, among other things, respectful treatment for their dignity and privacy by the criminal justice process authorities, consultation and participation in the process as well as ensuring that they get necessary information for their rights and all important case decisions. The effects of crimes also affect victims' sense of safety leading to the sentiment of fear and disempowerment which, in turn, results in need for support and protection to ensure their physical and psychological wellbeing in the course of the criminal justice process.

As earlier stated, attending to victims' needs throughout the criminal justice process is central to ensuring victim satisfaction with the criminal system. As Moffett maintains satisfying victims' needs in the course of the criminal justice process 'can be more important than substantive outcomes to some victims'.[582] Though an appropriate punishment for offenders is indeed critical to ensuring sense of justice for the victims,[583] Irvin Waller's study on victims of crime and the criminal justice process also found that the punishment of the perpetrator 'for punishment's sake is not high on victims' list of needs'.[584] This suggests that victims expect from the criminal justice not simply the outcome, but also the substance of the

[579] See Art.68 (3) of the Rome Statute and Rules 85 and 89-93 of the ICC Rules of Procedure and Evidence.
[580] See J. Dignan, *Supra* note 566, p. 24
[581] H. Strang and L. W. Sherman, *Supra* note 575, p. 24.
[582] See L. Moffett, *Justice for Victims before the International Criminal Court*, (Routledge Abingdon, 2014), p. 32.
[583] See N. Henry (2009), 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence', *The International Journal of Transitional Justice*, Vol. 3, p. 131.
[584] See I. Waller, *Rebalancing Justice: Rights for Victims of Crime*, (Rowman & Littlefield Publishers, 2011), p. 29.

process. Meeting their needs over the course of the criminal justice process can boost their faith in the process and, as a result, their willingness to collaborate with the criminal system. Attending to victims' needs is therefore fundamental not only to providing them with a sense that justice has been served but also for effective administration of justice. Victims' sense of disillusionment of the criminal justice system has, for instance, been associated with a reluctance to report future crimes or to reduced willingness to collaborate with the criminal justice authorities.[585]

In summary, studies indicate that victims have varying needs ranging from practical and emotional support to the need to be informed about, and participate, in the justice process as well as compensation for the material harm suffered. However, the extent and degree of these needs depend on the type of victimisation experienced, on circumstances surrounding a crime as well as on characteristics of victims. It is true that war victimisation can leave victims with similar needs in the criminal justice process to those of people affected by ordinary crimes. Some crimes committed in conflict settings can however result in more extensive needs for the victims, considering their enormity and massive nature as well as the context under which some of these crimes are committed. For many scholars such as Moffett[586], Jo-Anne Wemmers and Anne Marie de Brouwer[587] as well as Ernesto Kiza, Corene Rathgeber and Holger Rohne,[588] the complex phenomenon of war-victimisation often result in more 'extensive and acute' needs for the victims in the criminal justice process than those of ordinary crimes.

As discussed below, underlying such finding is the long-lasting and devastating effects some crimes inflicted in times of war have not only on the victims and their families but also on the social fabric of affected communities. For instance, highlighted above, the systematic and widespread nature of sexual violence in conflict situations as a weapon of war results in uniquely destructive effects. The remainder of this chapter briefly looks at the complexities in assessing victims' needs in the criminal justice process in the context of mass atrocities, and presents a critical analysis of the needs of victims of mass sexual violence as a weapon in conflict situations.

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[585] See J.-A. Wemmers and K. Cyr, *Supra* note 573, p.104.
[586] See L. Moffett, *Supra* note 582, p. 28.
[587] See J.-A. Wemmers and A. M. de Brouwer, 'Globalization and Victims' Rights at the International Criminal Court', in R. Letschert, J. Van. Dijk (Eds.), *The New Faces of Victimhood*, (Springer, 2011), p. 281.
[588] E. Kiza, C. Rathgeber and H. Rohne, *Victims of War: An empirical Study on War-Victimasation and Victims' Attitudes towards Addressing Atrocities*, (Hamburger Edition, 2006), p. 81.

3. Challenges of Determining Victims' Needs in the Context of Mass Victimisation in Conflicts

> Conflict or repression is often so widespread and traumatising that the entire society is victimised, and there is a need to redefine victims as the entire society.[589]

Redressing the harm done by mass atrocities is one of the most complex problems for international criminal justice system. Rama Mani' view that 'there is a need to redefine victims as the entire society' emphasises how the issue of addressing the needs of victims holds considerable challenges in the context of conflict-related gross and systematic violations. As earlier stated, redressing the harm done demands an understanding of the nature and extent of the victims' needs in order to match services delivery to their needs. However, the mass victimisation aspect of war-related crimes leads to a myriad of complexities in determining the needs of victims in the criminal justice process in order to deliver justice and redress for victimised people.[590] These complexities stem from the very fact that some crimes committed in times of war often leave affected society victimised as a whole. For instance, As shown in earlier discussion in this chapter, the causes and dynamics of mass sexual violence as weapons in conflict settings and their consequences make these practices in situations of conflicts not only an individual but also societal problem.

Mass victimisation in situations of conflicts is an aspect that holds considerable complexity in determining the resulting needs of victims. First, some types of mass criminal victimisation target specific communities or a group of people simply on the basis of the victims' connection to an identifiable social membership. Wemmers and de Brouwer note that such crimes affect victims' social identity and, as a result, other members of the group 'may also feel victimised regardless of whether or not they themselves experienced any direct victimisation'.[591] The nature of crimes that target a particular group of people, on the basis of their social membership, causes sense of victimisation beyond the individual victims. This suggests that the victims are not only individuals but the whole group targeted.

Second, in some circumstances, the nature of mass atrocities in conflict settings means that the victims are exposed to multiple types of violence, crimes and abuses. There is evidence suggesting for instance that the victims of systematic mass violence in conflicts settings are

[589] R. Mani, 'Reparation as a Component of Transitional Justice: Pursuing 'Reparative Justice' in the Aftermath of Violent Conflict, in K. De Feyter et al. (Eds.), *Out of the Ashes: Reparation for Victims of Gross Human Rights Violation*, (Intersentia, 2006), p. 68.

[590] See B. McGonigle Leyh (2012), 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls', *International Criminal Law Review*, Vol.12, p. 378.

[591] See J.-A. Wemmers and A. M. de Brouwer, *Supra* note 573, p. 284.

not confronted with a single type of atrocity but instead suffer from multiple direct or indirect victimisations.[592] It should be emphasised here that producing large-scale victimisation is one of the prime goals of the perpetrators. According to Jelena Jauković for instance, in her analysis of the forms of victimisation in the territory of the former Yugoslavia, a victim may experience multiple rapes and submitted to different other forms of physical violence such as wounding, torture, taking people by force and, in most cases, forced to witness torture or killings of their relatives and friends.[593] Similarly, as earlier noted with reference to the long conflict in the DRC during which mass sexual violence reached an epidemic level, studies found that the majority of the victims of systematic sexual violence were raped several times in different places by different armed forces.[594]

A third factor explaining the complexity of war-related mass victimisation is the uncertain line between victims and perpetrators. Erica Bouris, in her study of complex political victims,[595] found that the parameters around victims and perpetrators cannot easily be drawn in the aftermath of war-related large-scale violence. The conceptualisation of victimhood in situations involving gross and massive large-scale violence can pose important challenges, especially because in some situations the perpetrators of the crimes are also a part of the war victimisation context, as perpetrators and victims of same crimes at the same time.[596] Armed conflicts provide a fragile environment for extreme cruelty and brutality to the extent that even some victims find themselves in the same criminal context, perpetrating the same crimes of which they are victims. For instance, in situation in the Republic of Uganda, Dominic Ongwen, abducted as a 10 year old while on his way to school and turned to a child soldier by the Lord's Resistance Army, was indicted by the ICC for crimes against humanity and war crimes, crimes of which he is also a victim.[597]

Unique characteristics of conflict-related victimisation raise vexing problems in the pursuit of justice for the victims. Uwe Ewald argues that the massive nature of international crimes makes it difficult for the international criminal tribunals' jurisprudence to reflect the diverse ways in which many people contribute to mass crimes as well as actual lived experience of

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[592] Ibid. p. 286.
[593] J. Jauković (2002), 'The Forms of Victimisation in the Territory of the former Yugoslavia', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 10, p. 113.
[594] See F. Kathryn, *Supra* note 471, p. 1.
[595] See E. Bouris, *Complex Political Victims*, (Bloomfield: Kumarian Press, 2007), p. 20
[596] See K. Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World*, (Routledge, 2012), p. 68.
[597] See Situation in Uganda, *Warrant of Arrest for Dominic Ongwen*, Pre-Trial Chamber II, ICC-02/04-01/05-57, 8 July 2005.

the victims.[598] Armed conflicts not only produce a large number of victims who suffer directly or indirectly in the atrocities committed but also of perpetrators, and some find themselves as victims and perpetrators of same crimes at the same time. Kirsten Fisher notes that some perpetrators even get involved in mass atrocities 'in fear themselves, caught up in a movement of violence'.[599] The distinction between victims and perpetrators is therefore not always as clear cut for conflict-related mass violence as for ordinary crimes.

It is useful to note that, given the multifaceted nature of mass victimisation in conflict settings as indicated above, needs of victims of such crimes are far from being identified in general terms. Moffett and Heidy Rombouts argue that not all victims of mass atrocities seek the same things even in the aftermath of the same conflict.[600] This view is reflected in the ICC's finding on victims' participation in criminal proceedings in *Thomas Lubanga Dyilo* case, whereby the Court's judges found that international crimes have significant but diverse, direct and indirect effects for victims in the way that considerably shapes their needs.[601] For scholars such as Moffett, this reality makes the development of a comprehensive scheme for justice for victims within the context of international criminal justice very challenging, and even 'almost impossible'.[602]

As argued all through this thesis, the development of victims' needs based approach to international crimes must reflect the wide-ranging particular needs of individual victims and groups of victims of these crimes. This suggests that the multifaceted nature of conflict-related mass victimisation must be considered for the effectiveness of any victim redress mechanisms. This is particularly relevant in the context of systematic rape and other brutal acts of sexual violence as a weapon of war which are, as discussed earlier, often designed to have far-reaching devastating consequences beyond immediate victims, in particular to destroy the social fabric of affected communities. The victimisation process of sexual violence as a weapon of war is complex and often prolonged even long after conflicts. So what are the implications of distinct aspects of mass rape as a military tactic for the needs of victims in transitional justice processes? Do the conditions of victims of these crimes during

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[598] See U. Ewald (2006), 'Large-Scale Victimisation and the Jurisprudence of the ICTY: Victimological Research issues', in U. Ewald and K. Turkovic (Eds.), *Large-Scale Victimasation as Potential Source of Terrorist Activities*, (IOS Press, 2006), p. 187.
[599] K. Fisher, *Supra* note 596, p. 68.
[600] See L. Moffett, *Supra* note 582, p. 29; See also See H. Rombouts, 'Importance and Difficulties of Victim-Based Research in Post-Conflict Societies', *European Journal of Crime,* Vol. 10, p. 220.
[601] *The Prosecutor vs. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/ 06-1119, Decision on Victims' Participation, Trial Chamber I, 18 January 2008, § 97.
[602] See L. Moffett, *Supra* note 582, p. 29.

and after conflicts as well as the grim legacy of these crimes in affected areas lead to more extensive needs for victims of these crimes than for victims of ordinary crimes? These are important questions to which the discussion now turns.

B. Systematic Sexual Violence as a Weapon of War: Inquiring into the Victims' Needs in Transitional Justice Processes

The prevalence of systematic sexual violence in warfare is well documented. Some studies on armed conflicts suggest that the enormity and scale of these appalling practices appear to be on the rise in modern conflicts.[603] Reflecting on the prevalence of mass sexual violence in conflict situations, Margot Wallström, the first UN Secretary General's Special Representative for sexual violence in conflicts,[604] notes that 'in modern conflicts, rape is the front line of conflict'.[605] Wallström's view underlines the fact that mass rape and other acts of sexual violence are not side-effects of wars but rather have become a common thread in furtherance of clearly defined military and political objectives.

Distinct features in the victimisation process of mass sexual violence in conflicts, as discussed above, make these crimes more effective in destroying not only the lives of the individual victims but also the fabric of society than systematic killings.[606] Key features of mass sexual violence as a weapon of war that underlie the victims' complex experiences such as the extreme brutality of the methods used, massive nature of the incidents, public occurrence in order to spread terror and public humiliation, rape camps for mass and repeated rapes, and particularly, the motive of the perpetrators such as the dehumanisation of victims, tearing apart families and communities, ethnic cleansing or even genocide explain the humanitarian disaster associated with these crimes. It has been reported, for instance, that during the conflict in Guinea, 'the victims were often stripped on the streets and gang-raped in front of onlookers, some of whom recorded the attacks with cell phones, soldiers using knives to slice off women's clothing, women being raped with guns, etc..'[607]

Indeed, systematic and mass sexual violence military tools are distinctively destructive, and not only leave the victims with significant challenges to cope with their victimisation but also

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[603] See K. Farr, *Supra* note 542, p. 1.
[604] This Office of the Special Representative to the UN Secretary-General for Sexual Violence in Conflicts was created by the UN Security Council Resolution 1888 (2009) on 30 September 2009 and the first Special Representative was appointed by the UN Secretary General on 2 February, 2010.
[605] See J. Moore, 'Confronting Rape as a War Crime: Will a New UN Campaign have any Impact?' In *I*ssues *in Peace and Conflict Studies: Selection from CQ Researcher,* (SAGE Publications, Inc., 2011), p. 499.
[606] See, for instance, K. T. Hagen, *Supra* note 490, p. 15; M. Verveer, *Supra* note 432.
[607] See J. Moore, *Supra* note 185, p. 107.

fractures families and communities. As shown in earlier discussion, these distinct features coupled with the dynamics of these crimes in conflict situations distinguish these crimes from ordinary crimes.[608] The dehumanisation of victims and destruction of larger social bonds between families and communities have become a *modus operandi* of sexual violence as a strategy of war. For instance, victims of systematic rape in the Colombian conflict, testifying before the Inter-American Court of Human Rights, reveal that 'women were forced to strip naked and to dance in front of their husbands, many of the women were then raped in front of their husbands and their screams were heard as far away as the next ranch'.[609]

As stated earlier, the victimisation process in mass sexual violence in conflicts is often prolonged even long after conflicts. For instance, some victims of these crimes during the DRC conflict report that 'the stigma they face as survivors of sexual violence can be as traumatic as the attack itself.'[610] Studies on effects of war sexual violence in communities affected by conflicts have documented many instances of family rejections of the victims and societal stigma against the victims which hinder their social integration.[611] Most exposed to this reality are the victims with children born of war rape and their children, the victims of systematic sexual violence in public occurrence or gang raped and those with long-term consequences with regard to their health such as HIV/AIDS and some psychological problems such as trauma.[612] This reality often leads the victims to a total silence of shame and fear of community rejection. A victim of systematic rape during the Tutsi genocide in Rwanda, suffering from trauma and HIV/AIDS, relates that:

> This war [genocide against Tutsi] in Rwanda, if only they had exterminated us all . . . The way we live now, we live with the knowledge that our neighbours do not like us.[613]

In the aftermath of conflicts, the harm suffered by victims of mass sexual violence is compounded by the long-lasting effects of these crimes on their social circumstances. As

[608] See N. Farwell (2004), 'War Rape: New Conceptualisations and Responses', *Sage: Affilia: Journal of Women and Social Work*, Vol. 19, N°4, p. 393.
[609] See ABColombia, 'Colombia: Women, Conflict-Related Sexual Violence and the Peace Process', Report published in November 2013, available at http://www.christianaid.org.uk/images/ABColombia-conflict-related-sexual-violence-report.pdf , (Accessed on 20 March, 2015), p.12.
[610] Harvard Humanitarian Initiative, 'Characterizing Sexual Violence in the DRC: Profiles of Violence, Community Responses, and Implications for the Protection of Women', August, 2009, available at http://hhi.harvard.edu/sites/default/files/publications/final%20report%20for%20the%20open%20society%20institute%20-%201.pdf, (Accessed on 10 March, 2015), at p. 4.
[611] See, for example, S. Hunt, *Supra* note 527; M. C. Mukarugendo, *Supra* note 528.
[612] See the Harvard Humanitarian Initiative, *Supra* note 610. See also M. C. Mukarugendo, *Supra* note 528.
[613] Human Rights Watch, 'Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda', September 2004, Vol. 16, No. 10(A) available at http://www.hrw.org/reports/2004/rwanda0904/rwanda0904.pdf, (Accessed on 15 March, 2015), at p.35.

stated above, empirical accounts indicate that, in post-conflict settings, these victims face a lifetime of stigma, often abused and rejected by their own families and communities and some remain profoundly traumatised and isolated. In most cases, these victims are victimised again by the shame and stigma forced on them by their communities. Harvard Humanitarian Initiative, in their report on the victims' experiences after war in the DRC, noted that:

> The issue of stigmatization of rape survivors was an overarching and dominant finding: one in three women reported being rejected by their husbands and one in 15 women reported being rejected by their communities. Women state that the stigma they face as survivors of [conflict-related] sexual violence can be as traumatic as the attack itself.[614]

Particularly, conflict-related mass sexual violence in public occurrence, aimed to inflict severe humiliation on the victims and diminish human dignity as earlier noted, has often been associated with family rejection and marginalisation of victims in their communities. For instance, after the Darfur Conflict, during which the Janjaweed militiamen employed rape and other acts of sexual violence as systematic weapons,[615] the victims of these crimes share their experiences in the aftermath of the conflict:

> The 'crime' of falling victim to rapists and sexual attackers renders them valueless, dishonoured and rejected. Many have been divorced, exiled and cast out by their own husbands and communities.[616]

Another victim of mass sexual violence in the DRC conflict noted:

> If in your neighbourhood people know that you have been raped, they will be mocking at you wherever you will be, and say don't consider that person, she has been raped.[617]

Indeed, one way in which rape and other acts of sexual violence increasingly used in war as a military tactic challenge the conception of ordinary crimes is how these crimes destroy the social fabric of affected communities, leading to what scholars such as Sarah Clark Miller and Robin May Schott describe as 'the social death' of the victims.[618] In fact, victims of these crimes struggle for social reintegration after conflicts and, as a result, their absence hinders

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[614] Harvard Humanitarian Initiative, *Supra* note 610, p.4

[615] See the Amnesty International Report, *Supra* note 472.

[616] See L. Bautes (2012), 'A Crime upon a Crime: Rape, Victim-Blaming, Stigma', *Women under Siege*, Available at http://www.womenundersiegeproject.org/blog/entry/a-crime-upon-a-crime-rape-victim-blaming-and-stigma (Accessed on 20 March, 2015), at p. 1.

[617] See Harvard Humanitarian Initiative, *Supra* note 610, p. 24.

[618] See S. Clark Miller, 'Atrocity, Harm and Resistance: A situated Understanding of Genocidal Rape' in A. Veltman and K. J. Norlock (Eds.), *Evil, Political Violence and Forgiveness*, (Lexington Books, 2019), p. 64; See also R. M. Schott, *Supra* note 541.

the post-conflict recovery of entire affected society.[619] The consequences of these crimes for direct and indirect victims as well as for affected communities have profound implications for the victims' needs in the post-conflict transitional justice process.

1. The Victims' Need for Recognition and Validation of their Victimasation

The lived experiences of people victims of the use of sexual violence as a weapon in war leave them with appalling immediate and long-term effects but also make their communities struggle to recover from mass violence even long after conflicts.[620] In the aftermath of conflicts, thousands of direct and indirect victims might have lost trust in society and social values. It is therefore not only in the victims' but also the affected communities' interest that the victims of such crimes get a sense of justice. Evidence suggests, however, that the victims of conflict-related sexual violence are stigmatised, often rejected by their families and communities and, as result, the victims are reluctant to come forward share their traumatic experiences. Nancy Combs notes that victims of these crimes find it difficult to discuss their traumatic experiences because it leaves them 'more vulnerable to rejection, ridicule and stigmatisation'.[621] This fear of stigma and discrimination is often rooted in the moral taboos with regard to sexual violence in some cultural contexts. As discussed in earlier chapters, the reluctance of the victims to share their ordeals has even led to inconsistent indictments and myriad evidentiary challenges before international criminal tribunals.

As shall be argued also in the subsequent chapters of this thesis, central to addressing the use of systematic sexual violence a weapon of warfare and provide victim redress for the harm suffered, then, is to ensure the shift of the blame away from the victims and placing it on the perpetrators. Victims of mass rapes and other brutal acts of sexual violence therefore need recognition and validation of their victimisation not only by their communities but also by the criminal justice authorities. Empirical accounts emphasise how the stigmatisation and ostracism of the victims of mass rapes are major barriers for the victims' recovery.[622] Accordingly, it is safe to argue that an ideal justice response to the extremely nature of conflict-related sexual violence would include a justice process that counteracts isolation of such crimes' victims, addresses their fear of repeated victimisation in order to help them to

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[619] C. Cochran (2008), 'Transitional Justice: Responding to Victims of Wartime Sexual Violence in Africa', *The Journal of International Policy Solutions*, Vol. 9, p. 36.
[620] See A. Maedl (2011), 'Rape as a Weapon of War in the Eastern DRC? The Victims' Perspectives', *Human Rights Quarterly*, Vol. 33, pp. 128–147, p. 130.
[621] See N. A. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, (Cambridge University Press, 2010), p. 86.
[622] See C. Cochran, *Supra* note 619, p. 36.

regain new sense of order and control over their lives. Indeed, the uniqueness of their experiences leaves them in acute need to understand reasons for the crimes events and assurances that it will not happen again, through the legal process and societal validation of their victimisation in order to restore their faith in the community.

The view reflected here does not purport to suggest that victims' need for social acknowledgement and validation of their experiences in conflicts diminishes their desires for the punishment of individual perpetrators as Roman David and Susanne Choi have argued.[623] Rather, it underlines the significance of societal validation of such victims' lived experience in addition to accountability for perpetrators in providing a sense of justice to the victims in an effort to contribute in the rebuilding process of nations torn apart by these crimes. It is worth stressing here that one of the primary objectives of the perpetrators of systematic and widespread rapes and other acts of sexual violence as a weapon in many conflicts is to tear community apart or destroy the social cohesion of affected communities through appalling and dehumanising acts of sexual violence. To counter the effects of these crimes for the individual victims and the resulting social and community consequences, post-conflict justice processes must be equally comprehensive and mindful of the victims' social circumstances as well as the challenging social contexts in which these crimes are committed.

Victims would perceive social acknowledgement and accountability for perpetrators as validation of their experience and reaffirmation of their humanity. Nicola Henry, in her study of the limits and potential of international war crimes trials for victims of wartime sexual violence, observes that victims of sexual violence in armed conflicts 'frequently report loss of self-esteem, self-worth and their sense of personal security'.[624] Henry found that, together with the need to see the perpetrators appropriately held accountable for their crimes, victims of conflict-related mass sexual violence 'may be more concerned about whether their human and civic dignity is restored'.[625] The recognition and validation of their experiences by the criminal justice system and by their communities is thus central to restoring victims' sense of identity, particularly in relation to their communities. The restoration of their human and civic dignity is particularly important for victims of mass sexual violence in situations of conflicts in order to facilitate their social reintegration.

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[623] R. David and S. Y. P. Choi (2009), 'Getting Even or Getting Equal? Retributive Desires and Transitional Justice', *International Society of Political Psychology*, Vol 30, N° 2.
[624] N. Henry (2009), 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence', *The International Journal of Transitional Justice,* Vol. 3, p. 119.
[625] Ibid., p. 121. See also R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (Cambridge: Polity Press, 2002).

2. Victims' Need to Tell their Stories in their Own Way and Avoid Potential Re-Victimisation

> If victims struggle to find a language to tell their stories, if war crimes courts struggle to "hear" these traumatic experiences, and if [international] trials contribute to the disempowerment of victims …, then what purpose do [these] trials serve in dealing with trauma and helping victims come to terms with their grief?[626]

Various studies on victims and their needs in the criminal justice process have found that, together with the need to be informed about the criminal procedures, treated with respect, fairness and dignity, need for support, protection and reparation for the harm suffered, victims of crimes need to be heard and participate in the criminal justice process.[627] It is often argued that affording victims a role in the criminal process by opening up avenues for story-telling and sharing is key to ensuring acknowledgement of their suffering in the criminal system, hence contributing in their recovery process.[628] Victims need opportunities to have their voices heard over the course of the criminal process, as integral players in the criminal proceedings, rather than mere bystanders. This brings needed recognition and validation of the victims' sufferings within the criminal justice system and, as Wemmers argues, can promote victims' sense of justice and satisfaction with the criminal system.[629] Studies also indicate that victims' satisfaction with the criminal justice system not only contributes to their recovery process but also boosts their willingness to collaborate with the criminal justice authorities.[630]

Participation of victims is therefore an important component of the criminal justice process. While the need for victims' participation in the criminal justice process and its presumed benefits for victims and the value for their contribution to justice through participation in the process are reasonably established in the literature,[631] one may argue that the way victims are treated in the criminal justice process significantly impact their recovery. Evidence suggests that victims' encounter with the criminal system and especially their treatment in the system itself may compound their primary victimisation. Potential negative effects of criminal

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[626] N. Henry (2010), 'The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice', *Violence against Women,* Vol. 16, N° 10, p. 1113.

[627] See, among others, J. A. M. Wemmers, *Supra* note 573; A. Ten Boom and K. F. Kuijpers, *Supra* note 573; S. Bacchus, ' The Role of Victims in the Sentencing Process' in J. V. Roberts and D. P. Cole (Eds.), *Making Sense of Sentencing*, (University of Toronto Press, 1999).

[628] See, for instance, M. Findlay, L. Boom Kuo and L. Si Wei, *International and Comparative Criminal Justice: A critical Introduction*, (Routledge, 2013), p. 139.

[629] See J. A. Wemmers (2009), 'Where do they Belong? Giving Victims a Place in the Criminal Justice Process', *Criminal Law Forum*, Vol. 20, p. 412.

[630] See, for instance, J. A. Wemmers and K. Cyr, *Supra* note 573, p.104.

[631] See N. Henry, *Supra* note 626, p. 120.

proceedings on victims have been widely documented. Scholars such as Bree Cook, Fiona David and Anna Grant[632] and Debra Patterson[633] note that victims' experience within the criminal justice system may be so traumatic as to constitute re-victimisation. Victims' negative experiences with the criminal justice system increase feeling of alienation with the criminal justice system and have been associated with their unwillingness to cooperate with the criminal justice authorities.[634] In this respect, following extensive interviews with 276 victims of violent crime on their experiences in the criminal justice process, Joanna Shapland and Jon Willmore Peter Duff found that 'the experience of the criminal justice process did seem to have swayed some victims not bothering with the process again'.[635] Secondary victimisation of victims often results from the inadequate treatment of victims or the failure of the system to address their particular needs depending on the nature of their victimisation. Uli Orth argues that, since the treatment of victims over the course of the criminal proceedings can have negative impact on their victimisation, appropriate measures to address their needs are thus fundamental to reducing instances of secondary victimisation and improve their experiences of the criminal justice process.[636] It is safe to argue, in this connexion, that since criminal trials operate around victims from reporting crimes to participating in the process as witnesses, the criminal justice system would fail if victims' collaboration is not guaranteed.

If indeed secondary victimisation occurs, this is particularly relevant in the context of conflict-related sexual violence cases. The enormity and the complexity of the experiences of victims of the use of systematic mass rapes and other acts of sexual violence as a weapon in war leave them in the worst vulnerable situation. Although their participation in the criminal process and have their voices heard is as important for them as for other victims of crimes, victims of mass rape in conflicts are often frightened by the trauma of their victimisation and myriad other social issues associated with their victimisation. As a result, sharing their stories is often difficult. As shall be discussed with reference to the shortcomings[637] of the *ad hoc* international criminal Tribunal for Rwanda in its treatment of victims of rape and other forms

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[632] See B. Cook, F. David and A. Grant (1999), 'Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia', *Research and Public Policy Series*, N° 19, p. 49.
[633] See also D. Patterson (2011), 'The Linkage between Secondary Victimisation by Law Enforcement and Rape Case Outcomes', *Journal of Interpersonal Violence*, Vol. 20, pp. 1-20.
[634] See R. Ruddy (2014), 'The Victim's Role in the Justice Process', *International Journal of Criminology*, p. 5.
[635] J. Shapland and J. W. PeterDuff, *Victims in the Criminal Justice System*, (Gower Publishing Company Limited, 1985), p. 91.
[636] See U. Orth (2002), 'Secondary Victimization of Crime Victims by Criminal Proceedings', *Social Justice Research*, Vol. 15, N° 4, p. 314.
[637] See Chapter Five *infra*.

of sexual violence in the 1994 Genocide against Tutsi people, victims of these crimes need a safe environment to tell their stories without blame or judgement. It will particularly be indicated that rape victims before international criminal tribunals were treated in ways that they experience as upsetting, which led to their increasing resentment with the process and, in most cases, unwilling to cooperate with the international criminal system.

Empirical accounts emphasise how the experiences of victims of mass sexual violence in conflict situations are not only hard to tell but also to listen to.[638] Inger Skjelsbæk, in her empirical study of the experiences of women who experienced rape during the war in Bosnia-Herzegovina, notes that 'the interviews were psychologically draining for all involved,…one of the interpreters told me it was particularly hard to hear the rape stories in the aftermath of war'.[639] This suggests, as Henry also argues, post-conflict justice responses to these crimes must be designed in a way that accommodates the 'unspeakable' experiences of victims.[640] This should also include appropriate mechanisms aimed to enable the victims to effectively convey the complex reality of their experiences during conflicts over the course of the criminal process. This leads to another notable need of victims of these crimes in post-conflict transitional justice processes.

3. The Need for Empowerment of Victims of Conflict-Related Sexual Violence in their Contributions to the Criminal Process and Within Communities

Generally, being victim of a crime is a disempowering experience which sparks the feeling of vulnerability and powerlessness. Recent empirical studies on what we know about the effects of crimes on victims found that there is a whole range of ways in which crimes may directly or indirectly impact on victims.[641] These include financial loss, physical harm, short- and long-term psychological and emotional effects and, in some cases, social effects such as damage to social relationships and a loss of trust in society where the offence occurred.[642] James Dignan noted that the consequences of crimes on the affected people and communities are 'highly offence specific'[643], and the extent of the victims' needs for support, protection and empowerment to help cope with their victimisation also varies significantly. Moreover,

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[638] See, for instance, I. Skjelsbæk (2006), 'Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape during the War in Bosnia-Herzegovina', *Feminism & Psychology,* Vol. 16, N° 4, p. 378.
[639] Ibid.
[640] N. Henry, *Supra* note 626, p. 1098.
[641] See, for instance, J. Shapland and M. Hall (2007), 'What Do We Know About The Effects Of Crime On Victims?' *International Review of Victimology*, Vol. 14, p. 178; J. Dignan, *Understanding Victims and Restorative Justice*, (Open University Press, 2005), p. 31.
[642] Ibid.
[643] J. Dignan, *Supra* note 566, p. 29.

this variation can even be more significant in the nature of the protective, support and empowerment measures needed to alleviate the harmful consequences of victimisation and facilitate their contributions in criminal process and, even more crucially, in possibilities for implementation of those measures.

As noted above, it is well established that victims of conflict-related sexual crimes face enormous challenges to cope with their victimisation in the aftermath of war. In addition to the devastating physical, psychological effects, these crimes lead to a myriad of social effects for the victims. Various studies found, for instance, that victims of conflict-related sexual violence are often stigmatised and rejected by their families and communities and prefer to remain silent about their experiences for fear of further exclusion.[644] Skjelsbaek, in her empirical study on experiences of the Bosnian victims of sexual violence in war, found that many victims of conflict-related sexual violence choose to remain silent about their experiences.[645] This is particularly due to fear of stigma and social rejection from their families and wider community which, as discussed above, are the consequences many victims face after conflicts. This view is also reflected in the ICC's finding, in its decision on victims' participation in the proceedings in *Prosecutor v. Jean Pierre Bemba* case, that the victims of rape and other acts of sexual violence are often reluctant to discuss their 'experiences in explicit terms'.[646]

While the need for protective and support measures for victims in their contribution to the criminal justice process is unquestionable, in some cases, there is also need for emotional and practical assistance to victims as they make their way through traumatic experiences of their victimisation. Victims support and empowerment measures are therefore important not only for their recovery from traumatic experiences but also to boost their willingness to support the criminal justice process by facilitating their contributions in the process. It is worth noting that, when providing for protective and support measures, there is a need to understand and consider the socio-cultural context associated with victims given the dynamics of the use of sexual violence as weapon in conflicts. As will be further discussed in the next chapter with reference to the practice of the international criminal tribunals and courts, victims of systematic sexual violence encountered various sorts of challenges in giving testimony

[644] See J.C. O. Kalonda, F. Kittel and D. Piette (2013), 'Stigma of Victims of Sexual Violence's in Armed Conflicts: Another Factor in the Spread of the HIV Epidemic?', Epidemiol*, An Open Access Journal*, Volume 3, N° 2, p.1.
[645] I. Skjelsbaek, *Supra* note 638, p. 94.
[646] See *Prosecutor v Jean-Pierre Bemba Gombo*, Case N° ICC-01/05-01/08, Decision on 772 Applications by Victims to Participate in the Proceedings, , Trial Chamber III, 18 November 2010, § 57.

leaving many with hurtful experience and exposed to re-traumatisation. This situation often paralysed the work of the tribunals. Some victims of rape, for instance, refused to testify before the ICTR about their traumatic experiences during the genocide in Rwanda, claiming the lack of faith in its victims' protection mechanisms and inappropriate treatment during the proceedings.[647]

To summarise, as noted in earlier discussion, the legal basis for international prosecution of the use of mass rapes and other acts of sexual violence in war appears to be firmly established in international criminal law. As scholars such as Binaifer Nowrojee have noted, and as was discussed in this chapter, the criminal justice process should not be 'a disempowering experience' for victims in a way that compounds the original victimisation.[648] While recognising the importance of affording victims of mass atrocities recognition and an active role in the criminal process by opening up avenues for story-telling, it is worth noting that the way in which this is done influences its effectiveness in achieving effective redress for victims. Accordingly, given the enormity and dehumanising nature of the use of systematic rapes and other acts of sexual violence as a weapon in war, appropriate mechanisms that reflect the actual lived victims' experiences are therefore fundamental to addressing the effects of these crimes on victims and affected areas and ultimately provide effective responses to the needs of victims. This could be done through a combination of different justice mechanisms aimed at addressing such victims' needs over the course of the criminal justice process. It is also useful to note that, given the dynamics and particular circumstances surrounding the perpetration of these crimes, it is not only in the victims' but also communities' interests that the needs of victims of the crime are appropriately addressed in order to facilitate their social reintegration in post-conflict settings.

4.4 Chapter Summary and Concluding Remarks

The aim of this chapter has been to critically assess the needs of victims of conflict-related sexual violence in transitional justice process in light their complex victimisation process, the effects of these crimes on victims and communities as well as the reality prevailing in societies enduring the legacy of these crimes. The focus has rested specifically on the distinct

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[647] N. Henry, *Supra* note 566, p. 121.

[648] See, for instance, B. Nowrojee, 'We Can Do Better: Investigating and Prosecuting International Crimes of Sexual Violence', *Paper Presented at the Colloquium of Prosecutors of International Criminal Tribunals in Arusha, Tanzania* (November 25-27, 2004), at p. 6. Available at http://207.150.203.251/Portals/0/English%5CNews%5Cevents%5CNov2004%5Cnowrojee.pdf (Accessed on 30 January, 2015).

aspects of mass sexual violence as a weapon of war and their implications for the needs of victims in post-conflict transitional justice processes. This discussion provides an essential framework for the next stage of the thesis by bringing to the fore the complexity of the victims' experiences during and after conflicts which is profoundly reflected in their needs in the criminal justice process after conflicts.

Recognising that seeking justice for victims of mass atrocities poses considerable challenges within international criminal justice system, as discussed in the previous chapter, this analysis adds a further dimension to understanding the possible limitations of international criminal justice in achieving effective redress for victims of mass rapes and other acts of sexual violence as a weapon in war. The discussion provides therefore an essential bridge between an assertion that the relatively recent integration of victims in international criminal proceedings is a vital component of growing victims' needs based justice approach to international crimes and the argument that the conditions of victims of these crimes during and after conflicts and their legacy in affected communities may present a unique range of challenges in the pursuit of redress for victims, which is the focus of the next chapter.

Whilst the needs of victims in the criminal justice process can be relatively similar regardless of whether someone is a victim of ordinary crime or crimes committed in conflict situations, the nature and extent of these needs vary depending on the victimisation process and conditions in which it occurred. The discussion in this chapter has shown that the complex realities of victims of the strategic use of mass rapes as a weapon of war and the legacy of these crimes in affected communities result in more acute and extensive needs for the victims in the criminal process than those of ordinary crimes. The basic premise for this argument is that the victimisation process of sexual violence as a weapon of war is complex and prolonged even long after conflicts with devastating effects of victims and communities, often highly entrenched in the local contexts.

The next chapter takes this discussion forward by critically investigating potential challenges of international criminal justice system in achieving justice and redress for victims of the prevalent use of mass sexual violence as a weapon of warfare. In so doing, an analysis of the potentials and limits of the growing victim-centred approach in international criminal justice system in addressing the needs of victims of these crimes will be the mainstay of the discussion.

CHAPTER FIVE

CHALLENGES AND LIMITATIONS OF THE ICC VICTIMS' PARTICIPATION REGIME IN ADDRESSING THE NEEDS OF VICTIMS OF SEXUAL VIOLENCE AS A WEAPON OF WAR

5.1 Introduction

All too often in situations of armed conflicts, rape and other acts of sexual violence are used as a weapon. Distinct aspects of widespread and systematic sexual violence in conflict situations and their implications for the victims' needs in transitional justice processes have been identified and analysed in the previous chapter. The analysis in the earlier discussion[649] focused on various mechanisms developed in recent years to cope with the consequences of crimes on victims and address their needs which recently reached its high point with the Rome Statute's recognition of victim participation in the criminal justice process and certain rights of reparations.[650] This landmark development in international criminal justice system reflects the emerging sense of the need to accommodate the victims' needs within the criminal justice process. While such mechanisms are a necessary component of a comprehensive approach to post-conflict justice responses to mass crimes, post-conflict justice process absent of a consideration of the needs of victims will arguably fall short of bringing effective redress to the victims.

This chapter builds upon the framework set forth in the previous chapter about the multifaceted nature of the victimisation process in the strategic use of mass sexual violence as a weapon of war and its implications for the victims' needs in transitional justice to critically examine potential challenges and limits of the growing victim-centred approach in international criminal justice system in providing effective redress for victims of such crimes. The discussion in the previous chapter reveals that the victimisation process in sexual violence as a weapon of war is complex and prolonged even long after conflicts with devastating effects of victims and communities, often highly entrenched in the local contexts. It further shows that the complexity of the victims' experiences during and after conflicts is profoundly reflected in victims' needs in post-conflict justice processes, and this reality implies that mechanisms to address the needs of victims of these crimes must be able to address the broadest spectrum of effects of these crimes on victims and the resulting direct

[649] See Chapter three.
[650] See Art. 68 (3) of the Rome Statute. See also Rules 85 and 89-93 of the ICC Rules of Procedure and Evidence.

social and community consequences, covering all dimensions of the victims' conditions in post-conflict settings.

The discussion in this chapter examines the effectiveness of growing victim-centred approach in international criminal justice process in providing effective responses to the needs of victims of sexual violence as a weapon of war. Specifically this implies that the chapter reviews the procedural, legal and practical aspects of the victims' participation in the criminal justice process under development before the ICC, noting issues impeding this approach to effectively address the needs of victims of widespread and systematic sexual violence in conflict situations. As noted above, it is often argued that the integration of victims in international criminal proceedings is a critical constituent of post-conflict justice in order to support the rebuilding of societies destroyed by mass atrocities. For instance, scholars such as Mariana Pena and Gaelle Carayon as well as Susana SáCouto and Katherine emphasise the benefits of victims' participation in proceedings not only for victims but also for the ICC.[651]

Loosely defined in the Rome Statute and its subsidiary instruments, the procedural aspects of victims' participation in the ICC proceedings are currently still being developed by the Court. Our earlier discussion in chapter three reveals that the adoption of provisions affording victims with the right to participate in criminal proceedings beyond their traditional role of witnesses is a major step forward in the development of victims' rights in post-conflict justice process. It has however also shown how this approach in the context of a 'relatively fragile'[652] international criminal justice system is associated with myriad challenges, chief among them being a potential overly subjective voice into the proceedings[653] and the possible participation of thousands of victims that could enhance the complexity of the proceedings. This can hinder the protection of the accused's rights and ultimately affect the proper running of the criminal justice process.

Whilst addressing the victims' needs is often rightly invoked as the rationale for the recent adoption of provisions affording victims an active role in international criminal proceedings, some scholars express concerns as to its effectiveness in mass victimisation cases. Mark

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[651] See M. Pena and G. Carayon (2013), 'Is the ICC Making the Most of Victim Participation?', *The International Journal of Transitional Justice,*Vol. 7, pp. 518-535; S. SáCouto and K. Cleary (2008), 'Victims' Participation in the Investigations of the International Criminal Court', *Transnational Law & Contemporary Problems*, Vol. 17, pp. 76-82

[652] A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction*, (Oxford University Press, 2008), p. 75.

[653] D. N. Nsereko (2010), 'The Role of Victims in Criminal Proceedings: Lessons National Jurisdictions Can Learn From the ICC', *Criminal Law Forum*, Vol. 21, pp. 399-415, p. 408.

Wojcik argues that direct and active victims' involvement in criminal proceedings 'is not always in their best interests but could instead lead to false hopes of justice'.[654] Wojcik's position here aligns with Mina Rauschenbach and Damien Scalia's argument that participation of victims in criminal proceedings does not always improve their experiences, and this reality is aggravated by the nature of international criminal justice system and crimes under its jurisdiction.[655] In particular, some scholars have questioned the meaningfulness of this approach for victims of vulnerable groups such as victims of conflict-related sexual violence, arguing that these victims in particular 'bear the brunt of this approach'.[656] Indeed, the unique nature of victims of sexual violence may present a unique range of challenges in the pursuit of effective redress for victims within the context of international criminal justice.

Through a review of the procedural aspects of the victim' participation framework under development before the ICC, this chapter provides an analysis of its challenges and limitations in providing effective responses to the needs of victims of sexual violence as a weapon of war. The discussion first addresses the protective and support measures for victims of such crimes before international criminal tribunals, noting the shortcomings of the *ad hoc* tribunals and how some of the previous tribunals' flaws have been addressed by the ICC. The second section critically examines the effectiveness of the ICC victim participation's scheme in attending to the needs of victims of sexual violence. The discussion in this chapter highlights that whilst this approach is innovative and an important component of comprehensive victim-focused responses to the needs of victims it is also complex and risks failing to draw upon the dynamics of the victimisation process in conflict-related sexual violence and the conditions of victims after conflicts, thereby falling short to provide effective responses to a wide range of victims' needs.

5.2 Treatment of Victims of Sexual Violence in International Criminal Justice Process

5.2.1 Shortcomings of the ad hoc International Criminal Tribunals and Hybrid Courts

Various studies on treatment of victims in the criminal justice have found that the judicial process may have negative dimensions on the victims' ability to cope with their victimisation. There is empirical evidence suggesting that some victims' encounter with the criminal justice

[654] See M. E. Wojcik (2010), 'False Hope: The Rights of Victims before International Criminal Tribunals', *L'Observateur des Nations Unies*, Vol. 28, N° 1, p. 30.
[655] See M. Rauschenbach and D. Scalia (2008), 'Victims and International Criminal Justice: A Vexed Question?', *International Review of the Red Cross*, Vol. 90, N° 870, p. 445.
[656] See S. Mouthaan (2013), 'Victim Participation at the ICC for Victims of Gender-Based Crimes: A Conflict of Interest?', *Cardozo Journal of International & Comparative Law*, Vol. 21, p. 1.

system and especially their treatment in the system itself may compound their original victimisation.[657] This is even more relevant in regard to specific categories of vulnerable victims such as victims of rape and other acts of sexual violence. Some studies indicate that such crimes victims' negative experience with the criminal proceedings makes them feel like a 'second rape'.[658] Some scholars argue that the fear of re-victimisation makes them sceptical about the usefulness of the criminal justice handling of their situation and thus reluctant to report subsequent crimes. Ivana Bacik, Catherine Maunsell and Susan Gogan in their comparative analysis of the laws and legal procedures relating to rape, and their impact upon victims of rape in the fifteen member States of the European Union, found that though the prosecution is beneficial for victims of these crimes, their negative experience with the criminal proceedings make them reluctant to pursue their cases through the later stages of the legal system.[659] This understandably affects the effective prosecution of these crimes since trials operate around victims in the pursuit of a proof of guilt. In this connexion, Patricia McGowan Wald, former Judge at ICTY rightly argues that 'witnesses in war crimes tribunal proceedings are precious commodities'.[660]

As was previously discussed in chapter three, the development of victims' rights in the criminal process across different domestic systems has informed the progressive development of victims' friendly measures in international criminal proceedings. It is probably worth recalling that the objective of International Military Tribunal proceedings at Nuremberg and Tokyo after World War II was purely punishment, with no mention of participation of victims in the process and their interests over the course of the proceedings. The criminal justice process was therefore based almost entirely on documentary evidence.[661] Recent developments in the international criminal tribunals' procedural rules have allowed for provisions on victims' rights which engage them in the international criminal process. However, victims were not afforded any personal right to participate in criminal process to ensure the protection of their interests before both *ad hoc* international criminal tribunals.

[657] See, for instance, D. Patterson (2011), 'The Linkage between Secondary Victimisation by Law Enforcement and Rape Case Outcomes', *Journal of Interpersonal Violence*, Vol. 20, p. 2; R. Campbell and S. Raja (1999), 'Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence', *Violence and Victims*, Vol. 14, N° 3, pp. 261-275.

[658] Ibid.

[659] I. Bacik, C. Maunsell and S. Gogan, 'The Legal Process and Victims of Rape: A Comparative Analysis of the Laws and Legal Procedures Relating to Rape, and their Impact upon Victims of Rape in the Fifteen Member States of the European Union', A Report published by The Dublin Rape Crisis Centre in September 1998, p. 57.

[660] P. M. Wald (2002), 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', *Yale Human Rights & Development Law Journal*, Vol. 5, p. 238.

[661] See Y. Danieli (2006), 'Reappraising the Nuremberg Trials and their Legacy: The Role of Victims in International Law', *Cardozo Law Review*, Vol. 27, N° 4, p. 1641.

Before both *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda, victims can only participate as witnesses at the request of one of the parties. This suggests that their participation is therefore 'limited to the strategies adopted by the parties' at trial.[662]

Even so, the *ad hoc* international criminal tribunals and hybrid or mixed tribunals[663] significantly contributed in the development of the protective and support measures for victims and witnesses during the criminal justice process. Despite not featuring prominently in their Statutes, the practice of the ICTY and ICTR has demonstrated that there is real need for protective and support measures for victims and witnesses. A close review of the legal basis and practice of both *ad hoc* international criminal tribunals reveals that a range of measures to protect and support victims and witnesses during the criminal justice proceedings have progressively been developed. For instance, the Rules of Procedure and Evidence of both the ICTY and the ICTR provided for the setting up of Victims and Witnesses Assistance Units within the Tribunals to support and protect victims and witnesses.[664] Although these were often criticised for lack of comprehensive victim protection program,[665] these units significantly contributed to ensure that criminal trials are conducted 'with due regard for the protection of victims and witnesses', as provided in the Statutes of both Tribunals.[666]

A close reading of the Statutes and Rules of Procedure and Evidence of both tribunals clearly indicates the focus on protective measures for victims or witnesses who may be in danger or at risk for their testimonies. For instance, the ICTY and ICTR allow Trial or Appeals Chambers to hold in *camera* proceedings if circumstances so require in order to protect victims from exposure in the media or to facilitate their testimony.[667] In addition to the possibility of holding closed hearings whenever necessary,[668] these Tribunals also allow the use of pseudonyms, image and voice alteration devices or deleting names and other witnesses' identifying information from the Tribunals' public records.[669] Further measures such as granting full anonymity to witnesses have been decided by the ICTY in *Prosecutor vs*

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[662] See The International Federation for Human Rights (FIDH), 'Victims' Rights before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs', published on 23 April 2007, available http://www.fidh.org/IMG/pdf/4-CH-I_Background.pdf, at p. 25, (accessed on 25 May 2014).

[663] These are tribunals created by agreement between the national governments concerned and the UN. They therefore lack the UN Chapter VII powers of the ICTY and ICTR. These include among others the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon.

[664] See Rules 34, 69 and 75 of the ICTY and ICTR Rules of Procedure and Evidence.

[665] See The International Federation for Human Rights (FIDH), *Supra* note 13, p. 27

[666] See Articles 20 (1) of the Statute of the ICTY and 19 (1) of the ICTR's Statute.

[667] See The ICTY and ICTR's Rules of Procedure and Evidence, Rule 75 (B).

[668] Ibid. Rule 79.

[669] Ibid. Rule 75 B (i).

Duško Tadić case,[670] subsequently endorsed by the ICTR in different cases,[671] although this approach was not followed by judges of former Tribunal in some other cases.[672]

Moreover, in addition to general provisions intended to ensure the safety of witnesses or their families, the *ad hoc* Tribunals also recognised concerns for measures to avoid potential re-victimisation of victims or their traumatisation during trials, particularly in cases involving rape and other acts of sexual violence. In this regard, the Tribunals' Rules of Procedure and Evidence tasked the respective Victims and Witness Units with ensuring that victims summoned to appear as witnesses 'receive relevant support, including physical and psychological rehabilitation, and provide counselling and support for them, in particular in cases of rape and sexual assault'.[673] Particularly, the Rules of Procedure and Evidence of both Tribunals further recognise the sensitive nature of sexual crimes by mandating these tribunals to adopt a gender sensitive approach to victims and witnesses protective and support measures.[674] In order to facilitate this process, the ICTY and ICTR's Rules of Procedure and Evidence also explicitly demand the inclusion of qualified women in the appointment of staff within Victims and Witnesses Support Units.[675]

The central objective of the protective and support measures for victims and witnesses by the *ad hoc* international criminal tribunals was to ensure that victims can testify in safety and security, and that the experience of testifying does not result in secondary victimisation. However, a close analysis of the practice of these Tribunals reveals myriad challenges in the implementation of these measures and, even more significantly in protecting vulnerable victims of sexual violence from further harm during the criminal justice proceedings. In other words, the challenges that victims of such crimes encountered in giving testimony left them with hurtful experience that compounds their victimisation. Illustrating this point, Michael Bachrach notes that 'the *ad hoc* international criminal tribunals' provisions relating to victims were much easier to read than to see implemented'.[676] This argument resonates with Anne-Marie de Brouwer's view who deplores that frequently 'victims of sexual violence felt

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[670] See *Prosecutor vs Duško Tadić*, Case N° IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Decision of 10 August 1995, §§ 57-59.

[671] See, for instance, *Prosecutor vs Théoneste Bagosora*, Case N° ICTR-98-41-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December, 2001, §§ 23, 25.

[672] See P. M. Wald, *Supra* note 660, p. 223.

[673] See The ICTY and ICTR's Rules of Procedure and Evidence, Rule 34 A (ii).

[674] Ibid. (B).

[675] Ibid.

[676] M. Bachrach (2000), 'The Protection and Rights of Victims under International Criminal Law', *The International Lawyer*, Vol. 34, N° 1, p. 14.

victimised all over again as a consequence of the trial proceedings'.[677] Along similar lines, although the Statues of ICTY and ICTR demand judges to control the questioning of witnesses to avoid harassment,[678] the report of the International Fact-Finding Mission of the International Federation for Human Rights (FIDH) on the role and position of victims before the ICTR reveals many instances of inappropriate questions on the victims' complex experiences.[679] In this connexion, Anne-Marie De Brouwer notes that many questions that rape victims faced coupled with the defence's inappropriate questioning methods have led to further victimisation for victims rather than help them cope with their experiences.[680]

Following extensive interviews with victims of rape and other acts of sexual violence on their experiences as witnesses before the ICTR, the FIDH's Fact-Finding Mission found that victims of these crimes often encountered questions 'intended to upset the witness rather than to provide the necessary points of evidence'.[681] The report of the FIDH's Fact-Finding Mission indicates that no consideration was given to the mental exhaustion of rape victims, and judges rarely intervened to stop this inappropriate treatment of victims, the majority of whom considered as a degrading treatment.[682] Illustrating this argument, in her study on the practice of the international criminal tribunals, De Brouwer states instances of disturbing questions to victims of sexual violence on their experiences such as 'did you take pleasure in the act?, why did you not interrupt the act if you did not find pleasure in it?, did you touch his sex?, how was it introduced into your vagina?, are you able to tell the judges of this Chamber whether he (the accused) was circumcised or not?'.[683] Carla Del Ponte, then Chief Prosecutor for the ICTY and ICTR, also expressed concerns over 'judges laughing during testimony of a victim of multiple rapes'.[684] In similar vein, Madeleine Rees, former Chief of Mission in Bosnia for the Office of the High Commissioner for Human Rights, lamented the case of a judge asking a victim whether 'she was a virgin at the time of the alleged rape'.[685] Such treatment of rape victims has led to many witnesses experiencing traumatic experience rather

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[677] A. M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, (Intersentia, 2005), Vol. 20, p. 276.
[678] See The ICTY and ICTR's Rules of Procedure and Evidence, Rule 75 A (ii).
[679] See FIDH, 'Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda, Report on of the Fact-Finding Mission sent to the ICTR, and to Rwanda to collect information on the role and position of victims', Report N° 329/2 published in November 2002, available at http://www.iccnow.org/documents/FIDHrwVictimsBalanceNov2003.pdf (Accessed on 24 May, 2014).
[680] See A. M. de Brouwer, *Supra* note 677, pp. 272-275.
[681] See FIDH, *Supra* note 679, p. 8.
[682] Ibid. pp. 8-9.
[683] See A. M. de Brouwer, *Supra* note 677, pp. 272-273.
[684] Ibid. p. 273.
[685] See N. Henry (2009), 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence', *The International Journal of Transitional Justice*, Vol. 3, p. 121.

than help them cope with their victimisation. As a result, some victims of rape and other acts of sexual violence refused to testify before the ICTR about their traumatic experiences during the Tutsi genocide in Rwanda, claiming the lack of faith in the Tribunal victims' protection framework, and especially the inappropriate treatment of victims during the proceedings.[686]

While the ICTY and the ICTR as well as the mixed tribunals such as the Special Court for Sierra Leone (SCSL)[687] and Extraordinary Chambers in the Courts of Cambodia (ECCC)[688] have significantly contributed in the creation of a conceptual legal basis under which rape and other acts of sexual violence can be prosecuted, they have been less successful in providing justice and redress to victims of such crimes. The lack of a comprehensive witness protection and support program at the *ad hoc* tribunals exposed victims to further trauma dealing with investigators and prosecutors in the collection of evidence. Valerie Oosterveld argues that the protection techniques used by the *ad hoc* international tribunals in the investigation of sexual crimes often led not only to many hurdles in gathering evidence but also to intense psychological strain for victims.[689] Oosterveld further notes that even some victims and witnesses expressed disappointment over the investigation methods, and some 'have complained of feeling re-violated by the experience'.[690] As indicated in the recently published Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Confict Regions, the ICTR's Office of the Prosecutor admitted that often investigators ignore the cultural implications and the stigma associated with being a victim of sexual violence in most societies.[691]

Nevertheless, despite the many challenges and obstacles in providing justice and redress to victims of sexual violence, the *ad hoc* tribunals made some significant developments

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[686] Ibid.

[687] The SCSL was established to deal with serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. See Agreement between the UN and the Government of Sierra Leone on the Establishment of a SCSL ((2000), Annex S/2000/915).

[688] The ECCC were created to prosecute the senior leaders of the Khmer Rouge and other people most responsible for atrocities committed in Cambodia from 17 January 1979. The ECCC is also known as the United Nations Assistance to the Khmer Rouge Trials (UNAKRT).

[689] V. Oosterveld (2005), 'Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court', *New England Journal of International and Comparative Law*, Vol.12, N° 1, p.126.

[690] Ibid. p. 130.

[691] See the Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda published by the ICTR's Office of the Prosecutor on 30 January 2014, available at http://www.unictr.org/portals/0/English/Legal/Prosecutor/ProsecutionofSexualViolence.pdf (accessed on 26 July 2014), at p. 37. See also A. Beltz (2008), 'Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused', *Journal of Civil Rights and Economic Development*, Vol. 23, N° 1, p 31.

intended to facilitate the gathering of evidence for these crimes. In this sense, some rules aimed at addressing particular challenges facing rape witness-victims during the criminal proceedings have been improved. Keeping with Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence, the *ad hoc* tribunals held that, in the prosecution of sexual violence, the corroboration of the witness's evidence is not needed in order to convict the accused[692], the prior sexual behaviour of the victims is irrelevant during the trial,[693] and the consent of the victims cannot be used for the defence of alleged perpetrators.[694] According to the *ad hoc* tribunals, systematic and widespread rape and other acts of sexual violence are perpetrated under so coercive circumstances as to 'negate any possibility of consent' and victims are therefore not required to show evidence of 'permanent and lasting resistance' and 'simultaneous use of force or threat' by the alleged perpetrators.[695]

Despite limited supportive measures to victims, making evidence of victims' prior or subsequent sexual behaviour generally inadmissible into evidence, the non-corroboration requirement of the victim's testimony and the findings that coercive circumstances are inherent in armed conflicts represent a positive development in the protection of victims of such crimes. In fact, the context of war makes consent irrelevant to the prosecution of sexual crimes. As De Brouwer[696] and Kate Fitzgerald[697] have rightly argued, such an approach reflects the sensitive and coercive nature of sexual violence in armed conflicts. Ultimately, these measures prevent victims of rape and other acts of sexual violence from being harassed or embarrassed by defendants during court's proceedings, and boost their willingness to testify. These developments can be considered as positive elements in the protection of victims of sexual violence and certainly enhance the legacy of the international *ad hoc* tribunals in this regard.

In summary, although some important development have been made in the protection and support of victims of sexual violence before the *ad hoc* tribunals, the practice of these tribunals has often lead to deep disappointment and frustration of rape victims with the

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[692] See *Prosecutor vs Duško Tadić*, Case N^{o} IT-94-1-T, Opinion and Judgement of 7 May 1997, §§ 537-539.
[693] See *Prosecutor v. Delalić et al.*, Case N^{o} IT-96-21-T, Decision on the Prosecution's Motion for the Redaction of the Public Record, Trial Chamber II, 5 June 1997, § 58.
[694] See *Prosecutor v. Miroslav Kvočka et al.*, Case N^{o} IT-98-30/1-A, Appeals Chamber Judgment of 28 February 2005, §§ 129, 130 and 132. See *Prosecutor v. Anto Furundžija*, Case N^{o} IT-95-17/1, Trial Judgment of 10 December, 1998, § 162.
[695] See *Prosecutor v. Miroslav Kvočka et al.*, *Supra* note 694, §§ 393 and 395. See also *Prosecutor v. Zejnil Delalić*, et al., Case N^{o} IT-96-21, Trial Judgment of 16 November, 1998, § 494.
[696] See A. M. de Brouwer, *Supra* note 677, pp. 265.
[697] K. Fitzgerald (1997), 'Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law', *European Journal of International Law*, Vol. 8, p. 647.

international justice process. Victims of such crimes often found the courtroom a hostile environment which often exacerbates their suffering.[698] However, it is not surprising to see how limited protective and support measures were afforded to victims of rape and other acts of sexual violence before the *ad hoc* international criminal tribunals considering the fact that victims of crimes have for long considered as forgotten parties in the international criminal justice system. As noted in earlier discussion,[699] the post-World War II trials not only set a strongly flawed precedent by largely ignoring conflict-related sexual crimes despite the available evidence by virtually building upon documentary evidence with little attention to the plight of victims. Nicola Henry rightly argues that the 'appearance of victims of rape at international war crimes trials marks a new era in the history of international law' given the history of silence on conflict-related sexual crimes and little role of victims in criminal justice systems.[700] The development of some legal mechanisms to protect and support victims of such crimes in the *ad hoc* tribunals' procedural framework was thus a significant turning point in this regard, shortly before the establishment of the ICC as the first permanent criminal institution. As will be discussed below, the previous tribunals' procedural challenges and shortcomings in delivering justice and redress for victims of sexual violence contributed in advancing the international awareness of the complexity and breadth of the experiences of victims of such crimes, and provided valuable lessons in the framing of the ICC's victim protection framework.

5.2.2 Protection and Treatment of Victims of Rape and other Acts and Sexual Violence before the ICC: A Changing Landscape

As stated above, the challenges and shortcomings of the *ad hoc* international criminal tribunals in the protection and treatment of victims of sexual violence influenced significant improvement in the ICC victims' protection scheme. The provisions on protection and treatment of victims within the Rome Statute and Rule of Procedure and Evidence therefore develop the framework established at the *ad hoc* tribunals.[701] The Rome Statute is complemented by the Rules of Procedures and Evidence[702] and the Elements of Crimes.[703]

[698] See B. Nowrojee, 'Your Justice is too Slow: Will the ICTR Fail Rwanda's Rape Victims?', Working Paper No .105, (Consortium on Gender, Security, and Human Rights, 2003), p. 1.
[699] See Chapter Two and Three.
[700] N. Henry (2009), *Supra* note 685, p. 115.
[701] L. Moffett, *Justice for Victims before the International Criminal Court*, (Routledge Abingdon, 2014), p. 129.
[702] The Rules of Procedures and Evidence were adopted on 09 September 2002 by the Assembly of States Parties to the Rome Statute pursuant to Article 51 (1) of the Statute. (ICC.Doc. ICC-ASP/1/3 (Part II-A).
[703] The Elements of Crimes were adopted by the Assembly of States Parties to the ICC's Statute on 9 September 2002 pursuant to Article 9(1) of the Statute. See ICC-ASP/1/3, (Part II-B).

Volker Nerlich argues that the *ad hoc* tribunals' experience was considered as 'first-hand experience of running complex trials' during the drafting of the ICC's governing instruments.[704] The experience of these tribunals therefore informed the drafting of the ICC's legal framework.

With respect to investigation for instance, the Rome Statute incorporates provisions established at the ad hoc tribunals requiring the Prosecution's Office to 'take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court'.[705] Hans-Peter Kaul, former president of the ICC's Pre-Trial Division argues that this is important in ensuring effective administration of justice since '…effective investigations are the fuel for the entire Court'.[706] However, the Rome Statute takes a more significant step in this regard by adding that the investigation must 'respect the interests and personal circumstances of victims and witnesses…and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children'.[707] This is emphasised in Art.68 (1) of the Statute that 'the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. Whilst this provision can be understood as reflecting a broader spectrum of needs of victims,[708] the Statute stresses the need to pay particular attention to the nature of crimes and particular factors of the victimisation process.

The Rules of Procedure and Evidence of both *ad hoc* international tribunals provide for the establishment of Victims and Witnesses Units within the Tribunals to ensure the protection and security of victims and witnesses.[709] The ICC has also established the Victims and Witnesses Unit within the Registry pursuant to Art. 43(6) of the Statute. The main role of this unit is to provide ' protective measures and security arrangements, counselling and other appropriate assistance for witnesses who appear before the Court, and others who are at risk on account of testimony given by such witnesses'.[710] However, while the ICTY and ICTR's Victims and Witnesses Units do not require staff with expertise in sexual violence issues, the Rome Statute emphasises that 'the Unit shall include staff with expertise in trauma, including

[704] See V. Nerlich (2008), 'The Status of ICTY and ICTR Precedent in Proceedings before the ICC', in C. Stahn and G. Sluiter (Eds.), *The Emerging Practice of the International Criminal Court*, (Nijhoff, 2008), p. 307.
[705] See Art. 54 (1) (b).
[706] See H.P. Kaul (2007), 'The International Criminal Court: Current Challenges and Perspectives', *Washington University Global Studies Law Review*, Vol. 6, N° 3, p. 579.
[707] See Art. 54 (1) (b).
[708] See L. Moffett, *Supra* note 701, p. 129.
[709] See Rules 34, 69 and 75 of the ICTY and ICTR Rules of Procedure and Evidence.
[710] See Art. 43 (6).

trauma related to crimes of sexual violence'.[711] Moreover, in order to address the inappropriate treatment of victims of sexual violence before the previous tribunals, the Rules of Procedure and Evidence of the ICC incorporate additional in-court protective and support measures for victims of such crimes. Such measures include allowing a psychologist or a family member to attend during the testimony of the victim upon request of the Prosecutor or defence counsel, a witness or a victim or his or her legal representative.[712] Along similar lines, the Rules of Procedure and Evidence demand judges to control the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to victims of sexual violence.[713] In addition to protecting victims' dignity and safety, such special provision aims to ensure their psychological well-being during the criminal justice proceedings.

It is useful to note that various protective and support measures have been applied in different trials before the ICC. For instance, in *Prosecutor v. Thomas Lubanga Dyilo* case, the Court allowed a family member, psychologist or legal representative to accompany witnesses during testimony, if a witness is also a victim or for child witnesses.[714] Other measures such the use of pseudonyms and image and voice alteration devices as well as holding closed sessions have been used in various trial proceedings before the ICC.[715] It is important to note, however, that special protective measures to victims are not automatic as these are subject to the protection of the accused's rights.[716] This implies that these special protective and support measures can only be granted as exceptional measures after the Court's analysis of the 'necessity of the requested protective measures, the availability of alternatives as well as their overall impact on the rights of the accused'.[717]

Whilst the *ad hoc* international criminal tribunals were understandably criticised for lack of opportunity for victims to express their views and concerns beyond their traditional role of witnesses, an approach that led to limited contribution of these tribunals in the reconciliation

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[711] Ibid.
[712] See Art. 88 (2) of the ICC Rules of Procedure and Evidence.
[713] See Art. 88 (5).
[714] *Prosecutor v. Thomas Lubanga Dyilo,* Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Case N° ICC-01/04-01/06, 30 November 2007, § 24
[715] See for instance *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case N° ICC-01/04-01/07, Order Concerning Protection Measures Applied to Transcripts of Testimonies of Prosecution Witnesses 2, 12, 30 and 157 in the *Thomas Lubanga Dyilo* case, 7 October 2009, § 9.
[716] *Prosecutor v.Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06, Decision Issuing Confidential and Public Redacted Versions of "Decision on the 'Prosecution's Request for Non-Disclosure of the Identity of 8 Individuals Providing Rule 77 Information' of 5 December 2008 and 'Prosecution's Request for Non-Disclosure of Information in 1 Witness Statement containing Rule 77 Information' of 12 March 2009, 24 June 2009, § 48.
[717] Ibid. § 47.

process in affected areas,[718] their experience in addressing sexual violence contributed significantly to a richer understanding of the complexity and breadth of the experiences of victims of such crimes. Although significant strides have been made by the ICC in the protection and treatment of victims of sexual violence, the Court faces a unique range of challenges of not only protecting victims of such crimes as witnesses but also address their needs within the context of its victim participation framework.

The relatively recent change in the approach of international criminal justice to give victims the right to participate in judicial proceedings represents an attempt to address the victims' experiences and suffering, and ultimately contribute in their recovery process. This argument resonates with many of the justifications for victim participation in a wide range of scholarship that meeting the needs of victims is the prime purpose of allowing victims to participate in the international criminal justice proceedings.[719] Scholars such as Mariana Pena argues that this approach leads to victims 'experiencing justice' and can promote victim satisfaction, and ultimately contribute in the rebuilding process of fully functioning societies in the aftermath of mass atrocity.[720] However, as stated earlier, the unique nature of conflict-related sexual violence and the consequences for victims and affected communities as well as their subsequent needs pose profound challenges to achieving this goal. The remainder of this chapter will link these consequences and needs of victims of such crimes to the growing victim-centred approach at the ICC with a view to presenting its challenges and limits in providing effective responses to these needs.

5.3 Victim Participation at the ICC for Victims of Systematic Sexual Violence: An Analytical Framework

Protection and redress for victims of international crimes became a primary concern during the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[721]This resulted in unprecedented provisions which allow for victims to participate in the Court's proceedings, beyond their traditional role of witnesses.[722] Independently of the Prosecutor and the Defence and in a manner that should not affect the fairness of the process, Art. 68 (3) of the Rome Statute allows victims to participate in

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[718] See R. Zacklin (2004), 'The Failings of *Ad hoc* International Tribunals', *Journal of International Criminal Justice*, Vol. 2, p. 545.
[719] See, for instance, M. Pena and G. Carayon, *Supra* note 651; S. SáCouto and K. Cleary, *Supra* note 651.
[720] M. Pena (2010), 'Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead', *ILSA Journal of International and Comparative Law*, Vol. 16, p. 501.
[721]The Conference met in Rome, Italy from 15 June to 17 July 1998.
[722] See Art. 68 (3) of the Rome Statute.

proceedings by expressing their 'views and concerns' during the criminal proceedings. In addition to the right to make applications for reparations for the harm suffered,[723] victims may make opening and closing statements at the proceedings.[724] In some instances, victims may also be allowed to lead evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of evidence in the trial proceedings.[725]

As our earlier discussion in chapter three has shown, while victim participation is a new phenomenon in international criminal justice system, some national legal systems allow victims to participate in criminal proceedings. It is safe to argue, however, that the recent change in international criminal justice towards victims came as result of a compromise from different legal traditions that do not allow for victims' involvement in criminal proceedings. It is thus no surprise to see how little guidance the ICC's legal framework on victims' participation provides regarding the implementation of this approach. Since the adoption of the Rome Statute, some procedural aspects of this approach have been gradually developed by the Court. Also, despite much dissention among scholars on the essence and feasibility of this approach, significant interest in victim participation before the ICC in a range of literature has contributed to exposing its complex legal and practical challenges to achieving intended objectives considering the nature of international criminal justice and crimes under its jurisdiction.[726] Whilst acknowledging its benefits for victims and for the Court, the following section highlights the potential challenges and limitations of this approach in addressing the needs of victims of systematic mass sexual violence as weapon of war.

5.3.1 Challenges in Accommodating Victims and their Complex Experiences in conflicts

The introduction of the right for victims to participate in international criminal proceedings represents a major shift from their traditional role of involvement in the criminal justice process solely as witnesses. Some studies have analysed some specific aspects of victim participation at the ICC, highlighting its promises for victims and the Court's challenges in

[723] See Art. 75 of the ICC Statute.
[724] *See Prosecutor v. Thomas Lubanga Dyilo*, Case N^{o} ICC-01/04-01/ 06-1119, Trial Chamber I, Decision on Victims' Participation, 18 January 2008, § 117.
[725] *Prosecutor v. Thomas Lubanga Dyilo*, Case N^{o} ICC-01/04-01/06-1432 OA9 OA10, Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", 11 July 2008, §§ 104-105.
[726] See, for example, L. Moffet, *Supra* note 701; T. Bonacker and C. Safferling (Eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, (Springer 2013); B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings,* (Intersensia, 2011); T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court*, (Oxford University Press 2010); E. Baumgartner (2008), 'Aspects of Victim Participation in the Proceedings of the International Criminal Court', *International Review of the Red Cross*, Vol. 90, N° 870.

developing a consistent approach to victims. Scholars such as Thomas Antkowiak argue that the integration of victims as active participants in the prosecution of international crimes is of the utmost importance and can be an effective instrument of justice for victims, thereby lay strong foundations for the rebuilding process of societies torn-apart by mass atrocity.[727] Antkowiak claims that the ICC victims' rights framework is 'a unique system in which the elements of retributive and restorative justice aim to be reconciled'.[728] Antkowiak's argument implies that, in addition to assisting in the public exposure of the truth, affording victims an active role into the international criminal proceedings can be an effective way of ensuring acknowledgement of their suffering and hence facilitates their healing process. This resonates with Simon Robins's position that the involvement of victims in the post conflict justice process opens up avenues for victims' perspective, which is the only way to understand and address the effects of mass atrocities in the affected communities.[729] For Binaifer Nowrojee, this approach can also contribute in the restoration of 'dignity and humanity to victims who have been stripped of these things'.[730]

This approach is even more significant in the context of post-conflict situations for the international criminal proceedings to empower victimised communities by not only promoting accountability for mass human rights violations but also addressing the effects of these crimes on victims and their communities. Robins, with reference to mass atrocity during the Timor-Leste's conflict,[731]observes that the introduction of victims in justice processes holds potential to mend the harm sustained on individual victims but also could contribute to healing and reconciliation in war-torn societies.[732] This lends support to the general argument of some scholars such as Juan Carlos Ochoa-Sanchez that the introduction of victims as active participants in the ICC proceedings was an attempt to add restorative values in the international criminal justice process.[733] As Emily Haslam, Mariana Pena and Gaelle Carayon as well as Claire Garbett argue, the introduction of victims in international criminal justice process flows from the increasing awareness that victims have their own

[727] T. M. Antkowiak (2011), 'An Emerging Mandate for International Courts: Victim-Centred Remedies and Restorative Justice', *Stanford Journal of International Law*, Vol. 47.
[728] Ibid. p. 328
[729] S. Robins (2011), 'Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post-conflict Nepal', *The International Journal of Transitional Justice*, Vol. 5, p. 77.
[730] See B. Nowrojee, 'We Can Do Better: Investigating and Prosecuting International Crimes of Sexual Violence', Colloquium of Prosecutors of the International Criminal Tribunals, Arusha, 2004, p. 6.
[731] This led to the creation of the hybrid tribunal, the Special Panels for Serious Crimes in East Timor in 2000.
[732] S. Robins (2012) 'Challenging the Therapeutic Ethic: A victim-Centred Evaluation of Transition Justice Process in Timor Leste', *International Journal of Transitional Justice*, Vol. 6, p. 2.
[733] J. C. Ochoa-Sanchez, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, (Martinus Nijhoff Publishers Leiden, 2013), p. 211.

distinct interests that should be addressed during the criminal justice process and that holding perpetrators accountable alone hardly suffice to redress the victims' experiences.[734]

The growing victim-needs based approach to international crimes can therefore be viewed as a shift from a purely retributive approach with a view to adding restorative values into the international criminal process given the fact that the vision of international criminal justice has been assumed to coincide with the prosecution and punishment of offenders.[735] This assertion resonates with the ICC Revised Strategy in Relation to Victims adopted in 2012 which highlights that 'the ICC has not only a punitive but also a restorative function'.[736] This suggests that victims' participation in international criminal process can add restorative values into the process by opening up avenues for victims' perspective on their harms suffered and experiences to be heard and addressed throughout the proceedings. This can not only foster victims' satisfaction with the international criminal process but also contribute to a richer understanding of the context in which mass atrocity were committed, and can ultimately be important factor in the reconciliation process in the affected communities.

However, whilst it is safe to argue that the growing victim-centred approach to international crimes will have significant benefits for victims and for the court, it is useful to note that participation of victims in criminal proceedings does not always offer needed recognition to victims' suffering. In other words, the extent of victims' role in proceedings and, especially how their needs are taken into account will undoubtedly influence its effectiveness in providing effective responses to the needs of victims. Given the nature of international criminal justice and crimes under its jurisdiction, Luke Moffett argues that there are limits to the level of redress that justice mechanisms at the ICC can provide.[737] Several reasons are put forward to explain these limitations in providing full account of responses to the needs of victims. First, while the growing victim-centred approach to international crimes aims to address the interests of victims, it is also subject to the protection of defendant' rights.[738] Moreover, the ICC cannot provide a full account of justice to all victims of international

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[734] See M. Pena and G. Carayon, *Supra* note 651, p. 5; E. Haslam, 'Victim Participation at the International Criminal Court: A Triump of Hope Over Experience?' in D. McGoldrick and P. Rowe (Eds.), *The Permanent International Court*, (Hart Publishing, 2004), p. 320; C. Garbett (2013), 'The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court', *Contemporary Justice Review*, Vol. 16, N° 2, p. 1.
[735] See L. Moffett (2015), 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague', *Journal of International Criminal Justice*, Vol. 13, p. 282.
[736] See the ICC's Revised Strategy in Relation to Victims, adopted on 5 November 2012, § 2. Available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf (Accessed on 15 August 2014).
[737] See L. Moffett, *Supra* note 735, p. 288.
[738] Ibid.

crimes because of limited resources, and especially due to its limited jurisdiction.[739] It is useful to note that victim participation is dependent on the prosecutor's determination of events under investigation. Scholars such as Christine Van den Wyngaert and Sandra Mouthaan argue that such selection of victims to participate in the Court proceedings creates inequalities between victims and impedes the Court's ability to achieve its so-called restorative objectives.[740]

Whilst it is true that effective prosecution and punishment of perpetrators have a significant effect on how victims experience and perceive justice and can indeed contribute in reducing to the perception of victimisation, an effective consideration of victims' needs can contribute in victims' sense of justice and ultimately alleviate the effects of crimes. However, as discussed in chapter three with reference to the multidimensional nature of international crimes, this process entails an understanding of the victimisation experiences and subsequent needs of victims to better realise the effectiveness of mechanisms to address such needs. Our earlier discussion in this study also indicated that effective redress for victims encompasses both the procedural and substantive aspects, meaning the not only the effective prosecution of perpetrators but also the satisfaction of victims' procedural needs.[741] In this regard, scholars such as Moffett argue that justice for victims is measured along the Court' 'ability to satisfy their procedural needs and to inform outcomes aligned with their interests'.[742] Drawing on the limited role of the ICC in providing justice to all victims in Northern Uganda, Moffett suggests that procedural mechanisms that 'reflect the reality and complexity of victimisation and collective violence' are fundamental in the process of redressing international crimes.[743]

This is even more relevant in the context of systematic sexual violence as a military tactic which, as discussed in previous chapter, arises from a complex set of circumstances with terrible effects on individual victims and far beyond them. Some would argue the realities of victims of these crimes result in irreparable devastation to victims.[744] There is empirical evidence suggesting, however, that 'a restorative justice-based alternative' would alleviate

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[739] Ibid.
[740] See C. Van den Wyngaert (2011), 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', *Case Western Reserve Journal of International Law*, Vol. 44. S. Mouthaan, *Supra* note 656, p. 23.
[741] See Chapter three.
[742] Ibid.
[743] L. Moffet, *Supra* note 701, p. 37.
[744] See, for instance, M. Grimaldi (2013), 'Variations in Levels of Rape as a Weapon of War: A Comparative Analysis of Darfur and South Sudan', *International Affairs Review*, Vol. 22, N° 1, p. 6; D. Vidale-Plaza, *Conflicting Conflict-Driven Sexual Violence*, Unrest Magazine Published on 1 November 2011, available at http://www.unrestmag.com/confronting-conflict-driven-sexual-violence/ (Accessed on 15 August 2014).

the consequences of these crimes on victims, thereby contributing in their recovery process.[745] This implies that affording the victims of these crimes with opportunity to express their traumatic experiences brings recognition to their suffering and can provide tangible measures to victims for their empowerment and help them cope with their victimisation.

However, how the pursuit of redress for victims of mass sexual violence as a weapon of war can be constructed is neither easy nor straightforward. Some empirical studies on victims of sexual violence in the Bosnian and Herzegovina conflict found that victims of these crimes often choose to remain silent about their experiences.[746] Along similar lines, the ICC found in *Prosecutor v Jean-Pierre Bemba Gombo* case that victims of rape and other acts of sexual violence 'are reluctant to discuss their experiences in explicit terms'.[747] This is understandable considering the sensitive nature of these crimes, and especially the socio-cultural contexts in which they are committed. The victims' experience in the criminal justice proceedings may be particularly daunting and results in secondary victimisation rather than satisfying their needs.[748]

Moreover, apart from the inadequate treatment of victims or lack of appropriate mechanisms to accommodate the traumatic experiences of victims of these crimes, some procedural aspects may have also negative ramifications for victims of these crimes. In the context of victims' participation in the ICC proceedings, scholars such as Yvonne Mcdermott[749] and Brianne McGonigle Leyh,[750] and Van den Wyngaert,[751] express concerns over challenges that hinder the effective delivery of justice both for victims and the accused. Particularly, due to unique nature of international criminal justice and characteristics of international crimes, some procedural aspects of victim participation may prove of little benefit to victims. McGonigle Leyh addresses the limited restorative effect of the current modalities of victim participation at the ICC. In her study on victim participation in international criminal proceedings, Leyh argues that active and direct participation of victims at criminal trials

[745] See B. Naylor (2010), 'Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways', *The University of New South Wales Law Journal*, Vol. 33, N° 3, p. 684.
[746] I. Skjelsbaek (2006), 'Therapeutic Work with Victims of Sexual Violence in War and Post-War: A Discourse Analysis of Bosnian Experiences', *Peace and Conflict: Journal of Peace Psychology*, Vol. 12, N° 2, p. 94.
[747] *Prosecutor v Jean-Pierre Bemba Gombo*, Case N° ICC-01/05-01/08, Decision on 772 Applications by Victims to Participate in the Proceedings, Trial Chamber III, 18 November 2010, § 57.
[748] See B. Naylor, *Supra* note 745, p. 676. See also U. Orth (2002), 'Secondary Victimization of Crime Victims by Criminal Proceedings', *Social Justice Research*, Vol. 15, N° 4, p. 314.
[749] Y. McDermott (2009), 'Some are More Equal than Others: Victim Participation in the ICC', *Eyes on the ICC*, Vol. 5, N° 1.
[750] B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersentia 2011).
[751] See C. Van den Wyngaert, *Supra* note 740.

could not always be the best way to offer acknowledgement and recognition to victims' suffering.[752] This resonates with Van den Wyngaert's position in her analysis of the current practice of the ICC with respect to victim participation in proceedings that this approach generates lots of challenges to the Court and serves nothing more than 'symbolic' or an expressive function for victims.[753] While the 'symbolic' dimensions of victims' participation in international criminal justice process do have significant benefits for victims,[754] it however risks failing to draw upon the context and dynamics of victimisation in war sexual violence events and the conditions of victims during and after conflicts. Further, the implementation of the ICC victim participation framework comprises some procedural aspects that could prove unnecessarily daunting for victims of sexual violence and thus fall short to attend to particular conditions and circumstances of victims of such crimes in post-conflict settings.

5.3.2 Complex Victim Participation's scheme unlikely to Address the Needs of Victims of Sexual Violence but could rather Undermine their Engagement

Elisabeth Odio Benito, former judge at the ICC, argues in her separate and dissenting opinion in the *Lubanga* case that 'the harm suffered by victims is not only reserved for reparations proceedings but should be a fundamental aspect of the Chamber's evaluation of the crimes committed'.[755] Odio Benito's view suggests that the nature of the harm suffered by victims provide a measure for reparations purposes but also the extent of needs of victims in the Court proceedings. This underscores fact that the introductions of victims in international criminal justice came as a way to overcome the shortcomings of previous tribunals by attending to the needs of victims in criminal proceedings. Providing opportunities for victims' voices to be heard and their suffering addressed can provide a richer understanding of the impact of crimes on victims and especially adds restorative values into the process.

As stated earlier, while the Rome Statute vests the Court with a broad discretion to explain and develop victims' participation within the context of international criminal justice, the Court has gradually shaped this approach, setting up modalities of participation of victims in

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[752] B. McGonigle Leyh, *Supra* note 750, p. 343.
[753] C. Van den Wyngaert, *Supra* note 740, p. 489.
[754] See Jo-Anne Wemmers (2009), 'Where do we belong? Giving Victims a Place in the Criminal Justice Process', *Criminal Law Forum*, Vol. 20, p. 402. See also D. Taylor (2014), 'Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?', Discussion Paper, Impunity Watch, available at http://www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf (Accessed on 1 June, 2015), p.16; M. Pena and G. Carayon *Supra* note 651, p. 534.
[755] See *The Prosecutor v. Thomas Lubanga Dyilo,* Case N° ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Rome Statute, Separate and Dissenting Opinion of Judge Elisabeth Odio Benito, 14 March 2012, § 8.

the proceedings. One of the biggest challenges to this approach is the sheer number of victims of international crimes, constraining the ICC to limit the extent and scope of victims' participation. As such, modalities of participation developed by the Court includes what Mcdermott calls a 'two-pronged approach'[756], through which the Court's Chamber assesses whether the applicant satisfies the formal definition of a victim before establishing the 'victim' personal interests' and the 'appropriateness' of participation. This means that, in addition to qualifying as victim pursuant to rule 85 of the Rules of Procedure and Evidence (RPE),[757] the applicants must demonstrate that 'their personal interests' could be affected at the stage of proceedings with respect to which participation is sought. Further, the Court must establish the 'appropriateness' of their participation at that particular stage, and that their participation will not violate the fairness requirement of the criminal proceedings.[758] Assessment is made on a case by case basis, and participation is limited to issues that directly affect their personal interests.

This practice to date puts responsibility on victims to justify that their personal interests are sufficiently engaged to justify their involvement in proceedings. As such, victims must therefore demonstrate either 'a real evidential link between the victim and the evidence which the Court will be considering' or whether s/he was affected by 'an issue arising during the trial' to determine that the victim' personal interests are affected.[759] The harm sustained need not to be direct but must be personal[760], and victims must prove the causal link between harm suffered and charges faced by the accused. Moreover, despite lack of a consistent approach to victims' participation at the ICC,[761] modalities of participation developed also comprises a victim collective representation, an approach whereby victims are placed into groups and assigned common legal representatives to undertake the task of presenting their victims' views and concerns.[762] As discussed below, the current modalities of victim participation in the ICC involve a burdensome process that can be frustrating for victims who have been

[756] Y. McDermott, *Supra* note 749, p. 28.
[757] According to rule 85 of the Rules of Procedure and Evidence, victims:
'(a) Means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
(b) May include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.'
[758] See Art. 68 (3).
[759] See *Prosecutor v. Thomas Lubanga Dyilo*, *Supra* note 724, § 95.
[760] Ibid. § 39.
[761] See S. Mouthaan, *Supra* note 656, p. 621.
[762] According to Art. 80 (2) of the Regulations of the Court, in appointing legal representatives of victims, the Chamber may appoint counsel from the Office of Public Counsel for Victims (OPCV). The Regulations of the Court adopted by the judges on 26 May 2004, (ICC-BD/01-03-11).

through traumatic experience such as victims of rape and other acts of sexual violence during conflicts. This suggests, as Mouthaan rightly argues,[763] that some procedural aspects of victim participation at the ICC could be 'unnecessarily intrusive' for victims of such crimes, and especially absent a broader consideration of their complex realities during and after conflicts. This results in victims' limited ability to engage in the international criminal justice process or to provide a comprehensive picture of their particular experiences.

A. Status of Victims and Arduous Process of Applications for their Participation in Proceedings

It is useful to emphasise that not all victims of the conflict will be granted the status of victims for the purpose of victim participation at the ICC. As discussed in chapter three, although the Rules of Procedure and Evidence of the ICC provides a broad definition of victims,[764] the status of victims for the purpose of victim participation is narrower not only due to the choice of situations and charges by the prosecutor but also on the 'interests of justice' and the 'interests of victims' taking into account all the circumstances, including the gravity of the crime.[765] In fact, victim participation at trial proceedings is dependent on the prosecutor's choices of crimes and events to prosecute. Secondly, the potentially affected victims' interests further play an important role in deciding whether to allow victims to take part in the criminal proceedings.[766] The applicant's personal interests in taking part in the Court specific proceedings against a particular person must therefore be established and recognised by the judges.

Such participation of victims at trials proceedings dependent on the selection of crimes and events to prosecute have led to the limited recognition of some category of victims f or the purpose of participation at trial proceedings.[767] Some studies have highlighted that the prioritisation of some victims in the criminal proceedings has led to the limited participation of victims of sexual violence despite the prevalence of these crimes in situations of conflicts.[768] Mouthaan argues that the victims of rape and other acts of sexual violence in situations of conflicts 'can be a forgotten category' due to the prioritisation of victims based on prosecutorial selection of situations, perpetrators and charges.[769] It is indicated, for instance, that in *Prosecutor v. Thomas Lubanga* case, the prosecution's focus was on charges

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[763] See S. Mouthaan, *Supra* note 656, p. 656.
[764] See Rule 85 of the Rules of Procedure and Evidence of the ICC.
[765] See Art. 53 (1 (c) and (2) (c) of the Rome Statute.
[766] See Art. 68 (3) of the Rome Statute.
[767] See, for instance, L. Moffett, Supra note 735; S. Mouthaan, *Supra* note 656.
[768] S. Mouthaan, *Supra* note 656, p. 639.
[769] Ibid.

of child soldiers to the detriment of widespread rape and other systematic acts of sexual violence.[770] Despite the widespread allegations of systematic rape, sexual enslavement and other forms of sexual violence by the *Union des Patriotes Congolais pour la Reconciliation et la Paix* military group (UPC) in the Ituri region of the DRC led *Lubanga*,[771] the charges before the ICC made no mention of these crimes, thereby closing the door for victims to take part at criminal proceedings. Indeed, the disillusionment of victims of rape and other acts of sexual violence in this case highlighted the potential limited recognition of victims of these crimes due to the prosecution's charge selection.

Moreover, whilst the Court has issued a certain number of decisions which made important development with respect to the implementation of victims' participatory rights, procedural aspects of victim on the extent to which victims can take part in proceedings are still under development before the Court. The ambiguity governing the ICC victims' participatory system gives different Chambers of the Court a broad discretion in this regard. This discretion coupled with different understanding of the judges of what should be the role of victims in criminal proceedings has led to an inconsistent approach to victims' participation before the court.[772] In this connexion, the ICC in *Germain Katanga and Mathieu Ngudjolo Chui* case held that the regime governing victim participation varies from case to case and each Chamber has the discretion to define the appropriate modalities for victim participation depending on various factors such as the number of victims taking part in the proceedings and the nature of charges.[773]

Despite continued challenges in adopting a consistent approach to victim participation at trial proceedings, victims' participation is subject to arduous process of victims to justify their involvement in proceedings by demonstrating that their personal interests are affected.[774] In addition to satisfying the definition of victims pursuant to rule 85 of the Rules of Procedure and Evidence, victims must demonstrate that their personal interests can be affected at the stage of proceedings with respect to which participation is sought. As such, victims who want to take part into the proceedings must demonstrated that they have suffered harm as a result

[770] *Prosecutor* v. *Thomas Lubanga Dyilo,* Case N° ICC-01/04-01/06, Pre-Trial Chamber I, Decision of the Confirmations of charges, 29 January, 2007.
[771] See M E. Kurth (2013), 'The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity', *Goettingen Journal of International Law*, Vol. 5, N° 2.
[772] See S. Mouthaan, *Supra* note 114, p. 628; L. Moffett, Supra note 735, p. 291.
[773] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Case N° ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, Trial Chamber I, 22 January 2010, §§ 53-54.
[774] Art. 68 (3).

of the crime under the Court investigation, and especially that there must be a causal link between the harm suffered and the crimes with which the suspect is charged for them to be allowed to take part in proceedings of particular cases. This suggests that in addition to satisfying the requirements for 'procedural status of victims' before the ICC pursuant to Article 85 of the Rule of Procedure, the Court must establish whether their personal interests are affected as well as the appropriateness of their participation at trial proceedings.

It is worth noting that the ICC jurisprudence suggests that victims are allowed to participate at different stages of the proceedings, including those relating to an investigation stage or the situation phase.[775] With reference to the situation in the Democratic Republic of the Congo, the Pre-Trial Chamber I held that persons granted the status of victim in the context of the situation are allowed to 'be heard by the Chamber in order to present their views and concerns with respect to the ongoing investigation of a situation, and can file documents pertaining to the investigation, and request the Pre-Trial Chamber to order specific proceedings'.[776] Notwithstanding potential negative impact that participation of victims at early stage could pose on the expediency and objectivity of the proceedings,[777] the Court highlighted that victims' personal interests can be affected at the situation stage and their participation can serve to clarify the facts at early stage of the proceedings.[778]

In order to be allowed to participate at trial proceedings, victims must be able to demonstrate that their personal interests could be affected over the course of the proceedings. In so doing, victims are required to prove 'a real evidential link between the victim and the likely submitted evidence which the Court will be considering during the trial, leading to the conclusion that the victim's personal interests are affected or whether s/he is affected by an issue arising during the trial because his/her personal interests are in a real sense engaged by it'.[779] Markus Funk argues that the requirement of having a personal interest impacted by the proceedings particularly favours victims who may also be witnesses at particular trial.[780] This requirement of the real evidential linkage between the 'harm suffered' and the victims helps

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[775] See Pre-trial Chamber I, the Situation in the Democratic Republic of the Congo, Case N° ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January, 2006, § 38.
[776] Ibid. § 71.
[777] See Y. McDermott, *Supra* note 107, pp. 35-39.
[778] The Situation in the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1 to VPRS 6, *Supra* note 775, § 72.
[779] *Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/ 06-1119, Decision on Victims' Participation, 18 January 2008, § 95.
[780] See T. M. Funk, Victims' Rights and Advocacy at the International Criminal Court, 2nd Edition, (Oxford University Press, 2010).

the court to identifying that a victim's personal interests impacted by a particular criminal trial as opposed to the general interests shared by all victims. The onus is therefore on victims seeking to participate at trials before the ICC to prove that their personal interests can be affected by the proceedings.

It goes without saying that, given the nature of international crimes, the proceedings before the ICC are likely to involve a large numbers of victims wishing to participant in the proceedings and this would affect the efficiency of the trials and make the system unfeasible. Besides, the negative impact on the procedural fairness, allowing all victims to participate at trial proceedings would not even 'serve any useful purpose' for victims whose interests are not affected by the actual case.[781] Consequently, as David Donat-Cattin rightly notes, applying that requirement thus serves the Court to ensure that victims make a correct use of their right to take part in the justice process by limiting participation to issues directly affecting their personal interests at the appropriate stages of proceedings as opposed to the general interests shared by victims of a situation.[782]

The author is under no illusion that this process of determining who is a victim for the purpose of participation is critical to the effectiveness of this approach by ensuring that only victims with potentially impacted interests during the proceedings are allowed to participate. The requirement of 'the real evidential link' between the likely submitted evidence at trial and the victim serves the Court to prevent all victims of a situation to take part at every phase of the proceedings with a view to safeguarding the expediency and fairness of the proceedings. However, the complex and arduous process to formal recognition as victims for the purpose of participation at the ICC may create enormous challenges for victims who have been through traumatic experience such as victims of conflict-related sexual violence. In its Report on the Review of the System for Victims to Apply to Participate in Proceedings, the ICC indicates that victims of such crimes find it difficult to discuss their experiences,[783] owing to the complexity of their experiences and related risks in their communities. In post-conflict settings, most of the victims of rape and other acts of sexual violence are reluctant to

[781] See *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, *Supra* note 724, § 95.
[782] See D. Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings', in O. Triffterer (Ed.*) Commentary on the Rome Statute of the International Criminal Court*, (Hart Publishing 1999), p. 880.
[783] See the ICC, Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings published on 5 November 2012, ICC-ASP/11/22, §§ 46-47, Available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf (Accessed on 1 June 2014). See also *Prosecutor v. Jean Pierre Bemba Gombo*, Case N^{o} ICC-01/05-01/08-1017, Decision on 772 Applications by Victims to Participate in the Proceedings, Trial Chamber III, 18 November 2010, § 57.

speak about their ordeals because on the one hand, it is often seen as taboo in many societies and on the other hand victims of these crimes have difficulties talking about their painful experience. Accordingly, there are always difficulties to identify and locate victims of these crimes and gather the necessary information about their victimisation.

Moreover, besides the difficulties in identifying victims and collecting information about their victimisation, the long and complex road to formal recognition as victims for the purpose of participation at trials before the ICC can prove frustrating,[784] and especially 'place them in a potentially re-traumatising situation'.[785] Going through the cumbersome process of proving that their personal interests are affected may therefore be unnecessarily daunting and put an additional strain on these victims, thereby undermine their chance of participation. It is worth noting, as the ICC held in *Lubanga* case, the victim status application procedure is 'necessarily fact-dependant' and victims' personal interests in the case must go beyond a general interest in the outcome of the proceedings.[786] While this may be done through legal representatives as discussed below,[787] if victims of conflict- related rape and other acts of sexual violence are to go through this long and arduous process of victims status application procedure, this approach would lead to a sense of disillusionment with the international criminal justice among victims of such crimes rather than addressing their needs.

B. Victims' Participation through 'Common Legal Representation': Potential Challenges in Creating a Collective Narrative of Events in Conflict-Related Sexual Violence Cases

While there understandable reasons for common legal representation of victims seeking to participate at trials before the ICC, this process raises concerns for the challenges in creating a collective narrative of events in conflict-related sexual violence cases within the context of international criminal justice. Van den Wyngaert, judge at the ICC, in her analysis of how meaningful the ICC's victims participation regime can be for victims, argues that 'victims who expect to find a forum where they could personally and publicly express their grief and thus have a platform to expose their feelings will probably be disappointed'.[788] Van den Wyngaert's argument is premised on the fact that, in practice, the ICC has developed a

[784] See Redress Trust (2012), The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future, p. 16. Available at http://www.redress.org/downloads/publications/121030participation_report.pdf (Accessed on 10 June 2014).
[785] The Report on the Review of the System for Victims to Apply to Participate in Proceedings, *Supra* note 783.
[786] *The Prosecutor v. Thomas Lubanga Dyilo*, *Supra* note 724, § 96.
[787] See Article 68 (3) of ICC Statute and Rule 90 of the ICC RPE, Regulations 79-80 and 82 of the Regulations of the ICC adopted on 26 May 2004 and amended on 18 December 2007 (ICC-BD/01-01-04). See also Regulation 112 of the Regulations of the ICC Registry adopted on 6 March 2006 (ICC-BD/03-01-06-Rev.1).
[788] See C. Van den Wyngaert, *Supra* note 740, p. 489.

system whereby victims' perspectives are in most cases presented by common legal representatives. The ICC has developed a practice of placing victims into groups based either on geographical location[789] or victims' common interests[790] and assigned common legal representatives to undertake the task of representing them at proceedings.

For instance, in *Lubanga* trial, victims were placed into two groups with a common legal representative for each group, and at the same time the Office of Public Counsel for Victims (OPCV)[791] was authorised by the Trial Chamber I to represent the remaining group of victims with dual status as victims and witnesses.[792] This approach of appointing common legal representatives to appear in court for the participating victims was subsequently adopted in many other cases such as the *Prosecutor v. William Samoei Ruto and Joshua Arab Sang*[793] and *the Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*[794], whereby all victims admitted to participate in the cases have been assigned to a single common legal representative. While Art. 68 (3) of the Rome Statute vaguely provides for the possibility of legal representation in proceedings for participating victims, rule 90 of the Rule of Procedure and Evidence and the Regulations of the Court[795] explicitly provide that victims have the possibility to choose freely legal representatives or consult with victims in the appointment of a common legal representatives or representatives of victims. The Registrar's choice of a legal representative is also a possibility where the interests of justice so require and after consultation with the victims.

Given the widespread nature of international crimes and as a result the sheer number of victims expected to participative in proceedings, common legal representatives can act as a point of contact for victims admitted to participate in cases, formulate their views and concerns and play an active role on behalf of them throughout the proceedings. This approach may well be appropriate for the ICC to permit meaningful participation of a large number of

[789] See *Prosecutor v. Jean Pierre Bemba Gombo*, Case N° ICC-01/05-01/08, Decision on Common Legal Representation of Victims for the Purpose of Trial, Trial Chamber III, 10 November 2010, §§ 18-20.
[790] See *Prosecutor v. Bosco Ntaganda*, Case N° ICC-01/04-02/06, Decision Concerning the Organisation of Common Legal Representation of Victims, Pre-Trial Chamber II, 2 December 2013.
[791] See Art. 80 (2) of the Regulations of the Court about appointment of legal representatives of victims, *Supra* note 762.
[792] See *Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, § 20.
[793] See *Prosecutor v. William Samoei Ruto and Joshua Arab Sang*, Case N° ICC-01/09-01/11-249, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, Pre-Trial Chamber II, 5 August 2011, § 65.
[794] See *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-267, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, Pre-Trial Chamber II, 26 August 2011, § 91.
[795] Regulation 79 (2) of the Regulations of the Court, *Supra* note 762.

victims of international crimes while complying with the Court's obligation under the Rome Statute to ensure that participation of victims in proceedings is not prejudicial to or inconsistent with the rights of the accused.[796] In fact, organising victims into groups for the purpose of collective legal representation aims to ease the practical challenges facing the ICC regarding victim's participation in accommodating a large number of victims in the criminal justice process without hindering the fairness and expeditiousness of the proceedings.

However, while this approach would seem appropriate and has some benefits for the Court considering the number of victims expected to participate in proceedings, it does give rise to critical questions as to whether the common legal representatives system is appropriate in furtherance of the objectives of the Court's victims participatory regime. It is questionable whether the appointment of common legal representatives to voice the interests of all victims would be effective under the conditions of victims of systematic rape and other acts of sexual violence in post-conflict settings. Arguably, this approach could potentially weaken the engagement of victims of such crimes with the international criminal justice rather than enabling the Court to effectively address their needs.

A number of aspects with respect to the nature of the victimisation process in conflict-related sexual violence cases and especially the conditions of victims during and after conflicts give rise to this argument. First, as stated earlier, the complexity of such victims' experiences as a result of the the gravity and sensitive nature of conflict-related sexual crimes coupled with the socio-cultural contexts in which these crimes are committed lead to myriad social challenges for victims in post-conflict settings. As the UN Secretary General Ban Ki-Moon recently insisted, these crimes not only inflict great suffering on victims but they also destroy communities and tear the social fabric of the entire affected nations.[797] In the above mentioned Report on the Review of the System for Victims to Apply to Participate in Proceedings, the ICC recognises the potential challenges in creating a collective narrative of experiences for victims of conflict related sexual violence within the context of victim participation. The report notes that 'victims of gender crimes cannot be part of a collective action'.[798] It is useful to note that, at present, there are a variety of different approaches to collective victims' participation before the Court. While in some cases victims have been

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[796] See Art. 68 (3) of the Rome Statute.

[797] The UN Secretary-General's remarks at Security Council open debate on Sexual Violence in Conflict, New York, 25 April 2014. Available at http://www.un.org/sg/statements/index.asp?nid=7621 (Accessed on 10 September 2014).

[798] The ICC's Report on the Review of the System for Victims to Apply to Participate in Proceedings, *Supra* note 783.

grouped for the purposes of common legal representation, in other cases a single common legal representative was appointed to advance the views and concerns of all victims in the case. According to Anushka Sehmi, the Case Manager for the Legal Representative for Victims in the *Kenyatta* case, the development of a collective victims' participation approach suggests the treatment of victims as 'a mass' and 'homogenous in victimisation' during conflicts situations.[799] As the Victims' Rights Working Group (VRWG)[800] rightly argues the identification of the 'legitimate voice' within a mass of victims will run into significant challenges,[801] and is ultimately liable to disillusion those victims who have been through traumatic experiences such as rape and other sexual crimes in situations of conflicts.

Whilst it is true that the common legal representation system can facilitate the participation of thousands of victims in proceedings, this approach cannot however help to understand the complex reality of the experiences of victims of conflict-related sexual violence. As discussed in the previous chapter, widespread and systematic sexual violence in conflict zones generally follow distinct patterns and serve strategic purposes, with short- and long term effects on victims and entire affected nations, often entrenched in the local contexts. To identify these victims and effectively gather the necessary information about their victimisation to ensure that their needs are effectively addressed therefore demands taking into account particular circumstances of victims of these crimes during and after conflicts.

This brings us to another problem in the use of common legal representation of victims before the ICC regarding the manner in which common legal representatives are appointed. According to the Rules of Procedure and Evidence, victims should be free to choose their legal representatives and, when a common legal representation is necessary, victims should be allowed to choose for themselves the counsel that will represent them.[802] However, the practice of the Court shows that often common legal representatives have been appointed without the involvement of victims.[803] For instance, in the *Samoei Ruto et al.* case, common

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[799] A. Sehmi, 'New Victim Participation Regime in Kenya', VRWG Bulletin published in Spring 2013, N° 22, p. 6, available at http://www.vrwg.org/ACCESS/ENG-22Sehmi.pdf (Accessed on 10 September 2014.)

[800] VRWG is an organisation established in 1997 under the auspices of the NGO Coalition for the ICC, and its prime objective is to raise awareness of victims' rights for crimes that fall within the jurisdiction of the Court.

[801] VRWG, International Criminal Court at 10: The implementation of Victims' Rights, Issues and Concerns Presented on the Occasion of the 11th Session of the Assembly of States Parties, 14-22 November 2012, The Hague, at p. 8. Available at http://www.vrwg.org/VRWG%20Documents/201114_VRWG_ASP11-ENGLISH-VERSION.pdf (Accessed on 10 September 2014).

[802] See Rule 90 (1) and (2) of the Rule of Procedure and Evidence.

[803] See Carla Ferstman, Letter to the ICC on the Registrar's Approach to Common Legal Representation for Victims Participating in Cases before the Court, August 17, 2011, Available at http://www.vrwg.org/VRWG_DOC/2011_08_17_VRWGLettersmall.pdf, (Accessed on 10 September 2014).

legal representatives were appointed without consulting victims.[804] This is despite the fact that the Registry recognises the need for 'meaningful consultation with victims' regarding the common legal representation approach.[805] The purpose of the common legal representation approach is to facilitate thousands of victims take part in proceedings without overburdening the Court without weakening the protection of the accused' right, the appointment of legal representatives absent a genuine consultation with victims could potentially affect the credibility of victim participation in the eyes of victims. Pena and Carayon drew attention to the danger of this approach, arguing that in addition to violating their right to be heard, lack of consultations with victims raises concerns whether perspectives conveyed before the Court on behalf of victims reflect the actual lived experiences of victims.[806]

Although the common legal representation approach was recently introduced by the ICC as an alternative solution to the long and complex application process,[807] an analysis of the practice suggests that this approach is also used for participation in proceedings in general. In its report on modes of participation and legal representation before the ICC, Avocats Sans Frontières (ASF) notes that 'a collective approach is already implemented in practice in the manner in which victims are represented in Court'.[808] Hans-Peter Kaul and Eleni Chaitidou observe that common legal representation is part of the Court's structural and organisational arrangements in an attempt to address concerns regarding the potential high number of victims wishing to participate in proceedings.[809] In *Katanga and Ngudjolo Chui* case, the Court emphasised that common legal representation is 'the primary procedural mechanism' to ensure meaningful participation of thousands of victims without undermining the efficiency of the proceedings.[810]

While this approach may well serve the Court to avoid undue delays of the proceedings, considering a large number of victims expected, common legal representation of victims is

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[804] *The Prosecutor v. William Samoei Ruto et al*., Case N° ICC-01/09-01/11-243, Proposal for the Common Legal Representation of Victims, Pre-Trial Chamber II, 1 August 2011, §§ 5 and 8.

[805] Ibid. § 3 (b).

[806] See M. Pena and G. Carayon, *Supra* note 651, p. 533.

[807] See, for instance, *Prosecutor v. Laurent Gbagbo,* Case N° ICC-02/11-01/11-86, Second Decision on Issues Related to the Victims' Application Process, Pre-Trial Chamber I, 5 April 2012, § 44.

[808] ASF, Modes of Participation and Legal Representation, a Report published in November 2013, p.9. Available at http://www.asf.be/wp-content/uploads/2013/11/ASF_IJ_Modes-of-participation-and-legal-representation.pdf (Accessed on 12 September 2014).

[809] H. Peter Kaul and E. Chaitidou (2011), 'Balancing Individual and Community Interests', in U. Fastenrath et al. (Ed.), *From Bilateralism to Community Interest: Essays on Honour of Bruno Simma*, (Oxford University Press 2011), p. 1000.

[810] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case N° ICC-01/04-01/07-1328, Order on the Organisation of Common Legal Representation of Victims, Trial Chamber II, 22 July 2009, § 11.

unlikely to address the needs of victims of mass sexual violence as a weapon of war, and could rather undermine the engagement of victims of these crimes with the Court. Considering the fact that common legal representation is arranged before victims are accepted in take part in proceedings, a collective approach could have negative effects on such victims' willingness to engage with international criminal justice process. Moreover, as Redress has noted in their observations to Pre-Trial Chamber I of the ICC pursuant to rule 103 of the Rule of Procedure and Evidence, there can be challenges for victims of rape and other acts of sexual violence to speak to common representative about their ordeals besides other crimes.[811] This implies that this approach could lead to a prioritisation of other crimes to the detriment of conflict-related sexual violence. In fact, the potential challenges in creating a collective account of events in conflict-related mass sexual violence cases could ultimately lead to under-or misrepresentation of the actual realities of victims of such crimes.

5.3.3 Insufficient Recognition: The Under-or Misrepresentation of the Actual Realities of Victims of Conflict-Related Sexual Violence

The limits to the ICC's victim participation scheme in providing recognition of victims' voices and experiences of victims of rape and other acts of sexual violence reflect an inescapable challenge to international criminal justice, in that it cannot effectively address the needs of victims of such crimes. Given the myriad ways in which rape and other acts of sexual violence are experienced by victims in situations of conflicts, the task of accommodating victims of these crimes, and especially provide recognition of their experiences within the context of international criminal justice remains a colossal task. As our earlier discussion suggests, this task is rendered all the more difficult by direct social consequences of these crimes for victims in post-conflict societies that often compound their victimisation experiences and amplify significant barriers for victims of these crimes to participate in the criminal justice. The challenges for most victims of these crimes to engage with the international criminal tribunals or their inability to provide a comprehensive picture of their stories at these tribunals result in underrepresentation of their actual realities during and after conflicts, and especially leads to an insufficient recognition of the harm suffered.

Various studies have highlighted the challenges and limitations that *ad hoc* international criminal tribunals faced with in accommodating the complex realities of victims of rape and

[811] *Prosecutor v. Laurent Gbagbo*, Case N° ICC-02/11-01/11-62 16-03-2012, REDRESS Trust Observations to Pre-Trial Chamber I of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence, 16 March 2012, § 34.

other acts of sexual violence in situations of conflicts.[812] Doris Buss argues that, although international criminal tribunals have contributed to the legal basis upon which these crimes can be prosecuted within the context of international criminal justice 'seeing women, and their particular experiences in wartime, is not, it turns out, easy to do'.[813] Victims of such crimes not only encountered myriad difficulties in telling their stories before international criminal tribunals but also these tribunals faced with numerous challenges in investigation and collection of the necessary information about their victimisation. Dyan Mazurana and Kristopher Carlson argue that due to the limitations to accommodate victims of conflict-related sexual violence, the jurisprudence of the international *ad hoc* tribunals rarely adequately captured their realities during conflict.[814]

It is true that the challenges and shortcomings of the *ad hoc* international criminal tribunals in addressing the needs of victims of sexual violence significantly contributed in advancing the international awareness of the complexity and breadth of the experiences of victims of such crimes, and provided valuable lessons in the framing of the ICC's victim protection framework. Accordingly, as discussed earlier, the ICC includes extensive provisions intended to avoid inflicting further harm to victims and witnesses of rape and other acts of sexual violence. However, whilst significant strides have been made by the ICC in the protection and treatment of victims of sexual violence, the Court faces a unique range of challenges of not only protecting victims of such crimes as witnesses but also, and most importantly from the victims' perspectives, address their needs within the context of its innovative victim participation framework.[815] In other words, the Court is meant to provide greater recognition of voices and experiences of victims of rape and other acts of sexual violence than was possible during the criminal justice process before the *ad hoc* international criminal tribunals.

However, there are still challenges to accommodating victims of systematic sexual violence as a weapon of war, and especially provide recognition of their actual lived experiences within the context of international criminal justice. To a larger extent, these challenges stem from the very nature of systematic sexual violence in situations of conflicts and the socio-

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[812] See, for instance, D. E. Buss (2007), 'The Curious Visibility of Wartime Rape: Gender And Ethnicity in International Criminal Law, *Windsor Year Book of Access to Justice*, Vol. 25, No 1; M. Bachrach, *Supra* note 676, A. M. de Brouwer, *Supra* note 677; N. Henry, *Supra* note 685.

[813] See D. E. Buss, *Supra* note 812.

[814] See D. Mazurana and K. Carlson, 'Reparations as a Means for Recognizing and Addressing Crimes and Grave Rights Violations Committed Against Children during Situations of Armed Conflict and Under Authoritarian Regimes' in R. Rubio (Ed.), *The Gender of Reparations: Unsettling Gender Hierarchies While Addressing Human Rights Violations*, (Cambridge University Press, 2009).

[815] See Art. 68 (3) of the Rome Statute.

cultural context in which these crimes are committed as well as the realities prevailing in transitional societies enduring the legacy of these crimes. Susana Sacouto argues that the practices of the ICC in the implementation of its growing victim-centered approach indicates that victims of rape and other acts of sexual violence 'face some of the same limitations victim-witnesses encountered at the *ad hoc* tribunals'.[816] The complex procedural aspects of victim participation at the ICC provide an accurate picture of the limitations of this approach in accommodating the complex realities of victims of systematic and widespread rape and other acts of sexual violence in situations of conflicts.

As noted earlier, while the relatively recent introduction of victims in the international criminal process remains a significant component of comprehensive victim-focused responses to the needs of victims, it however risks failing to draw upon the complex contextual dynamics surrounding the plight of victims of conflict-related mass sexual violence during and after conflicts, thereby fall short of achieving effective redress for victims. This underpins the need to widen to scope of transitional justice in addressing the needs of victims of these crimes, including the increasing diversification of locally-embedded non-judicial transitional justice processes. The flexibility of these processes and ability to adapt to the challenging societal contexts hold potential to complement the formal criminal justice process in addressing the needs of victims of such crimes, and especially to extend victim redress efforts to transforming societal effects of these crimes on victims to ultimately facilitate the victims' social reintegration.

5. 4 Chapter Summary and Concluding Remarks

This Chapter has sought to examine the effectiveness of the ICC victims' rights framework in providing effective redress to victims of conflict-related sexual violence, drawing on the complexity of experiences of victims of these crimes during and after conflicts and their subsequent needs in transitional justice. A comprehensive account of the continued challenges of the ICC to accommodating victims of systematic sexual violence as a weapon of war, and especially provide recognition of their experiences within the context of victim participation in proceedings draws on the framework set forth in earlier chapter about the unique nature of these crimes and its implications for the victims' needs. The focus has rested on the procedural aspects of victim participation in proceedings currently under development

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[816] See S. SaCouto (2012), 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project', *Michigan Journal of Gender and Law*, Vol. 18, N° 2, p.303.

before the ICC to provide a picture of the confines of the ICC's victim-centred approach in providing effective responses to the needs of victims of these crimes in post-conflict settings.

While Art.68(3) of the Rome Statute, read in conjunction with rules 89 to 93 of the Rule of Procedure and Evidence set out key principles in relation to victims' participation in proceedings, wide discretion was vested with the Court to explain and set up modalities of victims' participation within the context of international criminal justice. The ICC jurisprudence, though permeated by inconsistency due to the nature of international criminal justice and different understanding of judges of the role of victims in criminal proceedings, has laid down a number of decisions on the procedural aspects of this approach. The analysis presented in this chapter shows that some procedural aspects of victim participation in international criminal proceedings may prove of little benefit to victims of mass sexual violence in conflicts, and especially dilute their engagement with criminal justice process rather than satisfying their needs. Essentially the discussion reveals that given the complex ways in which these crimes are experienced in conflict situations, accommodating victims of these crimes, and especially provide recognition of their experiences within the context of victim participation in proceedings remains a colossal task. This task is rendered all the more difficult by direct social consequences of these crimes for victims in transitional societies that often compound their exclusion and leaves open the possibility of a general social collapse.

In fact, the challenges for most victims of these crimes to engage with the international criminal tribunals or their inability to provide a comprehensive picture of their stories at these tribunals result in underrepresentation of their actual realities during and after conflicts, and especially leads to an insufficient recognition of the harm suffered. This reality reflects an inescapable challenge to international criminal justice, in that it cannot effectively provide effective responses to the needs of victims of sexual violence in conflicts. The author argues that while the relatively new victim-centred approach in international criminal justice process remains a significant component of comprehensive victim-focused responses, the complex realties of victims of sexual violence in conflicts and the challenging social contexts impede its effectiveness in advancing effective redress for victims. In other words, although victim participation in proceedings is integral to the purpose of the ICC in ending impunity and providing redress for victims, there is a need for integrated mechanisms to address the dynamics and complex social dimension of sexual violence as a weapon of war at the domestic level. An analysis of the role of a growing range of domestic transitional justice approaches to accountability and reconciliation in this regard is the focus of the next chapter.

CHAPTER SIX

THE ROLE OF NON- AND QUASI-JUDICIAL ACCOUNTABILITY MECHANIMS IN ADDRESSING A WIDE RANGE OF NEEDS OF VICTIMS OF SEXUAL VIOLENCE AS A WEAPON OF WAR

6.1 Introduction

This chapter critically analyses the potential contribution of contextualised, locally-embedded transitional justice processes in complementing the formal criminal justice processes for advancing effective redress for victims of sexual violence as an element of war strategies. Specifically, it widens the scope of transitional justice by examining how the increasing diversification of domestic quasi/non-judicial transitional justice processes can provide greater recognition of the lived experiences of victims of conflict-related mass sexual violence than possible within the international criminal justice processes. This is particularly relevant to the critical task of addressing the direct social dimension of these crimes in affected communities and promotes changes to enable the victims' social reintegration. As indicated in the earlier discussion,[817] what makes the phenomenon of systematic use of mass sexual violence as a weapon of war distinctive from ordinary crimes is the way in which these crimes destroy the social fabric of families and communities and set the scene for a broader social degradation within affected communities. There is substantial empirical evidence that perpetrators of these crimes in conflict situations often explicitly link their brutal acts of sexual violence to this broader social degradation within societies.[818]

The strategic use of sexual violence as a weapon of war represents a great threat to the safety of affected communities. The damaging social effects of these crimes add yet another component to the social disruption caused by armed conflicts. Fionnuala Ní Aoláin, Catherine O'Rourke and Aisling Swaine argue that even after conflict has ended, the impacts of sexual violence persist, including a myriad of social challenges for victims impeding their reintegration in their communities.[819] Essentially transitional societies enduring the legacy of sexual violence as a military tactic must contend with a wide range of complex challenges in

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[817] See Chapter Four.

[818] See Human Rights Watch, 'Sexual Violence Crimes during the Rwanda Genocide, June 2004, Available at http://www.rwandadocumentsproject.net/gsdl/collect/mil1docs/archives/HASHc834.dir/doc52025.pdf (Accessed on 10 March, 2014), at p. 4. See also R. M. Schott, 'Wartime Violence against Civilians: Philosophical Reflections on War Rape', in G. Lind (Ed.), *Civilians at War: From the Fifteenth Century to the Present*, (Museum Tusculanum Press, 2014).

[819] See F. Ní Aoláin, C. O'Rourke & A. Swaine (2015), 'Transforming Reparations for Conflict-Related Sexual Violence', *Harvard Human Rights Journal*, Vol. 28, N° 1, p. 99.

the reconstruction process after conflicts due to the degradation of moral values and societal disintegration or weakened solidarity within communities.[820] The earlier discussion of distinct aspects of sexual violence as a weapon of war and their implications for the victims' needs in post-conflict situations has shown that victims of these crimes yearn for social acknowledgment and validation of their complex experiences and the restoration of their human and civic dignity.[821] As Ní Aoláin, O'Rourke and Swaine argue, the societal recognition and validation of the actual lived experiences of victims of these crimes can significantly empower them, and ultimately assist their long-term recovery process.[822] Perhaps most importantly, the social acknowledgement and validation of the traumatic experiences of victims of such crimes can significantly contribute to breaking down negative attitudes towards them in post-conflict situations to enable their reintegration in communities.

In the aftermath of mass violence, states often resort to various quasi- or non-judicial transitional justice mechanisms focussing on uncovering the truth about the dark past, vindicate the dignity of victims and foster reconciliation in broken communities.[823] These include an increasing range of mechanisms such as truth commissions and other community-based approaches to accountability and reconciliation after mass violence such as the *Gacaca* process in Rwanda.[824] In recent years, quasi-or non-judicial transitional justice mechanisms have gained global significance as effective tools in the reconstruction of societies existing mass violence. Despite the perceived value of truth-seeking processes as complementary transitional justice mechanisms alongside the formal criminal prosecutions, several empirical accounts suggest that rape and other acts of sexual violence often tend to be neglected or marginalised in the growing diversification of these mechanisms.[825] This reality can be explained by the absence of a perspective devoted to these crimes in the mandates of some truth-seeking processes and the lack of appropriate mechanisms aimed at facilitating the victims' adequate engagement. It is worth noting, however, that, despite the total disregard or

[820] See J. L. Leatherman, *Sexual Violence and Armed Conflict*, (Polity Press, 2011), p. 48.
[821] See Chapter Four.
[822] See F. Ní Aoláin, C. O'Rourke & A. Swaine, *Supra* note 819, p. 145.
[823] See S. Buckley-Zistel *et al.*, 'Transitional Justice Theories: An introduction', in S. Buckley-Zistel *et al.*, *Transitional Justice Theories*, (Routledge, 2014).
[824] For information on the *Gacaca* process in Rwanda see, for example, P. Clark, *The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers,* (Cambridge University Press, 2010).
[825] See, for instance, M. Alam, *Women and Transitional Justice: Progress and Persistent Challenges in Retributive and Restorative Justice*, (Palgrave, 2014); L. Yarwoord (Ed.), *Women and Transitional Justice: The Experience of Women as Participants*, (Routledge, 2013); D. Mazurana and K. Carlson, 'Reparations as a Means for Recognizing and Addressing Crimes and Grave Rights Violations Committed Against Children during Situations of Armed Conflict and Under Authoritarian Regimes' in R. Rubio (Ed.), *The Gender of Reparations: Unsettling Gender Hierarchies While Addressing Human Rights Violations*, (Cambridge University Press, 2009).

no recognition of the harm suffered by victims of conflict-related sexual violence in various domestic approaches to accountability and reconciliation, some of the recent domestic transitional justice processes have provided due diligence to the unique nature of sexual violence occurring in conflict situations.[826] Recent developments in this regard can provide important lessons as to how these mechanisms can go to addressing the dynamics and complex effects of sexual violence as a weapon of war to ensure effective redress.

This chapter examines the promise of domestic transitional justice strategies in advancing redress for victims of sexual violence as a war strategy. Essentially I aim to understand the extent to which these processes can allow recognition and validation of the victims' experiences to promote societal level transformation and breakdown complex social challenges for victims in post-conflict situations as critical components of effective redress. The chapter also aims at highlighting obstacles and opportunities for victims of these crimes in engaging with these processes and how these challenges can be overcome to ensure a comprehensive account of the multifaceted harms suffered by victims. This chapter draws from experiences of various transitional societies that have included conflict-related systematic sexual violence into the mandates of truth-seeking processes to highlight the validity and critical importance of these processes in redressing the legacy of these crimes.

The discussion in this chapter starts by considering how effective redress for victims of sexual violence as a war strategy should be conceived in light of the complexity of the victims' experiences and legacy of these crimes in affected communities. The chapter then looks at the procedural fairness of community-based approaches to accountability and reconciliation, and notes some of the key strengths and weaknesses of such processes as transitional justice mechanisms. It further examines obstacles and opportunities for the engagement of victims of these crimes, and highlights the extent to which truth-seeking processes can assist to address the dynamics and complex effects of mass sexual violence. The chapter concludes with a critical reflexion on measures aimed at addressing challenges and barriers to victims' adequate engagement with such processes in the often fragile post-conflict societies. The analysis in this chapter draws on the transformative effects of domestic transitional justice processes on the social dimensions of sexual violence as weapon of war as a backdrop against which to understand their critical role in advancing effective redress.

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[826] See The UN High Commission for Human Rights, 'Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice', A Report submitted to the UN General Assembly on 30 June, 2014 (A/HRC/27/21 (2014), § 16. See also M. Alam, *Women and Transitional Justice: Progress and Persistent Challenges in Retributive and Restorative Processes*, (Palgrave Macmillan, 2014).

6.2 Effective Redress for Victims of Conflict-Related Sexual Violence in Light of the Complexity of their Experiences and Legacy of these Crimes in Communities

6.2.1 Addressing the Dynamics and Social Consequences of Conflict-Related Sexual Violence

The use of sexual violence in conflict situations constitutes a significant threat to the safety of affected communities in the aftermath of conflict. As the previous discussion in this thesis has shown, what makes these crimes distinctive is their power in a social context beyond the harm and devastation inflicted on individual victims.[827] Several empirical accounts emphasise how sexual violence as a military tactic carry significantly devastating effects in a social context, prolonged even long after conflicts end.[828] Margot Wallström, the former Special Representative on Sexual Violence in Conflict, describes sexual violence in conflict situations as an effective weapon for not only destroying the lives of victims but also 'the very fabric of society'.[829] The dynamics of war-related sexual violence are often highly entrenched within the local contexts, making these crimes not only an effective weapon for destroying the lives of individual victims but also a means of damaging the social fabric of families and communities. Andrew Simon, Susan Nolan and Chi Thao Ngo argue that sexual violence as a military tactic results in devastating consequences on victims that 'carry significantly more power in a social context than the damage the acts alone causes to the victim'.[830] Beyond the physical and psychological harm, victims of these crimes face a myriad of social issues that compound their victimisation and obstruct their recovery process.

There is substantial empirical evidence that the use of sexual violence as a war strategy is often designed to inflict harm upon entire communities. The Human Rights Watch explains that these crimes strike at the heart of communities as perpetrators often explicitly link their acts to creating a situation of general social collapse in societies.[831] This can be evidenced by the forms of these crimes in armed conflicts such as instances of collective rapes in public

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[827] See Chapter Four.
[828] See, for instance, A. F. Simon, Susan A. Nolan and C. T. Ngo, 'Sexual Violence as a Weapon of war', in J. A. Sigal and F. L. Denmark (Eds.), *Violence against Girls and Women: International Perspectives*, (Praeger, 2013), p. 78; Human Rights Watch, 'Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath', September, 1996, available at http://www.hrw.org/reports/1996/Rwanda.htm (Accessed on 10 May, 2015); J. E. Burnet, *Genocide Lives in Us: Women, Memory, and Silence in Rwanda*, (The University of Wisconsin Press, 2012); N. Henry (2010), 'The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice', *Violence against Women,* Vol. 16, N° 10, p. 1110.
[829] See M. Wallström (2012), 'Introduction: Making the Link Between Transitional Justice and Conflict-Related Sexual Violence', *Willian & Mary Journal of Women and the Law*, Vol. 19, N° 1, p. 1.
[830] A. F. Simon, Susan A. Nolan and C. T. Ngo, *Supra* note 828, p. 78
[831] See The Human Rights Watch, 'Sexual Violence Crimes during the Rwanda Genocide, June 2004, Available at http://www.rwandadocumentsproject.net/gsdl/collect/mil1docs/archives/HASHc834.dir/doc52025.pdf (Accessed on 10 March, 2015), at p. 4.

settings, forced rape in public between victims or even between relatives whereby people are forced to rape their mothers, sisters or daughters.[832] This strongly resembles strategies used by *Interahamwe*[833] during the genocide against Tutsi people in Rwanda whereby mothers were raped in front of their children, husbands, fathers forced to have sex with their daughters and members of the community witnessing their neighbours being raped in streets or taken as sex slaves, etc...[834] It is important to note that sexual violence as a military tool is often facilitated by pre-existing socio-cultural dynamics that make women vulnerable to sexual violence in many societies. One study conducted in the Democratic Republic of the Conge (DRC) found that soldiers involved in rape and other acts of sexual violence were often joined by civilians who also actively participated in mass rapes, including gang rapes.[835] The horror of the victims' experiences is compounded by the socio-cultural contexts in which these crimes are committed that often discriminate and perpetuate barriers to their social reintegration.[836] I have already established in previous discussion that victims of sexual violence as a military strategy face a double set of victimisation during conflicts and later in post-conflict situations, not least due to myriad social challenges facing victims in their families and communities.

Widespread and systematic sexual violence as a military strategy add another component in the social disruption caused by conflicts. The complex realities of victims of the strategic use of mass rapes as a weapon of war and the legacy of these crimes in affected communities result in more acute and extensive needs for victims in the criminal justice process compared with victims of ordinary crimes. Victims yearn for social acknowledgment and validation of their complex experiences, and the restoration of their human and civic dignity. Scholars such Nicola Henry and Rama Mani argue that, together with the need to see the perpetrators appropriately held accountable for their crimes, victims of conflict-related mass sexual

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[832] See, for example, Harvard Humanitarian Initiative, *Supra* note 533, p. 24; S. McEvoy-Levy, 'Human Rights Culture and Children Born of Wartime Rape' in R. Charli Carpenter (Ed.), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, (Kumarian Press, 2007), p. 161.

[833] Rwanda's hutu extremist insurgency that carried out the genocide against Tutsi in Rwanda, in April 1994.

[834] See, among others, A-M. De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, (Intersentia, 2005); B. Nowrojee (2005), '"Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?' *Occasional Paper: United Nations Research Institute for Social Development*, p. 7.

[835] See M. Bosmans (2007), 'Challenges in Aid to Rape Victims: The Case of the Democratic Republic of the Congo', *Essex Human Rights Review*, Vol. 4, N° 1, p.7.

[836] See, for instance, D. Seto, *No Place for a War Baby: The Global Politics of Children Born of Wartime Sexual Violence*, (Ashgate, 2013); D. Buss *et al.* (Ed.), *Sexual Violence in Conflicts and Post-Conflict Societies: International Agendas and African Contexts*, (Routledge, 2014), p. 88; C. Cochran (2008), 'Transitional Justice: Responding to Victims of Wartime Sexual Violence in Africa', *The Journal of International Policy Solutions*, Vol. 9, p. 36.

violence 'may be more concerned about whether their human and civic dignity is restored'.[837] The recognition and validation of their experiences by the criminal justice system and by their communities is particularly critical in restoring victims' sense of identity, particularly in relation to their communities. Societal validation of the victims' experiences is also crucial for the empowerment of victims in the often fragile societal contexts in post-conflict settings.

As noted earlier in this thesis, the use of sexual violence in conflict situations often builds upon the socio-cultural dynamics in affected communities to extend effects of these crimes beyond individual victims. The social impact that these crimes have on victims and communities adversely affects the long-term rebuilding process in the aftermath of conflicts.[838] Further, some studies also indicate that sexual violence as a weapon of war often creates an environment conducive for increased levels of sexual violence in in post-conflict settings due to the degradation of moral values and disintegration of families and communities.[839] Addressing the legacy of these crimes requires considering the dynamics and complex effects of these crimes on victims and affected communities to ensure long-term victims' recovery and sustainable redress embedded in affected societies. Social acknowledgement and validation of the victims' experiences may therefore be sought as redress for the individual victims but also as a way of restoring the torn fabric of families and communities. This implies the need for transformative redress through victims' empowerment and opportunity for changes of some structural conditions that often facilitate these crimes in conflict situations and exacerbate their impact on victims after conflicts.

6.2.2. Societal Transformation and Victims' Empowerment as Core Elements of Victim Redress in Post-Conflict Societies

The multifaceted social dimension of widespread and systematic sexual violence as a war strategy underpins the need for mechanisms for redress beyond the individual victims. The central goal for such mechanisms should be to restore the community as a whole and empower victims to facilitate their social reintegration. As noted above, the use of sexual violence as a military strategy has significant social effects with far-reaching implications for

[837] See N. Henry (2009), 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence', *The International Journal of Transitional Justice,* Vol. 3, p. 121; R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (Cambridge: Polity Press, 2002).

[838] See C. Duggan, C. Paz Y Paz Bailey and J. Guillerot (2008), 'Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru', *International Journal of Transitional Justice*, Vol. 2, p. 193.

[839] See a N.E. J. Dijkman, C. Bijleveld and P. Verwimp (2014), 'Sexual Violence in Burundi: Victims, Perpetrators, and the Role of Conflict', *Households in Conflict Network Working Paper*, p.33.

the future of victims and the rebuilding of affected societies. Recent empirical studies on rape and other acts of sexual violence as a weapon of war describe these crimes as a 'bomb that continues to explode' in affected communities, even long after conflicts.[840] In this regard, Anne-Marie La Rosa, Madeleine Rees and Margaret Purdasy rightly argue that the pursuit of justice and redress for victims requires taking full consideration of the immediate issues arising out of conflicts.[841] There is need for transformative transitional justice approaches to account for the extreme vulnerabilities of victims of conflict-related sexual violence created by their complex experiences in armed conflicts to build sustainable future for victims. Transformative approach that guarantees changes in affected societies is particularly crucial to tackling the dynamics of sexual violence in armed conflicts and elevates the victims' status in contexts where such victims face numerous challenges for social reintegration.

To ensure a transformative redress for victims of sexual violence in armed conflicts can, however, be challenging as it must especially take into account the pre-existing structural inequalities and deep-rooted socio-cultural norms impacting victims.[842] In other words, ensuring a wholesale societal transformation as one of the most critical components of effective redress in situations where sexual violence serves as a weapon of war requires an engagement with the complex dimensions of these crimes in way that is equally comprehensive and mindful of the often challenging societal contexts. The discussion in chapter four has shown that pre-existing gender discriminatory norms that induce sexual violence in many societies are also often intrinsically linked to the harms suffered by victims of these crimes in armed conflicts.[843] The effects of sexual violence in conflict situations are often aggravated by socio-cultural dynamics in many societies that discriminate victims of these crimes.[844] In his recent 'Report on Conflict-Related Sexual Violence' submitted to the UN Security Council, the UN Secretary-General notes that the long-lasting legacy of

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[840] See, for instance, J. Trenholm (2013), 'Women Survivors, Lost Children and Traumatized Masculinities: The Phenomena of Rape and War in Eastern Democratic Republic of Congo', *Acta Universitatis Upsaliensis Uppsala*, p. 39, S. Shteir (2014),'Conflict-Related Sexual Violence and Gender-based Violence: An Introductory Overview to Support Prevention and Response Efforts', *Australian Civil-Military Occasional Papers*, p. 23; R. Manjoo and C. McRaith (2011), 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas', *Cornell International Law Journal*, Vol. 44, p.16.

[841] See Anne-Marie La Rosa, Madeleine Rees and Margaret Purdasy, 'Sexual Violence in Conflict: What Use Is the Law?', A summary of an event held by the International Security Department and the International Law Programme at Chatham House on 23 January 2015, available at http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150123SexualViolence.pdf (accessed on 15 May, 2015), at p. 4.

[842] See F. Ní Aoláin, C. O'Rourke & A. Swaine, *Supra* note 819, p. 102.

[843] See Chapter Four.

[844] See UN Secretary-General, Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence, June 2014, available at http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf (Accessed on 10 September 2014), p.8.

systematic sexual violence in armed conflicts represents a unique range of challenges for affected countries attempting to engage in the reconstruction process.[845] In her remarks at a high level panel of the 58th Session of the Commission on the Status of Women, the UN Special Representative on Sexual violence Zainab Hawa Bangura noted that '…rape in war leaves many unseen scars that continue to haunt survivors long after the guns have fallen silent and the conflict has ended'.[846] In its report on denial of justice and redress for the victims of mass sexual violence in the long conflict in DRC, the International Federation for Human Rights (FIDH) notes that:

> For victims of conflict-related sexual and gender based violence, seeking access to justice is an individual and social struggle, in which they are forced to confront trauma and stigma, often alone.[847]

The implications of the social dimension of consequences of sexual violence as a military tool may be that securing effective redress for victims requires creating an environment that is supportive and empowering for victims as well as strengthening the affected community as a whole. In other words, as noted in the recent guidance note of the UN Secretary-General on reparations for conflict-related sexual violence, mechanisms for redress should strive to address the root causes of these crimes to provide opportunity for changes of the existing structural patterns that facilitate sexual violence in armed conflicts.[848] Effective redress for victims of these crimes also requires addressing a myriad of social challenges facing them in post-conflict settings, and the often deep-rooted taboos about sexual violence in some societies that make it difficult for victims to seek redress.

The distinct nature of sexual violence as a military strategy makes these practices not an individual' but a society's issue.[849] This underpins the need for transitional justice mechanisms that permit flexile ways to address the dynamisms and complex effects of these

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[845] See The 2014 UN Secretary-General Report on Conflict-Related Sexual Violence submitted to the UN Security Council on 13 March 2014 (S/2014/181), § 4. See also N. Henry, *War and Rape: Law, Memory and Justice*, (Routledge, 2011), p. 3.

[846] Zainab Hawa Bangura, the UN Special Representative on Sexual violence, Speech during the 58th Session of the Commission on the Status of Women held at the UN Headquarters on 10-21 March, 2014. Available at http://www.unfpa.org/news/sound-silence-dealing-legacy-sexual-violence-weapon-war (15 May, 2015).

[847] See FIDH, 'DRC: Victims of Sexual Violence Rarely Obtain Justice and Never Receive Reparation- Major Changes Needed to Fight Impunity', Report N^O 619a published in October 2013, Available at https://www.fidh.org/International-Federation-for-Human-Rights/Africa/democratic-republic-of-congo/14338-drc-denial-of-justice-for-the-victims-of-sexual-crimes (Accessed on 17 May, 2015), at p. 45.

[848] See UN Secretary-General, Guidance Note on Reparations for Conflict-Related Sexual Violence, *Supra* 844.

[849] See R. Rubio-Marín (2012), 'Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue', *William & Mary Journal of Women and the Law*, Vol. 19, Nº 1, p.76.

crimes on victims and communities for any victim redress process to have a positive contribution to the restoration of the victims' human and civic dignity, and especially to ensure a transformation of the victims' social status in post-conflict situations. Accordingly, as discussed in previous chapter, although the relatively new paradigm of victim participation in international criminal proceedings remains a critical component of victim-focused responses to mass atrocity, the complex dynamics of sexual violence in conflict situations impede the effectiveness of international criminal justice in advancing effective redress for victims. Significant limitations of international criminal justice to draw upon the challenging societal contexts and dynamics surrounding victimisation in conflict-related sexual violence events reflects the fact that it cannot solely serve to advance effective redress for victims.[850] Adopting a holistic approach to transitional justice can therefore be relevant for the over expanding domestic transitional justice processes to contribute to addressing the dynamics and complex effects of these crimes on victims and affected communities.

With the growing diversification of truth-seeking processes and other community-based approaches to accountability and reconciliation in post-conflict societies, it can be argued that these processes have the potential to empower victims and breakdown challenges and barriers to the victims' social reintegration. Specifically, these processes can provide opportunity for the societal moral condemnation of the lived experiences of victims with a view to empowering them and promoting changes in affected communities. By providing a venue in which victims can tell their stories in an informal way and have them socially acknowledged, these processes would complement the formal criminal justice institutions in addressing the a wide range of victims' needs by tackling a set of corrosive societal effects inherent to these crimes. As earlier argued in this thesis, victims' redress mechanisms that are equally comprehensive and mindful of the complex contextual issues are key to achieving effective redress in societies enduring the legacies of sexual violence as a military tactic. The societal acknowledgement of the victims' traumatic experiences and root-causes of these crimes would not only serve to mend the debasement and dehumanisation inflicted on victims but also empower them and prevent the continuation or recurrence of such violence.

The author is under no illusion of the potential challenges and obstacles for victims of sexual violence to adequately participate in domestic transitional justice processes. These obstacles are often compounded by the design of such processes that often ignore to integrate sensitive

[850] See T. St. Germain and S. Dewey (2013), 'Justice on Whose Terms? A Critique of International Criminal Justice Responses to Conflict-Related Sexual Violence', *Women's Studies International Forum*, Vol. 37, p. 39.

approaches to these crimes in their operational structure and rules of procedure. The remainder of this chapter presents a critical analysis of the contribution of the increasing diversification of domestic transitional justice initiatives in comprehensively accounting for the extreme vulnerabilities of victims of sexual violence as a war strategy, and even more crucially, address the often deep-rooted structural patterns that facilitate these crimes and exacerbate their impact in post-conflict situations. This analysis serves to provide a detailed understanding of the potential value of truth-seeking processes as complementary measures where there are available for advancing effective redress in situations where sexual violence serve as a weapon of war. The crux of the discussion is about the potential transformative effects of truth-seeking processes and other community-based transitional justice approaches to accountability and reconciliation on challenging social ramifications of conflict-related sexual violence. The discussion further highlights persistent challenges impeding the victims' full engagement with such processes and how these challenges can be addressed.

6.3 Domestic Transitional Justice Processes as Complementary Mechanisms for Advancing Effective Redress for Victims of Conflict-Related Sexual Violence

6.3.1 The Nature of Truth-Seeking Processes as Transitional Justice Mechanisms

Societies that have lived through extreme cases of mass atrocity struggle to find a way to move forward.[851] Many transitional societies have faced significant challenges to address mass violence, resorting to truth-seeking processes to help affected societies understand and acknowledge the scope of abuses committed and to promote changes aimed at preventing future atrocities.[852] Thus, in addition to national courts and supra national judicial bodies such as the International Criminal Tribunal for the former Yugoslavia (ICTY)[853] and International Criminal Tribunal for Rwanda (ICTR)[854] as *ad hoc* tribunals and hybrid or mixed courts[855] as well as the relatively recent permanent international criminal court (ICC),[856] the last two and half decades have witnessed an increasing number of non-or quasi-judicial transitional justice

[851] See R. Hodzic (2010), 'Living the Legacy of Mass Atrocities: Victims' Perspectives on War Crimes Trials', *Journal of International Criminal Justice*, Vol.8; J. R. Quinn (2001), 'Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile', *Netherlands Quarterly of Human Rights*, Vol. 19, N° 4, p. 387.
[852] See E. Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*, (Routledge, 2010). See also P. McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship*, (Routledge, 2013).
[853] The ICTY was established by the UN Security Council Resolutions 827 (1993) (S/RES/827 (1993)).
[854] The ICTR was established by the UN Security Council Resolution 955 of November 8, 1994.
[855] Established based on agreement between the national governments and the UN. They thus lack the UN Chapter VII powers of the ICTY and ICTR. Examples of such hybrid of mixed tribunals can be found in Kosovo, Bosnia Herzegovina, East Timor, Sierra Leone, Cambodia, and Lebanon.
[856] The Rome Statute Establishing the ICC entered into force on 1 July 2002.

measures designed to address mass atrocities. It has become widely recognised that mechanisms such as the truth commissions and other community-based approaches to accountability and reconciliation can play a critical role in the rebuilding of societies emerging from large-scale violence.[857] The growing interest in the use of truth-seeking processes as transitional justice mechanisms can partly be explained by the challenges in prosecuting mass crimes in post-conflict situations and the need for reconciliation strategies that enable affected people to move on from the dark past.

Over the recent few years, the world has witnessed an increasing range of truth-seeking processes to deal with the past human rights abuses in transitional societies. A report of the UN High Commissioner for Human Rights indicates that the use of truth-seeking processes is increasingly becoming common in societies enduring the legacy of mass atrocity.[858] These include truth commissions which have been used in more than thirty countries over the last two and half decades, including Chile, Argentina, South Africa, Timor-Leste, Haiti, Colombia, Peru, Guatemala, El Slavador, Sierra Leone, Liberia, East Timor, Kenya and Ghana.[859] The use of truth commissions alongside the criminal trials has become central to the success of transitional justice frameworks.[860] The development of domestic transitional justice initiatives was also marked by the use of community-based approach to accountability and reconciliation known as *Gacaca* after the genocide in Rwanda.[861] The value of truth-seeking processes in complementing the formal criminal justice for addressing the root causes and societal consequences of violence has driven their proliferation in transitional societies.

Transitional societies turn to non-judicial traditional justice process in an attempt to establish the truth about the extent and the patterns of past violations and to foster reconciliation. Whilst the design of truth commissions differs between countries in many aspects,[862] the overall purpose of such processes is to provide an account of past abuses with a view to

[857] See, for example, J. Perry and T. Debey Sayndee, *African Truth Commissions and Transitional Justice*, (Lexington Books, 2015); A. Bisset, *Truth Commissions and Criminal Courts*, (Cambridge University Press, 2012); R. Shaw, L. Waldorf and P. Hazan (Eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, (Stanford University Press, 2010); N. Schneider and M. Esparza (Eds.), *Legacies of State Violence and Transitional Justice in Latin America: A Janus-Faced Paradigm*? (Lexington Books, 2015).

[858] The UN High Commissioner for Human Rights, 'Rule of Law Tools for Post-Conflict States: Truth Commissions', Report published in 2008; available at http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf (Accessed on 10 September, 2015).

[859] See, for instance, A. Ferrara, *Assessing the Long-Term Impact of Truth Commissions: The Chilean Truth and Reconciliation Commission in Historical Perspective*, (Routledge, 2014), p. 4.

[860] See P. Flory (2015), 'International Criminal Justice and Truth Commissions: From Strangers to Partners?, *Journal of International Criminal Justice*, Vol. 13, p. 21.

[861] See Section 6.3.4 (B) *infra*.

[862] See A. Bisset, *Supra* note 857, p. 75.

bringing closure to victims and foster reconciliation.[863] By concentrating on the underlying causes of the human rights abuses, the primary purpose of truth-seeking processes is to facilitate community-building, particularly by emphasising societal acknowledgement of the dark past and reconciliation. Truth-commissions are therefore generally understood to be non-judicial temporary fact-finding bodies to investigate the patterns of past human rights abuses. In her study on truth commissions across the world, Prisilla Hayner identifies five common characteristics of truth commissions.[864] According to Hayner a truth commission:

> [F]ocuses on the past, rather than ongoing events, investigates a pattern of events that took place over a period of time, engages directly and broadly with the affected population to gather information on their experiences, is a temporary body with the aim of concluding with a final report and is officially authorised or empower by the state under review.

It is worth noting that truth commissions and other community-based transitional justice processes are not set up to replace the courts but rather as complementary strategies to address the large-scale violence, especially in situations where prosecutions for massive crimes are impossible as was the case in Rwanda in the wake of genocide. The use of truth-seeking process is generally meant to complement the criminal justice process by addressing a wide range of needs of victims and affected communities as a whole.

While truth commissions are generally established to advance reconciliation after mass violence, the forms and structure of these processes have varied widely in post-conflict societies over the recent years. Some scholars argue that a truth commission is a flexible transitional justice mechanism with the only similarity between countries that have used it being the mandate to account for the patterns and scale of past human rights abuses.[865] The variation of truth commissions is quite understandable as they are often formed in dissimilar political circumstances. This variation can be evidenced in the working relationship between such processes and prosecution institutions. While some truth commissions have a close working relationship with the courts, in some countries truth commissions have been established as a totally separate and independent body from the prosecution bodies.[866] For instance, while the Commission for Reception, Truth and Reconciliation in East Timor was

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[863] See A. Hegary, 'Truth, Law and Official Denial: The Case of Bloody Sunday', in W. Schabas and S. Darcy, *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth*, (Kluwer Academic Publishers, 2004), p.215.
[864] P. Hayner, *Unspeakable Truth: Confronting State Terror and Atrocity*, (Routledge, 2011), pp. 11-12.
[865] See E. Stanley (2005), 'Truth Commissions and the Recognition of State Crime', *British Journal of Criminology*, Vol. 45, p. 582
[866] See A. Bisset, *Supra* note 857, p. 75.

under obligation to share information and refer serious crimes to courts,[867] some other Truth Commissions such as the Truth and Reconciliation Commission in Sierra Leone,[868] Chile[869] and Guatemala[870] was not allowed to share information with prosecution institutions. Particularly in Sierra Leone, where the truth commission was established alongside the Special Court for Sierra Leone (SCSL),[871] the Truth and Reconciliation Commission Act adopted in 2000 provided the Commission with the power to gather information in confidence and imposed a duty on the Commission to respect confidentiality.[872] This means that the Commission could not be compelled to disclose any information given to it in confidence. Another significant difference is the power of truth commissions to grant or recommend amnesty. Whilst some truth commissions such as in South Africa were given broad power to grant amnesty, truth commissions in other countries such as in Liberia were given limited power to recommend amnesty for less serious crimes.[873] In fact, truth-seeking processes are established in quite different social and political circumstances in post-conflict societies which significantly influence their mandates and activities.

A. Strengths and Weaknesses of Truth-Seeking Processes as Transitional Justice Mechanisms

The preamble of the Presidential Act establishing the National Commission for Truth and Reconciliation in Chile, for instance, states that '…only upon a foundation of truth it is possible to meet the basic demands of justice and to create the necessary conditions for achieving true national reconciliation'.[874] The fundamental justifications for truth-seeking process are construed around the need to establish the truth about the past human rights violations and thereby advance public understanding of the affected countries' dark past. The work of non-judicial transitional justice mechanisms such as truth commissions also often

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[867] See P. Burgess, 'Justice and Reconciliation in East Timor: The Relationship between the Commission for Reception, Truth and Reconciliation and the Courts', *Criminal Law Forum*, Vol. 15.

[868] The Sierra Leone's Truth and Reconciliation Commission was established by the Lome´ Peace Agreement of 7 July 1999 between the Government and the rebel Revolutionary United Front after the nine-year civil war in Sierra Leone, marked by the systematic use of rape and other acts of sexual violence as a weapon.

[869] The Chilean Truth and Reconciliation Commission (commonly referred to as the Retting Commission after its chairperson Raul Retting) was created in 1990 and issued its report in 1991.

[870] The Guatemala Commission for Historical Clarification was established as part of the UN-Brokered Peace Agreement between Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca* to investigate human rights violations during the civil war from 1962 to 1996.

[871] The SCSL was created by the agreement between the UN and the Government of Sierra Leone on 16 January, 2002.

[872] See Section 7 (3) of the Truth and Reconciliation Commission Act 2000, Available at http://www.sierra-leone.org/Laws/2000-4.pdf (Accessed on 15 September, 2015).

[873] See The UN High Commissioner for Human Rights, 'Rule of Law Tools for Post-Conflict States: Truth Commissions' *Supra* note 858, p. 11.

[874] See M. Ensalaco (1994), 'Truth Commission for Chile and El Salvador: A Report and Assessment', *Human Rights Quarterly*, Vol. 16, N° 4, p.658.

results in recommendations aimed at preventing the recurrence of past human rights abuses after determining their patterns, root causes, and societal consequences in affected communities. Mladen Ostojic argues that truth-seeking processes significantly contribute 'to rebuilding divided communities through the establishment of a shared narrative about the past'.[875] The use of truth commissions and other community-based transitional justice initiatives therefore serves as an opportunity to create a common understanding of the past human rights abuses in order for societies affected by mass atrocities to move forward on a path to reconciliation.

Truth-seeking processes have also been valued as participative transitional justice mechanisms that have potential to bring closure to victims and facilitate their healing. Truth seeking initiatives can play a powerful role in achieving moral recognition of victims and their social reconnection with their communities.[876] Michael Humphrey argues that 'the strength of truth commission has been their participatory process in which the truth about the past atrocity is located outside the state within the people'.[877] For societies that have lived through extreme cases of mass atrocity, the public exposure of the truth about the nature and causes of such violence can be essential to individual and collective healing. In reference to the impact of the Truth and Reconciliation Commission in Chile, Mark Amstutz claims that the use of truth-seeking processes plays a crucial role in the 'moral reconstruction' of society in transition from violence and repression to stability.[878] Opportunity for victims to tell their stories in a supportive environment along with public acknowledgement of their experiences can lead to a sense of healing and validation among victims.[879]As Felicity Horne rightly argues public validation of the horrors of the past is critical not only to facilitating healing of the individual victims but also of the entire nation.[880] An opportunity for victims to talk and share their stories for public's acknowledgement and validation of their experiences is often presented as one of the key strengths of truth-seeking in aiding the victims' healing process.

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[875] See M. Ostojić, *Between Justice and Stability: The Politics of War Crimes Prosecutions in Post-Milosevic Serbia*, (Ashgate, 2014), p.111.

[876] See M. Humphrey (2003), 'From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing', *The Australian Journal of Anthropology*, Vol. 15, N° 2, p. 184.

[877] Ibid.

[878] See M. R. Amstutz, *The Healing of Nations: The Promise and Limits of Political Forgiveness*, (Rowman & Littlefield Publishers, Inc., 2005), p.153.

[879] See D. K. Androff (2012), 'Narrative Healing Among Victims of Violence: The impact of the Greenboro Truth and Reconciliation Commission', *Families in Societies: The Journal of Contemporary Social Services*, Vol. 93, N° 1, p. 38.

[880] See F. Horne (2013), 'Can Personal Narratives Heal Trauma? A Consideration of Testimonies given at the South African Truth and Reconciliation Commission', *Social Dynamics: A Journal of African Studies*, Vol. 39, No. 3, p. 445. See also H. L Guthrey, *Victim Healing and Truth Commissions: Transforming Pain through Voice in Solomon Islands and Timor-Leste*, (Springer, 2015), p. 3.

Beyond the healing and conciliatory value of truth-seeking process, they have also been touted for their potential in laying groundwork for societal transformation in transitional societies. Truth commissions and other community-based approaches to accountability and reconciliation in are often tasked with a wide range of responsibilities in the wake of mass violence, including educating the population about the past human rights violations and recommending ways to prevent the continuation or recurrence of similar atrocities in the future.[881] Final reports of truth-seeking initiatives often provide details on the nature of the past human rights abuses, their root causes and societal consequences on victims and communities. Some studies indicate that truth-commissions play a crucial role in promoting political and social changes in transitional societies by informing public debate about the past and recommending necessary legal and institutional reforms.[882] The collective account of the truth about the dark past through truth-seeking processes can result in lessons being learned by affected communities, thereby creating conditions that serve to transform social and political norms that often underlie mass violence.

Despite the proliferation and value of truth seeking processes as transitional justice mechanisms in the wake of collective violence and severe human rights violations, these processes are not without weaknesses. One key weakness of truth-seeking process is the limited accountability for perpetrators.[883] Although some truth commissions are designed with the power to make recommendations for prosecution in an effort to contribute to formal trials,[884] truth commissions as transitional justice mechanisms do not normally result in any punishment for perpetrators.[885] Specifically, perhaps the most controversial aspect of truth-seeking processes as transitional justice mechanisms is the amnesty regime in some truth commissions. Although the power to grant amnesty to perpetrators can assist the truth

[881] See, for instance, H. Van Der Merwe, V. Baxter and A. R. Chapman (Eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, (The United States Institute of Peace, 2009), p.3; E. Wiebehhaus-Brahm, *Supra* note 852, p. 20;

[882] See, for instance, O. Bakiner (2014), 'Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society', *The International Journal of Transitional Justice*, Vol. 8; A. Ferrara, *Supra* note 859; R. Linn (2011), 'Change Within Continuity:' The Equity and Reconciliation Commission and Political Reform in Morocco, *The Journal of North African Studies*, Vol. 16, N° 1; J. R. Quinn and M. Freeman (2003), 'Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa', *Human Rights Quarterly*, Vol. 25, N° 4.

[883] See E. Wiebehhaus-Brahm, *Supra* note 852, p. 24.

[884] For instance, the Truth and Reconciliation Commission of Kenya set up in 2008 to 'investigate the gross human rights violations and other historical injustices in Kenya between 12 December 1963 and 28 February 2008' was designed with the power to make recommendations for prosecutions to contribute in subsequent national trials. See Section 5 (d) of the Kenya Truth and Reconciliation Commission Act, N° 6 of 2008, passed by parliament on 23 November 2008 and became operational on 9th March 2009.

[885] See K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, (Norton ad Company, 2011), p. 174.

gathering to produce an accurate and more comprehensive account of the past hum rights violations, such power endorses impunity through a limited accountability for perpetrators. It is important to note that the procedural mechanisms used in the quest for truth about the past vary extensively, largely based on voluntary processes and traditional values of the affected communities. In fact, truth-seeking processes have varied in terms of their mandates and procedural mechanisms depending on the nature of crimes committed and the socio-political contexts in which they are created. One more complex challenge for the effectiveness of truth-seeking processes is the procedural fairness of the proceedings to ensure the protection of victims and perpetrators and attainment of intended objectives.

B. The Procedural Fairness of Truth-Seeking Processes in Transitional Societies

Domestic transitional justice initiatives such as truth commissions are often created during times of deeply challenging socio-political circumstances. Truth commissions have been used as transitional justice mechanisms in a wide range of political contexts characterised by the presence of fragile and profoundly challenging socio-political environments. The quest for the truth generally does involve a myriad of practical constraints centred not only on the sheer number of victims and perpetrators of the past human rights violations but also on the socio-political circumstances under which truth commissions are created.[886] It is important to note that while truth commissions can either be formal or informal, sometimes even facilitated by international bodies such as the UN, most commissions rely on voluntary disclosure of information by affected people in an attempt to secure the right to truth in post conflict societies.[887] Depending on the context and nature of crimes committed, some commissions have been given quasi-judicial powers such as the ability for the commissions to issue summons to appear for people deemed to hold relevant evidence but unwilling to voluntarily disclosure information.[888] Such quasi-judicial powers allow some commissions to go beyond voluntary methods of information gathering to create a true picture of the past.

Given the often complex realities of societies enduring the legacy of mass violence and the sheer number of participants in truth-seeking processes, the procedural fairness of the

[886] See P. B. Hayner, *Unspeakable Truths: Transitional Justice and The Challenge of Truth Commissions*, 2nd Ed., (Routledge, 2011).
[887] See, for instance, H. Van Der Merwe, V. Baxter and A. R. Chapman, *Supra* note 881, p. 3; S. Nauenberg (2015), 'Spreading the Truth: How Truth Commissions Address Human Rights Abuses in the World Society', *International Sociology*, Vol. 30, p. 663.
[888] See M. Freeman, *Truth Commissions and Procedural Fairness*, (Cambridge University Press, 2006), pp. 188-221. See also S. F. Materu, *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, (Asser Press, Springer, 2015), p. 161.

proceedings becomes critical to the effectiveness of truth-seeking processes as transitional justice mechanisms. As earlier noted, truth commissions are set up as a forward-looking transitional justice mechanism to advance public understanding of the affected countries' dark past, educate the public about the patterns, root causes and social consequences of the past human rights violations to prevent future atrocities.[889] The protection of the rights and interests of participants in the quest for the truth, especially victims and perpetrators who are primary sources of information, is therefore a crucial element in not only ensuring an accurate and comprehensive account of the past but also in ensuring that the outcome is credible and authoritative. Mark Freeman rightly argues that the success or failure of a truth commission crucially depends upon the fairness of its proceedings.[890] It is therefore crucial to have procedures that ensure the dignity and well-being of victims while respecting the rights and interests of suspected perpetrators of mass atrocities.

Truth commissions include a number of information gathering procedures, including holding public hearings, interviewing victims, suspected perpetrators and political actors as well as examining documents and visiting areas that may contain evidence, such as detention sites and mass graves. As Freeman rightly notes, depending on the nature of crimes and contexts, public hearings are not always 'desirable or possible' for participants in truth commissions, especially victims, their families and perpetrators.[891] For instance, as will be discussed below, the invasive nature of rape and other acts of sexual violence and deep rooted social norms and taboos about these crimes in some societies impede the victims' ability and willingness to participate in public truth telling sessions. In some contexts, access to victims is also limited due to fear of reprisals. It is thus critically important for truth-seeking processes to set out standards of procedural fairness aimed at ensuring the personal safety and integrity of information givers. This entails, for instance, creating a safe and accessible environment for victims to speak about their experiences, ensuring confidentiality of information if circumstances so require and providing all the necessary physical and emotional support to victims and alleged perpetrators.[892] It is also critical for truth commissions to undertake public awareness campaigns about the scope of their activities and modalities of participation.[893] Mechanisms to preserve confidentiality, if conditions of participants so

[889] See, for instance, A. R. Chapman and H. Van Der Merwe (Eds.), *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, (University of Pennsylvania Press, 2008), p.4.
[890] See M. Freeman, *Supra* note 888, p.1.
[891] Ibid. p. 224.
[892] Ibid.
[893] Ibid.

require, must also be clearly set out in the truth commissions' operational procedures to ensure that identities of witnesses cannot be easily discovered even after the publication of final reports with proper storage facilities and coding mechanisms.

Admittedly, the largely informal nature of truth seeking processes can raise a myriad of procedural fairness issues. The very nature of truth commissions as a victim-centred transitional justice mechanisms tasked with creating an authentic historical account about the past human rights violations through intensive truth seeking gives them a broad range of explicit and implicit responsivities. As a result, the functioning of truth commissions tend to be largely informal which can raise procedural fairness issues. Also, the political constraints on truth commissions' work carry significant risks, namely seeking the balance between truth finding and legitimating and advancing political interests of incoming regime.[894] Hugo Van Der Merwe, Victoria Baxter and Audrey Chapman argue that, in some contexts, some of the truth commissions' goals such as finding the truth and promoting reconciliation may have differing conflicting requirements.[895] In fact, given the socio-political conditions in transitional societies, proper standards of procedural fairness and mechanisms to ensure the safety for victims and perpetrators must always be clearly set out in their mandates.

In summary, although principally concerned with providing limited accountability for human rights violations, the importance of truth-seeking processes in transitional societies lies in the potential to broadly and widely engage with affected population in the process of redressing such violence with a view to advancing public knowledge about their nature and effects on communities. The exposure of the truth often leads to political and societal transformation to prevent the continuation or recurrence of past human rights abuses in the future. Public acknowledgment and validation of the past crimes can also be particularly helpful to restoring dignity to victims. In fact, as a vehicle to promote reconciliation and foster deterrence for future crimes, truth-seeking processes such as truth commissions and other community-based approach to accountability and reconciliation have become an essential part of transitional justice mechanisms for countries existing mass violence. Despite the perceived value of truth-seeking processes as complementary transitional justice mechanisms alongside the formal criminal prosecutions, rape and other acts of sexual violence often tend to be neglected or marginalised in the vast range of truth-seeking approaches, a point to which we now turn.

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[894] See, for instance, O. Bakiner, *Truth Commissions: Memory, Power and Legitimacy*, (University of Pennsylvania Press, 2016), p. 53.
[895] See H. Van Der Merwe, V. Baxter and A. R. Chapman, *Supra* note 881, p. 3.

6.3.2 The Neglect or Marginalisation of Conflict-Related Sexual Violence in Domestic Transitional Justice Processes

The challenges in securing criminal justice in transitional societies and the need to promote effective and lasting nation-building after periods of mass atrocity have given rise to truth-seeking processes as an important part of broader transitional justice approaches. Various transitional justice approaches to accountability and reconciliation such as truth commissions are becoming common in post-conflict settings. The use of truth-seeking processes is thus usually meant to complement the criminal justice process by addressing a wide range of needs of victims and affected communities as a whole. Although the world has witnessed a proliferation of truth-seeking processes over the last two and half decades, integrating and addressing conflict-related sexual violence remains a constant challenge. Despite the prevalence of sexual violence in conflict situations, recent studies emphasise how these crimes are generally neglected or marginalised in the work of truth-seeking processes.[896] Integrating these crimes in quasi/non-judicial transitional justice initiatives after periods of mass atrocities remains a highly complex challenge.

Despite the proliferation of truth-seeking processes, little regard has been devoted to sexual violence as the focus is rather put on other crimes suffered by victims. In addition to lack of specific reference to sexual violence in many truth commissions' mandates, the marginalisation of these crimes in truth-seeking processes is also often due to a lack of appropriate measures to facilitate the adequate participation of victims. Mayesha Alam explains that, due to the general lack of sensitive approaches to the harms suffered by victims of sexual violence in the operational structure of truth-seeking processes, most victims engaging with those processes often choose to focus on other crimes.[897] A field study on truth and reconciliation commissions conducted by the Coalition for Women's Human Rights in conflict situations found that truth commissions have generally failed to devote adequate attention to sexual violence in conflicts and to its consequences for victims.[898] This view resonates with the UN High Commissioner for Human Rights recent report submitted to the

[896]See, for instance, M. Alam, *Supra* note 825; N. Szablewska and C. Bradley, 'The Nexus Between Sex-Work and Women's Empowerment in the Context of Transitional Societies of Sothern Asia, in N. Szablewska and S-D Bachmann (Eds.), *Current Issues in Transitional Justice: Towards a More Holistic Approach*, (Springer, 2015); See L. C. Turano (2011), 'The Gender Dimension of Transitional Justice Mechanisms', *New York University Journal of International Law and Politics*, Vol. 43, p 1082.

[897] See M. Alam, *Supra* note 825, p. 93.

[898] See, Coalition for Women's Human Rights in Conflict Situations, 'Women's Right to Reparation: Background Paper for the Nairobi Meeting from 19-21 of May, 2007' available at http://www.womensrightscoalition.org/site/main_en.html (Accessed on 10 October, 2015).

UN General Assembly on Gender-Based and Sexual Violence in relation to transitional justice underlining that that the attention to gender-based and sexual violence is often absent from the work of some truth commissions.[899] The failure of many truth-commissions to adequately address conflict-related sexual violence is due to various factors, including the lack of appropriate mechanisms to enable the victims' adequate participation in the information gathering process.

In South Africa, for instance, crimes of sexual violence were substantially overlooked in the mandate of the South African truth commission. Despite the prevalence of rape and other forms of sexual violence during the apartheid years,[900] these crimes were not included as a separate gross violation in the mandate of the Commission. The Truth and Reconciliation Commission was created after the end of Apartheid in South Africa.[901] According to the Promotion of National Unity and Reconciliation Act establishing the truth commission in South Africa, the mandate of the commission was to account for patterns, causes and extent of 'gross violations of human rights' and especially refer these cases for reparation and rehabilitation.[902] One of the main distinct characteristics of truth commission in South Africa was its broad power to grant amnesty to the perpetrators of these crimes if they made 'full disclosure of all the relevant facts relating to acts associated with a political objective'.[903]

The Promotion of National Unity and Reconciliation Act made no specific reference to the crimes of sexual violence. Interventions by women's activists led to the Commission to address these crimes in special hearings and to explore some special mechanisms to facilitate their testimony.[904] Despite efforts to integrate these crimes in the truth gathering, lack of gender perspective in the mandate of the Commission impeded its ability to fully account for the experiences of victims of sexual violence under apartheid.[905] The Commission itself acknowledged its inability to account for the myriad forms of harms suffered by women during apartheid, particularly sexual violence by stressing in its report that to fully address

[899] See the Report of the Office of the UN High Commissioner for Human Rights, *Supra* note 858, § 16.
[900] S. Armstrong (1994), 'Rape in South Africa: An Invisible Part of Apartheid's Legacy', *Focus on Gender,* Vol. 2, N° 2.
[901] See The Promotion of National Unity and Reconciliation Act, N° 34 of 1995, available at http://www.justice.gov.za/legislation/acts/1995-034.pdf (Accessed on 16 September, 2015).
[902] Ibid. Chapter 2, Section 3, (1) (a)
[903] Ibid. Chapter 2, Section 3 (1) (b).
[904] See B. Russell (2008), 'A self-Defining Universe? Case Studies of the Special Hearings: Women of South Africa's Truth and Reconciliation Commission, *African Studies*, Vol. 67, pp 49; H. Millar, 'Facilitating Women's Voices in Truth Recovery', in H. Durham and Tracey Gurd (Eds.), *Listening to the Silences: Women and War*, (Brill NV, Leiden, 2005), p. 180.
[905] See T. A. Borer (2009) 'Gendered War and Gendered Peace, Truth Commissions and Post conflict Gender Violence: Lessons from South Africa', *Violence against Women*, Vol. 15.

women' experiences under apartheid 'would have required the Commission to amend its understanding of its mandate and how it defined gross human rights violations'.[906] Rashida Manjoo argues that the narrow interpretation of gross human rights violations made the Commission unable to address the multifaceted ways in which women suffered under apartheid, especially in terms of rape and other acts of sexual violence.[907] Further, lack of gender sensitive measures in the mandate of the commission also made the Commission fail to engage with women who suffered sexual violence under apartheid.[908] Studies indicate that women were unwilling to talk about their experiences of sexual violence to the extent that only 140 explicitly mentioned rape in over 21,000 testimonies given in hearings for women.[909] Trista Anne Borer explains that, although the Commission's final report noted that women were victims of sexual violence in South Africa, the Commission failed to provide details on the political dimension of these crimes during apartheid.[910] The South African truth commission is often touted by scholars as a success,[911] but its inability to establish a comprehensive picture of the nature and extent of sexual violence, including the political function of these crimes during the apartheid era can be presented as one of its major flaws.

Similarly, many other truth commissions neglected or failed to provide due diligence to conflict-related rape and other acts of sexual violence.[912] In his study of the functioning of truth and reconciliation commission in El Salvador and Guatemala, David Tombs found that in El Salvador the Commission's final report made cursory reference to sexual violence, leaving a number of similar sexual-violence related cases in unpublished attachments.[913] This is despite the fact that rape and other acts of sexual violence were frequently committed by state forces during the civil war in El Salvador, including sexual torture for male political detainees and women in detention.[914] Despite sexual violence being widely reported during the civil war from 1981 to 1991, the Commission failed to these crimes in the quest for truth.

[906] See Truth and Reconciliation Commission in South Africa, Report of 1999, Vol. 4, pp. 287.
[907] See R. Manjoo, 'Gender Injustice and the Truth and Reconciliation Commission', in D. Pankhurst (Ed.), *Gendered Peace: Women's Struggles for Post-War Justice and Reconciliation*, (Routledge, 2009), p. 138.
[908] R. Rubio-Marín, *Supra* note 849, p. 86.
[909] See The South African Truth and Reconciliation report, 1998b, p. 296 cited by T. A. Borer (2009) 'Gendered War and Gendered Peace, Truth Commissions and Post conflict Gender Violence: Lessons from South Africa', *Violence against Women*, Vol. 15, p. 1173.
[910] See T. A. Borer, *Supra* note 905, p. 1179.
[911] See, for instance, J. L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation*? (Russell Sage Foundation, 2004), p. 1.
[912] See, V. Nesiah *at al.* , *Truth Commissions and Gender: Principles, Policies, and Procedures*, (Gender Justice Series, 2006),
[913] See D. Tombs, 'Unspeakable Violence: The UN Truth Commission in El Salvador and Guatemala' in I. s. Maclean (Ed.), *Reconciliation, Nations and Churches in Latin America*, (Ashgate, 2013),
[914] See Aron *et al.* (1991), 'The Gender-Specific Terror of El Salvador and Guatemala: Post-Traumatic Stress Disorder in Central American Refugee Women', *Women's Studies International Forum*, Vol. 14, N° 1–2, p. 39.

As indicated in our earlier discussion in particular reference to Rwanda, in conflict situations many women are systematically raped before being killed. Although this was the case during the El Salvador civil war,[915] the Truth Commission ignored the cases of women systematically raped in detention camps before being killed but rather put emphasis on other crimes suffered by victims.[916]

Admittedly, the political context in which truth-seeking processes are established is a significant element for the success or failure of these processes in providing an accurate and complete picture of the past crimes.[917] Some truth commissions can therefore fail to successfully account for many of the widely experienced crimes due to post-conflict socio-political contexts in which they were set up. Several accounts indicate, however, that rape and other acts of sexual violence the most commonly under-covered crimes in transitional justice approaches to accountability and reconciliation.[918] Conflict-related sexual violence are either ignored or presented as a subsidiary issue in the quest for truth in transitional societies.

Part of the reason for the neglect or marginalisation of conflict-related sexual violence in growing diversification of community-based approaches to accountability and reconciliation such as truth commissions has to do with rare reference to these crimes in the mandates of many truth-seeking processes,[919] but also the implementation problems even when these crimes are integrated in the truth commissions' mandates. Although these problems are bound to vary depending on the socio-cultural contexts, pre-existing structural inequalities and other deep-rotated social norms impacting women in many societies inhibit their ability to engage with these processes. As elaborated in our earlier chapters,[920] the challenging contextual ramifications of sexual violence as a military tactic create extreme vulnerabilities for victims that compound their exclusion in communities and especially leave open the possibility of re-victimisation. The realities of victims in post-conflict settings create myriad challenges and barriers to victims' engagement with truth-seeking processes. Also, different

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[915] See M. Eriksson, *Defining Rape: Emerging Obligations for States Under International Law*?, (Martinus Nijhoff Publishers, 2011), p. 130.
[916] See D. Tombs, *Supra* note 913.
[917] See R. I. Zamora, 'Truth for Reconciliation: The Salvadoran Experiences of 1979 and 1992', in E. Skaar, S. Gloppern and A. Suhrke (Eds.), *Roads to Reconciliation*, (Lexington Books, 2005), p. 182.
[918] See, for instance, J. Boesten, *Sexual Violence during War and Peace: Gender, Power, and Post-Conflict-Justice in Peru*, (Palgrave Macmillan, 2014); P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, (Routledge, 2001), p. 77.
[919] See V. Nesiah *et al.*, 'Truth Commissions and Gender: Principles, Policies and Procedures', Report of the International Centre for Transitional Justice, (Gender Justice Series, July, 2006), p. 3, available at https://www.ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English_0.pdf (Accessed on 10 October, 2015).
[920] See Chapter Four *Supra*.

misconceptions about these crimes and victims in many societies further entrenches their silence and exclusion in families and communities and impede their ability to come forward to seek redress.[921]As a result, even when reference is made to sexual violence in the mandates of truth-seeking process, many victims of these crimes can still not be able to fully engage in the process, particularly in the absence of appropriate measures to assist their contribution.

One problem that the neglect or marginalisation of conflict-related sexual violence in transitional justice processes raises is the invisibility of the myriad forms of harms suffered by victims. When victims of these crimes are disregarded in the work of truth-telling processes or if the harms suffered by the victims are ultimately not part of a comprehensive account of the past crimes, the opportunity for a comprehensive collective knowledge about the root-causes and social effects of these crimes in affected communities is indeed lost. This also obstructs opportunities for transformative and structural responses to these crimes. It is important to emphasise that, as earlier pointed out, the use of sexual violence as a military tactic strikes at the heart of communities with far reaching social consequences for victims and affected communities.[922] It is probably against this backdrop that the UN Security Council's Resolution 1820 describes sexual violence in conflict situations as a danger to the social stability of affected nations.[923] Ignoring these crimes or giving them cursory treatment where referred to in the mandates of truth-seeking processes therefore adversely affects the rebuilding process of affected societies, considering the direct social consequences of these crimes for victims and their families as well as affected communities in general.

Although many truth-commissions have been characterised by a failure to integrate sexual violence in the quest for truth or including a gender perspective in their work,[924] some truth commissions such as in Peru,[925] Guatemala,[926] Timor-Leste[927] and Sierra Leone[928] have covered issues of conflict-related rape and other acts of sexual violence. Also, as will be

[921] See D. Pankhurst (Ed.), *Supra* note 907, p.1.
[922] See The Human Rights Watch, 'Sexual Violence Crimes during the Rwanda Genocide', *Supra* note 818, p. 4.
[923] Resolution 1820 (2008), UN Security Council at its 5916th meeting on 19 June 2008 (S/RES/1820, 2008).
[924] See Analytical study focusing on gender-based and sexual violence in relation to transitional justice, Report of the Office of the United Nations High Commissioner for Human Rights of 30 June, 2014, *Supra* note 826, § 16.
[925] The Truth Commission in Peru was established in June 2001 and concluded its activities in 2003.
[926] The Truth Commission in Guatemala was set up in 1997 and concluded its activities in 1999.
[927] The Commission for Reception, Truth and Reconciliation in East Timor was set up in 2001 as the first of the two truth commissions set up by Timor in order to inquire into the human rights violations committed during the 25 years of civil war, and the Timor-Leste Commission of Truth and Friendship established in 2005 following widespread and extreme violence during the Indonesian occupation of East Timor.
[928] The Sierra Leone's Truth and Reconciliation Commission was established by the Lome´ Peace Agreement of 7 July 1999 between the Government and the rebel Revolutionary United Front after the nine-year civil war in Sierra Leone, marked by the systematic use of rape and other acts of sexual violence as a weapon.

expounded below, the relatively recent community-based transitional justice approach to accountability and reconciliation in post-genocide Rwanda known as *Gacaca*, was proactive in addressing complex issues of systematic sexual violence against Tutsi women during the genocide. Even more crucially, more recent truth commissions, much like the *Gacaca* processes in Rwanda, were characterised by the incorporation of gender sensitive approaches into their operational structure and rules of procedure in an attempt to overcome the challenges in recovering traumatic stories of victims of sexual violence and create a comprehensive account about their experiences. This is critically important to create a clear picture of the victims' experiences, considering that recovering the voices and stories of the victims of sexual violence has challenged many truth-seeking processes even when these crimes are referred to in their mandates.

6.3.4 Conflict-Related Sexual Violence in Domestic Transitional Justice Processes: An Opportunity for Victims' Empowerment and Transformative Redress

This section considers lessons that can be drawn from the experiences of some recent quasi/non domestic transitional justice processes that have addressed the experiences of victims of conflict-related sexual violence. This analysis serves to substantiate the argument that the over expanding domestic transitional justice initiatives are critical in providing transformative responses to the dynamics and complex effects of sexual violence as a weapon of war. It is argued that specific attention to the harms suffered by victims of these crimes in the truth-gathering can be instrumental in facilitating victims' empowerment and provides an opportunity for changes of the structural conditions and often deep-rooted norms impacting victims in many societies. These processes can also serve to educate the population about the root causes and consequences of these crimes, and especially break down a myriad of challenges and barriers to the victims' social reintegration. Addressing the social effects of these crimes is a crucial in deterring the continuation or recurrence of such violence.

It should be stressed that ensuring the victims' adequate engagement with truth-seeking mechanisms is by no means a straightforward process, and the author is thus under no illusion that significant challenges obstruct their willingness or ability to share their traumatic experiences. As earlier noted, these crimes carry a myriad of social consequences for victims and their families in many societies. The discussion therefore further provides some insight into how to overcome some of these challenges to ensure a comprehensive account of the victims' experiences in conflict situations without running the risk of further harms for them.

A. Sexual Violence and Truth-Commissions: Lessons Learned from Peru, Guatemala, Timor-Leste, Liberia and Sierra Leone

While it is true that many truth commissions pay little regard to the complex dimensions of sexual violence in situations of conflicts, the relatively recent developments in integrating these crimes in the quest for truth can offer important lessons on how these processes can go in complementing the criminal prosecutions for addressing a wide range of victims' needs and contributing to the rebuilding of the torn fabric of families and communities. Peru experienced high level of sexual violence against women during the 20 year internal conflict between the rebel group Shining Path and the Peruvian state forces.[929] The Peruvian's 20 year tragic period started when the Community Party known as *Lendero Luminoso* (Shining Path) in Peru launched a campaign to overthrow the Peruvian State in 1980, instigating reign of terror in the country for two decades.[930] Some studies suggest that the dynamics of the conflict in Peru differed from other conflicts in Latin America despite arising out of similar ideological principles.[931] It is indicated, for instance, that much of the extreme violence occurred in the countryside, involving the entire Peruvian's community.[932] In fact, this conflict was characterised by extreme level of mass atrocity, leading some scholars to describe it as the 'dirty war'.[933] Estimates suggest, for instance, that the conflict led to deaths of around 70,000 people while many people disappeared in Peru between 1980 and 2000.[934]

The two decades of internal armed conflict between Peruvian State and the armed opposition groups were also marked by systematic and persistent forms of sexual violence.[935] Several accounts highlight how the armed forces systematically used rape and other brutal acts of sexual violence, such as forced abortion, nudity, prostitution as well as sexual slavery as part of broader strategies to terrorise the population.[936] In her research on the patterns of sexual violence during the conflict in Peru, Michele Leiby found that rape and gang rapes were the

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[929] See the Final Report of Truth and Reconciliation Commission in Peru, Vol. 1, Published in 2003. Available at http://www.usip.org/publications/truth-commission-peru-01 (Accessed on 15 June, 2015).

[930] See L. J. Laplante and K. Theidon (2007), 'Truth With Consequences: Justice and Reparations in Post-Truth Commission Peru', *Human Rights Quarterly*, Vol. 29, p. 232.

[931] See E. C. Espinoza *et al.* (2015), 'Women's Participation in a Post-Conflict Community in Peru', *Journal of Prevention and Intervention in the Community*, Vol.43, p. 280.

[932] Ibid.

[933] See S. J. Seven, *Shining and Other Paths: War and Society in Peru*, 1980-1995 (Duke University Press, 1998), p. 122.

[934] Ibid.

[935] See J. Boesten (2010), 'Analysing Rape Regimes at the Interface of War and Peace in Peru', *The International Journal of Transitional Justice*, Vol. 4, pp. 110-129.

[936] See, for instance, Chapter 1.5 of the Final Report of the Truth and Reconciliation Commission, Vol. 6, pp. 273-277; F. J. Mantilla, 'The Peruvian Case: Gender and Transitional Justice', in L. Yarwood (Eds.), *Women and Transitional Justice: The Experiences of Women as Participants*, (Routledge, 2013).

most frequently committed crimes against women.[937] According to Leiby, as it was also indicated in the truth commission's findings, the majority of these crimes were committed by members of the state forces, largely against women especially when victims were detained.[938]

After the war in 2001 the Peruvian's interim government decided to set up a Truth and Reconciliation Commission.[939] The Commission's mandate was to clarify 'the process, facts and responsibilities of the terrorist violence and the violation of human rights produced from May 1980 to November 2000, whether imputable to terrorist organizations or to State agents, as well as proposing initiatives destined to affirm peace and harmony among Peruvians'.[940] The Supreme Decree establishing the truth commission in Peru further states that the Commission 'will tend towards national reconciliation'.[941] As stated in the Supreme Decree, among other objectives of the Commission, were to 'analyse the political, social and cultural conditions that contributed to the tragic situation of violence through which Peru has passed to contribute to the justice system's clarification of the crimes and draw up proposals for reparation and dignification of the victims and their family members'.[942] In reference to other truth commissions' mandates such as in Chile, Cynthia Milton argues that Peruvian truth commission held a broader mandate than other commissions to establish forward-looking measures for facilitating individual and collective recovery in a highly fractured nation and ensure change of political and social conditions that contributed to the violence.[943]The Commission conducted investigations throughout the country mainly facilitated by Peruvians from the rural areas, many of whom had been terribly affected by the violence.

After two years of investigation, the Commission presented its report based on individual testimonies, public hearings as well as the analysis of the archives from the Peruvian government.[944] The Commission's final report provided a comprehensive account of the circumstances surrounding the human rights abuses and violations committed during the two

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[937] See M. L. Leiby (2009), 'Wartime Sexual Violence in Guatemala and Peru', *International Studies Quarterly*, Vol. 53, p. 445. See also J. Boesten (2010), 'Analysing Rape Regimes at the Interface of War and Peace in Peru', *The International Journal of Transitional Justice*, Vol.4, pp. 110-129.
[938] Ibid.
[939] The Truth and Reconciliation Commission in Peru was established in June 2001, under the Transitional government of Valentin Paniagua Coazao through the Supreme Decree Nº 065-2001-PCM, Available at http://www.mississippitruth.com/documents/PERU.pdf (Accessed on 15 June, 2015).
[940] See Art. 1 of the Supreme Decree Nº 065-2001-PCM Establishing the Peruvian Truth and Reconciliation Commission.
[941] Ibid.
[942] Ibid. Art. 2 (a) (b) (c).
[943] See C. E Milton, 'The Truth Ten Years on: The CVR in Peru', in E. Allier-Mntano and E. Crenzel, *The Structure for Memory in Latin America: Recent History of Political Violence*, (Palgrave MacMillan, 2015).
[944] The Truth and Reconciliation Commission in Peru presented its Final Report of 8,000 pages on 28 August 2003.

decades of conflict. Some studies indicate that the public exposure of the truth about the widespread violence in Peru not only served to create a collective narrative of the dark past but also provided the Peruvian prosecution institutions with essential information for the prosecution and convictions of perpetrators.[945] It is worth noting that, due to the close relationship between the Peruvian Truth Commission and the judiciary, the Commission submitted cases for prosecution in addition to recommendations for reforms and reparations.[946] During the Commission truth-seeking processes, the Commission drew attention to thousands of victims of mass violence, especially widow(er)s and orphans left by killed and disappeared people as well as those displaced, tortured, raped, incapacitated, and unjustly imprisoned.[947]

The Peruvian Truth and Reconciliation Commission provided opportunity for many victims to be heard, many of them for the first time,[948] in an effort to clarify the circumstances surrounding the gross human rights violations during the two decades of internal armed conflict. The Commission processes not only contributed to making the population aware of the nature and scale of violence that the victims have experienced but also to clarifying the political, social and cultural conditions which contributed to the violence.[949] This assisted the Commission to develop proposals for reparations to the victims, and even more significantly, put forward measures for reforms and social change aimed to ensure that the Country does not experience similar violence in the future. Some studies on the impact of the Truth Commission in Peru indicates, for instance, that the Commission 'detected the disintegration of community and family bonds and a weakening of social trust, creating a sense of vulnerability and insecurity that affects all levels of functioning'.[950] The Commission processes therefore contributed to creating significant political and social transformation through various measures for change and restoration of the dignity and status of the victims.

Unlike some previous truth commissions that provided little regard to sexual violence in the truth gathering process, the Peruvian Commission's final report devoted a long chapter to these crimes to explore the nature and extent of systematic acts of sexual violence as well as

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[945] See, for instance, C. E. Milton, *Supra* note 943, L. J. Laplante and K. Theidon, *Supra* note 930.
[946] See C. E. Milton, *Supra* note 943.
[947] See E. C. Espinoza *et al.*, *Supra* note 931, p. 280.
[948] See Amnesty International, 'Peru: The Truth and Reconciliation Commission- A first Step Towards a Country without Injustice', Report Published in August 2004, at p. 4. Available at https://www.essex.ac.uk/armedcon/themes/international_courts_tribunals/amnestyaugust2004.pdf (Accessed on 10 July, 2015).
[949] See L. J. Laplante and K. Theidon, *Supra* note 930, p. 234.
[950] Ibid.

the victims and perpetrators. In fact, the chapter highlights how these crimes, principally rapes and gang rapes against women, served as a weapon of terror during the conflict before going on to underline the resulting serious damage inflicted at both the individual and collective levels in the Peruvian communities.[951] The Commission established that rape and other acts of sexual violence such as forced nudity, sexual torture, forced prostitution, abortion, and sexual slavery were widespread practices to inflict severe trauma and humiliation on the victims and subjugate the population during the two decades of internal armed conflict.[952] According to the Commission's final report, much of violence targeted poorly-educated women and young girls from highland peasant communities or speakers of indigenous languages in order to humiliate and degrade the population.[953] It also stresses that state agents were responsible for the majority of sexual violence while the rebel movement Shining Path principally perpetrated sexual mutilation on of men .[954] Instead of engaging in the wholesale rape of members of villages, as it is often the case in some conflicts, the Peruvian state forces rather targeted specific individuals.[955]

Significantly, the final report included a sound analysis of the impact of these crimes in the Peruvian community, identifying serious damages inflicted at both individual and community levels as well as the challenges of recovery for victims. It is worth underlining that, as earlier discussed in chapter four, widespread sexual violence in conflict situations not only serve to dominate and degrade the individual victims but also destroy larger social bonds of families and the cultural values of affected communities. This often results in social disintegration and degradation of social values in affected communities which create an environment conducive for increased levels of sexual violence.[956] In her empirical study on rape regimes at the interface of war and peace in Peru, Jelke Boesten indicates that women experienced an increased level of sexual violence even after the end of the conflict, particularly at home.[957] The Truth Commission's processes in Peru not only provided an analysis of how the State forces used sexual violence as a tool of war but also significantly contributed to exposing the

[951] See Chapter 1.5 of the Final Report of the Truth and Reconciliation Commission. See also J. Boesten and M. Fisher, 'Sexual Violence and Justice in Post-conflict Peru: Special Report published in June 2012 available at http://www.usip.org/sites/default/files/SR310.pdf (Accessed on 15 July, 2015).
[952] Ibid.
[953] See Chapter 1.5 of the Final Report of the Truth and Reconciliation Commission.
[954] Ibid.
[955] See M. L. Leiby, *Supra* note 937, p. 463.
[956] See M. Bosmans (2007), 'Challenges in Aid to Rape Victims: The Case of the Democratic Republic of the Congo', *Essex Human Rights Review*, Vol. 4, N° 1, p.7. See also N.E. J. Dijkman, C. Bijleveld and P. Verwimp (2014), 'Sexual Violence in Burundi: Victims, perpetrators, and the Role of Conflict', *Households in Conflict Network Working Paper*, p.33.
[957] See J. Boesten, *Supra* note 951, p. 126.

link between the pre-war structural gender inequalities in Peru and the scale and nature of sexual violence during the internal conflict. In fact, as earlier discussed, the use of sexual violence as a military tactic is not only facilitated by the existing gender discriminatory practices towards women in some societies but also exacerbates such conditions in ways that make women more vulnerable to these crimes in post-conflict settings.[958] In its final report, the Commission highlighted how sexual violence committed by the Peruvian state forces against women was an explicit 'magnification of existing institutionalised and normative violence against women'.[959] This finding reveals how the nature of harms suffered by victims of sexual violence during the internal conflict encompasses a symbolic connotation to the existing gendered dimension in the Peruvian community.

The Peruvian Truth Commission had challenges in ensuring a comprehensive record of the patterns of sexual violence committed during the Peru's twenty year conflict. Like in many other societal contexts where sexual violence is a taboo subject, engaging with victims of these crimes was by no means a straightforward process in Peru. The social context of stigma and shame obstructs the victims' ability to share their ordeals. For instance, some women who testified before the Commission revealed how they kept their experiences of rape hidden from relatives, including spouses, parents and other members of the community.[960] On the other side, some men interviewed by the Commission disclosed that they abandoned their wives after learning of their experiences of rape and other acts of sexual violence to avoid the shame that these crimes bring for the society.[961] Due to this, it was difficult for victims of sexual violence to discuss their traumatic stories in public. Mindful of the sociocultural challenges that inhibit victims' willingness to come forward, the Commission held private hearings in addition to public hearings in which victims and their family members were able to testify. These private hearings served not only to facilitate victims' testimonies but also to avoid the potential negative social ramifications of being a victim of sexual violence in Peru.

Often hailed as the first truth and reconciliation commission to extensively cover the crimes of rape and other forms of sexual violence,[962] the Peruvian Truth and Reconciliation Commission set an important precedent in unearthing the complex patterns of sexual violence as an element of war strategies. Providing a forum for victims to tell their stories about the

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[958] See J. Boesten and M. Fisher, *Supra* note 951, p. 3.
[959] See J. Boesten, *Supra* note 918, p.114.
[960] See the Final Report of the Truth and Reconciliation Commission in Peru, published in 2003, Vol. 8, p. 91.
[961] Ibid.
[962] See J. Boesten, *Sexual Violence During War and Peace: Gender, Power, and Post-Conflict-Justice in Peru*, (Palgrave Macmillan, 2014), p.17.

harms suffered during the quest for the truth ultimately has a significant impact in the form of official recognition and collective acknowledgement of the victims' experiences to strengthen communities and foster victims' sense of recovered dignity. The Commission process provided a window of opportunity for addressing the complex nature of sexual violence within broader context women' historic and continuing marginalisation in the Peruvian community.[963] It also particularly assisted the community to break the silence on sexual violence, given the taboos and different misconceptions that often characterise sexual violence. As a vehicle for the societal moral condemnation of crimes committed during the internal conflict, the Commission's process was also not only instrumental in breaking the silence of victims of sexual violence after conflicts but also addressing the social challenges facing them such as the shame and stigma which compound their isolation in communities. One empirical study on the Peruvian Commission's approach to sexual violence against women found that the Commission's efforts in unearthing the patterns of sexual violence in the conflict and their consequences for victims and the wider Peruvian community contributed to bettering the victims' social conditions.[964] In this sense, Julissa Mantilla Falcón notes that, through a shared societal narrative of the victims' lived experiences, the Commission set conditions for a truly new beginning in highly fractured society.[965] It is worth noting that, in addition to recommendations for changes and reforms, the Commission recommended the government to offer apologies to victims as symbolic acts of reparations.

In addition to the Peruvian case, other notable examples of truth-seeking processes that extensively addressed issues of conflict-related sexual violence include the Commission for Historical Clarification in Guatemala,[966] the Commission for Reception, the Truth and Reconciliation in Timor-Leste[967] and the Truth and Reconciliation Commissions in Sierra Leone[968] and Liberia.[969] The earlier discussion in chapter four established that, although sexual violence have become an integral aspect of warfare, these crimes are perpetrated with

[963] See, for instance, the Report of the Office of the UN High Commissioner for Human Rights, *Supra* note 826, § 15. See also, UN Office for the Coordination of Humanitarian Affairs/Integrated Regional Information Networks, 'The Shame of War: Sexual Violence against Women and Girls in Conflict', A Report published in 2007, p. 101.

[964] See J. Mantilla Falcon (2005), 'The Peruvian Truth and Reconciliation Commission's Treatment of Sexual Violence against Women', *The Human Rights Brief*, Vol. 12, N° 2, p. 4.

[965] Ibid.

[966] The Guatemala Commission for Historical Clarification was established as part of the UN-Brokered Peace Agreement between Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca* to investigate human rights violations during the civil war from 1962 to 1996.

[967] Established in 2000 by the UN and the Government of Timor-Leste to inquire into human rights violations committed between April 1974 and October 1999. The Commission delivered its report on 31October, 2005.

[968] Established by the Lomé Peace Agreement of 7 July 1999. See *Supra* note 928.

[969] Established by the Liberia's Peace Agreement in 2003 after 14years of civil war.

significant variation of the scale and character depending on the nature of conflict. This variation is largely connected to objectives of the perpetrators and other social conditions that often facilitate these crimes and exacerbate their effects on affected communities. In fact, the nature and root causes of these crimes are very different in conflicts, and the needs of victims vary enormously in post-conflict settings. For instance, whereas mass sexual violence are often used as a military tactic to humiliate and instil fear among the civilian population,[970] in some cases these crimes serve as a tool to wipe out undesirable ethnic or social groups. Evidence of this can be found in Bosnia-Herzegovina and Rwanda during the genocide against Tutsi people and very recently in Darfur where the systematic use of rape involved an explicit ethnic targeting.[971] Unlike in the Former Yugoslavia and Rwanda, mass acts of sexual violence were inflicted indiscriminately on all women from all ethnic or social groups during the brutal nine-year civil war in Sierra Leone.[972] Similarly, in Guatemala, massive sexual violence was employed indiscriminately against indigenous people, considered as 'lesser human beings'.[973]

As in many other countries where rape were used as a weapon of war as earlier discussed, these crimes affected millions of women and men during armed conflicts in Guatemala, Timor-Leste, Sierra Leone and Liberia, not only destroying the lives of victims and families but also the social fabric of communities. In her study on the nature of sexual violence in Guatemala, during the country thirsty-six year civil war, Michelle Leiby found that sexual violence was used as a tool of repression to spread fear and terror throughout the communities.[974] Studies indicate that a large number of Timorese women were raped and forcefully impregnated by Indonesian soldiers during the Indonesia military occupation of Timor-Leste.[975] Evidence suggests that victims of these crimes and children born out forced impregnation and marriage faced with myriad social challenges, including the stigmatisation and rejection by their families and villages.[976] Studies also indicate that, throughout the armed conflict in Sierra Leone from 1991 to 2001, thousands of women were subjected to

[970] See the Preamble of the UN Security Council Resolution 1820 (2008) on Acts of Sexual Violence against Civilians in Armed Conflicts adopted on 19 June 2008, (S/RES/1820 (2008).
[971] See E. J. Wood, 'Multiple Perpetrator Rape during War', in M. A. H Horvath and J. Woodhams (Eds.), *Handbook on the Study of Multiple Perpetrator Rape: A Multidisciplinary Response to an International Problem*, (Routledge, 2013).
[972] See The Sierra Leone Truth and Reconciliation Commission's Report published in 2004, Chapter 3b, p. 282.
[973] See J. Boesten, *Supra* note 918, p. 110; M. L. Leiby, *Supra* note 937, p. 463.
[974] See M. L. Leiby, *Supra* note 937, p. 466.
[975] See, for instance, S. H. Rimmer, 'Orphans or Veterans? Justice for Children Born of War in East Timor', in R. C. Carpenter (Ed.), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, (Kumarian Press, INC. 2007), pp-55-56.
[976] Ibid.

widespread and systematic sexual violence, including gang rape, and rape with objects such as weapons.[977] Rapes in Sierra Leone become a spectacle, as much of this violence took place in public settings or using media coverage.[978] Carroll Bogert and Corinne Dufka found that sexual violence was the most prevalent human rights abuses during the conflict.[979] Similarly, in Liberia, some studies suggest a large number of women and girls were victims of war-related rape and other acts of sexual violence in the wake of the country's 14 year civil war.[980] After the civil war, the country faced an enormous task to address the legacy of these crimes in the Liberian communities. Doctors without Borders in Liberia observed, for instance, that the country faced a pressing need for 'rehabilitating and detraumatising people, both victims and perpetrators'.[981]

After tragic periods, Guatemala, Timor-Leste, Sierra Leone and Liberia have witnessed a number of developments in transitional justice, including the establishment of truth-seeking processes for addressing the goals of justice and reconciliation. Truth-seeking processes in Guatemala, Timor-Leste, Sierra Leone and Liberia, despite having different names and mandates, were commonly characterised by the incorporation of gender sensitive approaches into their operational structure and rules of procedure. This resulted in the commissions' final reports placing a strong spotlight on the horrific sexual atrocities endured by victims in the respective communities. In an attempt to redress the harms suffered by victims of sexual violence in conflicts, the truth commissions provided a platform for victims and witnesses to speak about their traumatic experiences.

In Timor-Leste, the Commission for Reception, Truth and Reconciliation developed a gender-sensitive approach to enlightening the patterns of sexual violence committed as part of broader strategies to inflict terror and dehumanise the East Timorese people.[982] In an effort to unearth the patterns of sexual violence committed by the Indonesian military during the

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[977] See, for instance, M. Gerecke, 'Explaining Sexual Violence in Conflict Situations', in L. Sjoberg and S. Via (Eds.), *Gender, War, and Militarism: Feminist Perspectives*, (Praeger, 2010).

[978] Ibid. p. 149.

[979] See C. Bogert and C. Dufka (2001), 'Sexual Violence in Sierra Leone', *The Lancet*, Vol. 357, N° 9252, pp. 304.

[980] See R. M. Chandler, 'Speaking With Post-War Liberia: Gender-Based Violence Interventions for Girls and Women', in R. M. Chandler, L. Wang and L. K. Fuller (Eds.), *Women, War, and Violence: Personal Perspectives and Global Activism*, (Palgrave Macmillan, 2010), p. 32.

[981] See A. Toral (2012), 'History of Violence: Struggling with the Legacy of Rape in Liberia', available http://world.time.com/2012/04/30/history-of-violence-struggling-with-the-legacy-of-rape-in-liberia/, (Accessed on 25 June, 2015).

[982] See UN Office for the Coordination of Humanitarian Affairs/Integrated Regional Information Networks, 'The Shame of War: Sexual Violence against Women and Girls in Conflict', A Report published in 2007, p. 101. Available at http://lastradainternational.org/lsidocs/IRIN-TheShameofWar-fullreport-Mar07.pdf (Accessed on 20 June, 2015), p.104.

24-year Indonesian occupation of Timor-Leste, the Truth Commission made a number of innovative efforts in recovering the victims' voices about their traumatic experiences. In addition to recruiting equal numbers of men and women as statements takers, it also organised special public hearings on women, at which many victims were facilitated and enabled to share their experiences of sexual violence.[983] The evidence gathered in the process helped to enlighten how these crimes were used by the Indonesian armed forces as a part of their strategies to destroy not only 'the self-esteem of the victims' but also the solidarity of the all the pro-independence people.[984] Significantly, the East Timorese Truth Commission's process also placed a particular spotlight on the effects of these crimes such as the victim-blaming, stigmatisation, family rejection and difficulties in marrying in the East Timorese communities.[985] The Commission adopted various strategies to facilitate victims' engagement such as providing women with the option of in-camera testimony, including many women in statement-taking teams and providing extensive training of statement-takers on rape issues.[986] These strategies not only enabled the Commission to better account for the victims' traumatic experiences, but also to minimise the risks of further social hams for the victims.

In a similar vein, the Guatemala Commission for Historical Clarification established in the aftermath of the civil war incorporated acts of systematic sexual violence during the war into its mandates. The Commission's process contributed to demonstrating how the use of sexual violence in the Country's civil war had a close connexion with the pre-war gendered dimensions in the Guatemalan community. For instance, the Commission emphasised the fact that women victims of sexual violence often referred to their attackers as 'patrons or bosses', indicating how women who endured mass rapes in war considered this violence as part of the country's history of male dominance. It concluded that 'wars exalt the values implied in the masculine paradigm that assumes the superiority of men over women and violence as a demonstration of macho power'.[987] Integrating sexual violence in the quest for truth in Guatemalan Truth Commission provided opportunity to provide a collective knowledge about the linkages between existing gender inequality in the community and the degree and nature of this violence during the civil war. The commission gathered testimony of the experiences

[983] See L. Kent (2014), 'Narratives of Suffering and Endurance: Coercive Sexual Relationships, Truth Commissions and Possibilities for Gender Justice in Timor-Leste', *International Journal of Transitional Justice*, Vol. 8, p. 292.
[984] Ibid. p. 293.
[985] Ibid.
[986] E. Porter (2013), 'Ethical Commitment to Women's Participation in Transitional Justice', *Global Justice; Theory Practice Rhetoric*, Vol. 6, p. 9.
[987] See J. Franco, *Cruel Modernity*, (Duke University Press, 2013), p. 79.

of victims of sexual violence during the civil war which significantly contributed to developing a collective knowledge of a close connexion between the socially constructed gender norms within the Guatemalan community with the complex ways in which soldiers and paramilitary state forces systematically used sexual violence on indigenous women.

In Guatemala, as in other societies where rape was used as a weapon, rape and other acts of sexual violence leave permanent scars on victims with significant social consequences. The silence that surrounds sexual violence due to the stigma that victims face in Guatemala threatened to impede the collection of information as some victims often choose not to speak about their experiences of sexual violence but rather focus on other crimes suffered .[988] The Truth Commission made significant efforts in assisting victims to break the silence about their experiences while minimising the possible re-victimisation. For Instance, the Commission contracted people to work specifically on gender violence to open a space for the victims to tell their stories and ensure that a specific description of women' experiences would be included in the final report.[989] As a result, the final report included a chapter illustrating the patterns of violence women experienced.[990] The Commission also analysed the impact of these crimes on victims and their families in the Guatemalan communities, stressing how some acts such as forcing members of the civil patrols to rape women of their own villages were not only intended to inflict trauma to the victims but also a way to destroy the entire social fabric of the society.[991] One empirical study on the impact of the Truth Commission in Guatemala in addressing sexual violence found that the commission' efforts in exposing the truth about the experiences of women during the civil war significantly contributed to enhancing women' ability to challenge the normality of gender violence in the Guatemalan community and improving the women status more generally.[992]

Perhaps more prominently, in Sierra Leone, a truth-seeking process was used alongside the Special Court for Sierra Leone (SCSL) created in partnership with the UN.[993] Rape and other acts of sexual violence were included in both the work of the SCSL and the Truth and

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[988] See M. L. Leiby, *Supra* note 937, p. 461.
[989] See R. Patterson-Markowitz, E. Oglesby and S. Marston (2012), '"Subjects of Change": Feminist Geopolitics and Gendered Truth-Telling in Guatemala', *Journal of International Women's Studies*, Vol. 13, p. 89.
[990] See Memory of Silence: Report of the Commission for Historical Clarification, 1999, Chapter II, Vol. III.
[991] See R. Patterson-Markowitz, E. Oglesby and S. Marston, *Supra* note 989, p. 89.
[992] Ibid. p. 83.
[993] The UN Security Council Resolution 1315 (2000) adopted at its 4186th meeting on 14 August 2000 provided the UN Secretary General with a mandate to negotiate an agreement with the government of Sierra Leone to set up a mixed jurisdiction to address serious crimes committed during the country's decade-long civil war from 1991-2002. The agreement between the UN and the Government of Sierra Leone was signed in Freetown on 16 January 2002. The Parliament of Sierra Leone ratified this agreement in March 2002.

Reconciliation Commission. Whilst the SCSL made significant strides in addressing sexual violence, it left a mixed legacy in providing some sense of justice and redress for the victims, mainly linked to 'a lack of sensitivity among the majority of the Judges towards sexual offences'.[994] In her empirical study in Sierra Leone, Lotta Teale found that a lack of good understanding of the work of the Court for victims also contributed in its limited contribution in addressing the needs of victims of conflict-related sexual violence in Sierra Leone.[995]

Due to the nature of the criminal justice process, a number of victims of conflict-related sexual violence in Sierra Leone lamented the Court's failure to give space to their stories, especially in cases where counts of sexual violence were not included in indictments. For instance, in a Civil Defence Forces (CDF) case, a pro-government militia that fought during Sierra Leone's civil war, such counts of sexual violence were not included in the indictment faced by the three senior leaders of the movement.[996] Thus, testimonies related to acts of sexual violence committed by CDF were inadmissible during the case hearing. The lack of opportunities for the victims to speak out their lived experiences had negative ramifications in their recovery process. For instance, one victim states that:

> I feel so bad, because they raped me very brutally, and that was my main reason for going to court to testify. As soon as I got there, my lawyer told me that I should not talk about that anymore. And up until now, that still causes me pain. It makes me feel bad.[997]

In contrast to the proceedings of the SCSL, the Truth Commission process endeavoured to accommodate victims of rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence committed during the Sierra Leone's 11-year civil war to ensure that their stories are heard. The Commission' establishing Act called for efforts to help to restore the victims' dignity with special attention to the subject of sexual abuses.[998] To encourage women's participation in the Commission's proceedings, considerable efforts were made to facilitate their voices and accommodate their traumatic stories.[999] These include detailed explanation to victims of sexual violence about the Commission's process and why

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[994] See L. Teale (2009), 'Addressing Gender-Based Violence in the Sierra Leone conflict: Notes from the Field', *African Journal on Conflict Resolution*, Vol. 9, N°, 2 p. 73.
[995] Ibid., p. 74.
[996] *The Prosecutor vs. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case N° SCSL-04-14-T, The SCSL, Decision on Prosecution Request to Leave to Amend the Indictment, 20 May, 2004.
[997] See M. S. Kelsall and S. Stepakoff (2007), ''When We Wanted to Talk about Rape': Silencing Sexual Violence at the Special Court for Sierra Leone', *The International Journal of Transitional Justice*, Vol. 1, p.357.
[998] See The Sierra Leone Truth and Reconciliation Commission Act (2000) Part III, Art. 2(b).
[999] See H. Millar, 'Facilitating Women's Voices in Truth Recovery: An Assessment of Women's Participation and the Integration of a Gender Perspective in Truth Commissions', in H. Durham and T. Gurd (Eds.), *Listening to the Silences: Women and War*, (Nijhoff, 2005), pp. 171-222.

their testimonies were needed.[1000] Women and girls who were to testify before the Commission were treated with extreme sensitivity. Significant efforts were also made to not only ensure privacy and confidentiality but also create an enabling environment for victims of sexual violence. For instance, special hearings were organised for victims and counsellors would also sit beside victims willing to share their stories to provide support and assistance, and the commission would reschedule the hearing if some victims are not comfortable to speak about their experiences.[1001] The final report established that brutal acts of sexual violence including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation were the most prevent crimes that women suffered during the civil war.[1002]

Similarly, in the wake of the Liberia's 14 year civil war, during which rape was used as a weapon to instil terror and humiliate the whole communities,[1003] the Act to Establish the Truth and Reconciliation Commission adopted in 2005 specifically stressed the need for measures to protect the dignity and safety of the victims and to avoid re-traumatisation.[1004] Section 24 of Art. VI of the Act states that the Truth and Reconciliation Commission (TRC):

> Shall consider and be sensitive to issues of human rights violations, gender and gender based violence thus ensuring that no one with a known record of human rights violations are employed by the TRC and that gender mainstreaming characterizes its work, operations and functions, ensuring therefore that women are fully represented and staffed at all levels of the work of the TRC and that special mechanisms are employed to handle women and children victims and perpetrators, not only to protect their dignity and safety but also to avoid re-traumatization.

In Liberia, the Commission's work contributed to exposing how gruesome acts of sexual violence were used against women and men as a means of destroying families and the country's social values.[1005] These include, for instance, forced incest such as the forced rape of women by their sons or brothers. In Liberia, as in Sierra Leone, the Commission's work

[1000] See S. Lakin, 'Keeping the Focus on Responding to Victims: Response to HSR 2012', World Peace Foundation, Published on 19 March, 2013. http://sites.tufts.edu/reinventingpeace/2013/03/19/keeping-the-focus-on-responding-to-victims-a-response-to-the-hsr-2012/ (Accessed on 25 June, 2015).
[1001] Ibid.
[1002] See C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, (Cambridge University Press, 2012), p.176.
[1003] See the Final Report of the Truth and Reconciliation Commission of Liberia, published in December 2009, Volume 1: Preliminary Findings and Determinations, available at http://trcofliberia.org/resources/reports/final/volume-one_layout-1.pdf. (Accessed on 12 January 2014).
[1004] See Liberia: An Act to Establish the Truth and Reconciliation Commission, Approved on June 10, 2005 available at http://www.refworld.org/docid/473c6b3d2.html (Accessed on July 11, 2015).
[1005] See R. Manjoo and C. McRaith (2011), 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas', *Cornell International Law Journal*, Vol. 44, p. 29.

not only contributed to providing a detailed account of the traumatic experiences of victims of sexual related atrocities in the country's civil war but also made significant contribution to addressing the effects of these crimes, particularly, the need for change of negative societal attitudes towards the victims. In the context of Sierra Leone, one study found that the Commission addressed the need for social reconstruction efforts, and recommended particular sensitivity on the status of women in the community, particularly those who were victims of systematic sexual violence during the civil war.[1006] In this regard, the Commission made a wide range of recommendations intended to address the effects of these crimes in the Sierra Leone Communities and promote societal changes, including measures aimed at dealing with negative attitudes toward the victims of sexual violence.[1007]

Whilst many truth commissions generally tend to provide little regard to conflict-related sexual violence and often fail to account for the complex experiences of victims, recent developments have provided some lessons as to how these processes can successfully complement the criminal justice process for addressing a wide range of victims' needs and affected societies in general. When the quest for truth includes appropriate measures to account for the extreme vulnerabilities of victims of these crimes in post-conflict settings, truth-seeking processes can be instrumental in addressing the often deep-rooted structural conditions that facilitate this violence in war. This is particularly relevant to elevating the victims' status and setting out reform measures to prevent the continuation of sexual violence in affected societies. In the context of Sierra Leone for instance, testimonies of victims of sexual violence enabled the Commission to expose the close tie between the pre-existing gender norms in the Sierra Leone communities and the nature and extent of violence that women and girls endured during the country's civil war.[1008] Accordingly, in its recommendations for redress, the Commission' report pointed to the country's pressing need to address the gender inequalities in the sierra Leone community, emphasising the existing discriminatory customary law and other practices which marginalise females.[1009]

Moreover, the analysis of transitional societies that included these crimes into mandates of truth-seeking processes further indicates how critical these processes can be in aiding societal

[1006] See S. Lakin, *Supra* note 1000.
[1007] See The Final Report of the Sierra Leone Truth Commission, Vol. 2, Chapter 3 & 4, Recommendations and Reparations. Available at http://sierraleonetrc.org/index.php/view-the-final-report (Accessed on 26 June, 2015).
[1008] See The Final Report of the Sierra Leone Truth Commission, Vol. 3(b), Chapter 3. See also The UN High Commission for Human Rights, 'Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice', *Supra* note 826, § 15.
[1009] Ibid.

recognition and validation of the victims' experiences. In Sierra Leone,[1010] as in Peru,[1011] the truth commissions highlighted the need for symbolic reparations in the form of recognition and apologies which led to all groups responsible for atrocities to recognise and apologise in public for sexual violence committed by some members of their troops. Further, this approach can also help to address the factors around the victims' silencing and bring to the fore their traumatic stories. After brutal conflicts in countries like Sierra Leone, Timor-Leste, Liberia, Peru, Guatemala, the truth commissions' proceedings helped to address complex dynamics and wide-ranging of effects of sexual violence on victims and their communities, and especially unveiling how the patterns and degree of sexual-related harms that women[1012] face in conflict situations are often intrinsically linked to pre-existing structural inequalities and other discriminatory practices towards women in many societies.

In summary, understanding the complexity of sexual violence as a military tactic, the socio-cultural contexts that facilitate these crimes and addressing their social ramifications for the victims' lives and the fabric of affected communities underscore the value of domestic quasi/non transitional justice processes in advancing effective redress for the victims. In Sierra Leone, for instance, the truth Commission highlighted that understanding the nature and patterns of brutal acts of sexual violence against women during the nine-year conflict required 'an extensive study of gender inequality and discrimination in Sierra Leone's history'.[1013] In fact, the systematic use of widespread sexual violence in conflict situations is often facilitated by entrenched social norms and gender inequities that make women vulnerable in many societies. Further, as discussed in chapter four, these crimes are also characterised by the systematic breaking of taboos and destruction of affected societies' cultural values. Integrating rape and other acts of sexual violence into the mandates of truth-seeking processes can therefore provide a window of opportunity for ensuring fundamental change in the victims' lives, and especially securing the often much needed sustainable societal transformation in affected societies. However, as will be discussed below in reference to Rwanda, the engagement of victims of sexual violence in the quest of truth is by no means an easy process. It will be argued that whilst it is important to integrate these

[1010] See the Final Report of the Sierra Leone Truth Commission, Vol. 2, p. 255, § 197.

[1011] See B. Hamber and I. Palmary, 'Gender, memorialisation, and symbolic Reparations', in R. Rubio-Marin (Eds.), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, (Cambridge University Press, 2009), p. 328.

[1012] As pointed out in Chapter four, whilst reports of sexual violence against males have emerged from many wars, women and girls make up the majority of victims and men comprise the majority of perpetrators.

[1013] See C. Salome Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative*, (University of Pennsylvania Press, 2013), p. 92.

crimes into the mandates of truth-seeking processes, mechanisms aimed at facilitating the victims' adequate participation while seeking to minimise the possible re-victimisation are fundamental for ensuring an accurate and complete picture of the victims' actual lived experiences without the risks of further harms.

B. The Community-Based Transitional Justice Approach to Accountability and Reconciliation in Post-Genocide Rwanda

1. The 'Gacaca' Proceedings in Rwanda and Victims of Genocidal Sexual Violence

The events that occurred in Rwanda between April and July 1994 were enormously cruel.[1014] Estimates suggest that over one million people, mainly Tutsi, were killed in twelve weeks during the Rwandan genocide with gruesome efficiency.[1015] One of the crucial elements of the genocide against Tutsi people in Rwanda was the systematic use of rapes and other brutal acts of sexual violence in the process of destruction of the Tutsi group.[1016] Réne Degni-Segui, the UN Special Rapporteur of the Commission on Human Rights on Rwanda, estimated that between 250,000 and 500,000 Rwandan Tutsi women were raped as part of broader strategies to wipe out the Tutsi group in Rwanda in 1994.[1017] In his report, Degni-Segui stated that:

> [r]ape was systematic and was used as a 'weapon' by the perpetrators of the massacres...and ….according to consistent and reliable testimony, a great many women were raped; rape was the rule and its absence was the exception.[1018]

Throughout the genocide in Rwanda, Tutsi women were individually or gang raped. Several accounts also emphasise how many victims were often raped or sexually mutilated publically in front of their families, friends and other community members. Thousands of Tutsi women were, for instance, raped on the streets and sexually mutilated with sharp sticks, machetes, knives and boiling water.[1019] Indeed, the strategic use of sexual violence on Tutsi women was explicitly intended to humiliate and strip the victims of their personal dignity and identity. As such, thousands of raped or sexually mutilated Tutsi women were stripped naked,

[1014] See A. Dauge-Roth, *Writing and Filming the Genocide of the Tutsis in Rwanda: Dismembering and Remembering Traumatic History*, (Lexington Books, 2010).
[1015] See L. Ann Fujii (2008), 'The Power of the Local Ties: Popular Participation in the Rwandan Genocide', *Security Studies: Routledge*, Vol. 17, p. 569.
[1016] See C. W. Mullins (2009), ''WE ARE GOING TO RAPE YOU AND TASTE TUTSI WOMEN': Rape During the 1994 Rwandan Genocide', *British Journal of Criminology*, Vol. 49, pp. 719-735.
[1017] See Rene Degni-Segui: The UN Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda*, § 16, (U.N. Doc. E/CN.4/1996/68, January 29, 1996).
[1018] Ibid.
[1019] B. Nowrojee (2005), "Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?, *United Nations Research Institute For Social Development*, p.7.

exposed on streets or left splayed on public roads.[1020] It is indicated in *Prosecutor vs Mikaeli Muhimana*, for instance, that:

> On or about 7 April……., Mikaeli Muhimana brought two civilian women Gorretti Mukashyaka and Languida Kamukina into his house and raped them. Thereafter he drove them naked out of his house and invited *Interahamwe* and other civilians to come and see how naked Tutsi girls looked like. Mikaeli Muhimana then directed the *Internahamwe* to part the girls' legs to provide the onlookers with a clear view of the girls's viginas.[1021]

The strategic use of sexual violence as an element of genocide against Tutsi people in Rwanda was also characterised by forced abortion and impregnation of women and young girls to prevent birth of Tutsi children. As a result, there was an estimate of up to 10,000 children born from the genocidal rape campaigns of Tutsi women in Rwanda.[1022] Moreover, in the wake of genocide, thousands of Tutsi women survivors of systematic rapes and sexual mutilations as well as mass killings found themselves HIV positive. It should be stressed here that integral to the plan to exterminate Tutsi during the genocide in Rwanda was also the purposeful spreading of the HIV infection to Tutsi women. Studies indicate several accounts of HIV positive Hutu men purposefully raping and infecting Tutsi women with the intent to cause a 'slow death' of victims.[1023] Various reports revealed that 'AIDS patients were released out of hospitals to form battalions of rapists' of Tutsi women.[1024] In her empirical study on rape and HIV/AIDS in Rwanda, Paula Donovan notes that:

> Eyewitnesses recounted later that marauders carrying the virus described their intentions to their victims: they were going to rape and infect them as an ultimate punishment that would guarantee long-suffering and tormented deaths.[1025]

As pointed out earlier, like in many other places where rape was used as a weapon, barbaric acts of sexual violence in Rwanda were also used as a strategy of the genocidal government to intimidate and humiliate Tutsi women, and ultimately destroy group solidarity within the Tutsi ethnic group. As discussed in earlier chapters, the Human Rights Watch noted in

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[1020] See G. Holmes, *Women and War in Rwanda: Gender, Media and the Representation of Genocide*, (Palgrave Macmillan, 2014), p. 127; Women's Media Center, 'Women under Siege', Published on 8 February, 2012, available at http://www.womenundersiegeproject.org/conflicts/profile/rwanda (Accessed on 10 July, 2015).

[1021] *Prosecutor vs Mikaeli Muhimana,* Case N° ICTR-95-1B-1, Revised Amended Indictment, § 6.

[1022] See R. Charli Carpenter (Ed.), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, (Kamarian Press, Inc., 2007).

[1023] See L. Sharlach (2010), 'Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda', *New Political Science*, Vol. 22, N° 1, p. 92.

[1024] S. Totten, 'The Plight and Fate of Females during and Following the 1994 Rwandan Genocide, in S. Totten (Eds.), *Genocide: A Critical Bibliographic Review*, (Transaction Publishers, 2012), p.192.

[1025] See P. Donovan (2002), 'Rape and HIV/AIDS in Rwanda', *The Lancet,* Vol. 360, pp.17-18.

reference to Rwanda that the perpetrators of sexual violence in conflict situations 'often explicitly link their acts of sexual violence to a broader social degradation'.[1026] In other words, as the Human Rights Watch further explained, the humiliation inflicted by the *Interahamwe* militia served not only to degrade the individual victim but also to 'strip the humanity' from their communities.[1027] In addition to rape in public scenes in front of victims' own children and husbands,[1028] evidence of the perpetrators' intention to cause a broader social degradation can also be found in accounts of forced rapes of incestuous nature by forcing victims to rape their mothers, sisters or daughters.

The experiences of victims of mass sexual violence during the genocide in Rwanda were profoundly destructive that survivors would be described as the 'living dead'.[1029] It is important to stress that thousands of Tutsi women were often raped to death with objects or raped before being killed 'as a way of making death more gruesome'.[1030] The complex lived experiences have significantly shattered the victims' lives in many ways. In addition to health problems such as HIV/AIDS and other sexually transmitted diseases, many victims endure long-term psychological effects.[1031] Further, due to the meaning of the violation in the Rwandan social context and the magnitude of the humiliation inflicted on victims, most victims were shunned by their communities in the wake of genocide, and often rejected by their husbands because of 'the shame of their violated status.'[1032] Donatilla Mukamana and Petra Brysiewicz explain how victims of rape were stigmatised in the aftermath of genocide, and their victimisation was compounded by a sense of isolation in their villages.[1033] This was even worse for the victims who became pregnant of rapes and later gave birth to children described as 'little killers' as they were conceived by the perpetrators of genocide.[1034] These children were highly marginalised in Rwanda, often abandoned or even killed by their

[1026] Human Rights Watch, 'Sexual Violence Crimes during the Rwanda Genocide, June 2004, Available at http://www.rwandadocumentsproject.net/gsdl/collect/mil1docs/archives/HASHc834.dir/doc52025.pdf (Accessed on 10 March, 2015), at p. 4.
[1027] Ibid.
[1028] See D. Mukamana & A. Collins (2006), Rape Survivors of the Rwandan Genocide, *International Journal of Critical Psychology*, p. 149.
[1029] See C. Newbury and H. Baldwin (2000), 'Aftermath: Women in Post-genocide Rwanda', Center for Development Information and Evaluation, Working Paper N° 303, available at http://pdf.usaid.gov/pdf_docs/pnacj323.pdf (Accessed on 12 July, 2015), p. 4.
[1030] S. Totten, *Supra* note 1024, p. 192.
[1031] Ibid. p. 145.
[1032] See J. E. Burnet, 'Sexual Violence, Female Agencies, and Sexual Consent: Complexities of Sexual Violence in the 1994 Rwandan Genocide', in D. Buss et al. (Eds.), *Sexual Violence in Conflict ad Post-Conflict Societies: International Agenda and African Contexts*, (Routledge, 2014), p.139.
[1033] See D. Mukamana & A. Collins, *Supra* note 1028, p. 141.
[1034] See D. Mukamana and P. Brysiewicz (2008), 'The Lived Experience of Genocide Rape Survivors in Rwanda', *Journal of Nursing Scholarship*, Vol. 40, N° 4, p. 383.

mothers as they represent bad memories for them and the entire victimised group.[1035] In the wake of genocide, victims of sexual violence had to contend with a myriad of social issues that discriminate against them and leave open the possibility of re-victimisation.

The strategic use of sexual violence as part of the genocidal campaign in Rwanda affected not only the individual victims and their families but also added another component in the social disruption caused by the genocide in Rwanda. The complexity of the victims' experiences exacerbated the unprecedented challenges post-genocide Rwanda faced with, considering the socio-cultural context in Rwanda which places women at the heart of community.[1036] The arduous task to recover from the scourge of genocide was compounded by social ramifications genocidal rape for the victims' lives and the fabric of families and communities. For instance, in addition to shunning of children born out of rape, the post-genocide Rwanda further witnessed an influx of women facing an 'unmarriageable status' or spouses walking out of their marriages.[1037] The dynamics of sexual violence during the genocide in Rwanda, which explicitly aimed to cause of 'a broader social degradation' according to Human Rights Watch,[1038] shattered the fabric of families and left a devastating legacy in the Rwandan community. In the wake of the genocide, victims of these crimes encountered overwhelming challenges to re-join their communities.[1039]

In addition to challenges and barriers to accountability for perpetrators of genocide, Rwanda was faced with an arduous task to rebuild the country's tattered social fabric. Despite the fact that the Rwandan ordinary courts were overwhelmed, given the sheer number of people involved in the genocide (victims and perpetrators), there was also a pressing need for reconciliation.[1040] In an effort to mix the desire for justice and the need for reconciliation in addressing genocide cases, Rwanda introduced a participatory justice process known as the '*Gacaca'* courts built upon the Rwandan traditional dispute resolution mechanisms.[1041] The rationale for the *Gacaca* courts was to deal with an influx of genocide cases, promote

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[1035] Ibid.

[1036] See D. Mukamana & A. Collins, *Supra* note 1028, p. 155.

[1037] See M. Zraly, S. E. Rubin and D. Mukamana (2012), 'Motherhood and Resilience among Rwandan Genocide-Rape Survivors', *Ethos*, Vol. 41, N° 4, p. 420.

[1038] Human Rights Watch, 'Sexual Violence Crimes during the Rwanda Genocide, June 2004, Available at http://www.rwandadocumentsproject.net/gsdl/collect/mil1docs/archives/HASHc834.dir/doc52025.pdf (Accessed on 10 March, 2015), at p. 4.

[1039] See Human Rights Watch, 'Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath', *Supra* note 828, p. 3.

[1040] See P. Clark, *Supra* note 824.

[1041] See the Organic Law of January 26, 2001 Setting Up *Gacaca* Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between October 1, 1990 and December 31, 1994. The *Gacaca* courts were officially closed in 2012.

communal healing and reconciliation as well as restoring social cohesion.[1042] As Phil Clark explains, the *Gacaca* courts prime aim was to restore social harmony among Rwandans by involving 'the people who experienced the genocide first-hand at every stage'.[1043] As such, members of the community were required to provide testimony and evidence against suspects, as well as to participate in public hearings. Although the *Gacaca* courts were inspired by the Rwandan traditional ways of conflict resolution, Clark rightly argues that the *Gacaca* process was a hybrid institution, inspired by traditional and endogenous forms of justice.[1044] Available empirical evidence suggests that the *Gacaca* process was critical to dealing with wider post-genocide issues in Rwanda and provided foundations for the rebuilding of the Rwandan community.[1045] Analysing the role of *Gacaca* proceedings in transforming Rwanda's post-genocide, Mark Drumbl emphasises their power to promote 'reintegrative shaming' for perpetrators.[1046] As an effective conduit for reconciliation, the *Gacaca* hearings served as a means for truth recovery and provided the perpetrators and victims with opportunity for remorse and forgiveness in front of their communities.

Due to the socio-cultural context in Rwanda, integral to the challenges of victims of rape and other acts of sexual violence was their inability to talk about their experiences for fear of being further stigmatised and rejected by their families and communities. As a result, the isolation of victims from their communities and various other societal consequences associated with their experiences in the Rwandan community provided additional challenges to justice in post-genocide Rwanda.[1047] It should be noted that the *Gacaca* courts operated alongside the ICTR[1048] and the Rwandan domestic courts. As our earlier discussion reveals, the ICTR illustrated the shortcomings of international criminal justice in responding to the needs of victims of mass sexual violence.[1049] For many victims of sexual violence during the genocide in Rwanda, the ICTR did not only deny them justice due to the limitations in the prosecution of rape cases, but further exacerbated their suffering with lack of enabling

[1042] See Human Rights Watch, 'Law and Reality: Progress in judicial reform in Rwanda' July 2008, available at http://www.hrw.org/sites/default/files/reports/rwanda0708webwcover.pdf (Accessed on 16 July, 2015), See also W. A. Schabas (2005), 'The Rwandan Courts in Quest of Accountability: Genocide Trials and *Gacaca* Courts', *Journal of International Criminal Justice*, Vol. 3, p. 880.

[1043] See P. Clark (2012), 'How Rwanda Judged its Genocide', *Africa Research Institute: Counterpoints*, p. 3.

[1044] See P. Clark, *Supra* note 824, p. 49.

[1045] Ibid.

[1046] M. Drumbl (2000), 'Punishment, Post-genocide: From Guilt to Shame to *Civis* in Rwanda', *New York University Law Review*, Vol. 75, p. 1463.

[1047] See Human Rights Watch, 'Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda', September 2004, Vol. 16, N° 10 (A), available at http://www.hrw.org/reports/2004/rwanda0904/rwanda0904.pdf (Accessed on 16 July, 2015).

[1048] The ICTR was established by the UN Security Council Resolution 955 of November 8, 1994.

[1049] See Chapter Five *Supra*.

courtroom environment for them to come forward to testify or inappropriate treatment of rape victims during the hearings.[1050] In fact, as discussed in the previous chapter, the proceedings at the ICTR exposed the limitations of international criminal trials to accommodating victims of these crimes and addressing the complex dynamics and effects of these crimes on victims and communities. Lack of sensitivity to the particular effects of rape on survivors and entrenched social dimension that their victimisation entails often led not only to considerable challenges in gathering evidence but also to secondary victimisation for victims. This reality understandably led many of the victims of sexual violence during the genocide in Rwanda to refuse to testify before the Tribunal.

In the face of complex challenges in the wake of genocide against Tutsi people in Rwanda due to the nature of crimes committed which had completely destroyed the fabric of families and communities, there was a pressing need for community involvement in the justice process to ensure social rehabilitation and reconciliation. There is ample empirical evidence that public acknowledgement of the victims' lived experiences was one of the major concerns for victims of mass rape and other acts of sexual violence during the genocide due to the effects of these crimes on the future social lives of victims.[1051] Further, direct effects of genocidal rape for families and communities set the scene for degradation of social values in the Rwandan community, including negative attitudes toward victims to compound victims' exclusion and sense of isolation in their communities. This reality in post-genocide Rwanda meant that incorporating gender-sensitive approaches into the work of the *Gacaca* proceedings would not only aid to ensure that the victims' voices are heard and their suffering addressed but also provides opportunity to address the entrenched social norms and other structural conditions that facilitated these crimes and exacerbate their effects on victims and the wider Rwandan community in the aftermath of the genocide against Tutsi people.

Under the *Gacaca* laws, perpetrators of sexual violence were classified under the first category of crimes committed during the genocide.[1052] This meant that genocidal related rape cases were first dealt with by formal courts in Rwanda. Due to a lack of adequate protection

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[1050] See B. Nowrojee (2005), *Supra* note 1019, p. 23.
[1051] Ibid. p. 4.
[1052] Art. 2 of Organic Law of 30 August 1996 on the Organization of the Prosecution of Offences Constituting the Crime of Genocide or Crimes Against Humanity in Rwanda established four categories of perpetrators:

- ✓ Category one for organisers or leaders of genocide, notorious killers, and persons who committed "acts of sexual torture;"
- ✓ Category two for murderers or accomplices to murder or serious attacks;
- ✓ Category three for persons who committed serious attacks without the intent to cause death; and
- ✓ Category four for those responsible for property damage.

mechanisms for rape victims, Rwanda ordinary courts, much like the ICTR, had to contend with an increased reluctance of victims to come forward to testify or even report their victimisation.[1053] Evidence suggests that sexual violence cases were among the most difficult to deal with by the ICTR and Rwandan ordinary courts, and the victims' experiences in the courts' rooms were especially very traumatising.[1054] Despite the high prevalence of sexual violence during the genocide, Rwanda illustrated challenges in addressing these crimes in the criminal justice largely due to the social ramifications of these crimes in the Rwandan community. Sexual violence cases were later transferred to *Gacaca* courts in an attempt to recover the truth about the victims' experiences. Given the sensitive nature of sexual violence and especially a myriad of social risks for the victims in the Rwandan context, recovering the truth about the victims' ordeals was an extremely challenging task for the *Gacaca* processes. As Human Rights Watch explains, when all rape cases were transferred to the *Gacaca* courts, some victims were anxious that these processes would exacerbate their victimisation by exposing them to further stigma, blame, or public ridicule by members of the communities.[1055] However, despite some difficulties to participate and testify in the process, many victims later expressed their preference for the *Gacaca* process because of less formal procedures and opportunities to speak out more freely.[1056]

Given the societal context of stigmatisation and other deep-rooted culturally imposed taboos with regard to rape in the Rwandan context,[1057] the public nature of the *Gacaca* processes would have certainly impeded the ability of victims of sexual violence to share their traumatic experiences. This concern was however addressed by the introduction of a number of procedural protections for victims of sexual violence which permit a victim to give testimony before a single *Gacaca* judge of her choice or provide a confidential testimony in writing.[1058] Further, under the *Gacaca* rules, victims of rapes were also allowed to sit with one trauma counsellor and a relative or friend to accompany them to the hearing, even in case

[1053] See, for instance, O. Jurasz (2015), 'About Justice that is yet to Come: A Few Remarks about the International Pursuit of Post-Conflict Gender Justice', *Journal of Gender Studies*, Vol. 24, p.65. See also N. Henry (2009), 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence', *The International Journal of Transitional Justice*, Vol. 3, p. 121.
[1054] See A. M. de Brouwer and E. Ruvebana (2013), 'The Legacy of the *Gacaca* Courts in Rwanda', *International Criminal Law Review*, Vol. 13, N° 5, p. 959.
[1055] See Human Rights Watch, 'Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, May, 2011 available at http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf, (Accessed on 17, July, 2015), p113.
[1056] Ibid.
[1057] See M. Zraly, S. E. Rubin and D. Mukamana, *Supra* note 1037, p. 420.
[1058] See Art. 38 of the Organic Law N° 16/2004 of 19/6/2004, establishing the organisation, competence and functioning of *Gacaca* Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1st, 1990 and December 31, 1994.

of in camera testimony.[1059] In order to facilitate victims of sexual violence to speak out about their experiences, most victims were briefed before and during the *Gacaca* hearings, and offered psychological support.

The *Gacaca* courts which closed in 2012 significantly contributed in truth recovery after genocide and brought to light the complexity of the experiences of victims of genocidal rapes during the genocide in Rwanda. Despite the prevalence of systematic rape and other acts of sexual violence during the genocide against Tutsi people in Rwanda, only a small number of cases involving sexual violence have been dealt with by ordinary courts and the ICTR. Studies indicate, for instance that, in over a thousand genocide cases that were in ordinary courts, very few included rape charges and many other rapes charges were dropped due to lack of evidence.[1060] As earlier noted, this rarity of rape cases before ordinary courts was largely connected to the victims' failure to come forward to testify for fear of stigmatisation, shame and other social risks for victims, including the community and family rejection and unmarriageable status. This is particularly true given the fact that the prosecution institutions were characterised by a lack of appropriate protection measures for the victims.[1061]

The 2008 *Gacaca* law transferring sexual related cases from ordinary courts to the *Gacaca* process specifically laid emphasis on the need for appropriate procedural measures to protect the dignity of victims of sexual violence and their families, and particularly to ensure their psychological well-being and confidentiality.[1062]These measures include among others the opportunity for victims and perpetrators of sexual violence during the genocide to only testify or confess in a closed sessions respectively.

> It is prohibited to publicly confess commission of any of the above crimes (the offence of rape or sexual torture). No person shall be permitted to initiate proceedings in respect to any of the above offences against another in public. All formal proceedings in respect to the above offences shall be held in camera.[1063]

There were also prior extensive trainings of lay judges on psychological support aspects with respect to sexual violence cases. These enabled the victims' engagement with the *Gacaca*

[1059] See Human Rights Watch, *Supra* note 1042, p.116.
[1060] Ibid.
[1061] Ibid.
[1062] The Organic Law N° 13/2008 of 19/05/2007 modifying and complementing Organic Law n°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of *Gacaca* Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994.
[1063] Ibid. Art. 6 § 4.

processes to the extent that by 2010 it had dealt with over 7,000 cases of sexual violence.[1064] Creating a comfortable and enabling environment for victims and setting out a range of measures aimed to ensure the victims' privacy and confidentiality significantly enabled the survivors to share their awful stories without fear of further harms, which significantly contributed to unearthing the genocidal dimension of sexual violence during the 1994 tragic events. There is evidence to suggest that the *Gacaca* processes served to empower the victims of rapes and other acts of sexual violence, countering their isolation, and especially addressing the multifaceted social dimensions of these crimes in the Rwandan community.

2. The Contribution of the Gacaca Processes to Addressing the Legacy of Genocidal Sexual Violence in Rwanda: A Lesson to be Learned from the Rwandan Context?

There were thousands of women victims of systematic rape during the genocide against Tutsi in Rwanda, and their victimisation experiences were often compounded by the social consequences of these crimes in the Rwandan community. As noted in earlier discussion, in addition to family and community' rejection of victims, reports point out the awful fate for children born out of rape, women facing an 'unmarriageable status' or spouses walking out of their marriages.[1065] In Rwanda, the social rejection that children born of war rape face, often characterised by awful relationships between them and their mothers, sometimes led to cases of infanticide.[1066] In fact, the isolation of the victims from their communities and various other societal consequences related to the social identity of the victims inhibit their ability to come forward to seek redress. This is not without severe implications not only for their recovery but also for the rebuilding of wider community. Without engaging in the discussion of some flaws and criticisms of the *Gacaca* process particularly with respect to international standards of due process,[1067] the *Gacaca* process illustrates the sorts of holistic responses to the complex reality of victims of systematic sexual violence in countries attempting to rebuild after odious events such as those through which Rwanda has passed.

Firstly, in Rwanda, as elsewhere in the world where mass rapes were used as a tool of political violence, the direct societal effects of these crimes impede the victims' social

[1064] See S. Ka Hon Chu and A M. De Brouwer (2009), 'Tragedy and Triumph: Rwandan Women's Resilience In The Face Of Sexual Violence', *Amsterdam Law Forum*, Vol. 3, N° 2, p. 1.
[1065] See S. Hunt, *This Was Not Our War: Bosnia Women Reclaiming the Peace*, (Duke University Press, 2004), p. 49.
[1066] See M. C. Mukarugendo, 'Caring for Children Born of Rape in Rwanda', in R. C. Carpenter (Eds.), *Protecting Children of Sexual Violence Survivors in Conflict Zones*, (Kumarian Press, 2007).
[1067] For more information see, for instance, P. Clark, 'Addressing Atrocity at the Local Level: Community-Based Approaches to Transitional Justice in Central Africa', in L. May, A. Forcehimes (Eds.), *Morality, Jus Post Bellum, and International Law*, (Cambridge University Press, 2012), pp. 64-68.

reintegration and their absence hinder the wider community's recovery from mass violence. Arguably, the most significant contribution of the Rwanda *Gacaca* proceedings in addressing rape as a tool of genocide is their ability to restore the dignity of the victims by focusing not only on finding the truth, but also on the root causes to ensure non-repetition. This is particularly significant in the Rwandan context, given the fact that the genocide was committed after many years of discriminatory practices and dehumanising propaganda against Tutsi people. It is important to stress here that rape as a tool of genocide in Rwanda was also facilitated by all sorts of dehumanising stereotypes for Tutsi women in Rwanda pre-genocidal media, including aspects such as the prohibition for Hutu men to marry Tutsi women.[1068]The *Gacaca* processes provided opportunity for victims and perpetrators to engage in collective debate about the nature and root causes of this violence which was instrumental in facilitating transformation of the Rwandan society, not least in terms of elevating the status of women in the Rwandan society and enabling much needed change of the negative social discriminatory attitudes towards the victims.

Another remarkable value of the *Gacaca* processes in Rwanda with respect to sexual violence against Tutsi women is its contribution to the collective knowledge about the genocidal dimension of these crimes during the tragic events in Rwanda. Creating a comfortable and enabling environment for victims and, particularly, to ensure their privacy and confidentiality was instrumental in enabling survivors to speak out without fear or shame about their experiences, which considerably contributed to unearthing the genocidal dimension of the gruesome sexual related harms inflicted on Tutsi women during the genocide in 1994. Usta Kaitesi rightly argues that the *Gacaca* courts contributed toward providing a shared narrative about the victims' experiences and establishing the genocidal dimension of these crimes in Rwanda.[1069] Without learning about the victims' experiences, no justice can be achieved and the genocidal dimension of rape and other acts of sexual violence committed in 1994 in Rwanda would have been omitted especially given the fact that the Rwanda conventional courts had failed to adequately address genocide-related rape cases.[1070] Failure to recover the truth about the complex realities of victims of genocide-related raped in Rwanda would have had negative implications for the rebuilding process of the country's tattered fabric. It can also be argued that, from the perspective of the Rwandan context, the *Gacaca* Courts

[1068] See N. A. Robins, A. Jones, *Genocides by the Oppressed: Subaltern Genocide in Theory and Practice*, (Indiana University Press, 2009), p. 17.
[1069] See U. Kaitesi, *Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary Courts and Gacaca Courts*, (Intersentia, 2014), pp. 271.
[1070] Ibid. p. 239.

provided opportunity for the societal moral condemnation of these crimes and for tackling the underlying structural discrimination and inequalities that have impacted women for so long.

Notwithstanding some difficulties of testifying for rape experiences in the *Gacaca* processes and the resulting trauma for victims,[1071] there is evidence to suggest that these processes have been one of the tools for the victims' healing, and played a critical role in empowering victims after genocide.[1072] It should be noted that, despite protective measures afforded to victims of sexual violence during the *Gacaca* proceedings such as the in camera proceedings meant to protect them and ensure their confidentiality, some victims opted to testify publicly. For instance, some survivors of rape and other acts of sexual violence during the genocide in Rwanda relate their experiences of sharing their awful stories during the *Gacaca* proceedings:

> Testifying in *gacaca* was empowering my heart. I was able to tell people what I went through. It made me feel pleased and stronger. Although it was traumatizing within me, later on it made me feel stronger. When I spoke at *gacaca* I fell down because of a nerve break; I would raise my voice because of all the emotions; but then I would be able to continue. In total, I spent three hours testifying in *gacaca*. After testifying, I went for psychological support.[1073]

> There were about 2,000 people there. When I testified, people kept quiet. I also said a lot of other things, including about other people. The judges said nothing. I said it all without shame. Immediately after the war, I was ashamed and always crying. But since then, it is better. People encouraged me and the women in the group [a support group for rape survivors] have helped me too.[1074]

Moreover, due to exceptionally cruel forms of sexual violence during the genocide in Rwanda where, for instance, mothers were raped in front of their children, husbands, fathers forced to have sex with their daughters and members of the community witnessing their neighbours raped in streets or being taken as sex slaves, etc..,[1075] it is safe to argue that even Rwandans who were not raped during the genocide were profoundly affected by it, given the fact that the humiliation that many victims experienced were witnessed by others in the community, neighbours and relatives. The *Gacaca* proceedings offered opportunity for collective acknowledgement and validation of the complex experiences of victims which

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[1071] See Human Rights Watch, *Supra* note 1047, p. 24.
[1072] See A. M. de Brouwer and E. Ruvebana, *Supra* note 1054, p. 960.
[1073] Ibid.
[1074] See Human Rights Watch, *Supra* note 1047, p. 27.
[1075] See D. Mukamana and P. Brysiewicz (2008), 'The Lived Experience of Genocide Rape Survivors in Rwanda, *Journal of Nursing Scholarship*, Vol. 40, N° 4, p. 381; B. Nowrojee, *Supra* note 1019, p.7.

paved the way for the collective healing in the Rwandan community. Significantly, due to the fact that women have always been considered as the heart of Rwandan society,[1076] it was also very important to ensure that the social reintegration needs of victims of sexual violence are met for the rebuilding of the Rwandan community as a whole after genocide.

What insights, then, might we draw from the Rwanda *Gacaca* courts for societies confronting the legacies of widespread and systematic sexual violence as a tool of political violence? Although significant strides have been made by the ICTR, and to some extent by the Rwandan conventional courts in addressing genocide related sexual violence, some empirical accounts emphasise how these 'developments have had little impact on the daily lives of survivors of genocidal rape in Rwanda'.[1077]In initiating the *Gacaca* processes, Rwanda followed a path similar to many countries emerging from mass atrocity, i.e. truth and reconciliation commissions, based on the idea that enabling survivors to publicly air what happened to them, and allowing citizens to participate in such process can be instrumental in ensuring that victims' needs are met and facilitating the rebuilding of the social fabric of families and communities. However, while such processes have been fruitful in many post-conflict societies, rape and other acts of sexual violence tend to be addressed as a secondary issue despite the prevalence of these crimes in modern warfare.[1078] Given the nature and dynamics of sexual violence as a military tactic, a specific attention to these crimes in domestic quasi/non transitional justice initiatives significantly contribute to comprehensively addressing the contextual ramifications of victims' experiences in situations of conflicts. The integration of specific gender sensitive approaches in the work of some relatively recent truth commissions analysed and the Rwanda community-based transitional justice approach to genocide represents therefore important efforts alongside a series of other transitional justice mechanisms in addressing the dynamics and complex consequences of sexual violence in situations of conflicts. Ensuring participation of victims of these crimes in contextualised victim redress processes is critical to ensuring the transformation of affected society as a whole which is, an essential component of comprehensive victim-focused responses to the needs of victims of mass sexual violence as a weapon of war. However, while it is necessary to integrate these crimes into the mandates of domestic transitional justice processes, what is more important is to set up appropriate measures to facilitate the victims' adequate

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[1076] See N. Hogg (2010), 'Women's Participation in the Rwandan Genocide: Mothers or Monsters?', *International Community of the Red Cross*, Vol. 92, N° 877, p.72.

[1077] See, for instance, S. Ka Hon Chu and A M. De Brouwer, *Supra* note 1064, p. 2.

[1078] See N. Ephgrave (2015), Women's Testimony and Collective Memory: Lessons from South Africa's TRC and Rwanda's Gacaca Courts, *European Journal of Women's Studies*, Vol. 22, N° 2, p.188.

engagement with such processes. Appropriate protective measures for victims of these crimes can not only serve to ensure an accurate and comprehensive picture of the victims' experiences but also help to avoid the risk of further harms in the often fragile and vulnerable contexts in post-conflict settings.

6.4 Looking Forward: Making Transitional Justice Work for Victims of Conflict-Related Sexual Violence

6.4.1 Removing Barriers to Victims' Participation and Full Engagement in Domestic Transitional Justice Processes

The foregoing suggests that while an increasing range of transitional justice strategies have been implemented extensively and with success in many societies exiting mass violence, integrating and addressing conflict-related sexual violence remains a major challenge. While some community-based transitional justice strategies often tend to devote little attention to diverse forms of harm suffered by victims of conflict-related sexual violence,[1079] recent developments in some countries that have integrated these crimes into the quest of the truth provide some valuable lessons as to how these processes can successfully complement the criminal justice processes for addressing the dynamics and social complex social effects of conflict-related sexual violence. This is particularly important to facilitate the victims' social reintegration, given the socially destructive process of sexual violence as a weapon of war.[1080] As indicated in the contexts of Rwanda, Peru, Guatemala, Timor-Leste, Liberia and Sierra Leone, using affected community as the base for justice and reconciliation as well as redress for victims has not only contributed to unearthing the patterns of these crimes during times of intense violence but also helped to address the social conditions that often facilitate these crimes and worsen their effects after conflicts. These developments represent an encouraging measure for ensuring effective redress for the victims of sexual violence as weapon of war by addressing the underlying structural conditions and other challenges impacting upon them in post-conflict settings.

Probably the most critical contribution of these processes in addressing sexual violence lies in their ability to deal with the victims and offenders of the conflict by focusing not only on punishing the perpetrators, but also on the root causes of these crimes to ensure non-

[1079] See, for instance, M. Alam, *Supra* note 825; N. Szablewska and C. Bradley; *Supra* note 896; L. C. Turano, *Supra* note 896; R. Rubio-Marín, *Supra* note 849; L. Yarwood (Eds.), *Women and Transitional Justice: The Experience of Women as Participants*, (Routledge, 2013).
[1080] See Chapter Four.

repetition and societal level transformation. As I argued in this thesis, a holistic and multidimensional approach to widespread and systematic sexual violence as a weapon of war is fundamental for ensuring effective redress for the victims. Addressing the dynamics of sexual violence in conflict situations is critically fundamental to advancing effective redress for victims, considering that in many contexts the nature and patterns of rape as an element of broader war strategies often hold a symbolic connection to the existing gendered dimension of the affected societies. Failure to address the structural conditions that facilitated these crimes in conflict situations can fuel the continuation of this violence in society or exacerbates the impact of these crimes on victims. Truth-seeking processes can therefore provide an opportunity for social changes which are pertinent to facilitating the victims' social reintegration, and especially serve to prevent the further spread of these crimes in affected societies.

However, while truth-seeking processes can effectively complement the criminal justice process for addressing a wide range of needs of victims and affected communities as a whole, the extreme vulnerabilities of victims of sexual violence in post-conflict settings make it difficult for these processes to fully account for the victims' traumatic experiences. The structure and process of post-conflict transitional justice mechanisms that often lack appropriate protective measures for victims of sexual violence inhibit victims' abilities to seek redress. There is also a serious risk of further harm for victims of these crimes in their engagement with various transitional justice processes. Notably, the public nature of truth-seeking processes and other alternative community-based transitional justice proceedings may deter the victims' willingness to effectively convey the complex reality of their experiences during conflicts. In most contexts, recovering the voices and stories of victims of such crimes through truth-seeking mechanisms is always fraught with difficulties. Despite some advances to integrate a specific gender perspective into mandates of the growing diversification of truth-seeking processes, experiences of some transitional societies analysed indicate that victims of mass rapes face considerable obstacles in adequately engaging with such processes, not least due to the traumatisation of reliving their experiences. Challenges of victims of conflict-related sexual violence to seek redress through truth-seeking processes are also often compounded by deep-rooted structural inequalities and taboos about these crimes in some societies that make it very difficult for victims to recount their traumatic ordeals.

The way in which transitional justice strategies are designed to facilitate the participation of victims of such crimes is therefore crucial to the effectiveness of these processes in advancing

effective redress for victims of sexual violence as a weapon of war. As established in the earlier discussion, several empirical accounts emphasise how the experiences of victims of conflict-related sexual violence are not only hard to talk about but also to listen to.[1081] In any truth-seeking process designed to account for the dark past, characterised by mass sexual violence as a weapon of war, it is vital to create a comfortable and enabling environment for victims of these crimes with a view to empowering them and guaranteeing their privacy and confidentiality in the often challenging societal contexts. This entails, for example, establishing sub-units dedicated to these crimes with specific attentions being paid to recruiting staff with experiences on these crimes. To better account for the victims' experiences therefore requires effective incorporation of gender perspectives in the work of truth-seeking mechanisms. Depending on the socio-cultural understandings of gender and sexuality in affected societies, other measures can include the public awareness campaigns to counteract the pre-existing and often deep-rooted structural discrimination towards women.

In summary, whilst it is true that providing opportunities for victims and other members of affected communities to tell their stories for societal acknowledgment and validation is central to achieving effective redress for victims,[1082] it is also necessary to understand that the dynamics with which sexual violence is deployed as a weapon of war is socially destructive. In any truth-seeking processes, there is need for appropriate protective measures to effectively combat the socio-cultural frameworks that impose silence on victims. In many contexts, victims of sexual violence prefer to focus on other crimes suffered in conflict situations.[1083] Ensuring effective redress for victims of such crimes through domestic transitional justice initiatives requires an enabling and supportive environment that permits victims to speak out about their experiences. Significantly, integrating these crimes into the agenda of these processes and provide forum the victims' voices can provide opportunity for the moral condemnation of these crimes in affected societies which, as I argued, has potential to empower victims and facilitate wholesale social transformation. It is also relevant for addressing the challenges and barriers to victims' social reintegration and preventing the further spread of sexual violence in post-conflict communities. Providing a forum for victims to share their experiences can further contribute in breaking down the silence that often

[1081] See I. Skjelsbæk (2006), 'Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape during the War in Bosnia-Herzegovina', *Feminism & Psychology,* Vol. 16, N° 4, p. 378. See also F. J. Mantilla, *Supra* note 936, p. 133.
[1082] S. Buckley-Zistel, 'Redressing Sexual Violence in Transitional Justice and Labelling of Women as "Victims", in T. Bonacker and C. Safferling (Eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, (Asser Press, 2013), p. 96.
[1083] See M. Alam, *Supra* note 825, p. 93.

surrounds sexual violence in post-conflict settings and ultimately facilitates the victims overcoming the shame and empower them to resist these crimes in their communities.

6.4.2 Bridging the ICC Victims' Participation Scheme with Domestic Transitional Justice Initiatives: Enhancing the Victims' Position both at International Trials and in Communities

The earlier discussion in this thesis has shown how the dynamics with which sexual violence is systematically used as a military tactic are often profoundly rooted in local contexts. It has also been indicated that, while the relatively recent introduction of victims in the international criminal justice process remains a significant component of comprehensive victim-focused responses, the complex contextual dynamics surrounding the plight of victims of sexual violence during and after conflicts impedes its effectiveness in ensuring effective redress for victims. In fact, the challenges faced by victims of these crimes in engaging with the international criminal tribunals or their inability to provide a comprehensive picture of their stories at these tribunals result in underrepresentation of their lived experiences during and after conflicts, leading to an insufficient recognition of the harm suffered.

The challenges facing international criminal justice in this regard underpins the need to widen the scope of transitional justice in addressing the needs of victims of these crimes, including the over expanding locally-embedded quasi/non-judicial transitional justice initiatives. The flexibility of these processes and their ability to adapt to the often challenging societal contexts can allow them to complement the formal criminal justice processes for addressing a wide range of victims' needs. In other words, there is need to extend victim redress efforts to addressing the dynamics and complex effects of these crimes in affected societies. This is critical to enabling societal level transformation, and ultimately facilitating the victims' social reintegration. In the pursuit of effective redress in situations where sexual violence serve as a weapon of war, it is fundamental that primordial attention be paid to the complex social dimension of these crimes in affected societies, and do so in ways which are mindful of the extreme vulnerabilities of victims and socio-cultural frameworks on gender and sexuality.

Thus the integration of sexual violence within particular mandates of domestic transitional justice strategies focused on a period of intense violence is critical for addressing the need for social change by focusing on the status of victims and the causes and consequences the harms suffered. Redress for victims must therefore take into account the entrenched contextual social norms and pre-existing gender inequities that women face to enhance their social status within their communities. This is particularly important not only for the individual victims'

recovery but also for the rebuilding of the fabric of families and communities torn apart by these crimes. As this thesis has earlier established, victims of widespread sexual violence struggle for social reintegration after conflicts, and their absence provides a unique range of challenges in the rebuilding process of affected nations. To ensure effective redress for the victims and lay strong foundations for the rebuilding of affected communities, efforts for accountability for perpetrators must be accompanied by victims' empowerment. In addition to practical reparations, victims of these crimes need symbolic social acknowledgement of their experiences and restoration of their dignity to help them cope with the effects of these crimes at individual and societal levels. Coordinated and collective approaches to enhancing the victims' position both at international trials and within their communities are thus central to advancing effective redress in societies enduring the legacy of widespread and systematic sexual violence. To this end, there must be a strong relationship between international criminal justice and local communities, and especially with the increasing diversification of locally-embedded transitional justice processes.

6.5 Chapter Summary and Concluding Remarks

The chapter widens the scope of transitional justice to provide critical reflections on the promise of the vast range of truth-seeking processes in complementing the criminal justice processes for advancing effective redress for victims of sexual violence as a weapon of war. As advanced in this thesis, given the dynamics and complex effects of conflict-related sexual violence on victims and communities, a full range of transitional justice approaches must be considered to provide effective responses to the needs of victims. The prevalent use of sexual violence as a military tactic is a multifaceted phenomenon, deeply rooted in local contexts with far-reaching implications for the victims' lives. In many contexts, these crimes are often facilitated by pre-existing structural conditions and deep-rooted social norms that often impose significant challenges and barriers to victims' social reintegration. It is therefore necessary to address the varying dynamics and complex ramifications of these crimes to empower victims and facilitate societal transformation.

In light of the limitations of the criminal trials, particularly international criminal justice, in providing a comprehensive account of the victims' actual lived experiences, this chapter sets out to critically examine the value of non-judicial transitional justice processes as complementary mechanisms to advance effective redress for these crimes. In order to make sense of the recent developments in integrating and addressing conflict-related sexual

violence in truth-seeking processes and lessons that can be drawn from their experiences, the discussion in this Chapter began by setting out the extent to which these crimes tend to be neglected or marginalised in transitional justice approaches to accountability and reconciliation. It shows that, despite the rise of truth-seeking processes over the last two and a half decades, conflict-related sexual violence is usually neglected or presented as a subsidiary issue in the quest for truth. This is particularly true in situations where the design of truth-seeking processes in post-conflict societies ignore these crimes in their mandates or fail to adopt appropriate measures to enable the victims' adequate engagement with such processes.

Despite the neglect or marginalisation of the harms suffered by victims of sexual violence, this chapter indicates that recent developments in some countries which have integrated these crimes into the mandates of quasi/non-judicial transitional justice strategies provide some valuable lessons as to how these processes can successfully complement the criminal justice processes for addressing the dynamics and complex effects of these crimes on victims and communities. The discussion emphasised the potential transformative effects of truth-seeking processes and other community-based transitional justice measures on the often challenging social dimension of sexual violence as a weapon of war. These processes can indeed present an opportunity for addressing the existing structural conditions that often facilitate sexual violence in conflict situations and exacerbate their effects in post-conflict settings.

The discussion in this chapter shows, however, that recovering the voices and stories of victims of sexual violence through truth-seeking processes is by no means an easy process in most contexts. Victims of these crimes face serious challenges that inhibit their ability to effectively convey their traumatic experiences during conflicts, even when these crimes are acknowledged and integrated into the quest for truth. The author argues that whilst it is necessary to integrate these crimes into domestic transitional justice processes; this should be done alongside embedding appropriate measures to facilitate the participation of victims while seeking to avoid the risk of further harm. The way in which these processes are designed to enable the victims' adequate engagement is therefore key to their success in advancing effective redress. Truth-seeking processes' staffing and mechanisms of collecting information in post-conflict settings must therefore foresee the challenges in accommodating victims of conflict-related sexual violence to ensure an accurate and comprehensive account of the victims' lived experiences. Although I agree that the victims' protective strategies are subject to variation depending upon the socio-cultural contexts, their focus should remain victim-centred and respond to the multifaceted vulnerabilities of victims of these crimes.

CHAPTER SEVEN

CONCLUSIONS AND IMPLICATIONS

7.1 Introduction

This study has aimed to provide critical insight into the question of how to ensure effective redress for victims of widespread and systematic sexual violence in conflict situations in light of the complexity of the victims' experiences and the legacy of these crimes in affected communities. This was accomplished through an extensive analysis of existing literature, largely the existing body of empirical studies on distinct aspects of sexual violence as a weapon of war, to understand the nature and extent of the needs of the victims in post-conflict settings. The study also critically examined the challenges and limits of international criminal justice in dealing with a wide range of the victims' needs, and provides critical insights on how such limitations can be addressed through the growing diversification of domestic transitional justice processes.

This concluding chapter commences with a discussion of the key points to have emerged from this study. It also discusses the study's contribution to the growing discourse in transitional justice responses to mass atrocities as well as the research's implications. Finally, the chapter concludes with a discussion about the limitations of this research and suggests potential areas for future research.

7.2 Summary of Key Points

This study explored mechanisms for advancing effective redress for victims of rape and other acts of sexual violence as an element of broader war strategies. Its primary aim was to provide critical insight into the question of how to ensure effective redress for victims in light of the dynamics of these crimes and the complexity of the victims' experiences during and after conflict situations. The study highlights that effective redress for victims of sexual violence as a military tactic requires more than just addressing their justice and reparative needs but also to attend to the complex social dimensions of these crimes in affected communities. It was primarily argued that, in looking at the nature and patterns of sexual violence as a weapon of war, a full range of transitional justice processes must be considered to address the dynamics and complex impact of these crimes on victims and affected communities. A unifying thread running throughout the analysis in this thesis is therefore the idea that redress for victims in situations where sexual violence serve as a war strategy must

be sought in an integrated manner, covering all dimensions of these crimes, including an element of societal transformation to empower victims and breakdown a myriad of challenges facing victims in post-conflict situations.

The study evidenced the need for victims' redress efforts beyond the punishment of perpetrators and consideration of immediate reparative needs of victims of mass sexual violence in conflict zones. Specifically, it has emphasised the need to address the dynamics and complex effects of conflict-related sexual violence in a social context to empower victims and promote change of pre-existing structural conditions that often facilitate these crimes and exacerbate their impact on victims after conflicts. Upon conducting an in-depth exploration of distinct aspects of sexual violence as a military tactic and making a critical analysis of the challenges and limits of international criminal justice processes in redressing these crimes, the study concluded that a full range of transitional justice approaches must be considered to provide effective responses to the needs of victims. The thesis advanced an argument that measures which accompany or follow domestic transitional strategies which aim to foster a wholesale social transformation are indispensable in contributing to tackling the dynamics with which sexual violence is often deployed as a weapon of war. This point is the case because, as highlighted in the study, the strategic use of sexual violence as a weapon of war arises from a set of complex circumstances with a myriad of interrelated consequences on victims and communities, often deeply entrenched within local contexts. In other words, in many contexts, the systematic use of sexual violence in situations of conflicts often holds a close link to the gendered dimensions in affected societies such as pre-existing discriminatory norms towards women. Consequently, the dynamics with which these crimes serve as a tactic of war carry significant devastating effects within social contexts in addition to the harm or devastation inflicted on individual victims. It is vital that due consideration is given to the various societal dimensions of these crimes in the pursuit of effective redress for victims.

In chapter two, the study first establishes whether rape and other acts of sexual violence, crimes that are endemic in conflict situations but often called the history greatest silence, have gained recognition and firmly established as international crimes. The discussion in this chapter highlights that, although the international prosecution of conflict-related sexual violence is still hindered by significant investigative and evidentiary challenges, the legal basis upon which these crimes can be prosecuted is firmly established in international criminal law after a long period of disregard. This is evidenced by the explicit criminalisation of different forms of sexual violence by the ICC Statute which built upon

and expanded significant historical advances made in the investigation and prosecution of rape and other acts of sexual violence before previous international criminal tribunals.

From the outset, this study emphasised that the struggle to address mass atrocity should not just be a struggle for prosecutions but rather a comprehensive victim-centred approach to ensure effective redress for victims to provide solid basis for the re-building of affected nations. In this regard, the discussion in chapter three highlighted the critical role of the relatively recent regime of victims' participation in international criminal justice processes in advancing redress for victims of international crimes. However, as the discussion in chapter three further underlines, the victims' inclusion in the international criminal justice processes has nothing more than an expressive function for them given the nature of international criminal justice proceedings and characteristics of mass crimes which often result in a sheer number of victims. The author argues that while the growing role of victims in international criminal processes is indeed critical to a comprehensive victim-focused justice response to mass crimes, the dynamics with which rape and other acts of sexual violence serve as a weapon of war provide a unique range of challenges in advancing effective redress within the context of international criminal justice. Specifically, victims' redress mechanisms within international criminal justice system risk failing to draw upon the social dimensions of the victimisation process in conflict-related sexual violence events, thereby falling short in providing effective responses to the needs of victims.

The latter point is particularly the case because, as shown in chapter four, the systematic use of rape and other acts of sexual violence as a weapon of war strikes at the heart of communities. The dynamics with which these crimes are employed as an element of war strategies not only leave victims with short and long term physical and psychological harm but also lead to a myriad of social problems within their families and communities, prolonged long after conflicts end. In fact, as indicated throughout this study, what makes the phenomenon of widespread and systematic sexual violence as a weapon of war distinctive from ordinary crimes is the way in which these crimes destroy the social fabric of families and communities, and set the scene for a general social collapse within affected communities. In other words, widespread and systematic sexual violence as a weapon of war carry significant devastating effects in a social context in addition to the devastation inflicted on individual victims. The complex realties of victims of sexual violence during conflict and in post-conflict situations coupled with the challenging social contexts in which their victimisation occurs impede the international criminal tribunals' ability in allowing

recognition of the victims' voices and actual lived experiences. As has been shown in chapter five, the challenges faced by victims of such crimes in engaging with the international criminal tribunals or their inability to provide a comprehensive picture of their stories at these tribunals result in an underrepresentation of the victims' actual realities during and after conflicts, and consequently leading to an insufficient recognition of the harm suffered.

The study emphasised that, to effectively redress sexual violence as a weapon of war, it is crucial to give due consideration to the broadest spectrum of impact of these crimes at both individual victims and community levels. As highlighted earlier in this study, in many contexts, the systematic use of sexual violence arises from a set of complex circumstance often highly rooted in local contexts. Several empirical accounts have indicated, for instance, a nexus between the use of sexual violence as an element of war strategies and the existing gendered dimensions within affected communities. In other words, sexual violence as a military tool is often facilitated by pre-existing socio-cultural dynamics that make women vulnerable to sexual violence in many societies; and these dynamics such as the gender discriminatory norms fuel the continuation of this violence or exacerbate the impact of these crimes on victims in post-conflict settings. Additionally, these crimes often represent an attack on the social values and safety of affected communities, a reality that also creates an environment conducive for increased levels of such violence in affected communities. Victims yearn for social acknowledgment and validation of their experiences, and the restoration of their human and civic dignity. Acknowledgement and validation of the victims' experiences may positively transform the underlying causes and societal level impact of sexual violence in conflict-situations and empower victims to facilitate their social reintegration.

In chapter six, the spotlight was therefore turned on the potential contribution of an increasing range of domestic transitional justice strategies in addressing a wide range of victims' needs, including the restoration of their dignity and tackling victims' social reintegration needs. The discussion in this chapter focused on the important but mostly neglected aspect of ensuring effective redress for victims of war sexual violence: the need to address the dynamics and complex social ramifications of these crimes for victims and affected community as a whole. Specifically, it looked at the neglect and marginalisation of sexual violence in various domestic transitional justice strategies often employed to achieve acknowledgement, accountability and reconciliation after a violent conflict. The discussion highlights how these crimes are usually neglected or presented as a subsidiary issue in many

truth-seeking processes such as truth commissions and other community-based approaches to accountability and reconciliation. It was primarily argued that when victims of these crimes are disregarded in the work of truth-telling processes or if the harms suffered by victims of systematic sexual violence are ultimately not part of a comprehensive account of past crimes, the opportunity for tackling the structural conditions that often facilitate these crimes and exacerbate their effects in post-conflict settings is indeed lost. This not only leaves a major defect in the pursuit of victims' empowerment but also adversely affects the rebuilding process of affected societies, considering the direct social consequences of these crimes for affected communities. The study therefore argues in favour of enhancement of victims' engagement with the growing diversification of domestic quasi/non-judicial transitional justice processes, whereby a collective knowledge about the root-causes and patterns of the victims' experiences can be established to empower victims, and enable the often much needed societal transformation.

The analysis in this chapter benefited considerably from an in-depth exploration of experiences of a number of countries that have included conflict-related rape and other acts of sexual violence into the mandates of quasi- or non-judicial transitional justice processes to understand lessons that can be drawn for transitional societies enduring the legacy of sexual violence as a war strategy. It was argued that the over expanding transitional justice strategies to achieve acknowledgment, accountability and reconciliation after a violent conflict hold potential to complement the limited narrative of events in wartime sexual violence cases within the criminal justice proceedings and allow greater recognition and validation of the victims' experiences. Essentially, these processes can be well positioned to address the dynamics of sexual violence as a military tactic and attend to the inherent complex social ramifications in post-conflict settings. Domestic transitional justice strategies can provide a window of opportunity for the societal level moral condemnation of these crimes in order to enhance the victims' social status and promote a wholesale societal transformation through recommendations for legal and institutional reforms, and other measures aimed at tackling the structural social conditions impacting upon victims in affected communities.

In arguing that an increasing range of truth-seeking processes as transitional justice mechanisms hold potential to bring about a long term transformative effect on the underlying root-causes and effects of sexual violence as a weapon of war by helping to promote inclusionary societal change, it is important to underline challenges faced by victims of sexual violence in engaging with such processes. In many contexts, as it was shown in

chapter six, recovering the voices and stories of victims of sexual violence through truth-seeking processes is by no means an easy process. Victims of these crimes face serious challenges that inhibit their ability to effectively convey their traumatic experiences endured during conflict situations. Even when these crimes are acknowledged and integrated into the quest for truth, the study has highlighted pressing challenges that impede the potential impact of domestic transitional justice processes in advancing effective redress for victims but rather increase the risks of undermining their social situations, particularly in societies characterised by deep-rooted beliefs and practices that perpetuate gender-based discrimination. It is argued that whilst it is necessary to integrate rape and other acts of sexual violence into domestic transitional justice processes; this should be done alongside embedding appropriate measures to ensure the victims' adequate engagement. These can help to ensure an accurate and comprehensive picture of the victims' lived experiences without the risk of further harm.

7.3 Contribution to scholarship and Research Implications

The analysis in this thesis proceeded from a standpoint that the pursuit of redress for victims of systematic sexual violence as a war strategy without a broader consideration of the contextual dimension of these crimes would indeed fall short of providing effective responses to victims' needs. The thesis advanced an argument that, to effectively redress rape and other acts of sexual violence as a weapon of war, it is critical to pay primordial attention to the multidimensional effects of these crimes for victims and communities. This must be done in ways which are sensible to the often challenging social contexts and the extreme vulnerability of victims of such crimes in post-conflict settings. Importantly, the study evidences the need to address the dynamics with which these crimes are used as a military tactic in conflict situations. It has explored mechanisms for extending the victims' redress efforts to addressing the complex societal dimension of these crimes and highlights the critical role of increasing transitional justice approaches to accountability and reconciliation in complementing the formal criminal justice processes for advancing effective redress for victims.

This study has sought not only to explore the nature of victims' needs but also to investigate the challenges and the limits of international criminal justice, particularly the relatively new victims' participation framework, in addressing a wide range of victims' needs. It also offers critical insights into how such limitations of the international criminal justice processes can be addressed through complementary domestic transitional justice strategies. This thesis is a significant contribution towards a better understanding of holistic responses to the legacy of

rape and other acts of sexual violence as a weapon of war at a time transitional justice approaches to extraordinary violence are rapidly increasing. Upon analysing distinct aspects of mass sexual violence in conflict situations and a unique range of challenges for international criminal tribunals in redressing these crimes, this study has established the need for pluralist responses to victims' needs with a view to enhancing the victims' position both at international trials and within their communities. Specifically, this study argues a case for the need to ensure that redress for victims of sexual violence as a military tactic is transformative through mechanisms aimed at fostering victims' empowerment and facilitating societal level change. Such aims should be mindful of existing structural conditions impacting upon victims as well as other challenges and barriers to their social reintegration in post-conflict situations.

It is intended that the outcomes of the thesis will be valuable in drawing attention to the multidimensional nature of sexual violence as a tactic of war and their effects on victims and affected communities. Particularly, the study underlines the need to attend to the challenging societal contexts in which these crimes are committed to ensure effective redress in societies enduring the legacy of such crimes. In fact, the field of transitional justice is rapidly evolving and the recent development in international criminal justice has been accompanied by a vast range of domestic responses to mass violence. However, as expounded throughout this thesis, many domestic transitional justice approaches to accountability and reconciliation tend to address sexual violence as a secondary issue despite the prevalence of these crimes as a military tactic in modern warfare. The analysis presented in this thesis has important implications for enhancing victims' engagement with locally-embedded transitional justice processes to address the complex social dimensions of these crimes. Domestic transitional justice processes such as truth commissions and other community-based approaches to accountability and reconciliation often enable a collective transformation of affected societies which is, as emphasised in the thesis, one of the critical aspects of effective redress in situations where mass sexual violence serve as a weapon of war.

7.4 Research Limitations and Avenues for Future Research

Although this research has attempted to examine mechanisms to ensure effective redress for victims of rape and other acts of sexual violence as a weapon of war, it cannot explore all aspects related to this subject area. In fact, it is hoped that the critical analysis presented in this study regarding the unique nature of war sexual violence-related consequences and the

need for a holistic approach to ensure effective redress for victims can provide new insights on avenues for future enquiry in this field of study.

Primarily, as highlighted in the introduction to this thesis, whilst the study acknowledges the relevance of reparations for victims of conflict-related sexual violence, its focus lies with demonstrating how the dynamics and complex consequences of these crimes encompass more than the need for justice and material reparations. It was not possible therefore within the limits of this thesis to engage in a deep analysis of challenges pertaining to implementation of the reparation regimes with respect to victims of sexual violence such as the limited recognition of various forms of harms suffered by victims of sexual violence in reparation frameworks. Particularly, an empirical examination of challenges surrounding the implementation of reparations for victims of conflict-related sexual violence, such as the tendency to exclude male victims in reparations programs particularly due to socio-cultural beliefs about victims of sexual violence, would be a worthwhile avenue of enquiry for future work. In fact, as established in this thesis, while females make up the majority of victims, males also experience brutal acts of sexual violence in conflict situations and their victimisation deserves equal acknowledgement in victims' redress mechanisms.

A further direction for research identified is an exploration of the relationship between victim-orientated approaches to mass crimes within the context of international criminal justice and domestic transitional justice strategies. In light of the limitations of international criminal trials in addressing the needs of victims of sexual violence as a weapon of war, the preceding analysis in this thesis argues in favour of complementarity measures whereby these crimes are comprehensively accounted for in various domestic transitional justice processes. Specifically, as highlighted in the present study, this implies that coordinated and collective measures aimed to enhance the victims' position both at international trials and within communities are fundamental to advancing effective redress in societies enduring the legacy of conflict-related sexual violence. A well-coordinated collaboration between victim-oriented measures at international and domestic levels may assist in not only addressing the justice and reparative needs of victims, but also complex social dimensions of such crimes. As argued in this thesis, this is particularly critical to ensuring transformative redress for the victims in situations where rape and other acts of sexual violence serve as a weapon of war. This relationship between victim-oriented developments in international criminal justice and local communities, particularly the increasing diversification of locally-embedded transitional justice processes, would therefore be an interesting point to explore further.

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