

HEINONLINE

Citation:

Melissa Goldenberg Goldstoff, Security Council Resolution 1820: An Imperfect but Necessary Resolution to Protect Civilians from Rape in War Zones, 16 *Cardozo J.L. & Gender* 491 (2010)

Content downloaded/printed from [HeinOnline](#)

Thu Feb 7 22:09:26 2019

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

SECURITY COUNCIL RESOLUTION 1820: AN IMPERFECT BUT NECESSARY RESOLUTION TO PROTECT CIVILIANS FROM RAPE IN WAR ZONES

MELISSA GOLDENBERG GOLDSTOFF*

I. INTRODUCTION

Rape and war have been synonymous for thousands of years. The traditionally held notion was that the captured territory, and all of its possessions, belonged to the captors.¹ Therefore, the women captured during wartime became the property of the captors and were often subjects of horrific rape. As one author reported:

[r]ape was a weapon of terror as the German Hun marched through Belgium in World War I; gang rape was part of the orchestrated riots of *Kristallnacht* which marked the beginning of Nazi campaigns against the Jews. It was a weapon of revenge as the Russian Army marched to Berlin in World War II, it was used when the Japanese raped Chinese women in the city of Nanking, when the Pakistani Army battled Bangladesh, and when the American G.I.s made rape in Vietnam a 'standard operating procedure aimed at terrorizing the population into submission.'²

Fortunately, women's rights and protections during wartime have significantly expanded over the last two decades, although wartime rape still occurs frequently. Human rights groups have estimated that hundreds of thousands of women have been raped in the Democratic Republic of the Congo ("DRC") since fighting began in 1998.³ Many of the victims are left mutilated, infected with HIV,

* J.D. Candidate, Benjamin N. Cardozo School of Law, 2010; B.A., Columbia College, 2007. This Note is dedicated to my parents and grandparents, who have supported and encouraged me throughout all of my endeavors, and to my husband Jason and son Samuel, whose patience, love and kindness inspire me daily. I would also like to give a special thanks to Dr. Lucille Roussin for her feedback and encouragement throughout the writing process.

¹ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, Art. 45, in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 9 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 2004) [hereinafter *The Lieber Code*].

² Maria B. Olujic, *Women, Rape, and War: The Continued Trauma of Refugees and Displaced Persons in Croatia*, 13 *ANTHROPOLOGY E. EUR. REV.* 1 (1995), available at http://condor.depaul.edu/~rrotenbe/aer/aer13_1/Olujic.html.

³ Anna Husarska, *Congo's Sex Crimes Rage On*, *GUARDIAN WKLY.*, Mar. 27, 2008, available at <http://www.guardianweekly.co.uk/?page=editorial&id=545&catID=2>.

pregnant and cast out by society.⁴ However, rape is no longer considered an unavoidable by-product of war. Instead, international tribunals and the United Nations have formally recognized that rape must be condemned as a war crime and prosecuted accordingly.⁵

This historic development in women's rights is long overdue and is largely a reaction to the frightening and life-threatening situations of millions of women living in areas of conflict. Health centers in the DRC estimate that in the South Kivu province, forty women are raped in the region every day.⁶ A governmental survey in Liberia in 2005-2006 revealed that in ten counties, 92% of the 1600 women interviewed had experienced sexual violence, including rape.⁷ Human Rights Watch recently reported that women in Darfur live in constant fear of sexual violence and rape.⁸ The report stated that 200 women in and around the Kalma camp of South Darfur were sexually abused in a five week period in August 2006.⁹ As incredible as these statistics may seem, they do not adequately reflect the degree to which rape and sexual violence are permeating war-stricken regions. Especially within the Muslim region of Darfur, women are reluctant to report rapes because they fear retaliation and do not trust the authorities to rectify the situation.¹⁰ Major-General Patrick Cammaert, former commander of U.N. peacekeeping forces in the eastern Congo, surmised that "[i]t has probably become more dangerous to be a woman than a soldier in armed conflict."¹¹

Despite the gruesome reality for women in war zones, the campaign to define rape as a war crime has been surprisingly slow and unsuccessful. The post-World War II Nuremberg Trials did not charge rape as a war crime,¹² and the Tokyo Trials regarded rape as a secondary crime, not specifically enumerated in the Tokyo Charter.¹³ Only recently have international tribunals prosecuted rape as a war crime. In 1996, the International Criminal Tribunal in the Hague indicted eight Bosnian Serb military and police officers in connection with rapes of Muslim women during the Bosnian war.¹⁴ The Rwandan war tribunals in the 1990s

⁴ *Id.*

⁵ S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008) [hereinafter *S.C. Res. 1820*].

⁶ Office of the High Comm'r for Hum. Rts., Rape: Weapon of War, <http://www.ohchr.org/EN/NewsEvents/Pages/RapeWeaponWar.aspx> (last visited Apr. 7, 2010).

⁷ *Id.*

⁸ HUMAN RIGHTS WATCH, FIVE YEARS ON: NO JUSTICE FOR SEXUAL VIOLENCE IN DARFUR: SEXUAL VIOLENCE IN DARFUR IN 2007-2008 (2008), available at <http://hrw.org/reports/2008/darfur0408/5.htm>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Office of the High Comm'r for Hum. Rts., *supra* note 6.

¹² KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 136 (1997) [hereinafter *WAR CRIMES AGAINST WOMEN*].

¹³ *Id.* at 202.

¹⁴ Marlise Simons, *For the First Time, Court Defines Rape as a War Crime*, N.Y. TIMES, June 28, 1996, available at <http://www.nytimes.com/specials/bosnia/context/0628warcrimes-tribunal.html>.

similarly prosecuted sexual violence as instruments of genocide, crimes of war, crimes against humanity, and methods of torture.¹⁵

On June 19, 2008, the United Nations Security Council took an important step to further the protection of women during war by unanimously passing Security Council Resolution 1820 (“Resolution 1820” or “the Resolution”) which calls for “immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians,” including children, and states that “rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide.”¹⁶ Although this measure is long overdue, it was generally well-received among women’s rights groups and lauded as a significant step in the right direction towards prosecuting rapists.¹⁷ However, some organizations have expressed various concerns that the implementation of the Resolution is unclear.¹⁸

This Note argues that despite the overwhelming importance of Resolution 1820 in protecting women raped during wartime conflict, the Resolution is ineffective and potentially detrimental to women’s rights because it suffers from inconsistencies and incompleteness.¹⁹ Furthermore, the Resolution may also undermine Resolution 1325, which requires parties in a conflict to respect the rights of women and support their participation in peace negotiations.²⁰ Since both Resolutions 1820 and 1325 address the protection of women’s rights, the overlap will possibly diminish the protection of women.²¹

Part II introduces the long journey towards defining rape as a war crime and determines that under customary law, rape was probably considered a criminal act and a violation of customary international law. However, despite attaining such status, the military tribunals of World War II did not prosecute the widespread rape that had occurred as a result of the war. Part III discusses the ad hoc prosecutions of wartime rapists during the Yugoslav and Rwandan war tribunals and determines that a more systematic method of prosecuting rape must be available.

¹⁵ JEANNE WARD & WENDY MARSH, UNITED NATIONS POPULATION FUND, SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN WAR AND ITS AFTERMATH: REALITIES, RESPONSES, AND REQUIRED RESOURCES 28 (2006), <http://www.unfpa.org/emergencies/symposium06/docs/finalbrusselsbriefingpaper.pdf>.

¹⁶ Press Release, Security Council, Security Council Demands Immediate and Complete Halt to Acts of Sexual Violence Against Civilians in Conflict Zones, Unanimously Adopting Resolution 1820, U.N. Doc. SC/9364 (June 19, 2008), available at <http://www.un.org/News/Press/docs/2008/sc9364.doc.htm>.

¹⁷ WOMEN’S UNITED NATIONS REPORT NETWORK, ANALYSES OF U.N. SECURITY COUNCIL NEW RESOLUTION 1820 ON SEXUAL VIOLENCE AGAINST CIVILIANS IN ARMED CONFLICT (2008), http://www.wunrn.com/news/2008/07_08/07_08/070708_un.htm.

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ *See generally* S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000) [hereinafter S.C. Res. 1325].

²¹ WOMEN’S UNITED NATIONS REPORT NETWORK, *supra* note 17.

Part IV examines the recently established International Criminal Court (“ICC”) and evaluates its effectiveness in prosecuting gender-based crimes. Part V explores the recently passed Resolution 1820 and establishes that although the Resolution is certainly a step in the right direction, the Resolution suffers from numerous shortcomings that can potentially limit women’s rights. Ultimately, Part VI concludes that Security Council Resolution 1820 could be integral for the protection of women in war-conflicted areas if it is implemented and monitored accordingly to ensure compliance.

II. THE HISTORY OF RAPE AS A WAR CRIME

A. *Pre-World War II Laws Protecting Women in Warfare*

Wartime rape by soldiers has been prohibited by the law of war for centuries,²² and the prohibition most likely has attained the status of a customary international law.²³ Customary international laws are the rules of law derived from the consistent conduct of states out of a sense of legal obligation;²⁴ customary international law is considered one aspect of international law. One of the first documents addressing the crime of rape during wartime was The Lieber Code, published in 1863 in response to the American Civil War.²⁵ The Code was derived from international custom and usage and eventually became the official regulation guide of the Army of the North.²⁶ The Code specifies that “all rape . . . is prohibited under the penalty of death.”²⁷ Although the Code was written to instruct the American soldiers during the Civil War, the Code reflected the international legal standard of war.²⁸ The Lieber Code essentially codified the customary international law that rape during wartime is a criminal act and will be punished.²⁹

The Hague Peace Conferences of 1899 and the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land further codified the laws and customs governing warfare.³⁰ The Conferences resulted in the establishment of thirteen international conventions governing war on land and at sea, neutrality, and peaceful settlements.³¹ The Hague Conventions mainly relied on the Lieber Code and were aimed at protecting civilians from the horrors of war as well as preventing

²² Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT’L L. 424, 425 (1993).

²³ WAR CRIMES AGAINST WOMEN, *supra* note 12, at 36.

²⁴ BLACK’S LAW DICTIONARY 172 (3d ed. 2001).

²⁵ WAR CRIMES AGAINST WOMEN, *supra* note 12, at 35-36.

²⁶ *Id.* at 36.

²⁷ *The Lieber Code*, *supra* note 1, at art. 45.

²⁸ WAR CRIMES AGAINST WOMEN, *supra* note 12, at 36.

²⁹ *Id.*

³⁰ WAR CRIMES AGAINST WOMEN, *supra* note 12, at 40.

³¹ *Id.* at 38.

unnecessary suffering during war.³² With respect to women, the Fourth Hague Convention stated that “family and honor rights, the lives of persons . . . must be respected.”³³ The laws stated in the Fourth Hague Convention most likely attained the status of customary international law, ensuring that rape was considered a punishable violation of the customs of war.³⁴

The recent codification of rape as a violation of wartime customary international law provided a new and keen awareness of wartime crimes during World War I but ultimately did not provide any concrete protections against further crimes. Sexual violence and rape were documented and many suggested prosecuting these crimes in front of an international tribunal.³⁵ The French government also declared that “acts so contrary to International Law, and to the very principles of human civilisation should not go unpunished.”³⁶ However, despite these seeming advances, rape was also used as a weapon of war during World War I to intimidate and terrorize the enemy.³⁷ The Allies established the World War I War Crimes Commission which named rape and prostitution as two of the thirty two offenses committed by the Germans, but no crimes were punished under the Commission due to lack of cooperation.³⁸ Those accused of war crimes were eventually tried before the Supreme Court of Germany, but 888 of the criminals were acquitted or not tried, and the court only convicted thirteen of the criminals.³⁹ No other efforts were made following the thousands of rapes committed during World War I to prevent such atrocities from occurring once again.⁴⁰

B. Prosecuting World War II Rape Crimes

1. Nuremberg War Tribunal

Women experienced some of the most atrocious mass rapes in history during World War II.⁴¹ Women were abducted, raped and forced to satisfy the needs of the occupying forces. For example, approximately two hundred thousand Korean, Chinese, Filipino and Indonesian women were forced to provide sexual services to

³² *Id.* at 39.

³³ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 46, Oct. 18, 1907, 36 Stat. 2277 [hereinafter *Fourth Hague Convention*].

³⁴ WAR CRIMES AGAINST WOMEN, *supra* note 12, at n.132.

³⁵ *Id.* at 41.

³⁶ CLAUD MULLINS, THE LEIPZIG TRIALS, AN ACCOUNT OF THE WAR CRIMINALS TRIALS AND A STUDY OF GERMAN MENTALITY 5 (1921) (quoting a notice issued by the French government on October 5, 1918).

³⁷ WAR CRIMES AGAINST WOMEN, *supra* note 12, at 41.

³⁸ *Id.* at 42, 44.

³⁹ *Id.* at 45.

⁴⁰ *Id.* at 48.

⁴¹ *See generally id.* at 49-95 (detailing the horrific stories of rape during World War II).

the Japanese military.⁴² However, the post-World War II war tribunals largely ignored war rapists and gender-based crimes and instead focused on other war crimes.⁴³

The Nuremberg Trials identified four categories of crimes: conspiracy to wage aggressive war, war crimes, crimes against peace, and crimes against humanity.⁴⁴ War crimes are traditionally divided into four categories of offenses: 1) violations of military norms of war; 2) illegal acts committed by non-military personnel; 3) espionage and treason; and 4) marauding.⁴⁵ The Nuremberg tribunal prosecuted the defendants for the following crimes:

- 1) Killing and cruel treatment of the civilian population on occupied territory and in the open sea;
- 2) Abduction of the civilian population of occupied territories into slavery and for other purposes;
- 3) Killing and cruel treatment of prisoners of war and other servicemen, with whom Germany found itself in a state of war, as well as persons in the open sea;
- 4) Killing of hostages;
- 5) Imposition of extortionate fines;
- 6) Senseless destruction of towns, settlements and villages and devastation unjustified by military necessity;
- 7) Forced recruitment of civilian manpower;
- 8) Germanization of occupied territories.⁴⁶

The Nuremberg tribunals prosecuted many of the customary war crimes such as murder, pillaging, and destruction of towns.⁴⁷ Despite the numerous reports and transcripts which identified forced sterilization, thousands of rapes, forced prostitution, pornography, and sexual mutilation, the International Military Tribunal (“IMT”) Charter neglected to mention “rape” or “sexual assault.”⁴⁸ The tribunals also neglected to prosecute rape despite its classification as customary law under the Lieber Code and the Fourth Hague Convention.⁴⁹ If the prosecutors were

⁴² ROY L. BROOKS, *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 5 (1999).

⁴³ Kelly Dawn Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals*, 93 AM. J. INT'L L. 97, 99 (1999).

⁴⁴ WAR CRIMES AGAINST WOMEN, *supra* note 12, at 126.

⁴⁵ Iu. A. Reshetov, *International Law and Crimes against the Laws and Customs of War*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 167 (George Ginsburgs & V. N. Kudriavtsev eds., Kluwer Academic Publishers 1990).

⁴⁶ N.F. Chistiakov, *The Question of War Crimes at the Nuremberg Trial*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 155-56 (George Ginsburgs & V. N. Kudriavtsev eds., Kluwer Academic Publishers 1990).

⁴⁷ Jocelyn Campanaro, Note, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2561 (2001).

⁴⁸ *Id.*

⁴⁹ Meron, *supra* note 22, at 425-26.

so inclined, rape could have been prosecuted under the indictment for “abduction of civilian population” or as “devastation unjustified by military necessity.”⁵⁰

The IMT drafters and prosecutors had the ability to prosecute and punish the sexually-based crimes during World War II. Their failure to do so suggests an inattentiveness and indifference to sexual crimes such as rape, despite the status of such crimes as crimes under customary law.

2. International Military Tribunal for the Far East

The Allies established the International Military Tribunal for the Far East (“IMTFE”) to prosecute the Japanese war criminals.⁵¹ The categories of crimes were similar to the categories established during the Nuremberg tribunals: war crimes, crimes against peace, and crimes against humanity.⁵² Similar to the Nuremberg Charter, the Tokyo Charter did not enumerate rape as a prosecutable violation.⁵³ However, the Tokyo Charter, unlike the Nuremberg Charter, included rape as one of the crimes in the indictment. The Tokyo Charter charged the defendants for acts “carried out in violation of recognized customs and conventions of war . . . [including] mass murder, rape . . . and other barbaric cruelties.”⁵⁴

Defendants were not prosecuted for rape as separate crimes but were instead prosecuted for general crimes such as prohibitions against “inhumane treatment,” “ill-treatment” and “failure to respect family honour and rights.”⁵⁵ Furthermore, the IMTFE found Japanese officials guilty of rape only because they failed to ensure that their subordinates complied with international law.⁵⁶ The Japanese officials were therefore not indicted because of the gravity of rape as a war crime on its own merit.

The inclusion and prosecution of rape in the IMTFE is significant, however, as it was the first time a military tribunal prosecuted and convicted officials of wartime rape. General Tomoyuki Yamashita, a high-ranking Japanese official, was charged with “[t]orture, rape, murder and mass executions of very large numbers of residents of the Philippines, including women and children”⁵⁷ This case was highly significant because it set forth the precedent that a wartime official could not rape civilian women or know of such rapes by lower ranking officials and stand

⁵⁰ WAR CRIMES AGAINST WOMEN, *supra* note 12, at 138.

⁵¹ *Id.* at 164.

⁵² *Id.* at 170.

⁵³ John Cerone, *Holding Military and Paramilitary Forces Accountable*, in HUMAN RIGHTS AND CONFLICT: EXPLORING THE LINKS BETWEEN RIGHTS, LAW, AND PEACEBUILDING 217, 227 (Julie A. Mertus & Jeffery W. Helsing eds., 2006).

⁵⁴ *Id.* at 180.

⁵⁵ Campanaro, *supra* note 47, at 2563.

⁵⁶ Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 410 (1998).

⁵⁷ *Yamashita v. Styer*, 327 U.S. 1, 51 n.13 (1946) (denying habeas corpus petition of General Yamashita).

idly by.⁵⁸ For the first time, rape was considered a crime which could be prosecuted by an international military tribunal.⁵⁹

Although prosecuting rape was both important and groundbreaking, the fact that the Charter did not name rape as one of the crimes committed by the defendants suggests that the crime of sexual assault remained callously neglected.⁶⁰ Instead of prosecuting rape as a crime by itself, rape was merely considered a subdivision of other crimes, and defendants were only charged with rape in connection with other, "greater" offenses.⁶¹ In order for wartime rapists to be adequately prosecuted, rape must be addressed in its own category so that courts will give such crimes the requisite amount of attention. The IMTFE went further than the Nuremberg war tribunals by prosecuting rape during the war while the Nuremberg war tribunals neglected to recognize the occurrence of rape.⁶² However, the lack of significance or importance attached to the rape charges in the IMTFE reinforces the historical view that gender-based crimes, such as rape, are perceived as lesser crimes and should be viewed within the framework of other, more important crimes.

C. Rape as a Crime Following World War II

Although rape was not given particular attention or significance during the World War II military tribunals, the Fourth Geneva Convention of 1949 prohibited rape of civilians, stating in Article 27 that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."⁶³ In Article 147, the Convention also prohibits "torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health."⁶⁴ Once again, despite this seemingly important breakthrough of banning serious injury and biological experiments, the Geneva Convention failed to list rape as one of the "grave breaches" which could be criminalized and punished.⁶⁵

⁵⁸ See *id.* at 51 n.15.

⁵⁹ Campanaro, *supra* note 47, at 2564.

⁶⁰ WAR CRIMES AGAINST WOMEN, *supra* note 12, at 203.

⁶¹ Campanaro, *supra* note 47, at 2564.

⁶² WAR CRIMES AGAINST WOMEN, *supra* note 12, at 163, 203.

⁶³ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁶⁴ *Id.* at art. 147.

⁶⁵ Cerone, *supra* note 53.

III. PROSECUTING RAPE CRIMES IN THE MILITARY TRIBUNALS OF RWANDA AND YUGOSLAVIA

Rape has long been used as a tactic of war to intimidate, scare, and terrorize the enemy and civilian population.⁶⁶ In Rwanda and Yugoslavia, rape was also used, in addition to these stated reasons, as a method of ethnic cleansing.⁶⁷

As many as 50,000 women were raped in Bosnia and Herzegovina during the 1990s and that figure continued to grow during the Balkan conflict.⁶⁸ Just as World War II was remembered for the killing of six million Jews, the Balkan conflict will be remembered for “manipulation and abuse of the female gender to commit ethnic cleansing and genocide.”⁶⁹ Women were raped in their own homes, during flight, and while they were in detention.⁷⁰ Similarly, in Rwanda, women of the Tutsi ethnic group were systematically raped by HIV-infected men recruited and organized by the Hutu-led government.⁷¹

In response to the atrocities in Balkan conflict the United Nations Security Council established a Commission of Experts to examine and investigate the humanitarian violations in Yugoslavia.⁷² The United Nations Security Council responded by calling for the creation of an ad hoc international war crimes tribunal,⁷³ which eventually became known as the International Criminal Tribunal for the former Yugoslavia (“ICTY”). The following year, a U.N. Security Council established a Commission of Experts to investigate the crimes in Rwanda.⁷⁴ The U.N. Special Rapporteur on Rwanda discovered that rape “was the rule and its absence the exception”⁷⁵ and that many of these rapes led to pregnancy.⁷⁶ After discovering such horrific humanitarian violations and hundreds of thousands of murders, the Security Council established a successful international war crimes tribunal known as the International Criminal Tribunal for Rwanda (“ICTR”).⁷⁷

⁶⁶ See generally Campanaro, *supra* note 47.

⁶⁷ HUMAN RIGHTS WATCH, FEDERAL REPUBLIC OF YUGOSLAVIA: KOSOVO: RAPE AS A METHOD OF “ETHNIC CLEANSING” (2000), available at <http://www.hrw.org/reports/2000/fry/Kosov003.htm>.

⁶⁸ StopRapeNow.org, Security Council Resolution 1820: Women, Peace, and Security, <http://www.stoprapenow.org/pdf/Security%20Council%20Resolution%201820.pdf> (last visited Apr. 8, 2010).

⁶⁹ WAR CRIMES AGAINST WOMEN, *supra* note 12, at 296.

⁷⁰ HUMAN RIGHTS WATCH, *supra* note 67.

⁷¹ Francoise Nduwimana, *Women and Rwanda's Genocide: What Goes Unsaid*, PEACEWOMEN, Dec. 2004, <http://www.peacewomen.org/news/Rwanda/Dec04/genocide.html>.

⁷² S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992).

⁷³ S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

⁷⁴ S.C. Res. 935, U.N. Doc. S/RES/935 (July 1, 1994).

⁷⁵ 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 (Jan. 29, 1996), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/ae2ff8ad005e2f6802566f30040a95a?Opendocument>.

⁷⁶ Kelly Dawn Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 300 (2003) [hereinafter *Prosecuting Wartime Rape*].

⁷⁷ S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

A. Yugoslav Tribunal

The U.N. established the ICTY in 1993 and the Security Council authorized the ICTY to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁷⁸ The ICTY has identified rape as a serious violation of international human rights and explicitly identified rape as a crime against humanity in the Statute of the International Tribunal.⁷⁹ The tribunal also has jurisdiction over the grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity.⁸⁰

The ICTY was instrumental in furthering the protection of women during wartime because, for one of the first times in history, the tribunal prosecuted rapists as violating crimes against humanity.⁸¹ In *Prosecutor v. Delalic*, decided in 1998, Hazim Delic, a Serbian prison camp guard, was charged with repeatedly raping two non-Serbian female prisoners.⁸² The Prosecutor argued that these rapes amounted to torture and violated articles two and three of the ICTY Statute.⁸³ Article 2(b) identifies “torture or inhumane treatment” as one of the grave breaches of the Geneva Conventions of 1949.⁸⁴ Article three of the Statute prohibits violations of the customs laws and of war, including torture.⁸⁵ Using the standard for rape set forth in the Torture Convention, the ICTY convicted Delic of violations of articles two and three on the basis that the rapes by Delic, a public official, amounted to torture.⁸⁶ The case was also groundbreaking because the court found that a person who did not commit rape could still be liable for that crime under the doctrine of command responsibility.⁸⁷

Furthermore, in February 2001, the ICTY released its decision of *Prosecutor v. Kunarac* which provided the first convictions of rape and enslavement as a crime against humanity and recognized the individual’s rights to autonomy.⁸⁸ The ICTY noted:

Force, threat of force or coercion are certainly relevant considerations in many legal systems but the full range of provisions referred to in that judgment suggest that the true common denominator which unifies the

⁷⁸ S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992).

⁷⁹ *Prosecuting Wartime Rape*, *supra* note 76, at 311, 314.

⁸⁰ See generally *id.*

⁸¹ Christine Strumpen-Darrie, *Rape: A Survey of Current International Jurisprudence*, HUMAN RIGHTS BRIEF, <http://www.wcl.american.edu/hrbrief/v7i3/rape.htm> (last visited Apr. 8, 2010).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Strumpen-Darrie, *supra* note 81.

⁸⁷ Valerie Oosterveld, *Prosecution of Gender-Based Crimes in International Law*, in GENDER, CONFLICT, AND PEACEKEEPING 72 (Dyan Mazurana, Angela Raven-Roberts, & Jane Parpart eds., 2005).

⁸⁸ *Id.* at 73.

various systems may be a wider and more basic principle of penalising violations of sexual autonomy.⁸⁹

Kunarac established the intrinsic connection between human dignity and bodily integrity. *Furundzija*, decided in 1998, was also groundbreaking because it was the first indictment to focus solely on rape charges and on the sexual assault of one woman.⁹⁰

B. Rwandan Tribunal

Like the ICTY, the ICTR also paved the way for prosecuting rape as an international crime and violation of international law. The Security Council established the ICTR in 1994 to prosecute “persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda.”⁹¹ One of the most important aspects of the ICTY and the ICTR is that they explicitly named rape as a crime against humanity.⁹² The ICTR also recognized rape as a form of genocide.⁹³

In *Prosecutor v. Jean-Paul Akayesu*, the ICTR convicted Akayesu, the mayor of Taba Commune in Rwanda, under Article 3(g) of the ICTR, for ordering and witnessing the rape of Tutsi women.⁹⁴ Article 3(g) identifies rape as a crime against humanity if the rape was committed as part of a widespread or systematic attack against any civilian population.⁹⁵ The trial court defined rape as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”⁹⁶ Because the women were targeted as a result of their Tutsi ethnicity, the court decided that Akayesu was guilty of rape as a crime against humanity.⁹⁷ This prosecution was also highly significant because it was the first international conviction for rape as a constituent part of genocide.⁹⁸ Judge Navanethem Pillay, following the verdict, said: “From time immemorial, rape has been regarded as spoils of war. Now it will be considered a war crime. We want to send out a strong message that rape is no longer a trophy of war.”⁹⁹ Such a message is highly significant, given the history of neglect in prosecuting rape victims during the time of war.

⁸⁹ *Id.*

⁹⁰ *Id.* at 79.

⁹¹ S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁹² Strumpen-Darrie, *supra* note 81.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Kelly Dawn Askin, *Legal Precedents in Rwanda Court*, THE TRIBUNALS, May 2001, http://www.crimesofwar.org/tribun-mag/rwanda_print.html.

⁹⁷ Strumpen-Darrie, *supra* note 81.

⁹⁸ Oosterveld, *supra* note 87, at 72.

⁹⁹ Women’s Rights and Development Centre, Rape and Sexual Violence, <http://womenrightsdevelopment.org/sexual.htm> (last visited Apr. 8, 2010).

C. Effects of Yugoslav and Rwandan War Tribunals

The ICTY and the ICTR both brought about important changes within the international legal community regarding gender-based crimes and rape. The tribunals prosecuted sexual violence crimes in areas of armed conflict, as a tool of genocide, and as a crime against humanity.¹⁰⁰ One of the most important contributions of the Tribunals was that they paved the way for the development and passage of the Rome Statute, which created the ICC. The Rome Statute of the ICC incorporated the definitions of rape from both the ICTY and the ICTR.¹⁰¹ The Rome Statute specifically made rape an individual crime and defined rape as a war crime and crime against humanity.¹⁰²

Despite these remarkable advances within the sphere of women's rights and protections, the nature of military tribunals cannot adequately protect the needs of women in conflicted areas. For example, the majority of the cases have ended in acquittal because prosecutors do not have strong evidence to proceed with rape charges, especially with regards to top military and government officials.¹⁰³ In the case of *Prosecutor v. Kajelijeli*, the defendant was acquitted of the rape charge because the witness' testimony was not credible.¹⁰⁴ The Prosecutor decided to file an appeal but missed the deadline; the Appeals Chamber therefore denied the Prosecutor's appeal.¹⁰⁵ This is a prime example of the inefficiency and negligence inherent in prosecuting rapists during wartime. Furthermore, the investigations have been poor in quality and are often not ready for trial when handed over to the Prosecutor's office.¹⁰⁶ The investigators often do not have experience with rape victims and a majority of the investigators are male.¹⁰⁷ Each of these factors makes it more difficult to collect the evidence and testimonies necessary for a prosecution, leaving many alleged rapists and war criminals acquitted due to inadequate evidence.

Other shortcomings are inherent in the formation of ad hoc tribunals. First, the tribunals were established solely to respond to the local atrocities which were occurring in the war stricken areas. Therefore, the decisions should be narrowly construed and viewed within the context of the country and war. Furthermore, "victor's justice" is often manifested during post-war prosecutions, and that notion

¹⁰⁰ Oosterveld, *supra* note 87, at 79.

¹⁰¹ Center on Law and Globalization, *The Statute of the International Criminal Court Protects against Sexual Crimes*, http://clg.portalxm.com/library/keytext.cfm?keytext_id=204 (last visited Apr. 8, 2010).

¹⁰² Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, U.N. Doc. A/CONF.183/9* (July 17, 1998) [hereinafter Rome Statute].

¹⁰³ BINAIFER NOWROJEE, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, "YOUR JUSTICE IS TOO SLOW": WILL THE ICTR FAIL RWANDA'S RAPE VICTIMS? 13 (UNRISD 2005).

¹⁰⁴ *Id.* at 18.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 12, 13.

¹⁰⁷ *Id.* at 12.

is often translated into the decisions rendered. The ICC has attempted to address these shortcomings and has been largely successful over the past five years, but at the same time has failed to gain the support and ratification of countries such as the United States.¹⁰⁸ An international standard is therefore still necessary to ensure the protection of women during wartime.

IV. INTERNATIONAL CRIMINAL COURT AND PROSECUTION OF GENDER CRIMES

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, known as the “Rome Conference,” took place from June 15 to July 17, 1998 in Rome, Italy, and culminated with the establishment of the ICC.¹⁰⁹ The NGO Coalition also closely monitored these discussions, distributing information on developments worldwide and facilitating the participation and parallel activities of hundreds of NGOs.¹¹⁰ After five weeks of intense negotiations, seven nations voted against the treaty—the United States, Israel, China, Iraq, Libya, Qatar and Yemen—and 120 nations voted in favor of the adoption of the Rome Statute of the ICC, with twenty-one states abstaining.¹¹¹ Since its inception, the ICC prosecutor has opened investigations in the DRC, northern Uganda, the Darfur region of Sudan, and the Central African Republic (“CAR”).¹¹² These investigations have led to criminal charges against at least twelve alleged perpetrators who would probably have never been prosecuted.¹¹³

The creation of the ICC by the Rome Statute further protected the rights of women by prosecuting gender based crimes. The Rome Statute was the first international criminal law treaty to use and define the term “gender.”¹¹⁴ The Rome Statute defined gender as “the two sexes, male and female, within the context of society.”¹¹⁵ The Rome Statute grants the ICC jurisdiction over four major areas of crimes: genocide, war crimes, crimes against humanity, and aggression.¹¹⁶ The ICC prosecutor can choose to prosecute rape or other gender-based crimes as a war

¹⁰⁸ Diane Marie Amann, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVth International Congress of Comparative Law: Section IV The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 381 (2002).

¹⁰⁹ Coalition for the International Criminal Court, History of the ICC, <http://www.iccnw.org/?mod=icchistory> (last visited Apr. 8, 2010); Coalition for the International Criminal Court, Rome Conference, <http://www.iccnw.org/?mod=rome> (last visited April 30, 2010).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT’S FIRST YEARS 4 (2008), available at http://www.hrw.org/sites/default/files/reports/icc0708_1.pdf [hereinafter COURTING HISTORY].

¹¹³ *Id.*

¹¹⁴ Rome Statute, *supra* note 102, at art. 7.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

crime or as crimes against humanity.¹¹⁷ The passing of the Rome Statute thus allows for more gender-based crimes to be prosecuted.

A. Negotiations to Ensure Protections for Women in the ICC

As the developments and plans for the ICC got underway and the drafting of the Rome Statute began, it became clear that drafters were not taking women's protections into consideration.¹¹⁸ Activists such as the Women's Caucus for Gender Justice formed to lobby and ensure that women would be afforded protection under the Rome Statute.¹¹⁹ The goal of the Women's Caucus was to firmly ingrain the principles of gender justice and accountability for crimes of sexual and gender violence in the Rome Statute¹²⁰ by attending and advocating at the Rome Diplomatic Conference.¹²¹ One reason cited for the success of these activist groups was the conflicts in the former Yugoslavia and Rwanda.¹²² The creation of the ICTY and the ICTR ad hoc tribunals and their prosecutions publicized the sexual violence crimes and shocked the world.¹²³ Therefore, such sexual issues received much more attention at the Rome Diplomatic Conference.¹²⁴

The negotiations at the Rome Diplomatic Conference yielded tremendous successes in the sphere of women's rights. Firstly, the women's activist groups worked hard to replace the word "sex" with "gender." Although the hostile states worked to ensure that the word "gender" would not be present within the statute, the activists believed that term "sex" was too narrow and did not fully encompass all of the crimes that should be prosecuted. The word "gender" is broader because it includes differences caused by social-construed rules.¹²⁵ The word "sex," however, only includes biological differences.¹²⁶ Similarly, "gender crimes" is a better term than "sexual violence" because it includes a wider range of crimes including crimes which target men or women because of their gender roles and do not necessarily have a sexual component to them.¹²⁷ The use of the terms "gender" and "gender violence" within the Rome Statute allows for a broader base for prosecutions and continues the tradition of using this broader concept in

¹¹⁷ Tina R. Karkera, Comment, *The International Criminal Court's Protection of Women: The Hands of Justice at Work*, 12 AM. U.J. GENDER SOC. POL'Y & L. 197, 204 (2003).

¹¹⁸ Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 66 (1999), available at <http://www.peacewomen.org/resources/Justice/GBCICC.html>.

¹¹⁹ Women's Initiatives for Gender Justice, History, <http://www.iccwomen.org/aboutus/history.php> (last visited Apr. 8, 2010).

¹²⁰ *Id.*

¹²¹ Bedont & Hall Martinez, *supra* note 118, at 66-67.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 68.

¹²⁶ Bedont & Hall Martinez, *supra* note 118, at 68.

¹²⁷ *Id.*

international instruments. Therefore, the terminology used in the Rome Statute was indeed a success for the protection of women's rights. Similarly, the substance of the Rome Statute, particularly Articles 7 and 8, also provided tremendous protections for women.¹²⁸

1. Article 7 and Article 8

Under Article 7 of the Rome Statute, the ICC is given jurisdiction over "crimes against humanity."¹²⁹ Such crimes are defined as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."¹³⁰ Included in the list of acts are "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."¹³¹

Article 8 of the Rome Statute provides for jurisdiction over war crimes. The category of war crimes is the oldest category of crimes mentioned in the Rome Statute.¹³² Under Article 8, the ICC has jurisdiction over war crimes, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."¹³³ Article 8 contains four different categories of war crimes: "[g]rave breaches of the Geneva Conventions,"¹³⁴ "serious violations of the laws and customs applicable in international armed conflict,"¹³⁵ "serious violations of article 3 common to the . . . Geneva Conventions of . . . 1949,"¹³⁶ and "other serious violations" in non-international armed conflicts.¹³⁷

Under these broad terms and categories, the ICC has the ability to prosecute and investigate many gender-based crimes. The terminology and the content of the Rome Statute certainly paved the way towards taking gender-based crimes seriously and prosecuting them accordingly. Despite tremendous successes, the ICC's court system does not sufficiently ensure the protection of women, especially in armed conflict.

B. Shortcomings of the ICC

On April 11, 2002, the sixtieth country ratified the statute, causing the Rome Statute to enter into force.¹³⁸ The treaty thus became effective on July 1, 2002.¹³⁹

¹²⁸ See Rome Statute, *supra* note 102, at arts. 7 & 8.

¹²⁹ *Id.* at Part 2, art. 7.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Karkera, *supra* note 117.

¹³³ Rome Statute, *supra* note 102, at Part 2, art. 8.

¹³⁴ *Id.* at Part 2, art. 8(a).

¹³⁵ *Id.* at Part 2, art. 8(b).

¹³⁶ *Id.* at Part 2, art. 8(c).

¹³⁷ *Id.* at Part 2, art. 8(e).

¹³⁸ Coalition for the International Criminal Court, *supra* note 109.

¹³⁹ *Id.*

By June 2003, the first of the eighteen judges and the ICC prosecutor were sworn into office, allowing the ICC to finally become a reality.¹⁴⁰ Since coming into force, the ICC has made tremendous headway in prosecuting some of the worst criminal offenses. Five years after its inception, Human Rights Watch released a report detailing the successes and shortcomings of the court.¹⁴¹ In particular, Human Rights Watch has detailed three different areas of the ICC which are in need of attention and change.¹⁴² Each of these areas has a tremendous impact on women and the prosecution of gender crimes.

First, the Office of the Prosecutor must improve its capacity to conduct investigations by recruiting more investigators.¹⁴³ Second, the ICC should also attempt to embark on a more targeted and tailored outreach campaign to increase its impact.¹⁴⁴ Lastly, Human Rights Watch suggests enhancing its level of field engagement and making field offices more accessible in affected communities.¹⁴⁵

1. Office of the Prosecutor

One shortcoming of the Office of the Prosecutor is that investigations are often dependent on the precarious security situation in the countries under investigation.¹⁴⁶ Key witnesses will agree to testify and meet at a specified time, but circumstances change quickly, making witnesses unable to travel to meet the investigative team when the team reaches the field.¹⁴⁷ This problem also specifically affects victims of rape and other gender-based crimes. Such victims are often reluctant to share their stories, and when they are finally willing to share, they often cannot because the investigative teams are not on-site to speak with them.¹⁴⁸ Human Rights Watch therefore suggested that the Office of the Prosecutor consider basing members of investigative teams in the field, which would increase the quality and efficiency of the investigations.¹⁴⁹ Field-based investigators can respond more quickly to a potential investigation, better understand the political context of the conflict, and develop stronger relations with the important actors who can help with the investigation's progress.¹⁵⁰ Most importantly, field-based investigators can gain the trust of victims over a longer period of time, which can be quite helpful with regard to rape victims.

¹⁴⁰ COURTING HISTORY, *supra* note 112, at 4.

¹⁴¹ See HUMAN RIGHTS WATCH, ICC: GOOD PROGRESS AMID MISSTEPS IN FIRST FIVE YEARS, available at <http://www.hrw.org/en/news/2008/07/10/icc-good-progress-amid-missteps-first-five-years> (last visited Apr. 11, 2010).

¹⁴² *Id.*

¹⁴³ COURTING HISTORY, *supra* note 112, at 6.

¹⁴⁴ *Id.* at 7.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 50.

¹⁴⁷ *Id.* at 55.

¹⁴⁸ See COURTING HISTORY, *supra* note 112, at 56.

¹⁴⁹ *Id.* at 48.

¹⁵⁰ *Id.*

2. Outreach

The ICC's goals of outreach and communication to the affected communities are extremely important but exceedingly difficult. Effective communication can help disseminate information to communities as well as reduce the likelihood of misconceptions about the court, thereby increasing the court's overall impact.¹⁵¹ Much work therefore must be done within the sphere of outreach. In particular, the Office of the Prosecutor and the ICC must respond to the negative perceptions that some have of the ICC. In many cases, the misperceptions stem from a lack of knowledge of the actions of the ICC representatives because of a failure of communication, and simple communication can rectify such situations.¹⁵²

Furthermore, to maintain an effective outreach program, the Court must identify the target audiences and tailor its message specifically toward those groups. As the strategy is currently drafted, however, there is no mention of plans to address the different factions and heterogeneity within the target audiences.¹⁵³ The court must be attuned to the political climate on the ground and address the needs of different victims within affected communities. Rape victims are particularly vulnerable and often harbor feelings of shame and isolation following the trauma.¹⁵⁴ Therefore, the ICC must reach out to the victims to ensure that they have an opportunity to be heard, and that they recognize the desire and ability of the ICC to prosecute the crimes they have experienced.

3. Field Engagement

After the establishment of the ICC, the prevailing notion at the ICC was that field offices were unnecessary and that most of the investigations could be conducted from the base in The Hague.¹⁵⁵ Some of the reasons cited for not establishing field offices included the overall expense of such offices and the compromising of witnesses and confidentiality if the court was too visible to the public.¹⁵⁶ Therefore, field offices were not included in any of the initial budget discussions.¹⁵⁷ Soon after, though, the Office of the Prosecutor realized that conducting investigations from The Hague without an active presence in the field was detrimental to the investigations.¹⁵⁸ Starting in 2005, the ICC established

¹⁵¹ *Id.* at 145-46.

¹⁵² *Id.* at 37.

¹⁵³ COURTING HISTORY, *supra* note 112, at 134.

¹⁵⁴ HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE: BARRIERS TO JUSTICE FOR RAPE VICTIMS IN RWANDA 13 (2004), available at <http://www.hrw.org/sites/default/files/reports/rwanda0904.pdf> [hereinafter STRUGGLING TO SURVIVE].

¹⁵⁵ COURTING HISTORY, *supra* note 112, at 101.

¹⁵⁶ *Id.*

¹⁵⁷ See International Criminal Court, Assembly of States Parties, ICC-ASP/1/Res. 12 (Sept. 3, 2002), available at http://untreaty.un.org/cod/icc/asp/1stsession/report/english/part_iv_res_12_e.pdf.

¹⁵⁸ COURTING HISTORY, *supra* note 112, at 102.

some field offices to rectify these issues.¹⁵⁹ The court has slowly recruited international and local field-based staff to work in the offices on areas including outreach, victims' participation, the Trust Fund for Victims, witness protection and investigative support.¹⁶⁰

The field offices have been tremendously successful in certain areas, such as in the distribution and collection of victims' participation forms and in making contact with potential victims in investigations.¹⁶¹ However, the process of creating field offices has been extremely slow and discreet, which often appears to the public as "secrecy."¹⁶²

In order to maximize the effectiveness of the ICC, the ICC should create more field offices which are visible to the public. Creating public field offices will, first, give more credibility and appeal to the Court by having its activities visible to the public. Victims will probably be more likely to approach members of the field office. Second, Human Rights Watch suggests moving the field offices closer to affected communities.¹⁶³ Especially with regard to rape victims, the closer the field offices are to the victims, the more likely it will be that investigations can proceed with cooperation. Many security issues arise in areas where investigations take place but the ICC must work to engage victims and provide support to them. One idea suggested "opening small public outposts in certain locations as a way to create a more public presence close to affected communities without having to face the entire range of obstacles to creating a full office."¹⁶⁴ This would allow field workers to interact with the affected population and potentially avoid some of the security issues. Field offices are integral to the success of the ICC and without these offices many victims, especially rape victims, will not enjoy protection or witness prosecutions of the perpetrators.

C. Evaluation of the ICC and War Crimes Tribunals in Relation to Rape Victims

The ICC, ICTY and ICTR have all been tremendously successful in paving the way for prosecuting war criminals. These tribunals are also notable because they each examined gender-based crimes in a serious manner and prosecuted such crimes appropriately. These tribunals therefore serve a very important purpose during war time and in conflicted areas. However, the nature of ad hoc tribunals and the ICC does not fully protect victims of gender-based crimes. Ad hoc tribunals are limited by their mandate and can only prosecute criminals in a given context. The ICC has broader jurisdiction but often the decision can be narrow and limited to the immediate circumstances. Thus, no perfect solution exists towards

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 103.

¹⁶¹ *Id.* at 104.

¹⁶² *Id.*

¹⁶³ COURTING HISTORY, *supra* note 112, at 105.

¹⁶⁴ *Id.* at 107.

helping victims of rape and other gender-based crimes. As noted below, rape is still widespread in areas of conflict and must continue to be addressed by the United Nations.

V. CURRENT SITUATION WITH WAR ZONES AND RESPONSE

The current situation for women living in war conflicted areas is deplorable. The Military Tribunals of Rwanda and Yugoslavia have made important headway in prosecuting rape as a war crime; however, the ad hoc trials did not fully and adequately address the issue of wartime rape.¹⁶⁵ Although rape during war has been a common occurrence for thousands of years, “it has taken a new twist as commanders have used it as a strategy of war.”¹⁶⁶ Two reasons are often cited for the use of mass rape during armed conflict. The first is that mass rape allows the enemy to terrorize and subdue the enemy population before destroying it.¹⁶⁷ Attacking a foreign country with arms and full force can be risky to the militia, so armies often subdue the rival citizens through rape to help bolster the militia’s stronghold in the area.¹⁶⁸ Furthermore, mass rape often goes undetected because the victims are ashamed of their abuse.¹⁶⁹ Additionally, there is rarely photographic documentation of such crimes as there are for mass murders.¹⁷⁰

Currently, women across conflicted regions live under the fear and threat of rape. It is estimated that in certain regions of the Congo, up to three-quarters of women have been subjected to sexual assault and violence.¹⁷¹ Females as young as six and as old as seventy have been raped in the DRC.¹⁷² The perpetrators rape pregnant, ill, and disabled women who cannot flee.¹⁷³ Armed forces often commit gang rape where groups of up to twenty men will rape the same group of women.¹⁷⁴ The perpetrators often do not only rape a girl, but subject her to extreme torture and violence.¹⁷⁵ In some cases, the rapists will torture a woman by inserting a rifle, knife, sharpened piece of wood, glass, rusty nails, stones, sand or peppers into her vagina, causing serious physical injury and pain.¹⁷⁶ Similarly, in

¹⁶⁵ See STRUGGLING TO SURVIVE, *supra* note 154, at 57.

¹⁶⁶ Nicholas D. Kristof, *The Weapon of Rape*, N.Y. TIMES, June 15, 2008, available at <http://www.nytimes.com/2008/06/15/opinion/15kristof.html>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Kristof, *supra* note 166.

¹⁷² Media Briefing, Amnesty International, Democratic Republic of Congo: Mass Rape - Time for Remedies 17, (Oct. 25, 2004), available at <http://www.amnesty.org/en/library/asset/AFR62/018/2004/en/618e1ff2-d57f-11dd-bb24-1fb85fe8fa05/afr620182004en.pdf>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

other war-stricken countries, such as Darfur, women are branded after being sexually assaulted and occasionally have their ears cut off.¹⁷⁷ One victim recalls being kidnapped, gang raped, mutilated, slashed on the leg with a sword and then left naked and bleeding to find her way back to her tribe.¹⁷⁸ In Papua New Guinea, rape has become so common that women taking the bus between towns will insert female condoms because they are almost certain to be raped.¹⁷⁹ In this manner they can protect themselves from unwanted pregnancy, sexually transmitted diseases, and HIV.¹⁸⁰

A. Security Council Resolution 1820

The United Nations and the international community have been relatively quiet and slow in addressing the increasing problem of rape as a war tactic. The U.N. passed Resolution 1325 in 2000, which was the first resolution ever passed by the Security Council that specifically addresses the impact of war on women and women's contributions to conflict resolution.¹⁸¹ The Resolution specifically "[c]alls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict."¹⁸²

Seven years after its implementation, the U.N. held a day-long open meeting to discuss the implementation of the Resolution.¹⁸³ U.N. Secretary General Ban Ki-Moon noted that mass rape as a weapon of war "has reached hideous and pandemic proportions."¹⁸⁴ The Under Secretary General for Peacekeeping Operations Jean-Marie Guéneno recognized that for seven years the focus has been on implementing parts of Resolution 1325, but urged a new approach: "A concerted integrated approach [is] needed to address rape and sexual violence in conflicts and post-conflict situations."¹⁸⁵

Less than one year after the meeting, the U.N. Security Council passed Resolution 1820 on June 19, 2008. The passing of the Resolution was preceded by a day long discussion of women and peace, chaired by the United States.¹⁸⁶

¹⁷⁷ Kristof, *supra* note 166.

¹⁷⁸ *Id.*

¹⁷⁹ News Release, Gill Greer, International Planned Parenthood Foundation, Rape: The Oldest and Newest War Crime (June 20, 2008), available at <http://www.ippf.org/en/News/Press-releases/Rape+the+oldest+and+newest+war+crime.htm>.

¹⁸⁰ *Id.*

¹⁸¹ PeaceWomen.org, United Nations Security Council Resolution 1325 on Women, Peace, and Security, <http://www.peacewomen.org/un/sc/1325.html> (last visited Apr. 8, 2010).

¹⁸² S.C. Res. 1325, *supra* note 20.

¹⁸³ See Ban Ki-moon, Secretary-General, United Nations, Remarks to the Security Council on Women, Peace and Security (Oct. 23, 2007), available at http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=142.

¹⁸⁴ *Id.*

¹⁸⁵ Family Violence Prevention Fund, U.N. Finds 'Hideous' Violence Follows Conflicts, <http://endabuse.org/content/features/detail/923/> (last visited Apr. 8, 2010).

¹⁸⁶ T. Vishnu Jayaraman, *Security Council Debate: 'Sexual Violence Affects Health and Safety of*

Secretary of State Rice questioned whether sexual violence was an issue to be mandated by the Security Council.¹⁸⁷ She answered her own question by saying “we respond to that lingering question with a resounding yes.”¹⁸⁸ Approximately one year prior, the Security Council attempted to pass a similar resolution but Russia, China, and South Africa refused to sign, claiming that such a topic was not under the purview of the Security Council.¹⁸⁹ This year, Russia, Indochina, and China similarly expressed reservations, citing similar reasons, but the Resolution was still passed unanimously.¹⁹⁰ Under Resolution 1820, rape is classified for the first time as a tactic of war and a threat to international security.¹⁹¹

Security Council Resolution 1820 specifically demands the cessation of violence against women as a war tactic. The Resolution stresses:

that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security, *affirms* in this regard that effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security, and *expresses its readiness*, when considering situations on the agenda of the Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence.¹⁹²

Importantly, the Resolution identifies rape as a war crime: “[R]ape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide.”¹⁹³ But how will this Resolution practically affect the hundreds of women who are being raped and beaten each day? Under the Resolution, the U.N. will be required to collect and analyze the information on sexual violence in conflict areas and to subsequently give over the information to the governments and the States who allow the use of rape.¹⁹⁴

Women’ 2008 Resolution Declares Rape Can Constitute a War Crime, U.N. CHRONICLE, available at http://www.un.org/Pubs/chronicle/2008/webarticles/080630_violence_against_women.html.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Kathambi Kinoti, *New Security Council Resolution on Sexual Violence in Conflict*, CHOIKE, July 7, 2008, http://www.choike.org/nuevo_eng/informes/6828.html.

¹⁹⁰ Womensphere, U.N. Classifies Rape a ‘War Tactic,’ available at <http://womensphere.wordpress.com/2008/06/24/un-classifies-rape-a-war-tactic/> (last visited Apr. 8, 2010).

¹⁹¹ S.C. Res. 1820, *supra* note 5, ¶ 5.

¹⁹² Press Release, U.N. Security Council, Security Council Demands Immediate and Complete Halt to Acts of Sexual Violence Against Civilians in Conflict Zones, Unanimously Adopting Resolution 1820, U.N. Doc. SC/9364 (June 19, 2008), available at <http://www.un.org/News/Press/docs/2008/sc9364.doc.htm> (emphasis added).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

The Resolution is clearly an important step in protecting women and mass rape victims in conflicted areas. Women's rights groups lauded the Security Council for passing the Resolution, stating that "[t]he resolution makes some important breakthroughs and goes further than prior resolutions to protect women and girls in conflict situations."¹⁹⁵ Others recognize that it is "an important and welcome step"¹⁹⁶ to ending violence against women in war-stricken areas and is a "historic achievement for a body that has all too often ignored the plight of women and girls in conflict"¹⁹⁷ At the same time, some realize that although the Resolution is historic, it is no legal remedy because "[t]ens of thousands of victims of sexual violence in Bosnia still do not have the status of victims of the war."¹⁹⁸

B. Effects of Resolution 1820

With the recent passing of Resolution 1820, the international community and women's rights organizations are wondering whether the Resolution will have any effect on stopping rape in war zones and what the larger implications of such a resolution will be. The Resolution undeniably boasts some wonderful strengths. First, the Resolution will allow the crime of wartime rape to be tried in front of the ICC and other international military tribunals.¹⁹⁹ The ICC Statute in Article 8(1) states that "the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."²⁰⁰ In order to convict a criminal of war crimes for acts committed during war, "the prosecutor must demonstrate some nexus with the armed conflict."²⁰¹ The Resolution now recognizes that "sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security"²⁰² Therefore, rape can now be considered a "plan" or a "large scale commission" instead of simply being viewed as a crime committed on an individual level by renegade soldiers and can be prosecuted under Article 8(1) of the ICC Statute.

¹⁹⁵ Nicole Slezak, *U.N.S.C. Resolution 1820*, ADVOC. PROJECT, June 20, 2008, http://www.advocacynet.org/blogs/index.php/2008/06/20/unscl_resolution_1820?blog=119.

¹⁹⁶ SAM COOK, PEACEWOMEN PROJECT, SECURITY COUNCIL RESOLUTION 1820: A MOVE TO END SEXUAL VIOLENCE IN CONFLICT (2008), http://www.peacewomen.org/un/sc/Open_Debates/Sexual_Violence08/PW_1820_Analysis.pdf.

¹⁹⁷ Human Rights Watch, *U.N.: Finally, a Step Toward Confronting Rape in War*, <http://www.hrw.org/english/docs/2008/06/19/global19161.htm> (last visited Apr. 8, 2010).

¹⁹⁸ Slavenka Drakulic, *Rape as a Weapon of War*, N.Y. TIMES, June 23, 2008, available at <http://www.nytimes.com/2008/06/26/opinion/26iht-eddrakulic.1.14013076.html>.

¹⁹⁹ S.C. Res. 1820, *supra* note 5.

²⁰⁰ Rome Statute, *supra* note 102, at art. 8(1).

²⁰¹ Posting of Beth Van Schaack to IntLawGrrls, <http://intlawgrrls.blogspot.com/2008/06/security-council-gets-it.html> (June 26, 2008, 06:02).

²⁰² S.C. Res. 1820, *supra* note 5, ¶ 1.

Another important aspect of the Resolution is the “zero tolerance policy” for sexual exploitation and abuse in United Nations peacekeeping operations.²⁰³ There have been numerous cases in which U.N. peacekeepers have sexually exploited women and girls.²⁰⁴ This Resolution hopes to stop such atrocities from occurring, especially at the hands of so-called “peace-keepers.”²⁰⁵

C. Shortcomings of Resolution 1820

Despite the many successes and the historic significance of the Resolution, the passing of the Resolution raises various concerns regarding the protection of women in warfare. The first, and most glaring shortcoming, is that the Resolution only protects civilians from sexual violence.²⁰⁶ Unfortunately, soldiers also require protection and are not afforded such by the Resolution. Second, some women’s rights organizations were particularly outraged that such organizations were not consulted during the drafting and passing of Resolution 1820.²⁰⁷ The Resolution specifies certain actions which must be taken by governments, which help implement the goals of the Resolution.²⁰⁸ The drafters defined “taking appropriate measures” to protect civilians as:

enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuation of women and children under imminent threat of sexual violence to safety; and *requests* the Secretary-General, where appropriate, to encourage dialogue to address this issue in the context of broader discussions of conflict resolution between appropriate U.N. officials and the parties to the conflict, taking into account, inter alia, the views expressed by women of affected local communities.²⁰⁹

By instructing the governments and military officials with detailed specifications on how to protect the civilians from sexual crimes, the Resolution helps identify the best ways to eradicate the ongoing problems of mass rape. At the same time, the Resolution seems to neglect the reality on the ground in so many war-stricken countries. As the DRC’s Minister of Gender, Family and Children noted in the thematic debates of the Security Council on Resolution 1820, women in the Sudan

²⁰³ *Id.*

²⁰⁴ *Security Council Demands Action to End Sexual Violence as a Tactic in War*, U.N. NEWS CENTRE, June 19, 2008, <http://www.un.org/apps/news/story.asp?NewsID=27093&Cr=sexual%20violence&Cr1=women>.

²⁰⁵ *Id.*

²⁰⁶ S.C. Res. 1820, *supra* note 5.

²⁰⁷ COOK, *supra* note 196.

²⁰⁸ S.C. Res. 1820, *supra* note 5, ¶ 13.

²⁰⁹ *Id.* ¶ 3 (emphasis in the original).

and the DRC are being raped and tortured daily.²¹⁰ No set of laws is in place to stop such behavior. And yet, this Resolution, while espousing high-minded goals, needs to focus on the situations currently on the ground. The Resolution fails to address what the punishments will be for those who violate the Resolution.²¹¹

Furthermore, some women's rights organizations have expressed concern that Resolution 1820 will have the effect of watering down the Security Council Resolution 1325. As noted above, Resolution 1325 provides a comprehensive framework for the role of women in peace building and conflict prevention and resolution. Additionally, it focuses on portraying the agency of women, especially in matters of peace and security, and asks the Security Council missions to "take into account gender considerations and the rights of women, including through consultation with local and international women's groups."²¹² Isolating the aspect of women as rape victims and focusing primarily on that issue, as is done in Resolution 1820, can have an adverse effect on women. Resolution 1325 focuses on broadening and strengthening women's rights and incorporating them as part of the solution while also addressing women as victims of war crimes.²¹³ Resolution 1820 instead primarily portrays women as victims of rape. Women must be empowered in order to resist rape. Portraying women as the victim only weakens them in the eyes of men and potential rapists. Continuing to propagate the myth that women are weak and susceptible to rape will allow men—particularly within the masculine forum of war—to victimize women. The underlying tone of Resolution 1325 empowers women while Resolution 1820 potentially victimizes them.

The women's rights organization "Peace Women" voiced a similar critique of Resolution 1820, stating that women cannot be classified in the restrictive categories of "victims" or "agents;" rather, such a distinction is a "false dichotomy."²¹⁴ In a telling example, a woman who is a powerful agent of change may also be a victim of sexual violence; she is not simply defined by her "victim" status.²¹⁵ A DRC women's rights activist discovered that sexual violence often discourages more than encourages women to engage in political activism.²¹⁶ To rectify this situation, gender equality must be a top priority in political decision-making. Furthermore, women must be included in discussions about their security needs and must have a forum where they can make recommendations for the future protection of women.²¹⁷

²¹⁰ *Security Council Demands Action to End Sexual Violence as a Tactic in War*, *supra* note 204.

²¹¹ Slezak, *supra* note 195.

²¹² S.C. Res. 1325, *supra* note 20, ¶ 15.

²¹³ COOK, *supra* note 196.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

Resolution 1820 could also be improved by acknowledging the importance of individualizing the crime of rape for women. As noted above, one of Resolution 1820's strengths is that it generalizes the crime of rape which allows for prosecution under international law as a large-scale commission of crime. At the same time, rape is a personalized crime which has lasting physical and psychological effects on women. The Resolution indicates that "women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill [sic] fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group" ²¹⁸ The focus in Resolution 1820 is on rape of a community or ethnic group. While it is important for Resolution 1820 to stop rape as a tactic of genocide, the Resolution should also be sensitive to the personalized nature of rape and not discount it at the expense of declaring rape as a large-scale tactic of war.

D. Resolution 1820: One Year Later

One year after the passing of Resolution 1820, the Secretary General published a report pursuant to the Resolution. ²¹⁹ The report detailed the precarious situation for women in areas of armed conflict. ²²⁰ The Secretary General noted that "the present report shows a disturbing picture of the use of sexual violence against civilians in armed conflicts and their aftermath." ²²¹ Despite the overwhelming support for the Resolution, little has changed in the year since its passing. According to the Secretary-General, sexual violence continues unabated in the DRC. ²²² Furthermore, women in the DRC and Sierra Leone are being abducted and subjected to rape and other forms of sexual violence. ²²³

Following the release of the report, the Secretary-General Ban Ki-Moon held a day-long debate on progress toward implementing Resolution 1820. ²²⁴ The Secretary General beseeched the member states to rise to the challenge and adopt an effective, multi-sectoral response strategy to eradicate the growing problem of rape within conflicted areas. ²²⁵ Each member state pledged to do their share to ensure that sexual violence is no longer used as a means to pursue military, political, social and economic aims. ²²⁶

²¹⁸ S.C. Res. 1820, *supra* note 5.

²¹⁹ The Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1820*, U.N. Doc. S/2009/362 (July 15, 2009) [hereinafter *Report*].

²²⁰ Press Release, Ahead of Security Council Debate, Secretary-General Ban Ki-Moon Outlines Challenges, Progress in Combating Tactical Use of Sexual Violence, U.N. Doc. HR/4994, WOM/1750 (Aug. 6, 2009), available at <http://www.un.org/News/Press/docs/2009/hr4994.doc.htm>.

²²¹ *Report*, *supra* note 219, ¶ 56.

²²² *Id.* ¶ 12.

²²³ *Id.* ¶ 13.

²²⁴ Edith M. Lederer, *UN Chief Demands Halt to Sexual Violence*, ABC NEWS, Aug. 7, 2009, <http://abcnews.go.com/US/wireStory?id=8280809>.

²²⁵ *Report*, *supra* note 219, ¶ 56.

²²⁶ Margaret Besheer, *U.N. Urges Action to Stop Sexual Violence Against Women, Girls*, VOA,

Although the Resolution was a victory for women's rights, the Report suggested that it fails to provide adequate implementing mechanisms. To this end, Mr. Ban urged the Security Council to authorize the establishment of a commission of inquiry, which would investigate and report on violations of human rights.²²⁷ This commission would focus on on-going conflict situations where sexual violence against civilians is rampant.²²⁸ Human rights groups also suggested the creation of a high-level U.N. post on women and armed conflict.²²⁹ Such a post would better coordinate security for women in regions of conflict.

Implementation of the Resolution and protection for the victims must now become top priority. To ensure that the goals of Resolution 1820 are met, the U.N. must provide basic health and psychological care for the women, men and children who have survived rape.²³⁰ Furthermore, U.N. staff must work within affected communities toward encouraging women to come forward and receive help. Working within communities to challenge sexual violence and norms can effectively destroy the underlying causes of violence against women. Lastly, stricter punishments must be used against countries who do not attempt to bar such actions.

VI. CONCLUSION

Security Council Resolution 1820 fills a void and is unfortunately highly necessary in today's society. As noted above, within the regions of Darfur and other war-conflicted zones, rape occurs on a daily basis and threatens the lives of thousands of women. Although the Resolution is long overdue, it is a welcomed measure towards protecting women in war zones, as ad hoc tribunals did not fully protect and prevent rape. The Resolution may be incomplete in some respects and, as described above, could potentially damper women's rights, but it succeeded at putting this important topic at the forefront of the international community's agenda. As U.S. Ambassador to the U.N. Susan Rice remarked, "we have a great deal to do, Mr. President, to fully implement Resolution 1820. Putting this topic on the world's agenda was an important step forward. But it was just a first step."²³¹ The Resolution needs stronger implementing mechanisms and U.N. peacekeepers to enforce them.

Aug. 7, 2009, available at <http://www.voanews.com/english/2009-08-07-voa50.cfm>.

²²⁷ Report, *supra* note 219, ¶ 56(i).

²²⁸ See *id.*

²²⁹ U.N. *Must Seize Opportunity to End Rape in Conflict*, HUDSON VALLEY PRESS, Aug. 3, 2009, available at

<http://www.hvpress.net/news/138/ARTICLE/7498/2009-08-03.html>; Care International, *The U.N. Must Act Now to Help End Rape in Conflict Zones*, Aug. 7, 2009, <http://www.alertnet.org/thenews/fromthefield/217440/9bfea63cf7b74320a76660464889bd15.htm>.

²³⁰ Care International, *supra* note 229.

²³¹ WOMEN'S UNITED NATIONS REPORT NETWORK, *supra* note 17.

It is clear that the United Nations and the Security Council are taking this new Resolution seriously. The Resolution maintains the potential to provide further protections for women as long as the Security Council implements it and clearly delineates the differences between Resolution 1820 and 1325. The Security Council has finally taken a step in the right direction towards protecting women in conflicted areas and should continue to do so, as long as such actions are necessary.

