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# The Women's Protocol to the African Charter and Sexual Violence in the Context of Armed Conflict or Other Mass Atrocity

Susana SáCouto and Katherine Cleary\*

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*I. Contemporary Problems of Sexual Violence in the Context of Armed Conflict or Other Mass Atrocity*

Sexual violence during conflict and periods of repression has been a problem of enormous magnitude in every region of the globe.<sup>1</sup> While not merely an African problem, sexual violence has been committed in epidemic proportions in many parts of Africa, including Rwanda, Uganda, the Democratic Republic of the Congo (DRC), Sierra Leone, and Sudan.<sup>2</sup> In fact, sexual violence has affected millions of lives in the region, including those of young girls who are particularly vulnerable to sexual violence by those who believe that intercourse with a virgin is either safer than intercourse with an older woman or will cure HIV-AIDS.<sup>3</sup> Rarely have these crimes been prosecuted, particularly when government leaders are responsible for tolerating, encouraging, or orchestrating these crimes.<sup>4</sup> As discussed below, the last fifteen years have seen an incredible transformation in the treatment of sexual and gender-based violence in international law, yet many challenges remain.

1. *See Rape as a Weapon of War: Accountability for Sexual Violence in Conflict: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Dr. Kelley Dawn Askin, Senior Legal Officer, Open Society Justice Initiative), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3225&wit\\_id=7081](http://judiciary.senate.gov/hearings/testimony.cfm?id=3225&wit_id=7081) (last visited Nov. 6, 2009) [hereinafter *Hearing*] (listing women in many parts of the world who have been subject to rape and sexual slavery during times of conflict) (on file with Washington and Lee Journal of Civil Rights and Social Justice). For example, the list includes: women from Asia and Europe who were raped and sexually enslaved during World War II; women from Burma who were subjected to rape campaigns by the Burmese military; Cambodian women who were forced into marriage by Khmer Rouge soldiers in the late 1970's; Bangladeshi and Bengali women who were raped during the war with Pakistan; women in East Timor who were held as sex slaves by Indonesian forces; Iraqi and Kurdish women leaders who suffered sexual violence under the Saddam Hussein regime; women from Bosnia, Croatia, Serbia, and Kosovo who survived repeated or systematic rape; Afghani girls who were sold into sexual slavery; and women from Colombia and Guatemala, Argentina, and Peru who were gang-raped repeatedly during years of war and oppression. *Id.*

2. *See id.* (recounting stories of survivors of sexual abuse from the DRC and discussing traveling to Rwanda, Uganda, and Sierra Leone, "where sexual violence has been committed in epidemic proportions, affecting millions of lives").

3. *See* United Nations Children's Fund, Joint United Nations Programme on HIV/AIDS, and World Health Organization, *Young People and HIV/AIDS: Opportunity in Crisis*, 13 (June 2002), [http://data.unaids.org/Topics/Young-People/youngpeoplehiv\\_aids\\_en.pdf](http://data.unaids.org/Topics/Young-People/youngpeoplehiv_aids_en.pdf) (looking at ways to raise awareness of methods to control HIV/AIDS among youth).

4. *See Hearing*, *supra* note 1; *see also* Cate Steains, *Gender Issues*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 357, 358 (Roy S. Lee ed., 1999) (discussing concerns about 'gender' that went into the writing of the Rome Statute).

This Article addresses the relationship between sexual violence in times of conflict and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>5</sup> More specifically, this Article first outlines accountability efforts at the international level for sexual violence in the context of war and/or mass atrocity over the past sixty-five years, and then examines ways in which the African system, particularly through implementation of the Protocol, might help meet some of the challenges international criminal bodies have faced in addressing these crimes to date.

## *II. Developments in the Prosecution of Sexual Violence Before International Criminal Tribunals*

Prior to the mid-1990s, crimes committed exclusively or disproportionately against women and girls in times of conflict were largely ignored or, at most, treated as secondary to other crimes.<sup>6</sup> For instance, while sources suggest that rape was recognized as a violation of the laws of war dating back to the fifteenth century,<sup>7</sup> the Hague Conventions on the Laws and Customs of War did not include any mention of sexual violence.<sup>8</sup>

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5. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted July 11, 2003, reprinted in Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and People's Rights in Africa*, 1 AFR. HUM. RTS. L.J. 40, 53 (2001) [hereinafter African Women's Protocol].

6. See *Hearing*, *supra* note 1 ("There was widespread acknowledgment that atrocities such as massacres, torture, and slave labor were prosecutable, but there was skepticism, even by legal scholars and military officials, as to whether rape was sufficiently serious to be prosecutable in an international tribunal set up to redress the worst crimes."); see also Steains, *supra* note 4, at 358 ("[I]t was only in relatively recent times that sexual and gender violence in armed conflict shifted from the periphery of the international community's focus towards the centre of debate, and was recognized as an important issue in serious need of redress.").

7. See M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 1 (1991) (noting that in 1474 twenty-seven judges of the Holy Roman Empire "judged and condemned Peter von Hagenbach for his violations of the 'laws of God and man' because he allowed his troops to rape and kill innocent civilians and pillage their property").

8. See Convention Relative to the Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803 (declaring that besides the prohibitions by special Conventions, it is especially prohibited, for example, to employ poison or poisoned arms; to kill or wound an enemy who, having laid down arms, or having no longer means of defense, has surrendered at discretion, but not mentioning sexual violence); Convention Relative to the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277 (adding that it is especially prohibited to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party).

Similarly, although various forms of sexual violence were documented and entered into evidence during the trials held by the International Military Tribunals at Nuremberg and Tokyo after World War II,<sup>9</sup> crimes of sexual violence were not expressly included in the charter of either tribunal and were given little to no attention in their indictments or judgments.<sup>10</sup> More significantly, some crimes of sexual violence of enormous magnitude were completely ignored.<sup>11</sup> For instance, the sexual slavery to which the Japanese military subjected some 200,000 so-called "comfort women" was not prosecuted at all by the Tokyo tribunal.<sup>12</sup> While gender-based crimes were recognized in the Fourth Geneva Convention of 1949, they are categorized as crimes against honor or dignity rather than as crimes of sexual violence.<sup>13</sup> This form of categorization was repeated in the 1977 Additional Protocols to the Geneva Conventions.<sup>14</sup>

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9. See KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* 136–138, 180–85 (1997) (discussing charges brought against defendants by the International Military Tribunals at Nuremberg and Tokyo after World War II).

10. See *id.* at 136 ("[W]ar crimes within the IMT indictment specifically included most violations of the laws or customs of war, such as murder, pillage, and destruction of towns; however, it did not enumerate one violation of the laws or customs of war which was particularly important to women—rape."); Cate Steains, *Gender Issues, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 361–62 (Roy S. Lee ed., 1999) (discussing a failure to mention crimes of sexual and gender violence). See generally Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50–55 (1946) (empowering the post-World War II occupying authorities to try additional war criminals in their respective occupation zones and which did include rape as a crime against humanity).

11. See ASKIN, *supra* note 9, at 354 ("[G]ender specific sex crimes were neither included directly within the IMT Charter nor prosecuted under the expansive language of the charter.").

12. See *id.* at 354 (noting that since these women "were forced into sexual slavery predominantly as a means of providing safe, convenient sex to the Japanese military" and "not to harm, a particular enumerated group," the perpetrators could not be prosecuted).

13. See Convention Relative to the Protection of Civilian Persons in Time of War Art. 27, Aug. 12, 1949, 75 U.N.T.S. 287 ("Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.").

14. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Art. 75(2), June 8, 1977, 1125 U.N.T.S. 3 ("The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: . . . (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault."); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Art. 4(2) June 8, 1977, 1125

Nevertheless, overwhelming evidence and reports of systematic raping of women during times of conflict over the last fifteen years have helped to create unprecedented levels of awareness that rape and other forms of sexual violence are methods of war and political repression.<sup>15</sup> As a result, great strides have been made in investigating and prosecuting crimes of sexual violence, in particular by the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (ICTY) and the International Criminal Tribunals for Rwanda (ICTR).<sup>16</sup> In a departure from the statutes governing the international military tribunals established in the wake of World War II, the statutes of the ICTY and ICTR expressly include the crime against humanity of rape.<sup>17</sup> Moreover, in practice, these tribunals have recognized that sexual violence may constitute a number of additional crimes, including the war crimes of torture<sup>18</sup> and outrages upon personal dignity,<sup>19</sup>

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U.N.T.S. 609 (categorizing rape as an outrage upon personal dignity). Article 4(2) of Protocol II states:

[W]ithout prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: . . . (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.

*Id.*

15. See Steains, *supra* note 4, at 358–59 (discussing the impact cases before the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda had "in the negotiations on the gender provisions in the Rome statute" and "furthering the momentum towards crimes of sexual violence being brought within the ambit of traditional crimes").

16. See *id.* at 359 (commenting that the jurisprudence of the Tribunals continues to evolve in a positive direction). Notably, ". . . the ICTR recently basing a conviction for genocide, in part, on evidence that the accused directed others to commit rape thus furthering the momentum towards crimes of sexual violence being brought within the ambit of traditional crimes." *Id.*

17. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 Art. 5, *adopted* May 25, 1993, Annex to U.N. Doc. S/25704 (1993) (including rape in the enumerated Crimes Against Humanity); Statute of the International Criminal Tribunal for Rwanda Art. 3, *adopted* Nov. 8, 1994, Annex to U.N. Doc. S/955 (1994) (including rape in the enumerated Crimes Against Humanity).

18. See Prosecutor v. Delalic, Mucic, Delic and Landzo, Case No. IT-96-21-T, Trial Judgment, ¶ 475 (Nov. 16, 1998), *available at* <http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e.pdf> (noting that "[t]he crime of rape is not itself expressly mentioned in the provisions of the Geneva Conventions relating to grave breaches, nor in common article 3, and hence its classification as torture and cruel treatment").

19. See Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Judgment, ¶ 274 (Dec. 10, 1998), *available at* <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>

the crimes against humanity of not only rape<sup>20</sup> but also enslavement<sup>21</sup> and persecution;<sup>22</sup> and sexual violence as an act of genocide.<sup>23</sup>

Additional strides were made in the drafting of the Rome Statute establishing the International Criminal Court (ICC), which incorporates many of the advances developed through the jurisprudence of the ICTY and ICTR.<sup>24</sup> Thus, for example, the Rome Statute includes specific gender-based crimes—including rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization—under both the war crimes and crimes against humanity provisions.<sup>25</sup> In addition, the Court's document laying out the 'Elements of Crimes' recognizes that although rape is not listed as a form of genocide under the Rome Statute, genocide committed by acts causing "serious bodily or mental harm" may include "acts of

(finding the accused guilty of outrages upon personal dignity, including rape).

20. See *Prosecutor v. Kunarac, Kovac, and Vukovic*, Case No. IT-96-23-T and IT-96-23/1-T, Trial Judgment, ¶ 436 (Feb. 22, 2001), available at <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> (discussing rape as a crime against humanity under Article 5(g) of the Statute).

21. See *id.* (including enslavement as a crime against humanity).

22. See *Prosecutor v. Brdjanin*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 15 (Sept. 1, 2004), available at <http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf> (noting that persecutions are a crime against humanity under Article 5(h) of the Statute).

23. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 113 (Sept. 2, 1998), available at <http://www.icty.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last visited Nov. 16, 2009) (explaining that genocide entails causing serious bodily or mental harm to members of the group) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

24. See Steains, *supra* note 4, at 358 (noting that the gender provisions in the Rome Statute developed in the "wake of a number of important developments in the field of international humanitarian law and advances in the international community's response to violence against women and women's human rights"); see also Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal For Rwanda: Lessons Learned For The International Criminal Court*, 12 NEW ENG. J. INT'L & COMP. L. 119, 128 (2005) (describing the lessons learned from the *ad hoc* tribunals' experiences, notably the need for a "wide-ranging approach" to ensuring the effective investigation and prosecution of such crimes by incorporating articles into the Rome Statute).

25. Rome Statute of the International Criminal Court Art. 7(1)(g), adopted July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (defining crime against humanity as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population . . . (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"); see also *id.* at Art. 8(2) (defining war crimes as "any of the following acts: . . . (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions"). Article 8(2)(e)(vi) enumerates the same crimes as Article 8(2)(b)(xxii) with regards to non-international armed conflicts.

torture, rape, sexual violence or inhuman or degrading treatment."<sup>26</sup> The Special Court for Sierra Leone (SCSL), which was established in 2002 to try serious international crimes committed in Sierra Leone during its civil war,<sup>27</sup> also has a statute that recognizes a range of sexual violence-based war crimes and crimes against humanity, including rape, sexual slavery, enforced prostitution, and forced pregnancy.<sup>28</sup> Additionally, the SCSL has held that the act of forced marriage constitutes a crime against humanity as an "other inhumane act" under the SCSL Statute,<sup>29</sup> and the Trial Chamber recently entered convictions for this crime,<sup>30</sup> representing the first time an international criminal body has convicted an accused for the act of forced marriage.

*A. Challenges Remaining in the Investigation and Prosecution of Sexual Violence in the Context of Armed Conflict or Other Mass Atrocity*

Despite the many advances made by prosecutors before the ICTY, ICTR, and SCSL in cases involving sexual violence and gender-based crimes, it remains true that such crimes are not charged in every case where the charges are warranted. Perhaps the most well known example of a prosecutor's failure to investigate and charge acts of sexual violence, at least in the first instance, is the *Akayesu* case,<sup>31</sup> which was tried before the

26. International Criminal Court, Elements of Crimes, *adopted* Sept. 9, 2002, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).

27. Statute of the Special Court for Sierra Leone, Jan. 16, 2002, S.C. Res. 1315, Annex to U.N. Doc. S/RES/1315 (Aug. 14, 2000).

28. *See id.* Art. 2(g) (noting that the Special Court shall have the power to prosecute persons who commit rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence); *id.* at Art. 3(e) (noting that the Special Court shall have the power to prosecute persons who commit outrages upon personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution, and any form of indecent assault).

29. *See* Prosecutor v. Brima, Kimaru and Kanu, Case No. SCSL-04-16-A, Trial Judgment, ¶ 202 (Feb. 22, 2008), *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=EqikfVSpLWM=&tabid=106> (holding that forced marriage constitutes a crime against humanity under the SCSL statute).

30. *See* Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-T, Trial Judgment, Part VII (Feb. 25, 2009), *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=buPK1 wx%2bWSo%3d&tabid=215> (holding that the defendants were responsible for, among other crimes, killing civilians, rape, sexual slavery, and forced marriages).

31. *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 23 (Sept. 2, 1998), *available at* <http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last visited Nov. 16, 2009) (describing the initial absence of rape charges and the Prosecution's amendment to add rape charges) (on file with Washington and Lee Journal



ICTR. John Paul Akayesu, who served as *bourgmestre* of Taba Commune during Rwanda's 1994 genocide,<sup>32</sup> was one of the first individuals to be arrested and prosecuted by the ICTR. At the time of his arrest, he was charged with direct responsibility for genocide, complicity in genocide, incitement to genocide, the crimes against humanity of extermination and murder, and the war crime of murder.<sup>33</sup> His trial began in January 1997. However, shortly after the start of trial, a witness called to testify about the murder of most members of her family mentioned—"in an almost offhand way"—that her six-year-old daughter had been raped.<sup>34</sup> In response to questioning by members of the Tribunal, which included Judge Navanethem Pillay, the only female judge on the ICTR at the time, the witness stated that she had never been questioned about the rape by ICTR investigators.<sup>35</sup> She further testified that she "had heard that other girls had been raped in Akayesu's *bureau communal*, but she had not seen it herself."<sup>36</sup> Two months later, another Prosecution witness was called to testify about an attack on her house that her family had tried to flee, and ended up telling the story of her capture, rape, and abandonment.<sup>37</sup> This witness also discussed her attempt to find refuge in the *bureau communal*, where she witnessed women and girls being raped by communal police and *Interahamwe* in the presence of the accused.<sup>38</sup> Although neither the Prosecution nor the Defense followed up on this testimony, the three judges asked her to elaborate on Akayesu's whereabouts and actions during the rapes.<sup>39</sup>

Ultimately, the Prosecution requested leave from the Tribunal to amend the indictment and their request was granted.<sup>40</sup> In October 1997, the

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of Civil Rights and Social Justice).

32. *Id.* at ¶ 48.

33. *See id.* at ¶ 10 (listing the charges against Akayesu).

34. *See* Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, in HUMAN RIGHTS ADVOCACY STORIES 193, 199 (Deena R. Hurwitz et al. eds., 2009) (analyzing the Akayesu case and the testimony of one witness in particular).

35. *Id.* at 199–200.

36. *Id.* at 200.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 23 (Sept. 2, 1998), available at <http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last visited Nov. 16, 2009) (discussing the trial procedure) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

Prosecution filed an amended indictment, which included three new charges: rape and other inhumane acts as crimes against humanity and the war crime of outrages upon personal dignity, which included rape, degrading treatment, and indecent assault.<sup>41</sup> Although the amended indictment did not include any new charges of genocide, it did include new factual allegations of sexual violence, which eventually permitted the Trial Chamber to convict Akayesu, *inter alia*, for genocide based in part on the acts of rape and sexual violence for which he was determined to be responsible.<sup>42</sup>

Following *Akayesu*, a number of amended indictments were filed in cases before the ICTR to include charges of rape and other forms of sexual violence.<sup>43</sup> However, the problem was not altogether resolved in the later years of the ICTR. Indeed, according to a detailed analysis of trends in the prosecution of sexual violence in the ICTR from November 1995 through November 2002, the number of indictments of sexual violence leveled-off between 1996 and 2001, and then decreased sharply through the end of 2002.<sup>44</sup> Finally, in two of the later cases in which crimes of sexual violence were charged, the Prosecution later sought to withdraw the charges due to insufficient evidence.<sup>45</sup>

Similar problems plagued the early operations of the Special Court for Sierra Leone, with the result that all evidence relating to crimes of sexual violence committed by the Civil Defence Force (CDF) was excluded from the trial of that group's leaders.<sup>46</sup> As explained above, the Statute of the

41. *Id.*

42. See Van Schaack, *supra* note 34, at 205 (discussing the amended indictment).

43. See Gaëlle Breton-Le Goff, *Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002* (2002), [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php) (last visited Nov. 16, 2009) (noting the prevalence of sexual violence charges in post-Akayesu indictments) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

44. *Id.*; see also Oosterveld, *supra* note 24, at 127 (noting a significant drop in the number of indictments including charges for crimes of sexual violence from 1999 to 2003).

45. See *Prosecutor v. Emanuel Ndindabahizi*, Case No. ICTR-2001-71-I, Judgment and Sentence, ¶9 (July 15, 2004) available at [http://www.ictor.org/ENGLISH/cases/Ndindabahizi/judgment/150704\\_Judgment.pdf](http://www.ictor.org/ENGLISH/cases/Ndindabahizi/judgment/150704_Judgment.pdf) (describing the decision to allow the Prosecutor to amend the indictment); see also *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment (Feb. 23, 2005), available at <http://www.ictor.org/ENGLISH/cases/Muvunyi/decisions/230205.htm> (last visited Nov. 6, 2009) (discussing the Prosecutor's rationale for amending the indictment) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

46. See Sara Kendall & Michelle Staggs, *Silencing Sexual Violence: Recent*

Special Court, like the Rome Statute, includes a range of gender-based crimes against humanity and war crimes.<sup>47</sup> Nevertheless, the Prosecution omitted any allegations with respect to these crimes in its initial indictment against the three leaders of the CDF.<sup>48</sup> While subsequent investigations led the Prosecution to seek to amend the indictment to add charges based on evidence regarding the subjection of women and girls to various forms of sexual violence, the Trial Chamber refused to allow the amendment.<sup>49</sup> In its decision, the Chamber noted it was "pre-eminently conscious of the importance that gender crimes occupy in international criminal justice given the very high casualty rates of females in sexual and other brutal gender-related abuses during internal and international conflicts,"<sup>50</sup> but the Chamber held that adding the new charges would result in undue delay and would prejudice the rights of the accused to a fair and expeditious trial.<sup>51</sup> The Prosecution then moved to introduce evidence of sexual violence to support the charges of inhumane acts as a crime against humanity and/or violence to life, health, and physical or mental well being of persons as a war crime, both of which had been included in the original indictment.<sup>52</sup> Yet the Trial Chamber rejected the request, noting that the indictment did not allege any facts relating to sexual violence in support of the relevant

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*Developments in the CDF Case at the Special Court for Sierra Leone*, U.C. Berkley War Crimes Study Center (2005), [http://ist-socrates.berkeley.edu/~warcrime/Papers/Silencing\\_Sexual\\_Violence.pdf](http://ist-socrates.berkeley.edu/~warcrime/Papers/Silencing_Sexual_Violence.pdf) (noting the Special Court's exclusion of systematic sexual violence allegations).

47. See Statute of the Special Court for Sierra Leone, *supra* note 27, Art. 2(g) (granting jurisdiction for sexual violence crimes); *id.* Art. 3(e) (granting jurisdiction over crimes against personal dignity and rape).

48. See Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-T, Indictment (Feb. 4, 2004), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=3DY274jtZAY=&tabid=104> (failing to mention any gender-based crimes against humanity or sexual violence charges).

49. See Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-T, Decision on Prosecution Request for Leave to Amend the Indictment, ¶ 49 (May 20, 2004), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=2HXkGY17w80%3d&tabid=153> (refusing to grant Prosecution leave to amend the charges to include sexual violence).

50. *Id.* at ¶ 82.

51. *Id.* at ¶ 86.

52. See Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-T, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶ 3 (May 24, 2005), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=fNLvGddWcbc%3d&tabid=153> (refusing to allow the Prosecution to introduce evidence to prove sexual violence crimes since they were not plead in the indictment).

charges and that permitting the evidence would cause undue prejudice to the accused.<sup>53</sup>

Unfortunately, the International Criminal Court's record with respect to the investigation of sexual violence and gender-based crimes has also been mixed in its first years of operation. Positive developments include the fact that two of the four persons charged thus far in connection with the situation in the Democratic Republic of Congo have been charged with sexual slavery and rape, both as a war crime and as a crime against humanity.<sup>54</sup> Rape allegations have been brought against all three of the individuals pursued by the Prosecutor in the Darfur situation, including the sitting head of state, Omar Hassan Ahmad al Bashir.<sup>55</sup> Similarly, allegations involving rape and sexual slavery are included in the arrest warrant against Joseph Kony in the Uganda situation.<sup>56</sup> Lastly, charges of rape as a war crime and a crime against humanity have been levied against the only suspect identified so far in the Central African Republic situation, Jean-Pierre Bemba Gombo.<sup>57</sup>

Nevertheless, the Court has also suffered criticism with regard to its approach to sexual violence and gender-based crimes. For instance, with respect to Thomas Dyilo Lubanga, the first person arrested by the ICC, human rights groups criticized the Office of the Prosecutor for failing to include sexual violence charges in the indictment against him despite

53. *Id.* at ¶ 19.

54. *See* Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 25–28 (Sept. 30, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> (discussing the sexual slavery and rape charges against Katanga and Chui).

55. *See* Prosecutor v. Omar Hassan Ahmad al Bashir, Case No. ICC-02/05, Annex A to Public Redacted Version of Prosecution's Application Under Article 58 filed on 14 July 2008 ¶ 10 (Sept. 12, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc559999.pdf> (stating the sexual violence allegations against Omar Hassan Ahmad al Bashir). *See also* Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, 8 (April 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF> (stating the charges against Ahmad Harun).

56. *See* Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ¶ 16 (Sept. 27, 2005), available at <http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF> (stating the allegations against Joseph Kony).

57. *See* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo, ¶ 12 (May 23, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc504390.PDF> (listing the charges brought against Jean-Pierre Bemba).

allegations that girls had been kidnapped into Lubanga's militia and often raped and/or kept as sex slaves.<sup>58</sup> In light of the World Bank's estimate that over a third of child soldiers (12,500 out of 30,000) in the DRC in 2006 were girls,<sup>59</sup> organizations criticized the Court for failing to recognize the systematic sexual violence girls had been subject to during that conflict.<sup>60</sup> More generally, a recent report cites anonymous "former ICC investigators" as saying that the first series of investigations undertaken by the Prosecution were launched "before sufficient planning had been done," resulting in the lack of an effective strategy regarding the investigation of sexual violence and gender-based crimes.<sup>61</sup> Furthermore, even where sexual violence has been charged, challenges to those charges threaten

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58. See, e.g., Joint Letter from Avocats Sans Frontières et al. to Chief Prosecutor of the International Criminal Court (July 31, 2006), [http://hrw.org/english/docs/2006/08/01/congo13891\\_txt.htm](http://hrw.org/english/docs/2006/08/01/congo13891_txt.htm) (last visited Nov. 6, 2009) (questioning the lack of charges the Chief Prosecutor brought against Lubanga) (on file with Washington and Lee Journal of Civil Rights and Social Justice). The letter states:

We are disappointed that two years of investigation by your office in the DRC has not yielded a broader range of charges against Mr. Lubanga . . . . We believe that you, as the prosecutor, must send a clear signal to the victims in Ituri and the people of the DRC that those who perpetrate crimes such as rape, torture and summary executions will be held to account . . . .

*Id.*; see also Press Release, Redress, ICC Prosecutor Leaves Unfinished Business in Ituri, DRC (Feb. 20, 2008), <http://www.redress.org/news/08-02-20%20ICC%20DRC%20-%20REDRESS%20Press%20Statement%20-%20Final%20-CORRECTED.pdf> (criticizing the Chief Prosecutor for moving on to investigate war crime suspects in other parts of the DRC before finishing a full investigation of war crimes in Ituri). The press release states:

There is resentment that Thomas Lubanga and the UPC militia that he led are getting away too lightly. Arrested by the ICC in March 2006, Lubanga is said to be responsible for widespread killings and countless incidents of sexual violence. Yet, Lubanga has only been charged with recruiting and using child soldiers. . . .

*Id.*

59. See Katy Glassborow, *Plight of Girl Soldiers "Overlooked"*, *Institute for War & Peace Reporting* (Oct. 31, 2006), [http://www.iwpr.net/index.php?m=p&o=324983&s=f&apc\\_state=henfacr324983](http://www.iwpr.net/index.php?m=p&o=324983&s=f&apc_state=henfacr324983) (last visited Nov. 6, 2009) ("The DRC government and World Bank agree there are currently about 30,000 child soldiers in the Congo . . . . An estimated 12,500 of these child soldiers are girls, some as young as six-years-old, who become sex slaves.") (on file with Washington and Lee Journal of Civil Rights and Social Justice).

60. See *id.* (discussing the shared concerns that International Criminal Court indictments were lacking sex crime charges).

61. See Katy Glassborow, *ICC Investigative Strategy Under Fire* (Oct. 17, 2008), reprinted in SPECIAL REPORT: SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF CONGO, 8 (Caroline Tosh & Yigal Chazan eds., Institute for War & Peace Reporting 2008), available at [http://www.iwpr.net/pdf/IWPR\\_NL\\_DRC\\_special\\_102008.pdf](http://www.iwpr.net/pdf/IWPR_NL_DRC_special_102008.pdf) (discussing some of the problems encountered with the procedures at the International Criminal Court).

removal of those charges from the indictments. Specifically, in the case against militia leaders Germain Katanga and Mathieu Ngudjolo, the Prosecutor dropped charges of sexual slavery as both a war crime and a crime against humanity after a Pre-Trial Chamber judge excluded the statements of witnesses supporting those charges on the grounds that the witnesses were not adequately protected.<sup>62</sup> The situation was resolved after the witnesses were eventually accepted into the Court's Witness Protection Program,<sup>63</sup> and the Prosecution amended its charges not only to reinstate those relating to sexual slavery but also to include allegations of rape as a war crime and a crime against humanity.<sup>64</sup> However, the tug-of-war over these victims' statements indicates how vulnerable sexual violence charges can be if the evidence supporting them is limited and subject to challenge.

### *III. Ways in Which the Women's Protocol to the African Charter Might Be Able to Help Meet Challenges in the Investigation and Prosecution of Sexual Violence in the Context of Armed Conflict or Other Mass Atrocity*

Based on the foregoing, it seems clear that jurisprudential advances in this area of the law will not alone guarantee the effective investigation and prosecution of sexual violence crimes by international or hybrid tribunals. Moreover, even if the International Criminal Court and other tribunals were able to ensure that crimes of sexual violence were investigated thoroughly and effectively, the fact that they have limited mandates and enjoy limited resources means they will only be able to focus on a small fraction of the

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62. See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ¶ 39 (Apr. 25, 2008), available at <http://www.iccklamberg.com/Caselaw/DRC/Katanga/PTC%20I/ICC-01-04-01-07-428-Corr-ENG.pdf> (excluding the statements of witnesses not adequately protected).

63. See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287, 6 (May 28, 2008), available at <http://www.iccklamberg.com/Caselaw/DRC/Katanga/PTC%20I/ICC-01-04-01-07-523-ENG.pdf> ("[O]n 19 May 2008, the Registrar, in the Registrar's Report, informed the Chamber that Witnesses 132 and 287 had been accepted into the Court's Witness Protection Programme and had been relocated within the scope of the programme.").

64. See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Annex 1A to Submission of Amended Document Containing the Charges Pursuant to 61(3)(a) of the Statute, 32–33 (June 26, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc520482.PDF> (reviewing the Prosecution's amendments to the charging documents).

perpetrators of these crimes. This raises the question of how regional instruments, such as the Women's Protocol to the African Charter, might help meet some of these challenges. In seeking to answer this question, first we will briefly explore Article 11 of the Protocol, which is the provision focused on the protection of women in armed conflict.<sup>65</sup> Second, we will address how Article 11 might contribute to the successful investigation and prosecution of sexual violence in armed conflict.

*A. Article 11 of the Women's Protocol to the African Charter*

Article 11 of the Women's Protocol to the African Charter, entitled "Protection of Women in Armed Conflicts," states:

States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations which affect the population, particularly women.

States Parties shall, in accordance with the obligations incumbent upon them under the international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.

States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

States Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.<sup>66</sup>

As one commentator has observed, the Protocol "primarily complements the African [C]harter and international human rights conventions by focusing on concrete actions and goals to grant women rights."<sup>67</sup> Thus, Article 11 is a positive development to the extent that it "further

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65. African Women's Protocol, *supra* note 5, Art. 11.

66. *Id.*

67. See Mary Wandia, *Rights of Women in Africa: Launch of a Petition to the African Union*, in AFRICAN VOICES ON DEVELOPMENT AND SOCIAL JUSTICE: EDITORIALS FROM PAMBAZUKA NEWS 2004 98 (2005) (looking at the background behind the establishment of the Protocol).

domesticates"<sup>68</sup> the obligations of African states under International Humanitarian Law (IHL). Interestingly, however, while the provision clearly obligates States Parties to protect civilian women in armed conflict, Article 11 uses less mandatory language when it comes to states' duties to respect IHL generally, merely requiring States Parties to "undertake to respect and ensure respect for the rules of [IHL]."<sup>69</sup> This is potentially problematic because it suggests that women detained as prisoners of war could receive less protection against sexual violence under the Protocol than their civilian women counterparts. Since the drafting history of this provision is scarce, it is difficult to identify whether this distinction was intentional, thus raising questions as to whether the drafters were more focused on the traditional role of women as civilians or their potential roles as soldiers and combatants. Moreover, the final subsection of Article 11 requires States Parties to ensure that no child, "especially girls under 18 years of age, take a direct part in hostilities and that no child [irrespective of gender] is recruited as a soldier."<sup>70</sup> Again, it is hard to say whether the distinction here was deliberate, but it might be interpreted as the drafters' reluctance to recognize the particular plight of girls recruited as child soldiers, often for sexual purposes and/or forced marriage.

Most importantly, perhaps, Article 11 urges states to ensure that "all forms of violence, rape and other forms of sexual exploitation . . . are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction."<sup>71</sup> Yet this particular Article 11 subsection specifically focuses on states' obligations to protect "asylum seeking women, refugees, returnees and internally displaced persons"<sup>72</sup> from these acts. Oddly, this subsection again appears not to include women that do not fall within one of these categories and suggests that these crimes can only be committed against women who belong to one of Article 11's defined groups. This is not the case under international law.<sup>73</sup> Nevertheless, the previous

68. *Id.*

69. African Women's Protocol, *supra* note 5, Art. 11

70. *Id.*

71. *Id.*

72. *Id.*

73. See Rome Statute, *supra* note 25, Preamble ("The States Parties to this Statute . . . [are] [m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shake the conscience of humanity."); see also G.A. Res. 61/143, Preamble, U.N. Doc. A/RES/61/143 (Jan. 30, 2007), (seeking to intensify efforts to eliminate violence against all categories of women and girls).



subsection requires States Parties to protect women "irrespective of the population to which they belong,"<sup>74</sup> suggesting responsibility to ensure these crimes are adequately addressed to all women in times of conflict, not merely women who belong to one of these categories.

*B. Cooperation with International and Hybrid Tribunals: Providing Assistance and Building Domestic Capacity*

Despite some lack of clarity in Article 11, the requirements that states must undertake to ensure crimes of sexual violence are considered serious international crimes and their perpetrators are brought to justice before a competent criminal jurisdiction are significant and could be used to help fill gaps left open by the work of international and hybrid tribunals.

*1. Providing Assistance to the International Criminal Court and Similar Tribunal*

The cooperation of the states is perhaps the most fundamental factor common to the success of both the permanent International Criminal Court and *ad hoc* tribunals such as the ICTY and ICTR. None of these bodies has its own police force; without state cooperation the tribunals cannot effectively investigate and prosecute these crimes.<sup>75</sup> As the earlier discussed examples make clear, it is tremendously challenging for the tribunals to find evidence necessary to bring sexual violence charges in a timely manner. Some of this can be attributed to a lack of expertise in investigating such cases or to a lack of political will to prosecute them because sexual violence crimes are often perceived as merely "incidental" or "opportunistic" when compared to other "core" crimes.<sup>76</sup> However, investigations are likely to improve if the Protocol could successfully change attitudes toward violence against women and if the states were willing and able to assist tribunals with evidence collection and the protection of witnesses, which is necessary to successfully prosecute these

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74. African Women's Protocol, *supra* note 5, Art. 11.

75. See Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFFAIRS JOURNAL, 23, 24 (Spring 2009) (discussing the evolution of the ICC and noting that this tribunal does not have its own police force to enforce its orders).

76. See Sita Balthazar, *Gender Crimes And The International Criminal Tribunals*, 10 GONZ. J. INT'L L. 43, 48 (2006) (addressing the transformation of sexual violence in international law and how easily sexual crimes against women may be overlooked).

cases. Importantly, States Parties to the Protocol could fulfill their obligation to ensure that "perpetrators are brought to justice before a competent criminal jurisdiction"<sup>77</sup> by assisting and cooperating with international or hybrid courts seeking to hold perpetrators of sexual violence responsible.<sup>78</sup> For the thirty African states that are parties to the Rome Statute that establishes the ICC, this would mean, at the very least, implementing cooperation provisions of Part 9 of the Statute.<sup>79</sup> This would require taking necessary steps domestically to allow states to assist the Court not only with arrest and surrender of suspects,<sup>80</sup> but also with execution of investigative tasks,<sup>81</sup> such as tracing, freezing and/or seizing of accused persons' proceeds and assets,<sup>82</sup> operational coordination with law enforcement agencies,<sup>83</sup> and logistical and security support.<sup>84</sup>

Furthermore, Article 11's focus on ensuring that no child, "especially girls under 18 years of age, take a direct part in hostilities"<sup>85</sup> could be useful to highlight the importance of seeking redress for girls forced to participate in conflict. As mentioned above, the Prosecutor of the ICC failed to include sexual violence charges or the plight of girl soldiers in the case against Thomas Lubanga Dyilo.<sup>86</sup> Dyilo was charged with the war crime of recruiting child soldiers to actively participate in hostilities.<sup>87</sup> The Protocol's singling out of girls' participation in armed conflict as a particularly important issue could have an impact on the Court's willingness and ability to seek redress on their behalf. Indeed, the United Nations Special Representative on Children and Armed Conflict expressly

77. African Women's Protocol, *supra* note 5, Art. 11.

78. See Indira Rosenthal, *Making the International Criminal Courts Work*, 13 HUM. RTS. WATCH J. 3–32 (Sept. 2001) ("The ICC will extend the rule of law internationally, impelling national systems to investigate and prosecute these crimes themselves . . . while ensuring that where they fail, an international court is ready to act.").

79. See Rome Statute, *supra* note 25, Art. 88 ("States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part 9 of the Statute].").

80. See *id.* at Art. 89 (discussing "surrender of persons to the court").

81. See *id.* at Art. 93 (addressing "other forms of cooperation").

82. *Id.*

83. *Id.*

84. *Id.*

85. African Women's Protocol, *supra* note 5, Art. 11.

86. See *supra* note 58 and accompanying text.

87. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶9 (Jan. 29, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> (listing the charges against Lubanga).

referred to this section of the Protocol in an amicus submission to the ICC, arguing that the crime of using children "to participate actively in hostilities"<sup>88</sup> should be interpreted to "deliberately include any sexual acts perpetrated, in particular against girls"<sup>89</sup> recruited by armed forces.

## 2. *Development of Domestic Capacity to Investigate and Prosecute Sexual Violence in the Context of Armed Conflict or Other Mass Atrocity*

Perhaps more significantly, Article 11 of the Protocol could be used to help fill the gap left open by the international and hybrid tribunals' limited focus on those most responsible for serious international crimes. Again, it is a feature of both the International Criminal Court and *ad hoc* tribunals (including the ICTY and the SCSL) to concentrate primarily on those most responsible for crimes, leaving many mid-level and lower-level perpetrators unpunished.<sup>90</sup> Thus, implementing Article 11 by developing the capacity to try wartime crimes of sexual violence at the domestic level is critical to

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88. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Annex A to Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in Application of Rule 103 of the Rules of Procedure and Evidence, ¶ 24 (Mar. 18, 2008), available at [http://www.un.org/children/conflict/\\_documents/AmicuscuriaelCCLubanga.pdf](http://www.un.org/children/conflict/_documents/AmicuscuriaelCCLubanga.pdf).

89. *Id.*

90. See, e.g., International Criminal Court Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor* 3 (September 2003), [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf) (explaining that the Office of the Prosecutor will focus on those leaders who bear the most responsibility for crimes); International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, adopted Feb. 11, 1994, amended July 24, 2009, 22, U.N. Doc. IT/32/Rev. 43 (July 24, 2009) (encouraging the Tribunal to concentrate on prosecuting only the most senior leaders). Rule 28A in its entirety reads:

On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for the review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor.

*Id.*; Statute of the Special Court of Sierra Leone, *supra* note 27, Art. 1 ("The Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996 . . .").

attaining accountability on a broader level. Obviously, bringing perpetrators of such violent crimes to justice is easier said than done. Yet one of the ways States Parties to the Rome Statute can do this is by requesting ICC assistance, which, because of the principle of complementarity, operates on the premise that the primary responsibility for trying serious international crimes rests with states and that the Court is intended to act only when national systems are unable or unwilling to act themselves.<sup>91</sup>

Indeed, one of the principal purposes of the complementarity regime is to "encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes."<sup>92</sup> Thus, as the ICC Prosecutor has stated, the principle of complementarity implies that the Court should encourage and assist states in their efforts to develop the capacity to investigate and prosecute serious international crimes.<sup>93</sup> Coupled with Article 11 of the Protocol, African states—thirty of which are already parties to the Rome Statute—should take advantage of the complementarity principle to request the assistance of the ICC in gathering evidence and acquiring necessary expertise to try crimes of sexual violence in armed conflict at a domestic level.

#### IV. Conclusion

Although international and hybrid criminal bodies have made extraordinary progress in developing laws allowing them to hold perpetrators accountable for wartime sexual violence, much remains to be done in order to achieve success. Indeed, even with the establishment of a permanent International Criminal Court, international and *ad hoc* tribunals are still only be able to try a small percentage of the sexual violence crimes actually committed during war. Despite ambiguities in the language of Article 11, the fact that the Women's Protocol to the African Charter recognizes that states have an obligation not only to protect women in armed conflict but also to take steps to ensure perpetrators of sexual

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91. See Rome Statute, *supra* note 25, Art. 17(1)(a) ("The Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.").

92. See *Paper on Some Policy Issues Before the Office of the Prosecutor*, *supra* note 90, at 5.

93. See *id.* ("[N]ational investigators and prosecutors are often best placed to carry out some of the tasks assigned to the Office of the Prosecutor.").

violence are brought to justice means that the impunity gap left open by these tribunals could be significantly narrowed.

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# NOTES

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