

# Conflict-related Sexual Violence: Achievements and Challenges in International Criminal Law and the Role of the Military

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## Introduction

In many conflicts around the world, sexual violence has been committed against women, men and children alike. A recent study into armed groups' involvement in conflict-related sexual violence reported a total of 129 active conflicts in the period 1989-2009 alone.<sup>2</sup> The consequences of sexual violence are usually very severe and may last a life time: many survivors of sexual violence contract sexually transmitted diseases, including HIV/AIDS, face unwanted pregnancies and health complications, and suffer from sexual mutilations and other injuries, such as fistulas, uterine problems, vaginal lesions and scarring. In addition, they often face stigma, isolation, poverty and severe traumas.<sup>3</sup> Despite the often high occurrence of sexual violence in conflict and its enormous potential to destroy individual lives and communities and societies at large (capable of rising to a national and international peace and security issue)<sup>4</sup>, perpetrators of these crimes have often not been prosecuted. Prosecutions before international criminal tribunals are relatively rare and on the national level, conflict-related sexual violence prosecutions are very often minimal or non-existent. Prevention strategies are furthermore given more thought; yet more needs to be learned and done in order to make the prevention of conflict-related sexual violence more effective. While it will not be possible to cover everything of relevance to conflict-related sexual violence, some of the most important achievements and current challenges concerning the understanding, prevention, investigation and prosecution of sexual violence in conflict, with special attention to the role of the military, will be addressed in this contribution.

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<sup>2</sup> Dara Kay Cohen and Ragnhild Nordas, 'Sexual Violence in Armed Conflict: Introducing the SVAC Dataset, 1989-2009', 51(3) *Journal of Peace Research* (2014) 418-428 (the authors looked at intrastate, internationalized internal and interstate conflicts).

<sup>3</sup> See further e.g.: Evelyne Josse, 'They Came With Two Guns': The Consequences of Sexual Violence for the Mental Health of Women in Armed Conflicts', 92 (877) *International Review of the Red Cross* (2010) 177-195.

<sup>4</sup> Patrick Cammaert, 'Voorwoord', in Anne-Marie de Brouwer and Sandra Ka Hon Chu, *De Mannen Die Mij Hebben Vermoord: Rwandese Overlevenden van Seksueel Geweld* (Wolf Legal Publishers, Oisterwijk, 2011), pp. 1-3. See also several resolutions of the UN Security Council since 2008, in which the link between sexual violence, often used as 'a tactic of war', and the maintenance and restoration of international peace and security is addressed: i.e., in particular, UN Resolution 1820 (2008), 1888 (2009), 1960 (2010), 2106 (2013).

## I Achievements in International Criminal (Procedural) Law

To what extent has international criminal law and international criminal procedural law, to date, contributed to the effective understanding, investigation and prosecution of conflict-related sexual violence? This question will be answered in this section.

### 1.1 International Criminal Law and Sexual Violence Prosecutions

First of all it should be mentioned that for a very long time, conflict-related sexual violence crimes were not recognized as self-standing international crimes constituting genocide, crimes against humanity or war crimes; rather they were often seen, not as crimes, but as byproducts of war, as rewards for soldiers to boost their morale.<sup>5</sup> As such, these crimes were not or hardly prosecuted before national or international criminal tribunals.<sup>6</sup> It took until the 1990s – with the growing media exposure of the massive sexual violence in the conflicts in the countries of the former Yugoslavia and (to a lesser extent) the genocide in Rwanda<sup>7</sup> – before sexual violence crimes were explicitly labeled as crimes in the statutes of international criminal tribunals. The Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL)<sup>8</sup>, for instance, all criminalize rape and some other forms of sexual violence as crimes against humanity and war crimes.<sup>9</sup> Rape and other forms of sexual violence were thus transformed from a private, off-duty, inevitable and collateral crime to something that was public, political and worthy of criminalization and prosecution. In 1998, with the creation of the permanent International

<sup>5</sup> It should be noted, however, that some international treaties did criminalize sexual violence, but under vaguely worded phrases and not as independent crimes. For example, the Fourth 1949 Geneva Convention and the 1977 Additional Protocol II reference to rape and enforced prostitution falling under the provisions of ‘attack on their honour’ and ‘outrages upon personal dignity’, respectively. See further: Kelly Askin, ‘Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward’, in Anne-Marie de Brouwer et al. (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Cambridge/Antwerp/Portland, 2013), pp. 3-55.

<sup>6</sup> For example, after the Second World War, sexual violence was not prosecuted before the Nuremberg Tribunal, despite evidence available. Sexual violence was prosecuted before the Tokyo Tribunal, but not extensively. See further: Askin 2013, *supra* note 5, pp. 32-49.

<sup>7</sup> Estimates of sexual violence in the conflict in Bosnia and Herzegovina, for instance, revealed that between 20,000 to 50,000 women experienced sexual violence between 1992 and 1995. In Rwanda, it was estimated that 250,000 to 500,000 Tutsi women and girls endured sexual violence during the 100 days of genocide in 1994. See e.g.: Vesna Nikolić-Ristanović, ‘Living Without Democracy and Peace: Violence Against Women in the former Yugoslavia’, 5(1) *Violence Against Women* (1999) 63-80; United Nations, *Report on the Situation of Human Rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/11 of 25 May 1994, E/CN.4/1996/68, 29 January 1996.*

<sup>8</sup> These tribunals are mandated to prosecute the most responsible individuals of the respective conflicts. The SCSL (set up in 2002 in Freetown) has, in the meantime, closed down, while the ICTY (set up in 1993 in The Hague) and the ICTR (set up in 1994 in Arusha) are in the process of closing their doors.

<sup>9</sup> See specifically: Article 5(g) ICTY Statute (rape as a crime against humanity); Article 3(g) ICTR Statute (rape as a crime against humanity); Article 4(e) ICTR Statute (‘Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’ as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II); Article 2(g) SCSL Statute (rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as a crime against humanity); Article 3(e) SCSL Statute (outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II); Article 5 SCSL Statute furthermore lists several offences related to the abuse of girls as crimes under Sierra Leonean Law.

Criminal Court (ICC)<sup>10</sup>, the most extensive list criminalizing sexual violence crimes, was laid down in an international treaty, the Rome Statute. In Articles 7 and 8 of the Rome Statute, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence of comparable gravity are explicitly outlawed as crimes against humanity and war crimes. In addition, persecution against any identifiable group or collectivity on the ground of gender, and the crime of enslavement (which may include trafficking in persons, in particular women and children), are prohibited as a crime against humanity.<sup>11</sup> Although the Rome Statute definition of genocide (which follows verbatim that of the 1948 Genocide Convention) does not include specific sexual violence crimes amongst its acts, the ICC's guiding Elements of Crimes do recognize that rape and other forms of sexual violence could be prosecuted as such.<sup>12</sup>

Besides these important and unprecedented recognitions and prohibitions of specific sexual violence crimes as independent international crimes, arguably the most notable jurisprudential achievements the international criminal tribunals have made are the acknowledgements that rape and sexual violence can amount to genocide and that the definition of rape does not need to include lack of consent as an element of the crime.<sup>13</sup> As for the latter, the recognition that consent is virtually meaningless in a context of structural force and subjugation, would reflect an important achievement from a victim's perspective. It reflects a recognition that the traditional burden of proof of the lack of consent is putting an unjustifiable burden on the victim/witness, notably in the context of conflict situations where conditions of force and threat preclude any freedom to consent.<sup>14</sup> In 2014, before the ICC in the case of the accused Katanga (DRC situation), this interpretation was confirmed.<sup>15</sup> In addition to these two jurisprudential advances, rape and sexual violence crimes have

<sup>10</sup> In brief, the ICC is based in The Hague, the Netherlands, and is similarly capable of prosecuting the most senior individuals (in principle coming from State Parties or nationals from State Parties) who allegedly committed international crimes.

<sup>11</sup> Article 7(1)(h) Rome Statute.

<sup>12</sup> Article 9(1) Rome Statute ("Elements of Crimes shall assist the Court in the interpretation and application of Articles 6, 7 and 8:") and Article 6(b), element 1, footnote 3 ICC's Elements of Crimes.

<sup>13</sup> See e.g.: Kelly Askin, 'Gender Crimes Jurisprudence in the ICTR: Positive Developments', 3(4) *Journal of International Criminal Justice* (2005) 1007-1018; Eric Mose, 'Main Achievements of the ICTR', 3 *Journal of International Criminal Justice* (2005) 920-943. See also: *The Prosecutor v. Jean Paul Akayesu*, Judgment, Trial Chamber I, Case No. ICTR-96-4-T, 2 September 1998 (in this case rape and sexual violence were for the first time recognized as crimes that could amount to genocide).

<sup>14</sup> For a long time there seemed not to be consensus on the definition of rape as ICTY and ICTR Chambers came up with different definitions of the crime, sometimes including 'lack of consent' as an element. Pursuant to the non-binding Elements of Crimes of the ICC, however, lack of consent is, in principle, not an element of the crime. See further on the definition of rape and why it is important to keep 'lack of consent' outside the definition of rape e.g.: Patricia Viseur-Sellers, 'The 'Appeal' of Sexual Violence: Akayesu/Gacumbitsi Cases', in Karen Stefisyn (ed.), 'Gender-Based Violence in Africa' (University of Pretoria, Pretoria, 2007), 51-103; Anne-Marie de Brouwer, 'Gacumbitsi Judgement', in Göran Sluiter and André Klip (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2005-2006 (Volume 24)* (Intersentia, Antwerp/Oxford/Portland, 2009), pp. 583-594.

<sup>15</sup> In the *Katanga* case, it was noted that, with the exception of the specific situation in which the perpetrator takes advantage of the inability of a person to give genuine consent, the Elements of Crimes do not refer to the absence of consent and this factor does therefore not need to be demonstrated. Instead, the Chamber found that it is sufficient to demonstrate one of the circumstances of a coercive nature listed in the second element of the crime of rape, noting that this interpretation is confirmed by Rule 70 of the ICC's Rules of Procedure and Evidence. See *Le Procureur c. Germain Katanga*, Jugement Rendu en Application de l'Article 74 du Statut, No. ICC-01/04-01/07, 7 mars 2014, paras. 964-966.

been successfully prosecuted under different modes of liability as war crimes and crimes against humanity, such as rape, torture, enslavement and persecution.<sup>16</sup> The Tribunals have also noted that other gender-related crimes, such as forced marriage, forced nudity, forced pregnancy, sexual mutilation, and forced abortion, may constitute international crimes. In fact, the SCSL has successfully prosecuted not only rape and sexual slavery, but also forced marriage as the crime against humanity of an 'other inhumane act'.<sup>17</sup> Although the majority of sexual violence cases before the tribunals involved sexual violence committed against women and girls by men and boys, the tribunals recognised in several cases that men and boys are also subjected to various forms of sexual violence and that women can equally be the perpetrators of sexual violence.<sup>18</sup> The above achievements are all major steps forward in the development of sexual violence and its different forms as self-standing crimes in international criminal law for which individuals can be held accountable under different liability modes.

### 1.2 International Criminal Procedural Law and Sexual Violence Prosecutions

With regard to international criminal procedural law, of particular importance to victims of sexual violence are several evidentiary rules, in particular the rules specifying that, as for any testimony, the testimony of a victim of sexual violence does not need to be corroborated, that consent cannot be inferred from words or conduct undermined by coercive circumstances, and that evidence on prior or later sexual conduct is not admitted.<sup>19</sup> While these rules are essentially concerned with the presentation of evidence, they also offer certain protective measures to victims of sexual violence when testifying. These rules, for the first time laid down in the international criminal procedural rules of the ICTY and the ICTR<sup>20</sup>, are a major achievement, particularly when compared with a number of national jurisdictions which, *inter alia*, use definitions of rape which allow defense counsel to introduce suggested consent of the victim as a defense strategy, even in the context of force. Other positive developments for victims of sexual violence at the ICC relate to provisions on protection (e.g. *in camera* proceedings), participation (expressing views and concerns), reparation and assistance, the latter via the Trust Fund for Victims (e.g. physical and psychological rehabilitation projects and socio-economic activities).<sup>21</sup> In addition, the Rome Statute of the ICC

<sup>16</sup> For example, in 2011, the Extraordinary Chambers in the Courts of Cambodia (ECCC) convicted 'Duch,' the head of a notorious Khmer Rouge torture facility, of a number of crimes, including rape subsumed under torture as a crime against humanity.

<sup>17</sup> See for further discussions on this crime, including how to label it, e.g.: Iris Haenen, *Force & Marriage. The Criminalisation of Forced Marriage in Dutch, English and International Criminal Law* (Intersentia, Cambridge/Antwerp, 2014). See on the issue of the importance of labelling sexual violence crimes as sexual violence crimes rather than non-specific sexual violence crimes, such as 'other inhuman act', e.g.: Hilmi M. Zawati, *Symbolic Judgements or Judging Symbols: Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes under the Statutes of the International Criminal Tribunals* (Pennsylvania Press, Philadelphia, 2013).

<sup>18</sup> For cases involving sexual violence against men see, *inter alia*, the ICTY cases concerning Tadić, Češaić, Mucić *et al.*, Todorović and Simić. Before the ICTR, sexual violence against a man was only examined in the Niyitegeka and Muhimana cases, dealing with the same incident. For cases involving female perpetrators of sexual violence, see the ICTR case involving Pauline Nyiramasuhuko, the ICTY case of Biljana Plavšić, and the ICC case of Simone Gbagbo.

<sup>19</sup> See e.g. Rules 63(4), 70-72 ICC Rules of Procedure and Evidence.

<sup>20</sup> Common Rule 96 ICTY and ICTR Rules of Procedure and Evidence.

<sup>21</sup> For an in depth discussion of these matters, see e.g.: Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia, Antwerp/Cambridge, 2005).

includes provisions related to its institutional framework, requiring, for example, geographical and gender balance among the staff of the Court, and expertise in sexual violence.<sup>22</sup> For example, the Office of the Prosecutor of the ICC, *inter alia*, appointed a Special Gender Advisor, established the Gender and Children Unit, and provides training on the legal framework and methods of conducting interviews on sexual violence crimes.<sup>23</sup> These and other positive developments in international criminal (procedural) law, as far as sexual violence prosecutions are concerned, extend well beyond many laws in national jurisdictions.

## 2 Challenges in International Criminal (Procedural) Law

Despite the many achievements in international criminal (procedural) law, there are several remaining challenges facing the understanding, investigation and prosecution of sexual violence crimes. Some of these challenges will be discussed in this section.

### 2.1 Male Sexual Violence and Female Perpetrators of Sexual Violence

For a long time, sexual violence crimes have been seen and largely prosecuted as crimes committed by men against women.<sup>24</sup> Only recently, the international community is becoming aware of the brutality of sexual violence perpetrated against men in conflict situations, and that the number of these atrocities is much higher than has always been assumed. In at least twenty-five conflict situations over the past thirty years alone, male sexual violence has been reported.<sup>25</sup> For the few prevalence studies that are available, the statistics make very clear that the cases concerning male sexual violence are no isolated cases. For example, in Liberia, 32.6% of male combatants surveyed reported being subjected to some form of sexual violence<sup>26</sup>, while in Eastern DRC, 22% of men reported conflict-related sexual violence.<sup>27</sup> Conflict-related sexual violence against men, committed by other men but also women, include rape, enforced sterilization, beatings to and mutilation of the genitals, enforced nudity and enforced masturbation, sexual slavery, forced sex with dead animals and forced marriage.<sup>28</sup> The problem of sexual violence against men remains, however, hidden and

<sup>22</sup> Articles 36 and 44 Rome Statute.

<sup>23</sup> E.g. Article 42(g) Rome Statute.

<sup>24</sup> See e.g.: Chiseche Salome Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (Penn, Philadelphia, 2013); Rosemary Grey and Laura J. Shepherd, 'Stop Rape Now?: Masculinity, Responsibility, and Conflict-related Sexual Violence', 16(1) *Men and Masculinities* (2012) 115-135.

<sup>25</sup> United Nations Office for the Coordination of Humanitarian Affairs (UN-OCHA), *The Nature, Scope, and Motivation for Sexual Violence against Men and Boys in Armed Conflict*, in UN-OCHA, *Use of Sexual Violence in Armed Conflict: Identifying Gaps in Research to Inform More Effective Interventions* (OCHA - Policy Development and Studies Branch, Pretoria, South Africa, 2008), pp. 1-13 and background papers; Lara Stemple, 'Male Rape and Human Rights', 60 *Hastings Law Journal* (2009) 611-615.

<sup>26</sup> Kirsten Johnson et al. (eds.), 'Association of Combatant Status and Sexual Violence with Health and Mental Health Outcomes in Postconflict Liberia', 300(6) *Journal of the American Medical Association* (2008) 676-690.

<sup>27</sup> Kirsten Johnson et al. (eds.), 'Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo', 5 *The Journal of the American Medical Association* (2010) 553-561.

<sup>28</sup> See e.g.: Eric Stener Carlson, 'The Hidden Prevalence of Male Sexual Assault During War', 46(1) *British Journal of Criminology* (2005) 16-25; R. Charli Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations', 37(1) *Security Dialogue* (2006) 83-103; Usta Kaitesi, *Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary Courts and Gacaca Courts* (Intersentia, Cambridge/Antwerp/Portland, 2013), pp. 89-90. On forced marriage in Cambodia in 1975-1979 under the Khmer Rouge regime, see Haenen 2014, *supra* note 17, pp. 88-98, 282-283.

lack of reporting by the victims (e.g. due to shame, issues of masculinity, prosecution possibilities for homosexuality in some countries) is a problem as is the lack of knowledge or discomfort with the issue with the people on the ground, including investigators.<sup>29</sup> Although the legal framework is in place to prosecute sexual violence against men, as the legal framework for prosecuting sexual violence is no different for men than for women, investigations and prosecutions of male sexual violence have to date been rare.<sup>30</sup> In cases in which prosecutions did take place, male sexual violence was prosecuted under other non-specific sexual violence crimes, such as 'cruel treatment', which hides the nature and occurrence of male sexual violence.<sup>31</sup>

Like men and boys, women and girls are equally capable of committing atrocious forms of conflict-related sexual violence against men, boys, women and girls alike. Although sexual violence in conflict was long considered to be committed by men and boys only, in several studies women and girls have been identified as the physical perpetrators of conflict-related sexual violence, as co-perpetrators by helping others to inflict sexual violence on the victims, or as the ones ordering sexual violence.<sup>32</sup> Conflicts where women and girls committed sexual violence include countries such as Sierra Leone, DRC, Iraq, Rwanda, Liberia, Haïti, Ivory Coast and the former Yugoslavia.<sup>33</sup> In the DRC, in a prevalence study, "by simply asking respondents to report the sex of the perpetrator, we found that of female survivors 40% reported the perpetrator as female, and among male survivors 15% reported the perpetrator as female" and that 17% of survivors of sexual violence perpetrated by the militia group Mai-Mai named females as the perpetrators.<sup>34</sup> In the absence of prevalence studies inquiring about the sex of the perpetrators of sexual violence in conflict (the DRC study cited here being the exception), it remains unclear how big the phenomenon of female perpetrators of sexual violence really is. What is clear, however, is that the number of female perpetrators of sexual violence is much larger than has generally been assumed to date.<sup>35</sup> The reason why many more men have been involved in committing international crimes is likely because the main organizations (militarized units) responsible for the physical perpetration of international crimes are still male dominated.<sup>36</sup> The reason why only one per cent of all the people convicted by international criminal courts and tribunals are female is because these tribunals focus on those in leadership positions and the physical perpetrators and women are underrepresented amongst these two groups, which, however, may change over time.<sup>37</sup>

<sup>29</sup> Sandesh Sivakumaran, 'Prosecuting Sexual Violence against Men and Boys', in Anne-Marie de Brouwer et al. (eds.), *supra* note 5, p. 81.

<sup>30</sup> *Ibid.*, p. 97. See section I above on the legal framework that is in place to prosecute sexual violence in conflict.

<sup>31</sup> *Ibid.*, pp. 92-93.

<sup>32</sup> See e.g.: African Rights, *Rwanda: Broken Bodies, Torn Spirits: Living with Genocide, HIV/AIDS and Rape*, Kigali, 2004; Nicole Hogg, 'Women's Participation in the Rwandan Genocide: Mothers or Monsters?', 92(877) *International Review of the Red Cross* (2010) 69-102; Helen Durham and Katie O Byrne, 'The dialogue of Difference: Gender Perspectives on International Humanitarian Law', 92(877) *International Review of the Red Cross* (2010) 1-22.

<sup>33</sup> See e.g.: Alette Smeulers, 'Female Perpetrators: Ordinary or Extra-ordinary Women?', 15(2) *International Criminal Law Review* (2015) 205-251; Dara Cohen, 'The Role of Female Combatants in Armed Groups: Women and Wartime Rape in Sierra Leone (1991 2002)', 65 *World Politics* (2013) 383-415.

<sup>34</sup> See e.g. Lynn Lawry, Kirsten Johnson and Jana Asher (eds.), 'Evidence-based Documentation of Gender-based Violence', in Anne-Marie de Brouwer et al. (eds.), *supra* note 5, pp. 258-259.

<sup>35</sup> Smeulers 2015, *supra* note 33, p. 251.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* For an overview of the women charged for sexual violence before the international criminal tribunals, see *supra* note 18.

It is thus important not to turn a blind eye to sexual violence crimes committed against men or sexual violence committed by women as sexual violence can be perpetrated by anyone (men, women, boys, girls) against anyone (men, women, boys, girls). As research into sexual violence perpetrated by women and girls, sexual violence committed against men and boys and sexual violence committed against children generally is still relatively scarce, more research is needed to establish the extent of it, why it happens and why it is less discussed.<sup>38</sup> Only then will we understand some of the complexities of conflict-related sexual violence better and can we better think of ways to prevent it.

## 2.2 Investigating Conflict-related Sexual Violence

Many strides have been made to prosecute those responsible for war crimes, crimes against humanity and genocide, but less so when it concerns sexual violence crimes. Marcus, who has more than fourteen years of experience as an international criminal investigator and prosecutor, stated that “crimes of sexual and gender-based violence are under-documented and under-included in cases which are brought before international jurisdictions.”<sup>39</sup> This, Marcus argued, is remarkable in light of the fact that the gathering of evidence of sexual violence crimes does not pose any additional legal burden and need not pose any additional investigative challenge when compared to other international crimes.<sup>40</sup> The key to include sexual violence crimes in the indictments requires the investigative plan to include and be open to evidence of these crimes (from direct witnesses, but also from other sources), preparation with as much information as possible in advance of the field investigation (including cultural aspects of the region and victims), and, throughout the whole process, a checklist of elements of crimes to be proven and coordination between investigators and prosecutors, needs to be relied on.<sup>41</sup> Furthermore, while gathering the evidence, the needs of the survivor need to be prioritized to the extent possible so that they are approached with respect and care. In light of what was just said in section 2.1 above, it is furthermore imperative that investigators are also open to the fact that male sexual violence may have occurred or that women may have been the perpetrators of sexual violence crimes and accordingly inquire into these issues.<sup>42</sup> According to Marcus “[t]he investigation and prosecution of crimes of sexual and gender-based violence is crucial to closing the impunity gap.”<sup>43</sup> In light of the undercharging of sexual violence crimes, the ICTR, ICTY and ICC have drafted manuals/policy papers in which they describe lessons learned and come up with recommendations with regard to improving the investigation and prosecution of sexual violence.<sup>44</sup>

<sup>38</sup> *Ibid.*; Kaitesi 2013, *supra* note 28, p. 243.

<sup>39</sup> Maxine Marcus, ‘Investigation of Crimes of Sexual and Gender-Based Violence Under International Criminal Law’, in Anne-Marie de Brouwer *et al.* (eds.), *supra* note 5, p. 211.

<sup>40</sup> *Ibid.*, pp. 211-242.

<sup>41</sup> *Ibid.*

<sup>42</sup> It should be noted that, in order to make contact with victims of sexual violence, it is important to work with diverse investigative teams, composed of male and female members of different ages and nationalities or regional backgrounds. It is furthermore not correct to assume that female victims only want to speak to female investigators and male victims only the male investigators. This may very much depend on the personal preferences of the victims themselves and the underlying sexual violence they endured.

<sup>43</sup> Marcus 2013, *supra* note 39, p. 242.

<sup>44</sup> See further: ICTR, *Prosecution of Sexual Violence: Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-conflict Regions - Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, 30 January 2014; ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014; ICTY Office of the Prosecutor, *Prosecuting Sexual Violence Legacy Project, Information Sheet*, September 2014 (the ICTY is in the process of finalising such a manual).

It should here be noted that the still often heard claim that victims of sexual violence simply do not wish to testify is not true.<sup>45</sup> Although this may be the case for some survivors, certainly not for many others. Testifying in court can give victims of sexual violence, when done under the right circumstances, a sense of justice (e.g. recognition, establishment of the truth, empowerment).<sup>46</sup> Speaking up furthermore contributes in openly taking away the shame and stigma that perpetrators of sexual violence and others so often incur on their victims. Convictions that victims of sexual violence do not want to speak rather keep the sexual violence committed in conflict situations under-documented and under-represented in cases before international criminal tribunals. Sharratt suggested that the reluctance to discuss and deal with conflict-related sexual violence should perhaps be found elsewhere. In one of the few, if not only, empirical studies on this matter, she held that interviews with judges, prosecutors, investigators, and victim and witnesses unit members of the ICTY and the Bosnian War Crimes Court (BIH) revealed that many of them accept rape myths, hold misogynistic views about women, and are ambivalent and uncomfortable when dealing with rape and sexual violence.<sup>47</sup> Others, working in and outside the international criminal tribunals, have similarly concluded on the reluctance of court officials that comes with speaking and hearing of conflict-related sexual violence.<sup>48</sup> To overcome such attitudes, at least a mandatory training in sexual violence and gender competence and psycho-social capacity building should therefore be obligatory for all parties involved in the judicial system.

### 2.3 Linking Sexual Violence to High Level Accused

Another remaining challenge in the prosecution of sexual violence before international criminal tribunals relates to the prosecution of sexual violence in highly complex cases involving high level officials and/or crimes that require linking sexual violence with a broader campaign of crimes. For example, before the ICTY, the bulk of sexual violence cases included direct perpetrators of sexual violence crimes or others close to the scene of the crime. Prosecuting sexual violence in high level complex cases where the perpetrators are more remote from the crime scene could, however, be done on the basis of superior/command responsibility and joint criminal enterprise theories. While convictions based on these liability modes are necessarily complicated, in cases of sexual violence crimes where prosecutors and investigators may mischaracterize sexual violence as non-violent crimes that are incidental to the conflict, these prosecutions will definitely be bound

<sup>45</sup> See e.g.: Allison Cole, 'Myth-Buster: Rwanda Tribunal Judgment Establishes New Prohibitions of Wartime Rape', *IntLawGrrls*, 10 April 2012.

<sup>46</sup> See e.g.: Nicola Henry, 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence', 3 *The International Journal of Transitional Justice* (2009) 114-134; Anne-Marie de Brouwer and Sandra Ka Hon Chu, 'Gacaca courts in Rwanda: 18 years after the genocide, is there justice and reconciliation for survivors of sexual violence?', *IntLawGrrls*, 7/8/9 April 2012.

<sup>47</sup> Sara Sharratt, 'Voices of Court Members: A Phenomenological Journey - The Prosecution of Rape and Sexual Violence of the ICTY and the BIH', in Anne-Marie de Brouwer *et al.* (eds.), *supra* note 5, pp. 365-367. Sharratt interviewed 14 judges (seven females and seven males) and 12 prosecutors (seven women, six men) in both courts and most of them had been involved in the most prominent sexual violence cases before these courts.

<sup>48</sup> Askin 2013, *supra* note 5, p. 52; Michelle Jarvis and Elena Martin Salgado, 'Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice', in: Anne-Marie de Brouwer *et al.* (eds.), *supra* note 5, p. 113; Marcus 2013, *supra* note 39, p. 211.

to fail.<sup>49</sup> For superior responsibility cases, the Prosecution needs to prove that the superior knew or had reason to know that subordinates were about to commit sexual violence specifically or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>50</sup> The challenge in establishing superior responsibility for sexual violence cases is to prove that an accused person at least had reason to know that his subordinates would commit sexual violence crimes specifically, as opposed to other types of mistreatment. While establishing a generalized level or risk of the prevalence of sexual violence in conflict is unlikely to be sufficient for establishing superior responsibility, many of the factual situations in international prosecutions disclose more concrete indicators of the risk of sexual violence crimes, including the detention of women in camps where subordinates have uncontrolled access to them or knowledge that sexual violence has been prevalent in the recent past in a particular conflict zone.<sup>51</sup> Furthermore, sexual violence prosecutions on the basis of joint criminal enterprise categories I, II and III can be improved.<sup>52</sup> Although it is generally considered easier for a prosecutor to prove that a crime was a natural and foreseeable consequence of a joint criminal enterprise (category III) than to prove that it formed part of the common criminal purpose to which all JCE members subscribed (categories I and II), the ICTY has recognized that sexual violence can constitute part of a common criminal purpose, either at the outset of the joint criminal enterprise or over time.<sup>53</sup> Yet, there are still few ICTY cases where this has occurred.<sup>54</sup> In the case of sexual violence, according to Jarvis and Salgado: “there is a particular risk of failing to appreciate how they fit within an over-arching campaign of crimes due to the historical assumptions outlined above [referring to seeing sexual violence as personal in nature and separate from the main activity of conflict]. Extra attention is likely to be required on the part of the investigators and prosecutors to locate relevant witnesses and ask the right questions to uncover the extent to which sexual violence crimes fall within the broader pattern of crimes attributable to the JCE members.”<sup>55</sup> Before the ICTR, prosecutions based on command responsibility and joint criminal enterprise theory for sexual violence crimes have proven to be very difficult and rare and in its more recent prosecutions, prosecutors have been putting more emphasis on putting the rapes *within* the context of the genocide so as to help the judges accept that the rapes were within the sphere of the genocidal campaign, and not outside.<sup>56</sup>

<sup>49</sup> Jarvis and Salgado 2013, *supra* note 48, pp. 103, 122.

<sup>50</sup> E.g. Article 7(3) ICTY Statute; *Prosecutor v. Milutinović et al.*, Judgement, IT-05-87-T, Vol. III, 26 February 2009, paras. 472, 1135.

<sup>51</sup> Jarvis and Salgado 2013, *supra* note 48, pp. 108-111.

<sup>52</sup> In the Tadić Appeal Judgement, the Chamber distinguished three categories of collective criminality, which today are known as joint criminal enterprise (JCE) I, II and III. First, the *basic* form, where the participants act on the basis of a ‘common design’ or ‘common enterprise’ and with a ‘common intention’. Secondly, the systemic form, the so-called ‘concentration camp cases’ where crimes are committed by members of military or administrative units, such as those running concentration or detention camps, on the basis of a common plan (61 common purpose). Thirdly, the so-called *extended* JCE where one of the co-perpetrators actually engages in acts going beyond the common plan, but his acts still constitute a foreseeable consequence of the realization of the plan. See *The Prosecutor v. Dusko Tadić*, Appeal Judgement, IT-94-1A, 15 July 1999, paras. 196-219.

<sup>53</sup> Jarvis and Salgado 2013, *supra* note 48, pp. 112-113.

<sup>54</sup> *Ibid.* (discussing the ICTY *Stakic* and *Krajisnik* cases).

<sup>55</sup> *Ibid.*, p. 113.

<sup>56</sup> Linda Bianchi, ‘The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR’, in Anne-Marie de Brouwer *et al.* (eds.), *supra* note 5, pp. 134-136.

### 2.4 Other Types of Evidence than Direct Witness Testimony

The former ICC Chief Prosecutor, Luis Moreno-Ocampo, said in 2009 that he welcomed interventions of social scientists to push forward the frontiers of international criminal justice and that “one of our goals is a case with no witnesses, no victims. We want to use methods that you are developing, such as statistical analysis. We must refine how to use your tools.”<sup>57</sup> Navanethem Pillay, then UN High Commissioner for Human Rights, similarly held that in cases of sexual violence in conflict “a good prosecutor should be able to argue a case without individual testimony by establishing the planning, the *modus*, and the effects of the crime.”<sup>58</sup> The question that has therefore been posed, including by the current Chief Prosecutor Fatou Bensouda, is whether international criminal tribunals, in particular the permanent ICC, can sustain a conviction for the underlying crime of mass rape without testimony from victims.<sup>59</sup>

First of all, based on the ICC legal framework it could be concluded that evidence other than direct physical victim testimony could be sufficient to arrive at a conviction of an accused for sexual violence or any other crime constituting genocide, a crime against humanity or a war crime.<sup>60</sup> In each case, it is up to the Chamber to rule on the relevance or admissibility of the evidence, taking into account the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.<sup>61</sup> There has not been a case before an international criminal tribunal in which it was stated that without the direct testimony of the victim the crime could not be proven or that the rights of the accused were violated. Evidence in cases of sexual violence other than direct victim testimony has commonly included eyewitnesses, hearsay witnesses, and expert witnesses (for instance, from an NGO, medical, military or psychology background) who testified about an actual incidence of sexual violence and/or sexual violence in general. Witnesses appearing in court could, for instance, be asked what they know about the sexual violence that was being committed or whether they could give descriptions of female corpses with indications of rape to establish that there was a permissive environment for sexual violence. In addition, there might be military supporting or incriminating documents or other documents (e.g. UN, NGOs) generated concerning the specific incidents of sexual violence. Furthermore, plain admission by insiders, or the accused, or stipulations to previously established facts - especially for leadership cases - can be used as a source of evidence. All of this non direct, physical victim evidence concerns admissibility issues that, as mentioned above, the Chamber will need to decide upon. Nevertheless, cumulative probative non direct victim testimony also requires one to answer the main question addressed above - whether international criminal tribunals can sustain a conviction for the underlying crime of mass rape without testimony from victims - in the affirmative, even

<sup>57</sup> Press Release Center on Law & Globalization, *Social Science Research Seen to Play Key Role in Building Institutions of International Criminal Law*, 22 June 2009.

<sup>58</sup> Keynote address by Navanethem Pillay, *Sexual Violence: Standing by the Victim*, First Hague Colloquium on ‘Sexual Violence as an International Crime’, 16 June 2009.

<sup>59</sup> ICC Forum, *Mass Rape Question, Topic for June 2012-February 2013*, at: <http://iccforum.com/massrape>. The contents of this paragraph is based on my expert opinion published on the ICC Forum.

<sup>60</sup> See, in particular, Articles 69(2) and 69(3) Rome Statute; Rules 63(4), 64-75 ICC Rules of Procedure and Evidence.

<sup>61</sup> See Article 69(4) Rome Statute.

if there must be a case-by-case exploration of the sufficiency of the evidence for conviction in the absence of having a physical victim testify (which could also include the situation where the victim died or where the victim is a child and cannot testify because of capacity reasons).

Several ways in which social science evidence can build cases and international justice institutions, and could thus supplement the more traditional legal approaches in gathering evidence and prosecuting sexual violence crimes as just discussed, have furthermore been proposed. For example<sup>62</sup>, the work of Lawry, Johnson and Asher showed the usefulness of epidemiologic sampling methods (a health and human rights framework) “to gather data from individuals of the population who represent the population as a whole”, including in countries such as Sierra Leone, Iraq and Liberia.<sup>63</sup> Their work shows how cluster surveys are used to provide generalizable information in circumstances where a comprehensive study could not be done because of terrain or safety concerns in conflict situations. Such studies do not rely on interviews primarily, but rather on population assessments and can be used “to demonstrate the systematic or even opportunistic nature of the crime.”<sup>64</sup> As Lawry and colleagues noted: “Qualitative interviews provide insight into the individual’s experience of human rights abuses and thereby offer the human face and voice to the statistical numbers that are obtained from quantitative work.”<sup>65</sup> Qualitative and quantitative data therefore play essential and complementary roles in providing evidence of sexual violence crimes. This form of evidence-based documentation has been important in placing rape within an overall group dynamic of violence. Lawry and colleagues concluded that although employing these methods provide a means to generate statistically significant data that can be generalized to the population as a whole for the purposes of evidence collection in the case of international crimes, such as before the ICC, “[i]t is important to continue the dialogue and to better understand the different needs between the lawyers, the social scientists and the survivors of sexual violence.”<sup>66</sup>

The question therefore remains how these statistical analyses can be used for international criminal prosecution? Aranburu, senior analyst in the ICC’s Office of the Prosecutor, said: “It is necessary to take three steps: to get a level of description of the patterns of a crime; then, to correlate the crime with the working of the command structures that produced it; then to explain what caused it. We need descriptive statistics to show that the crime is grave, that its scope warrants the International Criminal Court, which intends to take only the most serious cases.”<sup>67</sup> Aranburu stated that pattern evidence has been used to investigate large-scale killings,

<sup>62</sup> See also others on this matter, e.g.: John Hagan, Richard Brooks and Todd Haugh, ‘Reasonable Grounds’ Evidence Involving Sexual Violence in Darfur’, 35(4) *Law & Social Inquiry* (2010) 881-917.

<sup>63</sup> Lawry *et al.* 2013, *supra* note 34, p. 251.

<sup>64</sup> *Ibid.* See also: Lynn Lawry, Anne-Marie de Brouwer, Alette Smeulders, Juan Carlos Rosa, Michael Kisielewski, Kirsten Johnson, Jennifer Scott & Jerzy Wiecezorek, ‘The Use of Population-based Surveys for Prosecutions at the International Criminal Court: A Case Study of Democratic Republic of Congo’, 24(1) *International Criminal Justice Review* (2014) 5-21.

<sup>65</sup> Lawry *et al.* 2013, *supra* note 34, p. 257.

<sup>66</sup> *Ibid.*, p. 274.

<sup>67</sup> Press Release Center on Law & Globalization, *Social Science Research Seen to Play Key Role in Building Institutions of International Criminal Law*, 22 June 2009.

destruction, and displacement, but much less for sexual violence.<sup>68</sup> According to him: “International crimes often comprise a large number of incidents that can be characterized as a pattern as long as they show common features on all or most of the following aspects: (1) the profile of the perpetrators; (2) the profile of the victims; (3) the geographical and chronological distribution profile of the victims; and (4) the *modus operandi* in the commission of the crime.”<sup>69</sup> According to him there are challenges to using pattern evidence on at least three levels: (1) the tendency of law enforcement and judicial institutions to ignore sexual violence requires direction from the top of these institutions to correct this; (2) sexual violence continues to be under-reported; and (3) whatever evidence is provided needs to stand up to the scrutiny of impartial experts and others who are not directly involved in the conflict.<sup>70</sup> Therefore, in order to use statistical evidence in a legal proceeding, such evidence must follow methodologies accepted by the scientific community, be subject to peer review, and be properly sourced and justified. New methodological approaches to collection and use of data on sexual violence in conflict and interdisciplinary partnerships may therefore reduce impunity, strengthen law, and alleviate suffering for victims of sexual violence, and need to be further researched and continually improved for the use before international criminal courts.<sup>71</sup>

### 3 Sexual Violence in Conflict: A Preventable Crime?

When it comes to conflict-related sexual violence, popular belief does not always correspond with the reality on the ground. First of all, conflict-related sexual violence is not specific to certain types of conflicts or to geographic regions; it occurs in ethnic and non-ethnic wars, in Africa and elsewhere.<sup>72</sup> Second of all, there is no single cause of conflict-related sexual violence. Military strategy (“rape as a weapon of war”) plays a role in some cases, but so do group characteristics, within-unit social dynamics, and individual-level factors like opportunism or trauma.<sup>73</sup> Third, research has indicated that state militaries are more likely to be reported as perpetrators of sexual violence than either rebel groups or militias.<sup>74</sup> Fourth and finally, in exceptional cases is sexual violence not perpetrated in conflict or very rare.<sup>75</sup> According to Wood, this is the situation “where the organization prohibits sexual violence and effectively enforces that decision through a tightly controlled military hierarchy in which punishment is swift and severe” and cites the case of the Liberation Tigers of Tamil Eelam of Sri Lanka as an

<sup>68</sup> Xabier Agirre Aranburu, ‘Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases’, 35(4) *Law and Social Inquiry* (2010), p. 856.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, pp. 875-876.

<sup>71</sup> Patricia Viseur Sellers, ‘Foreword’, in Anne-Marie de Brouwer *et al.* (eds.), *supra* note 5, p. xi; Terence C. Halliday, ‘Introduction: Symposium on Systematic Sexual Violence and International Criminal Law’, 35(4) *Law and Social Inquiry* (2010) 835-838.

<sup>72</sup> Dara Kay Cohen, Amelia Hoover Green and Elisabeth Jean Wood, *Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward*, United States Institute of Peace, Special Report, 2013.

<sup>73</sup> *Ibid.*; Maria Eriksson Baaz and Maria Stern, ‘Why do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)’, 53 *International Studies Quarterly* (2009) 495-518.

<sup>74</sup> Cohen and Nordas 2014, *supra* note 2, p. 418.

<sup>75</sup> Elisabeth Jean Wood, ‘Armed Groups and Sexual Violence: When is Wartime Rape Rare?’, 37(1) *Politics & Society* (2009) 131-161. Of course, more inaccurate popular beliefs can be discerned, such as the ones discussed in paragraphs 2.1 and 2.2 above.

example.<sup>76</sup> The organization and structure of military organizations, and the types of training, indoctrination and punishment schemes that exist within armed groups, could therefore explain the (relative) absence of sexual violence in some instances.<sup>77</sup> Where a military hierarchy exists, leaders may have a variety of reasons not to engage in sexual violence (ideological, strategic, practical); when the benefits of sexual violence are lower than the potential damage to the organization and war effort, leaders will likely refrain from the use of sexual violence in conflict.<sup>78</sup> Sexual violence is thus not necessarily an inevitable product of conflict, as has oftentimes been stated, and this thus means that conflict-related sexual violence can also be prevented. Some of the recommendations and ways to prevent conflict-related sexual violence that have been proposed concern: changing norms, creating safer spaces, improving reporting, ending impunity, assuring accountability, and mitigating sexual violence after conflict.<sup>79</sup> Changing norms would then include changing how survivors of sexual violence are perceived and treated in their communities; creating safer spaces would include improving infrastructure and reporting practices; improving reporting would include protection of witnesses; ending impunity would include substantially increasing the likelihood that sexual violence crimes will be punished; assuring accountability would include strengthening superior/command responsibility for acts committed by troops; and mitigating sexual violence after conflict would include more systematic integration of sexual violence prevention programmes in Disarmament, Demobilization and Reintegration (DDR) processes and security sector reform.<sup>80</sup> In addition, it has been held that there is a responsibility not only to protect, but also a responsibility to prevent sexual violence from occurring, which can be achieved through three decisive approaches at different levels by focussing on the perpetrators.<sup>81</sup> In the first place, by increasing focused research on individual perpetrators and their backgrounds ('individual focus'). In the second place, by holding military leaders responsible for crimes of sexual violence committed by soldiers under their command and ensuring that all soldiers, as well as aiders and abettors, understand that acts of sexual violence in conflict are criminal acts and not an integral part of a military culture ('group focus'). In the third place, by fostering military cultures in which perpetrators of sexual violence are exposed and condemned ('cultural focus').<sup>82</sup> In general, more research in the area of how to adequately prevent conflict-related sexual violence seems to be needed as answers to this issue are not yet satisfactorily given or implemented.

#### 4 The Role of the Military

The military has an important role to play in the prevention of and protection from sexual violence in conflict. They are often one of the first people to respond when sexual violence occurs and have access to information about events on the ground that is not always available

<sup>76</sup> *Ibid.*, p. 152.

<sup>77</sup> Ragnhild Nordas, *Preventing Conflict-related Sexual Violence*, PRIO Policy Brief, 02, 2013, p. 2.

<sup>78</sup> Elisabeth Jean Wood, 'Variation in Sexual Violence During War', 34(3) *Politics and Society* (2006) 307-342.

<sup>79</sup> Nordas 2013, *supra* note 77, pp. 3-4.

<sup>80</sup> *Ibid.*

<sup>81</sup> Inger Skjelsbæk, *Preventing Perpetrators: How To Go from Protection to Prevention of Sexual Violence in War?*, PRIO Policy Brief Oslo, 03, 2013.

<sup>82</sup> *Ibid.* (for these three approaches).

to civilians. At times, the military may be the only protection available that civilians have against sexual violence. In addition, military actors may also have a role to play as witnesses before national and international criminal tribunals, i.e. in the prosecuting of sexual violence by giving testimony on the sexual violence that took place in the area they were stationed in. In this section, these roles of the military and the positive contributions they can make in the area of sexual violence prevention and prosecution are addressed.<sup>83</sup>

#### 4.1 *Military Actors as Witnesses on Sexual Violence before International Criminal Tribunals*

As mentioned in section 2.4 above, military actors can appear as fact and expert witnesses for the Prosecution and Defence before international criminal tribunals. In the past this has happened on a number of occasions and also included testimony of Dutch military actors in UN Peacekeeping missions. As witnesses, they can, for instance, testify on specific military knowledge that they have<sup>84</sup> or the crimes with which the accused is charged, which may include evidence on actual incidences of sexual violence and/or sexual violence in general. Before the ICTY, several witnesses with a military background appeared. For example, in the *Strugar* case (Major General Milovan Zorić and Lieutenant Colonel Jozef Poje), in the *Blaskić* case (General Philippe Morillon, former UNPROFOR commander-in-chief) and in the *Perišić* case (Thom Karremans, Commander of the Dutch UNPROFOR Battalion III in 1995). Before the ICTR, Major General Roméo Dallaire, former Force Commander of the UN Assistance Mission in Rwanda (UNAMIR), testified in the *Akayesu*, *Bagosora et al.* and *Bizimungu et al.* cases. So did Dallaire's former executive assistant Major Brent Beardsley and officer Major Robert Alexander van Putten, both in the *Bagosora et al.* case. Before the ICC, General Daniel Opaté, for example, testified as a military expert in the *Bemba Gombo* case. Opaté testified to the accused's criminal liability and held that the accused Bemba Gombo bore command responsibility over his troops that were deployed in the Central African Republic where they committed crimes, including rape, and that the accused had the capacity to stop the troops from committing the crimes.<sup>85</sup>

As military actors are often - as UN peacekeepers - UN officials, they have in principle immunity from the jurisdiction of the international criminal tribunals. This immunity is drawn from Article 105 of the UN Charter and the 1946 Convention on the Privileges and Immunities of the United Nations.<sup>86</sup> Yet, their immunity to testify can be lifted by the UN Secretary-General, in which case

<sup>83</sup> In addition, UN peacekeepers have at times themselves been accused of sexual violence committed against the vulnerable populations they are mandated to protect. This issue will not be addressed in this contribution. For more information on this, see: Carla Ferstman, *Criminalizing Sexual Exploitation and Abuse by Peacekeepers*, United States Institute of Peace, Special Report 335, September 2013.

<sup>84</sup> For example, Major General Milovan Zorić testified on his knowledge of command and control in the Yugoslav People's Army (JNA) and Lieutenant Colonel Jozef Poje testified on his knowledge of artillery and weapon use in the JNA, both in the ICTY *Strugar* case.

<sup>85</sup> Wairagala Wakabi, 'Military Expert Says Bemba Bore Command Responsibility but Defence Faults his Testimony', *International Justice Monitor*, 9 December 2011.

<sup>86</sup> The definition of 'official' as used in this convention does, however, not cover most military personnel in UN peace operations, in particular not members of national contingents. However, it could be argued that such personnel is covered by Article 105 of the UN Charter, if it is accepted that the term 'official' as used in that provision has a broader meaning. See on this: Paul C. Szasz and Thordis Ingadottir, 'The UN and the ICC: The Immunity of the UN and Its Officials', 14 *Leiden Journal of International Law* (2001) 871. See also: Joop Voetelink, 'Status of forces': *Strafrechtsmacht over militairen vanuit internationaalrechtelijk & militair-operationeelrechtelijk perspectief*, UvA PhD Dissertation, 2012, pp. 51, 53.

they - past and present UN officials - can testify in court on matters relating to their official tasks during UN service, although conditions of testifying can be imposed by the UN Secretary-General, e.g. in relation to disclosure of documents.<sup>87</sup> From the examples given above, it can be seen that it is - in principle - practice of the UN to waive the immunity of military personnel in UN peacekeeping operations testifying before international criminal tribunals, including for members of formed military contingents.

Two members of the military whom are known to have testified in court to the sexual violence that took place during their military mission assignment are Roméo Dallaire and Brent Beardsley. Dallaire testified before the ICTR on, *inter alia*, the sexual violence he had come across during the genocide in Rwanda in 1994. He mentioned that the sexual violence, which he had not witnessed directly himself but which he saw evidenced in the way the corpses were displayed, was one of the most difficult things to deal with.<sup>88</sup> In a similar vein, Beardsley testified in court about two weeks later as follows:

Q. With respect to the female corpses, in particular, did you make any observations about any particular characteristics that those corpses may have had?

A. Yes, two things, really. One, when they killed women it appeared that the blows that had killed them were aimed at sexual organs, either breasts or vagina; they had been deliberately swiped or slashed in those areas. And, secondly, there was a great deal of what we came to believe was rape, where the women's bodies or clothes would be ripped off their bodies, they would be lying back in a back position, their legs spread, especially in the case of very young girls. I'm talking girls as young as six, seven years of age, their vaginas would be split and swollen from obviously multiple gang rape, and then they would have been killed in that position. So they were laying in a position they had been raped; that's the position they were in.

Rape was one of the hardest things to deal with in Rwanda on our part. It deeply affected every one of us. We had a habit at night of coming back to the headquarters and, after the activities had slowed down for the night, before we went to bed, sitting around talking about what happened that day, drink coffee, have a chat, and amongst all of us the hardest thing that we had to deal with was not so much the bodies of people, the murder of people -- I know that can sound bad, but that wasn't as bad to us as the rape and especially the systematic rape and gang rape of children. Massacres kill the body and rape kills the soul. And there was a lot of rape. It seemed that everywhere we went, from the period of 19th of April until the time we left, there was rape everywhere near these killing sites.<sup>89</sup>

<sup>87</sup> See extensively and more on this issue: Suzannah Linton, 'Testimony of Expert Witnesses, Journalists, ICRC, and UN staff', in: Göran Sluiter *et al.*, *International Criminal Procedure: Principles and Rules* (Oxford, Oxford University Press, 2013), pp. 878-938.

<sup>88</sup> Examination-in-Chief of General Roméo Dallaire in: *Le Procureur c. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva*, Transcription Caviardee, Affaire No. ICTR-98-41-T, 20 janvier 2004, p. 32.

<sup>89</sup> Examination-in-Chief of Major Brent Beardsley in: *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Transcripts, Case No. ICTR-98-41-T, 3 February 2004, pp. 51-52.

Dallaire's and Beardsley's testimonies were subsequently used to support the sexual violence charges against the accused. What, additionally and importantly, becomes clear from their testimonies is that sexual violence was a topic that was very hard to talk about among the military. Yet, it had a very big impact on them, arguably even more so than the dead bodies of people, and even long after the genocide had ended.<sup>90</sup> This statement underlines the importance to address conflict-related sexual violence in the military, which will be addressed next.

#### 4.2 *The Role of the Military in the Prevention of and Protection from Sexual Violence*

Recognition of the proactive role that the military can have in protecting civilians against conflict-related sexual violence goes back to UN Security Council Resolution 1325 (2000) on Women, Peace and Security, complemented with UN Security Council Resolutions 1820 (2008), 1888 (2009), 1960 (2010) and 2106 (2013).<sup>91</sup> These resolutions recognize conflict-related sexual violence as a security issue that demands a security response, i.e. mandating peacekeepers to intervene against sexual violence. In fact, several UN peacekeeping missions' mandates have explicitly included tasks to counter sexual violence, such as the United Nations Organization Stabilization Mission in the DRC (MONUSCO).<sup>92</sup>

During the Global Summit to End Sexual Violence in Conflict in London in June 2014, organized by the Preventing Sexual Violence in Conflict Initiative of the UK Foreign and Commonwealth Office, there was much discussion on how to more effectively engage the military in the prevention of and protection from sexual violence in conflict. It was held that, despite the military being a critical partner in this, they are not always properly equipped, nor at times willing, to deal with conflict-related sexual violence.<sup>93</sup> Mainstreaming the prevention and response to sexual violence in military doctrine, policy training and operations was therefore held to be important. Critical to all of this is to ensure that "senior military leaders lead by example, can demonstrate awareness of gender and sexual violence issues in the environments in which they operate and that they support relevant policies and doctrine being disseminated down the chain of command. This includes delivering

<sup>90</sup> Probably because Dallaire and his colleagues found it so difficult to talk about the sexual violence, Dallaire was only able to write about sexual violence on no more than one page of his over five hundred page volume on the genocide in Rwanda that he witnessed, namely: 'I don't know when I began to clearly see the evidence of another crime besides murder among the bodies in the ditches and the mass graves. I know that for a long time I sealed away from my mind all the signs of this crime, instructing myself not to recognize what was there in front of me. The crime was rape, on a scale that deeply affected me (...). For a long time I completely wiped the death masks of raped and sexually mutilated girls and women from my mind as if what had been done to them was the last thing that would send me over the edge. But if you looked, you could see the evidence, even in the whitened skeletons. The legs bent and apart. A broken bottle, a rough branch, even a knife between them. Where the bodies were fresh, we saw what must have been semen pooled on and near the dead women and girls. There was always a lot of blood. Some male corpses had their genitals cut off, but many women and young girls had their breasts chopped off and their genitals crudely cut apart. They died in a position of total vulnerability, flat on their backs, with their legs bent and knees wide apart. It was the expressions on their dead faces that assaulted me the most, a frieze of shock, pain and humiliation.' See: Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Random House Canada, Toronto, 2003), p. 430.

<sup>91</sup> UN Security Council Resolutions 1889 (2009) and 2122 (2013) additionally highlight the importance of women's participation in peace and security matters.

<sup>92</sup> UN Security Council Resolution 1856 (2008).

<sup>93</sup> Summit Report, *End Sexual Violence in Conflict*, Global Summit, London 2014, 29 December 2014, p. 21.

relevant and practical scenario-based and operationally focused pre-deployment training for all levels on gender, protection of civilians, human rights, child protection and conflict-related sexual violence. It should also incorporate international humanitarian law, human rights and criminal law. More widely, military deployments need to have a gender-sensitive approach integrated throughout their operations, including through the use of gender advisors with access to senior military leaders.”<sup>94</sup> Attention was also given to the very low number of female mediators in peace and reconciliation processes and women police and military peacekeepers and a fixed minimum percentage was recommended in light of broadening the range of available skills and perspectives.<sup>95</sup> In an expert meeting in November 2014 in Sweden, in which the UN and NATO among others participated, more elaborate recommendations on training the military to combat conflict-related sexual violence specifically were drafted.<sup>96</sup>

Several years earlier, in 2010, UN Women and the UN Department of Peacekeeping Operations (DPKO), on behalf of UN Action against Sexual Violence in Conflict, published a report - *Addressing Conflict-Related Sexual Violence: An Analytical Inventory of Peacekeeping Practice* - in which they identified ten elements that, all together, support an effective response by peacekeepers to conflict-related sexual violence. These elements include: (1) leadership backed by strong command and control structures; (2) systematization of ad hoc responses (e.g. organize patrols when women collect firewood and chances are high they will be raped); (3) understanding the links between sexual violence and the restoration of peace and security, supported by clear, achievable and sufficiently robust mandates (i.e. explain to lower-level commanders that there are ‘no rape cultures’, rather only cultures of impunity if nothing is done against sexual violence); (4) willingness and wherewithal to patrol and operate in unconventional space (in proximity to villages, compounds, camps, forests and fields) in response to an unconventional and often ‘invisible’ threat; (5) consultation with all segments of the community, including women, for intelligence-gathering, confidence-building and to inform protection activities; (6) incentives that recognize and reward successful initiatives to combat sexual violence and acknowledge their contribution to overall mission success; (7) effective coordination between military and other protection stakeholders; (8) operational scenario-based pre-deployment and in-mission/refresher training; (9) role-modeling and capacity-building to help leave a legacy of security for women and girls (e.g. UN peacekeepers can set an example in how they view and treat women, including by having women among their ranks); and (10) gender balance in force generation and deployment (i.e. to underline that women are equal security beneficiaries as well as security-providers).<sup>97</sup> These measures are important for military actors when preventing and responding to sexual violence in all operations, including when they act within the mandates of protection of civilians (which covers 95% of current peacekeepers), capacity building of national security forces and in monitoring cease-fires and peace agreements.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, pp. 22-23.

<sup>96</sup> See further: Recommendations on Training Military to Combat Conflict-Related Sexual Violence, Life Guards Regiment, Sweden, 25 November 2014.

<sup>97</sup> See more elaborately: UN Women, *Addressing Conflict-Related Sexual Violence: An Analytical Inventory of Peacekeeping Practice*, 2010, pp. 35-39.

As mentioned, training of military actors is a crucial factor in preventing and responding to conflict-related sexual violence. As suggested by the UN, such training should preferably be scenario-based, which translates the principles and policies into advice on how peacekeepers should act and what they are allowed and should do in specific situations within the scope of their mandate and Rules of Engagement (ROE).<sup>98</sup> This could mitigate the lack of clarity on the part of the military on how and whether to respond to cases of sexual violence. To date, very few of the - often ad hoc and scarcely - available training programs on gender and sexual violence focus on the practical application of resolutions, policy and mandates on sexual violence by peacekeepers by the means of military tasks.<sup>99</sup> Scenario-based pre-deployment training modules, based in part on the above cited 2010 report, have been piloted - and been well-received - in a number of troop-contributing countries and regional peacekeeper training centers (more than 500 military officers have been trained).<sup>100</sup> The aim is to have these training programs mandatory and part of pre-deployment training for peacekeeping forces in troop contributing countries as 'currently, peacekeepers rarely receive even one day of practical training on prevention and response to conflict-related sexual violence.'<sup>101</sup> In addition, the aim is to have these training programs not only for prospective peacekeepers, but also for other military staff, mission leaderships and other stakeholders.<sup>102</sup> In evaluating the training, it was established that, *inter alia*, more attention should be given in the course to gender, international humanitarian law and human rights. Furthermore, it would seem important that the complexity of sexual violence is also given sufficient attention in the trainings, including that men, boys, women and girls may both be victims and perpetrators of sexual violence (see section 2.1 above), and that the newly drafted 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict' is part of the course material and discussion as well.<sup>103</sup> The UK's Preventing Sexual Violence in Conflict Initiative led, *inter alia*, to the drafting of this Protocol, which aims to support national and international investigations/evidence collection of sexual violence and may be useful for military actors when they encounter victims of sexual violence.<sup>104</sup>

It has been held that at the national level, there is even less training of uniformed peacekeepers on the protection of civilians, in particular when it comes to protection of civilians

<sup>98</sup> *Ibid.*, p. 38. Dutch Major General Patrick Cammaert (retired) leads (many of) these training exercises. See: UN Women, *Setting the Scene: Using Audiovisual Tools to Train Peacekeepers*, 2013.

<sup>99</sup> Susanne Axmacher, *Review of Scenario-based Trainings for Military Peacekeepers on Prevention and Response to Conflict-Related Sexual Violence*, December 2013, pp. 8-9 (referring to, *inter alia*, training modules of NATO and the Nordic Centre for Gender in Military Operations).

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*; UN Women, *Setting the Scene: Using Audiovisual Tools to Train Peacekeepers*, 2013.

<sup>102</sup> *Ibid.*

<sup>103</sup> See for a similar observation: Recommendations on Training Military to Combat Conflict-Related Sexual Violence, Life Guards Regiment, Sweden, 25 November 2014.

<sup>104</sup> Foreign and Commonwealth Office UK, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law*, June 2014.

from sexual violence.<sup>105</sup> When training is given, the focus is on international humanitarian and human rights law mostly, which reinforces militaries' perception that protection of civilians is the task of humanitarians only.<sup>106</sup> During the Global Summit to End Sexual Violence in Conflict in June 2004 it was concluded that Ministers of Defence should take responsibility for preventing sexual violence by their armed forces.<sup>107</sup> Furthermore, in the 2013 'Declaration of Commitment to End Sexual Violence in Conflict', which contains a set of practical and political commitments to end the use of rape and sexual violence as a weapon of war, the commitment to ensure that national military and police doctrine and training is aligned with international law to enable a more effective prevention and response to sexual violence in conflict was laid down.<sup>108</sup> The Declaration is endorsed by over two thirds of all members of the United Nations, including the Netherlands.

Indeed, the Netherlands recognizes that conflict-related sexual violence is a matter that may impact on peace and security and that the role of the military and civilians in peacekeeping operations is of crucial importance in promoting stability.<sup>109</sup> For several years now, the Dutch and Spanish governments have therefore organized training for the military and civilians in peacekeeping missions in the biannual Dutch-Spanish week-long course on gender in peace operations by the European Security and Defence College.<sup>110</sup> The Netherlands is furthermore committed in hiring more experts on gender and sexual violence who can take part in international peace and reconciliation processes.<sup>111</sup> In addition, it was intended that gender forms part of the training of new recruits and of career advancement courses, a gender advisor was to be appointed to make sure that gender constitutes an element of all military planning for operations, and staff sent to crisis areas would receive gender awareness training prior to their deployment.<sup>112</sup>

In the above and other ways, the Netherlands aims to live up to the obligations set out in UN Resolution 1325 to strengthen the position of women during and after conflict. Thus, where the Dutch military is involved in military operations itself, such as with the UN Mission in the Republic of South Sudan (UNMISS)<sup>113</sup> where its main task is the protection of civilians, it is important that the military is well prepared and knows how to prevent sexual violence or how to respond when they come across cases of sexual violence. When

<sup>105</sup> Axmacher 2013, *supra* note 99.

<sup>106</sup> *Ibid.*

<sup>107</sup> Summit Report 2014, *supra* note 93, p. 43, para. 33.

<sup>108</sup> *Ibid.*, para. 34. See also: 'A Declaration of Commitment to End Sexual Violence in Conflict', 24 September 2013.

<sup>109</sup> Nieuwsbericht Rijksoverheid, *Seksueel geweld nog te vaak onbestraft*, 12 June 2014.

<sup>110</sup> Axmacher 2013, *supra* note 99, p. 3.

<sup>111</sup> Nieuwsbericht Rijksoverheid, *Nederland intensiveert inspanningen tegen seksueel geweld in conflictgebieden*, 30 June 2014.

<sup>112</sup> Ministry of Foreign Affairs, *Women: Powerful Agents for Peace and Security - Dutch National Action Plan (2012-2015), For the Implementation of UN Security Council Resolution 1325 (2000) on Women, Peace & Security, A Dutch Partnership*, July 2014, pp. 29-30.

<sup>113</sup> Nieuwsbericht Ministerie van Buitenlandse Zaken, *Nederland verlengt deelname aan VN-missie in Zuid-Soedan*, 30 January 2015 (since the start of UNMISS in 2011, the Netherlands participates in this mission with about 30 military and police staff members, and has just extended its participation with another year).

Dutch military are involved in training missions, such as the current one in Iraq where they train local units as part of a broader international mission to fight members of the Islamic State (IS)<sup>114</sup>, the Dutch military could have a role to play in training the trainees on how to deal with cases of sexual violence. The training program for Iraq does not, however, seem to deal with conflict-related sexual violence specifically.<sup>115</sup> The Dutch involvement in the training mission in Mali did include, for a substantial part, training on gender, protection of women and children and international humanitarian law.<sup>116</sup> Yet, in all three examples, in South Sudan, Mali and the crimes committed by IS fighters, sexual violence is absolutely rife and most brutally committed against large parts of the civilian population.<sup>117</sup> Finally, to conclude, not long ago, the General Assembly of the United Nations adopted a resolution - a Dutch-French initiative - to ban violence against women, referring to, *inter alia*, violence against female refugees and women who are attacked by extremist groups.<sup>118</sup> The resolution calls upon countries to invest in both prevention measures and fighting impunity of violence committed against women all over the world. The fight against violence against women is currently a focal point of the Dutch human rights policy.<sup>119</sup>

## 5 Final Remarks

It is clear, from what has been said above, that much has been achieved when it comes to understanding, preventing, investigating and prosecuting conflict-related sexual violence. Yet, again from what has been said above, it is also apparent that much more still needs to be learned and done in this area either. In particular when it comes to the prevention of sexual violence crimes, where the military can play an important role. After all, prevention of sexual violence is of course still to be preferred than having to deal with the aftermath, once the crimes have already occurred. As conflict-related sexual violence crimes have proven to be very effective weapons of war which can threaten national and international peace and security, it is important to focus our attention on the best ways to address these crimes. Indeed, there is a growing awareness and momentum to deal with conflict-related sexual violence to date. This is, for example, not only apparent from the developments described in this contribution, but also from other global undertakings at the level of the UN, North Atlantic Treaty Organization (NATO), European Union (EU), Organization for Security and Co-operation in Europe (OSCE) and African Union (AU)

<sup>114</sup> Ministers van Buitenlandse Zaken en Defensie, *Kamerbrief stand van zaken trainingen Irak/verslag coalitiebijeenkomst*, 5 February 2015 (about 130 Dutch military will take part in this mission).

<sup>115</sup> *Ibid.*, pp. 2-3 (although it could be part of the international humanitarian law and human rights law modules of the training).

<sup>116</sup> Brief van de Minister van Buitenlandse Zaken aan de Voorzitter van de Tweede Kamer der Staten-Generaal, *Nederlandse deelname aan vredesmissies*, Kamerstuk 29 521, Nr. 207, 11 April 2013.

<sup>117</sup> See e.g. Waakhe Simon Wudu, 'Horrific Sexual Violence in South Sudan, UN Envoy Says', *Voice of America*, 27 October 2014; UN News Centre, 'Barbaric' Sexual Violence Perpetrated by Islamic State Militants in Iraq - UN' 13 August 2014; Paul Wood, 'Islamic State: Yazidi Women Tell of Sex-slavery Trauma', *BBC News*, 22 December 2014; Amnesty International, *Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq*, 2014; Flavia Krause-Jackson and Pauline Bax, 'Sexual Violence in Mali Casts Shadow over Peace Efforts', *Bloomberg*, 31 January 2013.

<sup>118</sup> Nieuwsbericht Rijksoverheid, *VN-resolutie aangenomen tegen geweld tegen vrouwen*, 24 November 2014.

<sup>119</sup> *Ibid.*

## BESCHOUWING

amongst others.<sup>120</sup> In addition, there seems to be an increase, even if slight, in the national prosecution of sexual violence in several countries where conflict-related sexual violence was committed.<sup>121</sup> It is therefore important to keep the momentum alive and to force ourselves to properly understand what sexual violence in conflict may entail and to, subsequently, act adequately and effectively in the prevention, investigation and prosecution thereof.

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<sup>120</sup> See e.g.: [http://www.nato.int/cps/en/natohq/topics\\_91091.htm](http://www.nato.int/cps/en/natohq/topics_91091.htm) (for NATO; NATO also has a NATO Secretary General's Special Representative for Women, Peace and Security and is currently in the process of preparing military guidelines for training on sexual violence prevention); <http://www.un.org/sexualviolenceinconflict/about-us/about-the-office> (for information on the UN Special Representative of the Secretary-General for Sexual Violence in Conflict); UN-AU Framework of Cooperation on Prevention and Response to Conflict-related Sexual Violence in Africa, 31 January 2014 (available at: <http://www.un.org/sexualviolenceinconflict/wp-content/uploads/joint-communique/joint-communique-with-the-african-union-and-the-united-nations-on-landmark-agreement-to-prevent-and-respond-to-conflict-related-sexual-violence/AU-Framework-of-Cooperation-Signed.pdf>). See generally: Civil-Military Co-operation Centre of Excellence (CCOE), *Gender Makes Sense: A Way to Improve Your Mission*, 2013.

<sup>121</sup> E.g. for DRC and gender mobile courts, see: Askin 2013, *supra* note 5, p. 54; UN Press Release, *UN Envoy Welcome Conviction of Congolese Army Officer for Crimes against Humanity*, 16 December 2014; UN Press Release, *DR Congo: UN Official Applauds Sentencing of Militia Leader*, 9 November 2014. E.g. for Rwanda and the prosecution of some 7,000 cases of sexual violence, see Kaitesi 2013, *supra* note 27. In the Netherlands, only in one international case so far, involving the Rwandan Joseph Mpambara, the charges also included a charge of rape. For the rape (as a war crime) charge, he was, however, acquitted due to a lack of supporting evidence. The Dutch Code of Criminal Procedure, contrary to the criminal procedural rules of the tribunals as set out above, do not accept the evidence of one witness, as was the case here, only. The Prosecution did not appeal the Judgement on the rape acquittal. See further: The Hague Court, *Judgement*, ECLI:NL:GHSGR:2011:BR0686, 7 July 2011.