

INTERNATIONAL CRIMINAL LAW

Accountability in international law for sexual crimes against women in situations of conflict and mass atrocity

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Introduction

In the vast majority of conflicts and mass atrocities, there is a silent war of violence waged on women, which international law seeks and often struggles to address. In this context, “sexual crimes against women” (SCAW) refer to violent and non-consensual sexual acts against women that meet a criminal standard of gravity, which in this dissertation are treated synonymously with sexual and gender-based violence (SGBV). SCAW was an “integral part of the hostilities” in Burundi,¹ and were “committed in a systematic and widespread manner” in the Central African Republic,² and were reported in a variety of conflicts throughout the world.³ Despite developments in international law, these crimes are still being committed in conflicts today.⁴

This piece will focus on the development of international law when addressing SCAW and the efficiency of the law and accountability for these crimes. SCAW includes rape, sexual assault, forced pregnancy, forced marriage, forced abortions and public nudity,⁵ which occur in the context of hostilities, conflicts and situations of mass atrocity. Although it references crimes, it will not only focus on International Criminal Law (ICL), but will also explore the linked areas of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) to discover how they all complement one another. This topic is essential as it recognises grave violations of international law where the law either works, or fails to hold those responsible accountable for their actions or to provide redress for victims of these violations. The first part will consider the development of sexual crimes by looking at specific examples, such as the cases of *Akayesu*, *Čelebici* and *Furundžija*, before focusing more specifically on the law surrounding these crimes. The third and fourth parts will look at legal challenges in addressing sexual crimes and the lack of accountability and detail available means of redress for victims, respectively. The final part will cover limitations and gaps in the law and how they affect current events, specifically looking at the current conflict in Gaza.

The development of sexual crimes against women in international Law

SCAW appears to be a consistent reoccurring issue within a variety of conflicts and mass atrocities throughout the world.⁶ Rape was used as the “prevalent form of torture”⁷ of women in Kuwait by Iraqi soldiers as well as being used to “punish and humiliate the entire community”⁸ in Kashmir under the administration of the Indian army. Throughout the non-international armed conflict (NIAC) in Peru,

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¹ Megan Bastick, Karin Grimm and Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Centre For The Democratic Control Of Armed Forces 2007), 33.

² Ibid, 35.

³ Ibid, 23.

⁴ OHCHR, ‘Sudan: UN experts appalled by use of sexual violence as a tool of war’ (30th November 2023) < <https://www.ohchr.org/en/press-releases/2023/11/sudan-un-experts-appalled-use-sexual-violence-tool-war> > Accessed 9th April 2024.

⁵ Gloria Gaggioli, ‘Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law’ (2014) 96 *IRRC* 503, 506.

⁶ Christine Chinkin, ‘Rape and Sexual Abuse of Women in International Law’ (1994) 5 *EJIL* 326, 328.

⁷ Amnesty international, ‘Iraq/Occupied Kuwait Human Rights Violations since 2 August’ (1990), 34. < <https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE140161990ENGLISH.pdf> > Accessed 20th March 2024.

⁸ Asia Watch, Human Rights Watch (Organization and Physicians for Human Rights U.S.), *the Human Rights Crisis in Kashmir: A Pattern of Impunity* (Human Rights Watch 1993), 14.

women were targets of sexual violence from both parties to the conflict.⁹ Sexual violence has been prevalent throughout history,¹⁰ but the perception by the special rapporteur appointed by the United Nations Commission on Human Rights is that it is not only used as an abuse of power and control but also to “humiliate, shame, degrade and terrify” entire groups of civilians.¹¹

Early development of ICL in gender violence can be seen in the post-World War II *ad hoc* tribunals. The 1945 International Military Tribunals at Nuremberg (IMT) was established to prosecute major war criminals of the Nazi regime,¹² and the 1946 Tokyo International Military Tribunal for the Far East (IMTFE) to prosecute those responsible for the Japanese atrocities of the Second World War.¹³ These tribunals focused on crimes against peace but largely ignored sexual violence.¹⁴ Within the IMT, there was mass evidence of sexual violence, which was extensively documented, yet the tribunal did not expressly prosecute such crimes¹⁵ and did not list rape as a crime.¹⁶ The tribunal implicitly recognised sexual violence as torture when referring to the young girls who were raped, stripped naked and endured miscarriage by brutality.¹⁷ Rape was classified in the Control Council Law No. 10 as a crime against humanity,¹⁸ but neither the IMT nor the Nuremberg Military Tribunals (NMT) charged the defendants with rape.¹⁹ In the IMTFE, rape was explicitly referred to for the first time; however, it was not placed at a level to stand-alone.²⁰ There was never punishment for the crime of “comfort women” in the Tokyo Tribunal, even though there was overwhelming evidence.²¹ The sexual slavery of around 200,000 women²² obligated to “serve” Japanese soldiers was not punished until 2001 when the Woman’s International War Crimes Tribunal found Emperor Hirohito guilty based on precedent from the International Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

After these trials, there was a hiatus in international tribunals until 1993, when the UN Security Council established a commission to investigate violations of IHL in the former Yugoslavia²³ due to reports of systematic rape to further policies of ethnic cleansing.²⁴ Utilisation of Chapter VII of the UN Charter led to the establishment of the ICTY and the ICTR in 1994. These tribunals focused more on gender violence than the previous post-World War II tribunals. The UN Special Rapporteur on the situation in Rwanda reported that within the conflict “rape was a rule and its absence the exception”,²⁵ as rape was used systematically as a “weapon”.

⁹ Human Rights Watch, ‘Untold Terror: Violence against Women in Peru’s Armed Conflict’ (1 December 1992) < <https://www.hrw.org/report/1992/12/01/untold-terror-violence-against-women-perus-armed-conflict> > Accessed 7th March 2024.

¹⁰ Chinkin (n 6) 327.

¹¹ UNCHR, Forty-ninth Session Agenda item 27 ‘Report on the situation of human rights in the territory of the former Yugoslavia’ (10 February 1993) E/CN.4/1993/50, para 19.

¹² Anders Henriksen, *International Law* (4th edn, OUP 2023) 310.

¹³ *Ibid.*

¹⁴ Kelly D. Askin, ‘Prosecuting Wartime Rape and Other Gender Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’ (2003) 21(2) *Berkeley J Int. Law* 288, 301.

¹⁵ *Ibid.*

¹⁶ Judith Gardam, ‘Women, human rights and international humanitarian law’ (1998) 38(324) *IRRC* 421, 423.

¹⁷ Trial of the Major War Criminals before the International Military Tribunal, (14 November 1945-1 October 1946), Volume 6, transcript at 177.

¹⁸ Trials of War Criminals before Nuremberg Military Tribunals under Control Council Law No. 10 (1945), Article 2(1)(c).

¹⁹ Kevin John Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (online edn, OUP 2011), 245.

²⁰ David J. Scheffer, ‘Rape as a War Crime’ (29 October 1999) < <https://www.peacewomen.org/node/90353> > accessed 10th March 2024.

²¹ Women’s Caucus for Gender Justice, ‘RE: Judgement of the Women’s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery’ (2000) < <http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/judgmentannounce.html#:~:text=%22The%20Tribunal%20finds%2C%20based%20on,as%20a%20crime%20against%20humanity> > Accessed 20th March 2024.

²² Alexis Dudden, ‘A Guide to Understanding the History of the ‘Comfort Women’ Issue’ (16 September 2022) < <https://www.usip.org/publications/2022/09/guide-understanding-history-comfort-women-issue> > Accessed 8th March 2024.

²³ UNSC Res 780 (6 October 1992) UN Doc S/Res/780.

²⁴ Askin (n 14) 305.

²⁵ UNCHR ‘Report on the Situation of Human Rights in Rwanda by Rened Degni-Segui, Special Rapporteur of the Commission on Human Rights’ U.N. Docs. E/CN.4/1996/68 (1996), para 16.

The case of *Akayesu* was the first ever conviction for genocide as well as the first conviction for rape and sexual violence as genocide within an international tribunal.²⁶ Initially, *Akayesu* was not being charged with any form of gender crimes until a witness spontaneously testified of the gang rape by three Interahamwe soldiers of her six-year-old daughter, a testimony that resulted in a following witness testifying against also being a victim and witness to other rapes committed by members of the Hutu militia.²⁷ The case referred to sexual violence as “forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity”²⁸ before declaring that rape constitutes torture.²⁹ This case also went further than the historical definition of rape. It incorporated the insertion of objects to take into consideration the Interahamwe’s “thrusting a piece of wood into the sexual organs of a woman as she lay dying”,³⁰ extending the *actus reus* of rape within ICL. The progression of recognising rape as torture may have taken too long, but this is due to torture being a *jus cogens norm* which places an obligation on states to act against perpetrators of this crime, and sexual violence was considered a ‘lesser crime’ and a ‘necessary by-product of conflict’.³¹ Even within this case, sexual violence was put in the fourth category with petty theft until the Tutsi women marched to the capital in protest leading to the reclassification of rape as one of the most serious crimes within the ICTR.³² This landmark case placed sexual violence on equal footing with other crimes³³ and now sits as the foundation for the development and accountability of SCAW.

In 1998, the ICTY reaffirmed the precedent in the *Čelebići* case³⁴ that rape constitutes torture under customary law. The case entailed an indictment against four defendants who were part of an operation involving taking control of villages inhabited mainly by Bosnian Serbs. They subsequently detained them in the Čelebići prison camp, where they were subject to torture, sexual assault, death, and other forms of inhuman treatment.³⁵ The actions contained in the crime of sexual assault included gang rape, sexual humiliation, and rape during interrogation.³⁶ The defendants were either charged with individual responsibility for the crimes they committed, and those who had superior authority or ‘effective control’ over their subordinates were prosecuted for command responsibility either for a positive act or culpable omission³⁷ such as having authority to prevent or punish these acts but not doing so.³⁸ This case marks the point where international law finally put sexual violence on a level playing field with other serious crimes as it was decided that if sexual violence satisfied the elements contained in the Convention Against Torture, then it would constitute torture.³⁹ This involves the act being committed due to discrimination by a person acting in an official capacity.⁴⁰ Looking at this alongside the examples, the Chamber found that the victim raped during interrogation was raped for discriminatory purposes due to

²⁶ United Nations, International Residual Mechanism for Criminal Tribunals ‘*The Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4-A)’ <

<https://www.internationalcrimesdatabase.org/Case/50/Akayesu/#:~:text=His%20was%20the%20first%20conviction,as%20a%20crime%20against%20humanity.>> Accessed 8th March 2024.

²⁷ Askin (n 14) 318.

²⁸ *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement) ICTR-96-4-A, Para. 10A.

²⁹ *Ibid*, 597.

³⁰ *Ibid*, 686.

³¹ Saumya Uma, ‘Where does International Criminal Law Stand When It Comes to Sexual and Gender Based Violence?’ <
<https://pure.jgu.edu.in/id/eprint/5263/1/5%20Sexual%20and%20Gender-Based%20Violence.pdf>> Accessed 10th March 2024.

³² *The Uncondemned* (Directed by Nick Louvel and Michele Mitchell, 2015).

³³ Scheffer (n 20).

³⁴ *The Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo and Zejnil Delalić* (IT-96-21). (Mucić et al)

³⁵ *Celebici case: the Judgement of the Trial Chamber*, press release (16 November 1998) CC/PIU/364-E. <

<https://www.icty.org/en/press/celebici-case-judgement-trial-chamber-zejnil-delalic-acquitted-zdravko-mucic-sentenced-7-years> > Accessed 10th March 2024.

³⁶ Askin (n 14) 322.

³⁷ Mucić et al (n 34) 333.

³⁸ *Ibid*, 378.

³⁹ *Ibid*, 333.

³⁹ *Ibid*, 480.

⁴⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984 UNGA Res 39/46) art 1.

being a woman of an opposing group.⁴¹ Classifying rape as torture allows courts to recognise the seriousness of the offence. The Chamber considers the “rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity”.⁴² In 1998, we also saw the broadening of the scope of rape in the *Furundžija* trial, which addressed physical elements of sexual violence. This involved examples of sexual humiliation and intimate sexual lethal threats with a weapon,⁴³ as well as sexual assault to the point of the witness passing out from exhaustion⁴⁴ in the presence of *Furundžija*. The Chamber found that the elements of rape were met, but the issue of consent was not raised, as the position of the Trial Chamber was that “any form of captivity vitiates consent”.⁴⁵ The court attempted to consider whether oral penetration is categorised as rape or whether it is treated as sexual assault. The Trial Chamber held that the oral penetration constitutes “a most humiliating and degrading attack upon human dignity,”⁴⁶ which is what IHL and IHRL focus on protecting.

Nevertheless, it also recognises the principle of *nullum crimen sine lege* and whether they could prosecute the accused with oral penetration as rape when in his own jurisdiction, it would only constitute sexual assault.⁴⁷ The assault occurred against defenceless civilians during time of armed conflict, which would transform the act from mere sexual assault to sexual assault as a war crime.⁴⁸ Therefore, as long as the sentencing is per Article 24 of the Statute of the Tribunal,⁴⁹ which considers the gravity of the offence, the only issue the accused may have is the stigma around the categorisation. This is not a concern for the tribunal as this kind of assault is humiliating and traumatic for the victim in the same way that vaginal or anal penetration is, outweighing the complaints of the accused. Broadening the definition of rape in this way protects human dignity. The trial chamber came to the final decision that sexual penetration of the vagina, anus or mouth of the victim by coercion, force or threat of force constitutes rape.⁵⁰ This was also the first case to consider rape as an act of genocide,⁵¹ a grave breach of the Geneva Conventions or a violation of the laws or customs of war. This was clarified following *Akayesu*, which concluded that rape constituted genocide.⁵²

This same year, 120 States adopted the Rome Statute, leading to the establishment of the International Criminal Court (ICC) in 2002, aiming to “end impunity for the perpetrators of the most serious crimes of concern to the international community”⁵³ for crimes committed after 1 July 2002. In 2021, the court brought the trial of Dominic Ongwen. Ongwen personally committed crimes involving the enslavement of seven abducted girls, which he forced to be in a conjugal relationship with him.⁵⁴ The victims were repeatedly forced to have sex with him, and two of the girls endured forced pregnancy.⁵⁵ The girls were subject to beatings, and one victim was forced to kill another abductee, causing severe anguish.⁵⁶ As a leader, *Ongwen* also had control of soldiers whom he relied on to abduct girls to distribute them to members of the Sinia brigade.⁵⁷ The abductees were considered ‘wives’ of the male members they were

⁴¹ Mucić et al (n 34) 941.

⁴² Ibid 495.

⁴³ “The accused continued to interrogate Witness A, who was forced to remain naked in front of approximately 40 soldiers. Accused B drew a knife over the body and thigh of Witness A, threatening, inter alia, to cut out her private parts”, *Prosecutor v. Anto Furundžija* (Judgement) IT-95-17/1-T (10 December 1998) (*Furundžija*), para 82.

⁴⁴ Ibid, 88.

⁴⁵ Ibid, 271.

⁴⁶ Ibid, 183.

⁴⁷ Ibid, 184.

⁴⁸ Ibid.

⁴⁹ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (2009), Article 24 (2).

⁵⁰ *Furundžija* (n 43) 185.

⁵¹ Ibid, 172.

⁵² International Residual Mechanism for Criminal Tribunals, Landmark Cases < <https://www.icty.org/sid/10314> > Accessed 11th March 2024.

⁵³ International Criminal Court, ‘The ICC at a Glance’ < <https://www.icc-cpi.int/sites/default/files/Publications/ICCAtAGlanceENG.pdf> > Accessed 11th March 2024.

⁵⁴ *The Prosecutor v. Dominic Ongwen* ICC-02/04/-1/15 (Judgement) (4 February 2021) (*Ongwen*), para 206.

⁵⁵ Ibid, 207.

⁵⁶ Ibid, 209.

⁵⁷ Ibid, 214.

assigned to from the time they were first forced to have sex with them.⁵⁸ This case allowed over 4000 victims to participate in the trial⁵⁹ and gave hope for possible justice for victims. *Ongwen* was convicted of a record number of charges in ICC history and sentenced to the second-largest prison sentence imposed by the ICC.⁶⁰ It also focused on forced marriage as a gender-based crime, which had never been adjudicated at the ICC before.⁶¹ While this development signals progress in ICC convictions, it is still too premature to categorise it as a positive trend in ICC outcomes rather than a mere isolated exception.

SCAW have been shown to be prevalent throughout various armed conflicts, so it is essential to recognise reasons for this behaviour. Rape is anticipated as an inevitable and expected side effect of war⁶² but need not be because if this were the case, then it would fail to explain why sexual violence is widespread in some conflicts but not others.⁶³ Another theory discussed by Thornhill and Palmer is that men inherit a genetically transmitted propensity for rape, which then increases with opportunity in wartime due to regulatory measures being weaker.⁶⁴ Brownmiller stated that “war provides men with the perfect psychological backdrop to give vent to their contempt for women”.⁶⁵ This is considered a misconception because rape is not due to sexual desire but instead an expression of dominance and power.⁶⁶

Additionally, an increase during wartime is not merely due to opportunity, but wartime experience increases incentive due to the relationship between competition, increased testosterone, and engagement in sexual violence.⁶⁷ This is also due to armed forces comprising young men far from standard social control.⁶⁸ This reasoning explains why sexual violence is more common in wartime than in peacetime. It is considered that wartime amplifies peacetime patterns of rape, and therefore rape becomes more frequent due to weakened community and family networks.⁶⁹ Increased frequency can also be attributed to militaristic norms, which strengthen patriarchal social practices that support rape and other forms of sexual violence,⁷⁰ as similarly discussed by Chinkin.⁷¹

The incentive aspect is also referred to as a “war booty”,⁷² which is displayed in the example of *Borislav Herek*, who admitted that his superiors gave him women to rape as a reward for good behaviour in the armed conflict in Bosnia and Herzegovina.⁷³ In addition to being an incentive, it is also viewed as a war strategy.⁷⁴ Coomaraswamy identified that SCAW in armed conflict is due to the ideology that ‘to rape a woman is to humiliate her community’, which encapsulates the men’s defeat as they failed to protect ‘their’ women.⁷⁵

⁵⁸ Ibid, 216.

⁵⁹ Redress, ‘Domicic Ongwen: Ugandan Victims Must Be at the Centre of Reparations Proceedings (2022) <<https://redress.org/news/domicic-ongwen-ugandan-victims-must-be-at-the-centre-of-reparations-proceedings/>> Accessed 11th April 2024.

⁶⁰ Juan-Pablo Perez-Leon-Acevedo and Fabio Ferraz de Almeida, ‘Lights and Shadows of the *Ongwen* Case at the International Criminal Court’, (2023) 23(5-6) *IntJCLR* 667, 668.

⁶¹ Ibid, 670.

⁶² Maria Eriksson Baaz and Maria Stern, ‘Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)’, 2009 53(2) *Int Studies Quarterly* 495, 498.

⁶³ Dara Kay Cohen, Amelia Hoover Green, and Elisabeth Jean Wood, Special Report 323 ‘Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward’ (2013) *United States Institute of Peace* (Special Report 323), 2.

⁶⁴ Elisabeth Jean Wood, ‘Variation in Sexual violence during War’ 2006 36(3) *Sage Journals* 307, 321.

⁶⁵ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Simon and Schuster 1975), 32.

⁶⁶ Cohen (n 63), 6.

⁶⁷ Wood (n 64), 323.

⁶⁸ Ibid, 321.

⁶⁹ Cohen (n 63), 5.

⁷⁰ Ibid.

⁷¹ See Chinkin, ‘Women and Peace: Militarism and Oppression’, in Kathleen Mahoney and Paul Mahoney, *Human Rights in the Twenty-First Century: A Global Challenge* (Springer 1993) 405.

⁷² Baaz and Stern (n 62) 498.

⁷³ Claudia Card, ‘Rape as a Weapon of War’ (1996) 11(4) *Women and Violence* 5, 10.

⁷⁴ Gaggioli (n 5) 505.

⁷⁵ Coomaraswamy, ‘Of Kali Born: Violence and the Law in Sri Lanka’, in M. Schuler (ed.), *Freedom from Violence: Women's Strategies from Around the World* (1992) 49. As cited in Chinkin (n 6) 328.

International Law relating to sexual crimes

IHL, IHRL and ICL all intersect to address regulations on SCAW. The three sectors complement and reinforce each other,⁷⁶ referred to as “cross fertilisation”.⁷⁷ For example, the ICTY in the *Čelebići* case referred to both the Inter-American Commission on Human Rights (IACHR) and the European Court of Human Rights (ECtHR), precisely the case of *Aydin v Turkey*, when attempting to ascertain whether rape constitutes torture. The case of *Aydin v Turkey* also referred to the ICTY for torture based on allegations of rape.⁷⁸ It is noticeable that the sectors intertwine to reinforce each other and give substance to the precedence.

Focusing on IHL, Geneva Convention IV 1949, Additional Protocol I to the Geneva Conventions⁷⁹ and Additional Protocol II prohibit SGBV. It is important to note that this convention applies to “persons taking no active part in hostilities”.⁸⁰ Article 27(2) provides that women be “especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”.⁸¹ Article 76 of Additional Protocol I is focused on the protection of women “against rape, forced prostitution and any other form of indecent assault”⁸² within international armed conflicts (IAC). Article 4 of Additional Protocol II⁸³ protects victims within NIACs and prohibits “outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.⁸⁴ Common Article 3 also prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”.⁸⁵

IHRL prohibiting SCAW can be interpreted in Article 12 of the Universal Declaration of Human Rights (UDHR), which states that no one should be subject to “attacks upon his honour and reputation”.⁸⁶ Although not intended to be a legally enforcing instrument, “its content can now be said to form part of customary international law”.⁸⁷ The World Conference on Human Rights in Vienna has a more direct approach to SGBV as it stressed the elimination of violence against women and specifically references rape, sexual slavery and forced pregnancy.⁸⁸ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is another IHRL Instrument that addresses sexual violence. Recommendation 35 states that gender-based violence can constitute torture or cruel, inhuman, or degrading treatment⁸⁹ in specific circumstances, which are understood using a gender-sensitive approach to analyse the level of pain and suffering experienced by women,⁹⁰ including cases of rape. The Recommendation also points out that gender-based violence can constitute international crimes, including crimes against humanity and war crimes.⁹¹

It is also vital to recognise regional instruments of IHRL. The European Convention on Human Rights (ECHR) does not explicitly provide a right to be free from sexual violence, but through case law, state parties are responsible for rape crimes in cases where either state agents perpetrated the crime or the

⁷⁶ Gaggioli (n 5), 532.

⁷⁷ Boyd van Dijk, “Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions” (2018) 112(4) *AJIL* 553, 556.

⁷⁸ *Aydin v. Turkey* (1997) 57/1996/676/866, para 51.

⁷⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁸⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War Of 12 August 1949 (GC4), Article 3.

⁸¹ *Ibid*, Article 27(2).

⁸² Protocol I (n79) Article 76(1).

⁸³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁸⁴ *Ibid*, Article 4(e).

⁸⁵ GC4 (n 80)

⁸⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) Article 12.

⁸⁷ Geoffrey Marston (ed), “United Kingdom Materials on International Law” (1991) 62 *BYIL* 535, 592.

⁸⁸ World Conference on Human Rights Vienna 14-15 June 1993 A/CONF.157/23 (Vienna WCHR), para 38.

⁸⁹ CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (14 July 2017) CEDAW/C/GC/35, para 16.

⁹⁰ *Ibid*, 17.

⁹¹ *Ibid*, 16.

state failed to provide adequate remedy for the crime.⁹² The case *X & Y v. The Netherlands* held that rape was a violation of The ECHR Article 8's right to privacy,⁹³ but later, *X & Y* followed the progression of the IACHR and classified rape as a form of torture in *Aydin v Turkey*.⁹⁴ The 1979 CEDAW directly addresses SGBV. At the same time as the UDHR, post-Second World War, the Council of Europe was founded, and in 1950, it adopted the ECHR.⁹⁵ Then, in 1993, the World Conference on Human Rights recommended strengthening and harmonising human rights, taking new steps to protect women's rights.⁹⁶ This included supporting the creation of a 'Special Rapporteur on Violence against Women', ensuring the integration of violence against women into UN human rights framework.⁹⁷

ICL is now predominantly provided within the Rome Statute 1998, which established the ICC. Article 7 addresses crimes against humanity which includes "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity"⁹⁸ if it is committed as part of a widespread or systematic attack. Article 8 gives the ICC jurisdiction in respect of war crimes, which includes "Committing rape, sexual slavery, enforced prostitution, forced pregnancy, [...] enforced sterilisation, or any other form of sexual violence"⁹⁹ for IAC and the same is recognised for a NIAC.¹⁰⁰ The Elements of Crimes provides clarification for the courts to interpret the elements required for rape and sexual violence. Article 7(1)(g) focuses on gender-based crimes against humanity,¹⁰¹ while Article 8(2)(b)(xxii) describes required elements for gender-based war crimes within IAC¹⁰² and 8(2)(e)(vi) the same for NIAC.¹⁰³ There have also been several *ad hoc* tribunals set up for specific situations that addressed these types of crimes and included them within the statutes. For example, the Statute to the ICTY Article 5(1)(g) listed rape as a crime against humanity,¹⁰⁴ as did the Statute to the ICTR in Article 3(1)(g).¹⁰⁵ The Special Panel for Serious Crimes in East Timor qualified rape as a crime against humanity in Section 51,¹⁰⁶ and the Statute for the Special Court of Sierra Leone listed "Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence"¹⁰⁷ as a crime against humanity and as a violation of the Geneva Conventions. The Extraordinary Chambers in the Court of Cambodia also listed rape as a crime against humanity.¹⁰⁸

Kunerac et al. set out the conditions and material scope of war crimes by applying Article 3 of the Statute of the ICTY. *Kunerac* was convicted for directly committing torture and rape as well as aiding and abetting gang rape by several of his soldiers in the Bosnian Serb Army.¹⁰⁹ To apply the Statute, there needs to be an armed conflict and the act must be closely related to the armed conflict. Armed conflict exists where there is a resort to armed force or violence between states or governmental authorities and organised armed groups, but the law of war applies in the whole territory of the states

⁹² Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (2008) *Women's Human Rights and Gender Unit* 32.

⁹³ *X&Y v. The Netherlands* (1983) 8978/80.

⁹⁴ *Aydin v. Turkey* (n 78).

⁹⁵ Henriksen (n 12) 175.

⁹⁶ Vienna WCHR (n 88).

⁹⁷ UNCHR, 'Special Rapporteur on violence against women and girls' <<https://www.ohchr.org/en/special-procedures/sr-violence-against-women>> Accessed 9th April 2024.

⁹⁸ Rome Statute of the International Criminal Court 2011 (Rome Statute), Article 7(1)(g).

⁹⁹ *Ibid*, Article 8(2)(b)(xxii).

¹⁰⁰ *Ibid*, Article 8(2)(e)(vi).

¹⁰¹ International Criminal Court Elements of Crimes 2013, Article 7(1)(g).

¹⁰² *Ibid*, Article 8(2)(b)(xxii).

¹⁰³ *Ibid*, Article 8(2)(e)(vi).

¹⁰⁴ Statute ICTY (n 49) Article 5(1)(g).

¹⁰⁵ Statute of the International Tribunal for Rwanda 2007, Article 3(1)(g).

¹⁰⁶ United Nations Transitional Administration in East Timor on the establishment of panels with exclusive jurisdiction over serious criminal offences (6 June 2000) (UNTAET/REG/2000/15), Section 5.1(g).

¹⁰⁷ Statute of the Special Court for Sierra Leone 2000, Article 2(1)(g).

¹⁰⁸ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 5.

¹⁰⁹ *Kunerac, Kovač & Vukavić* (IT-96-23 and 23/1) case information sheet.

involved, and therefore, there can be a violation even in a place where the fighting is not taking place.¹¹⁰ In deciding whether the crime is sufficiently related to the armed conflict, the Trial Chamber takes into account: ‘the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of the military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties’.¹¹¹ For an offence to be prosecuted under Article 3 of the Statute, there are four conditions concerning a serious violation constituting an infringement of a rule of IHL, which must be customary, and the violation must entail individual criminal responsibility of the person breaching the rule.¹¹² The case also states that rape is regarded as a war crime under customary law.¹¹³

The case of *Ongwen*, which shows the ICC’s most recent success, as discussed in chapter one, sets out the requirements for a crime to be classified as a war crime or crime against humanity regarding an IAC. Referencing the Rome Statute, the Trial Chamber recognised that rape and other forms of sexual violence could be classified as a ‘crime against humanity’ when committed as “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.¹¹⁴ The Chamber uses the case of *Ntaganda*¹¹⁵ to explain what this phrase means. This is defined as “a course of conduct involving the multiple commissions of acts”¹¹⁶ in which rape and sexual assault are listed, not directed at individual civilians but a collective.¹¹⁷ The civilian population must also be the primary target rather than an accidental victim.¹¹⁸ This distinction between a legitimate target and protected people is labelled the ‘principle of distinction’.¹¹⁹ The term ‘widespread or systematic attack’ requires a large-scale nature, assessed on all relevant factors rather than exclusively quantitative or geographical.¹²⁰ ‘Systematic’ refers to the attack not being random¹²¹ but reiterating the organisational objective. The requirement for ‘knowledge of the attack’ is particularly relevant for many of the cases discussed in the first chapter because the accused did not commit the crimes themselves but instead had command responsibility over those perpetrating the attack. For this requirement, the perpetrator must know that their action is part of a widespread attack directed against a civilian population.¹²² If they are to be convicted due to command responsibility, they must have effective control or command over the force that committed the crime and knew or should have known that the crimes were being committed or about to be committed. They then must have failed to take necessary measures to prevent or repress the crimes, which resulted from the commander’s failure to exercise proper control over the forces.¹²³

For a war crime to be committed in a NIAC, two requirements are set out in *Ntaganda*. The conduct must have occurred in and been associated with the armed conflict, and the perpetrator must have been aware of an armed conflict.¹²⁴ To ensure the crime is not an isolated occurrence, there is a “nexus requirement” which ensures that the perpetrator’s conduct must be “closely linked to the hostilities”.¹²⁵ The requirements are very similar to those of an IAC, and the Chamber used the precedence set out in *Kunerac*. The main difference is the establishment of a NIAC, which exists in ‘protracted armed

¹¹⁰ *Prosecutor v. Dragoljub Kunerac, Radomir Kovac and Zoran Vukovic* (Trial Judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001) (*Kunerac et al*), para 57.

¹¹¹ *Ibid*, 59.

¹¹² *Ibid*, 66.

¹¹³ *Ibid*, 195.

¹¹⁴ Rome Statute (n 98), Article 7.

¹¹⁵ *The Prosecutor v. Bosco Ntaganda* (Trial Judgement) ICC-01/04-02/06 (8 July 2019).

¹¹⁶ Rome Statute (n 98), Article 7(2)(a).

¹¹⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo* (Judgement pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016), para 152.

¹¹⁸ *The Prosecutor v. Germain Katanga* (Judgement pursuant to article 74 of the Statute) ICC-01/04-01/07 (7 March 2014), para 1104.

¹¹⁹ For international armed conflicts see Protocol I (n 79), Article 48; for non-international armed conflicts see Protocol II (n83), Article 13.

¹²⁰ Bemba (n 117), 163.

¹²¹ Ntaganda (n 115), 691.

¹²² Kunerac et al (n 110) 102.

¹²³ Bemba (n 117), 170

¹²⁴ Ntaganda (n 115), 698.

¹²⁵ *Ibid*, 731.

violence between governmental authorities and organised armed groups or between such groups within a State'.¹²⁶

Problems in achieving accountability in the law for sexual crimes in conflict

After discussing the development of sexual crimes and their prohibition within international law, it is essential to analyse problems with these prohibitions before examining instances of legal violations. This includes accountability for sexual crimes and the challenges encountered when ensuring that justice is served for such crimes. Accountability is more than a criminal conviction but also redress for the victims. The basic principles for redress include reparation, restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.¹²⁷ However, this part will focus on criminal convictions, or lack thereof and the fourth part will discuss details of redress.

Instruments of international law hold many different issues when referring to SCAW. Looking at IHL, the Geneva Convention is criticised because it directly correlates rape with a woman's honour, not reflecting the seriousness of the offence¹²⁸ and focuses the protection of women on their reproductive roles.¹²⁹ IHL rules also conceptualise rape as a by-product of war and a necessary sacrifice, as the combatants, who are almost invariably men, are at risk when fighting.¹³⁰ Gardam recognises that this is an unfair analysis as it assumes that women's interests mirror the male interest and ignores structural discrimination.¹³¹

Regarding IHRL, the UDHR does not address sexual violence directly but instead suggests its prohibition by referring to attacks upon honour and reputation. This becomes an issue as the crime is not put explicitly but must be interpreted. Additionally, woman's rights activists are critical of the link between rape and honour.¹³² This perpetuates the societal belief that a raped woman is dishonourable.¹³³ Niarchos points out the drawbacks of this link which fails to capture the real significance of the harm inflicted upon the women and causes rape to appear as seduction with "just a little persuading" instead of the severe and violent attack that it is.¹³⁴ Another pitfall is that presenting honour as something that needs to be protected reiterates the idea that a raped woman is disgraced.¹³⁵ A final reason is that describing rape as a mere attack on honour disregards the scale of the crime, making it appear less worthy of prosecution than other injuries to the person.¹³⁶ To deal with the indirect law, the World Conference on Human Rights directly addressed the prohibition of violence against women.¹³⁷ Although this may appear progressive for SCAW, it is a soft law guideline that lacks the enforcement power necessary to impose legal obligations on states. CEDAW is another convention that is direct in dealing with gender-based violence; however, the issue with these conventions is that not all states recognise them. For example, CEDAW has not yet been ratified by the United States.¹³⁸

¹²⁶ Ibid, 701.

¹²⁷ ECOSOC 'The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' Res 1999/33 (18 January 2000).

¹²⁸ Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46(1) *ICLQ* 55, 74.

¹²⁹ Cordula Droege and Eirini Giorgou, 'How international humanitarian law develops' (2022) 104(920-921) *IRRC* 1798, 1818.

¹³⁰ Judith Gardam, 'A Feminist Analysis of Certain Aspects of International Humanitarian Law' (1992) 12 *Australian Year Book of International Law* 265, 277.

¹³¹ Ibid.

¹³² Dyani, Ntombizozuko, "Protocol on the rights of women in Africa: protection of women from sexual violence during armed conflict" (2006) 6(4) *Afr. Hum Rts LJ* 166, 171.

¹³³ Ibid.

¹³⁴ Catherine N. Niarchos, 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia' (1995) 17(4) *Hum Rts Q* 649, 674.

¹³⁵ Rhonda Copleon, 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 *Women's Law Journal* 243, 249.

¹³⁶ Niarchos (n 134), 674.

¹³⁷ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna 25 June 1993, Para 18.

¹³⁸ Human Rights Watch, 'United States Ratification of International Human Rights Treaties' (24 July 2009) <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties#_Convention_on_the> accessed 15th March 2024.

Even though there are issues with how sexual violence is addressed in international law, Gaggioli recognises that the grey areas have minimal impact in practice due to case law clarifying questions of law.¹³⁹ Although it may be helpful for a binding treaty combining IHL, IHRL and ICL rules concerning sexual violence to be developed, it is unlikely that a new treaty will be introduced due to the framework already being strong and the States having a lack of appetite for a new treaty.¹⁴⁰ Several risks would come with a treaty-making exercise, as it would open negotiation points solved within case law, jeopardising existing framework and making it unlikely that the benefits outweigh the costs.¹⁴¹ Instead, it is important to look at why there is still discrepancy between prohibition of sexual crimes and criminalisation of perpetrators. This can be explained by the implementation of the rules and lack of effective prosecutions.¹⁴² This is because international law must be integrated into domestic law; otherwise, the rules will be ineffective.¹⁴³ Specifically with gender violence, domestic legal framework must prohibit and criminalise sexual violence adequately.¹⁴⁴ This is due to the principle of complementarity in Article 1 of the Rome Statute, which states that the ICC “shall be complementary to national criminal jurisdictions”.¹⁴⁵ This ensures that the court does not impinge on state sovereignty while also prosecuting serious crimes for which national courts may not have the capacity.¹⁴⁶

The ICC addresses SGBV expressly; however, the court was set up to prosecute perpetrators of the “most serious crimes”,¹⁴⁷ and the Office of the Prosecutor (OTP) focuses on prosecuting those “most responsible”,¹⁴⁸ usually meaning high-ranking perpetrators. This may fail to hold those with a lower ranking status accountable, as Article 17 of the Rome Statute states it is inadmissible when a case is not of sufficient gravity.¹⁴⁹ Waschefort points out that those who fall “between the petty crimes of little people and the evils of men of great power [...] remain beyond the reach of the law”.¹⁵⁰ O’Brien argues that applying the broader gravity factors would allow the ICC to extend its reach to include low-ranking offenders, ensuring that individual perpetrators are held accountable rather than just the commanders,¹⁵¹ thereby enhancing the courts’ efficiency.

Looking at whether accountability of SCAW is just and effective, cases such as *Lubanga*, *Katanga* and *Bemba*, display the lack of prioritisation regarding sexual violence within the ICC. The investigation in *Lubanga* disclosed evidence of sexual violence as he enlisted girl soldiers to serve as sex slaves and instructed his soldiers to terrorise the people in the Democratic Republic of Congo (DRC) by committing rapes.¹⁵² However, the ICC did not deem the acts to meet the crimes against humanity threshold¹⁵³ and charged him solely for enlisting and conscripting children to participate in active hostilities.¹⁵⁴ This failure of the prosecutors to acknowledge the accounts of the women in court has a psychological and symbolic effect on the victims.¹⁵⁵ The victims are likely already scarred from the

¹³⁹ Gaggioli (n 5) 532.

¹⁴⁰ Ibid, 532-533.

¹⁴¹ Ibid.

¹⁴² Gaggioli (n 5), 533.

¹⁴³ Ibid

¹⁴⁴ Ibid.

¹⁴⁵ Rome Statute (n 98), Article 1.

¹⁴⁶ Mohamed M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ (2002) 23(4) *Mich J Intl L* 869, 890.

¹⁴⁷ Rome Statute (n 98), Article 1.

¹⁴⁸ Office of the Prosecutor, Policy paper on case selection and prioritisation (15 September 2016), para 42.

¹⁴⁹ Rome Statute (n 98), Article 17(1)(d).

¹⁵⁰ Gus Waschefort, ‘Gravity as a requirement in international criminal prosecutions: implications for South African courts’ (2014) 47(1) *CILSA* 38, 63.

¹⁵¹ Melanie O’Brien, ‘Using the Gravity threshold to Categorise Low-Ranking Perpetrators and Peacekeepers as “Most Responsible” for International Crimes’, *ICC Forum* (1st July 2021) < https://iccforum.com/gravity#OBrien_fn2 > Accessed 8th April 2024.

¹⁵² K’Shaani O. Smith, ‘Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of Congo’ (2011) *How LJ* 467, 468.

¹⁵³ Tanja Altunjan, ‘The International Criminal Court and Sexual Violence: Between Aspirations and Reality’ (2021) 22 *German Law Journal* 878, 884.

¹⁵⁴ *The Prosecutor v. Thomas Lubanga Dyilo* (Judgement pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012).

¹⁵⁵ O. Smith (n 152) 485.

atrocities that were inflicted upon them, but being ignored by the prosecutor after having to relive the events in court “can result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm”.¹⁵⁶ This is notably worse with victims of rape as they tend to suffer from post-traumatic stress disorder or other psychological effects such as anxiety, depression, insomnia, and social withdrawal.¹⁵⁷ However, by bringing charges, the victims can find solace in knowing that the perpetrator cannot commit the crime again, their voice has been listened to, and they will not have to fear that the culprit will violate them again, relieving psychological strain and helping deal with the physical violation.¹⁵⁸ The systematic importance allows the victims to have faith in their legal system, encouraging them to report crimes and effectively preventing future crimes.¹⁵⁹ The prosecutor’s failure to hold *Lubanga* accountable for sexual violence displayed that women’s interests are not represented and not viewed as crucial as other interests by the court.¹⁶⁰

Following *Lubanga*, the case of *Katanga* was the first trial within the ICC to explicitly deal with sexual violence.¹⁶¹ The Pre-Trial Chamber found that there was sufficient evidence of rape and sexual slavery constituting war crimes and crimes against humanity.¹⁶² The Woman’s Initiative for Gender Justice (WIGJ) carried out documentation of the gender-based crimes that allegedly took place and found that the women whom they interviewed had been victims of attacks involving rape, gang rape, rape in front of family members (including their children) and losing consciousness from rape.¹⁶³ However, *Katanga* was acquitted of the charges of rape and sexual slavery due to insufficient evidence linking him to the charges.¹⁶⁴ Accountability in *Katanga* is crucial, particularly given the DRC’s distinction for having the ‘highest rate of sexual violence in the world’. Accountability in the ICC would recognise the legal rights of women, which are disregarded within the DRC’s domestic jurisdiction.¹⁶⁵ The Executive Director of the WIGJ states that the acquittal is a “devastating result for victims”¹⁶⁶ and expresses how the judgement “demonstrates the ways in which the ongoing practice of gender inequality, distorts and impedes the possibility of gender justice”.¹⁶⁷ This stems from the fact that rape is a daily occurrence in armed conflict, yet accountability is still exceptional.¹⁶⁸

In 2016 the ICC sentenced *Bemba* to 18 years imprisonment for crimes against humanity and war crimes involving murder, rape and pillaging in the Central African Republic.¹⁶⁹ This was a ground-breaking case as *Bemba* was the most senior leader to be successfully convicted by the ICC¹⁷⁰ and was also the first conviction by the court for sexual crimes.¹⁷¹ Initially, this appeared to be a significant advancement for developing SCAW in international law; however, two years after sentencing, *Bemba*’s conviction was overturned in full.¹⁷² This is due to inadequate evidence of command responsibility, resulting in the

¹⁵⁶ Erin Ann O’Hara, ‘Victim Participation in the Criminal Process’ (2005) 13(1) *Journal of Law and Policy* 229, 244.

¹⁵⁷ O. Smith (n 152) 487.

¹⁵⁸ *Ibid.*, 486.

¹⁵⁹ *Ibid.*, 489-490.

¹⁶⁰ *Ibid.*, 489-491.

¹⁶¹ Altunjan (n 153), 885.

¹⁶² *Katanga* (n 118).

¹⁶³ Brigid Inder, ‘Statement by the Women’s Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngujolo Chui’ (23 November 2009) < <http://www.iccwomen.org/news/docs/Katanga-Statement.pdf> > Accessed 31st March 2024.

¹⁶⁴ Woman’s Initiative for Gender Justice, ‘Partial Conviction of Katanga by ICC. Acquittals for Sexual Violence and Use of Child Soldiers’ (7 March 2014) < <http://iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf> > Accessed 31st March 2024.

¹⁶⁵ Inder (n 163).

¹⁶⁶ Woman’s Initiative for Gender Justice (n 164).

¹⁶⁷ Brigid Inder, ‘Expert Panel: Prosecuting Sexual Violence in Conflict – Challenges and Lessons Learned’ (11 June 2014) *Global Summit to End Sexual Violence in Conflict*, 7 < <http://iccwomen.org/documents/Global-Summit-Speech.pdf> > Accessed 31st March 2024.

¹⁶⁸ *Ibid.*

¹⁶⁹ Bemba (n 117), 7.

¹⁷⁰ Joseph Powderly, ‘Prosecutor v. Jean-Pierre Bemba Gombo: Judgement on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s’ (2018) 57 *ILM* 1031, 1031.

¹⁷¹ Altunjan (n 153), 885.

¹⁷² International Criminal Court, Press Release: ‘ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity’ ICC-CPI-20180608-PR1390 (8 June 2018) < <https://www.icc-cpi.int/news/icc-appeals-chamber-acquits-mr-bemba-charges-war-crimes-and-crimes-against-humanity> > Accessed 11th March 2024.

acquittal of all charges, which was a major setback in prosecuting crimes of this nature in the ICC. While the grounds for acquittal did not specifically relate to the sexual violence charges, the consequences are likely to disproportionately hinder future prosecutions of such crimes.¹⁷³ Due to the limited number of prosecutions, the acquittal of *Bemba* appears to be a greater loss and demonstrates a significant setback for the accountability of SCAW. It emphasises the lack of a single, final conviction for such crimes even sixteen years after the Rome Statute implementation.¹⁷⁴

These cases highlight the ICC's inability to successfully prosecute perpetrators of SCAW, which would also result in the loss of reparation to the victims due to the link between reparation and conviction.¹⁷⁵ However, there are alternative methods beyond ICL to ensure accountability. This can be seen in the situation of Iraq, which involved a system of organised rape, sexual slavery and forced marriage by the Islamic State on Yazidi women that may constitute SCAW.¹⁷⁶ Still, Iraq has not ratified the Rome Statute, so the ICC and UN Security Council would struggle to impose penal sanctions. However, Iraq instead uses a counterterrorism law in which they can charge suspects for ISIS membership, support, sympathy, or assistance.¹⁷⁷ This may be easier to convict regarding evidentiary matters, but it becomes problematic when seeking to punish the most serious crimes. It also fails to provide judicial documentation of the specific crimes nor deliver justice for the victims. In addition to this, the UN Security Council adopted a resolution to allow the investigation and preservation of evidence of serious crimes committed by ISIS, but the evidence team cannot provide Iraqi courts with the evidence since it allows for the death penalty for ISIS suspects. The policies of the UN do not allow for supporting or assisting processes, which could lead to the death penalty. Therefore, they urge that Iraqi authorities suspend the death penalty for these trials.¹⁷⁸ Human Rights Watch recommend that Iraqi and KRG authorities pass laws that criminalise war crimes and crimes against humanity.¹⁷⁹

The principle of Universal Jurisdiction provides for national courts in third countries to address international crimes where the crimes did not occur on the state's territory¹⁸⁰ to "prevent impunity for perpetrators of particularly serious offences".¹⁸¹ This principle enabled Germany to convict members of ISIS for crimes against humanity, war crimes and genocide in 2021. The Higher Regional Court of Hamburg charged Jalda A. with gender-based persecution and aiding and abetting rape.¹⁸² The Higher Regional Court of Koblenz convicted Nadine K. of war crimes, including aiding and abetting rape.¹⁸³ Although it is not a common occurrence, criminal responsibility is still possible where states have not ratified the Statute due to the 'responsibility to protect', which is a principle that encourages the international community's responsibility to protect populations against genocide, war crimes, ethnic cleansing, and crimes against humanity.¹⁸⁴

¹⁷³ Altunjan (n 153) 885.

¹⁷⁴ Susana SáCouto and Patricia Viseur Sellers, 'The BEMBA Appeals Chamber Judgement: Impunity for Sexual and Gender-Based Crimes' (2019) 27 *Wm & Mary Bill Rts J* 599, 599.

¹⁷⁵ Luke Moffett and Clara Sandoval, 'Tilting at windmills: Reparations and the International Criminal Court' (2021) 34 *LJIL* 749, 750.

¹⁷⁶ Zeynep Kaya, 'The Causes and Consequences of Sexual Violence in Conflict' *LSE Middle East Centre Report* (28 November 2019), 13.

¹⁷⁷ Iraqi Counterterrorism Law, No. 13 of 2005.

¹⁷⁸ Human Rights Watch, *Flawed Justice: Accountability for ISIS crimes in Iraq* < <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq> > Accessed 11th March 2024.

¹⁷⁹ *Ibid.*

¹⁸⁰ European Centre for Constitutional and Human Rights glossary < <https://www.echr.eu/en/glossary/universal-jurisdiction/> > Accessed 11th March 2024.

¹⁸¹ Henriksen (n 12) 89.

¹⁸² Sofia Koller, 'Prosecution of German Women Returning from Syria and Iraq' (2022) *Counter Extremism Project*, 13. < https://www.counterextremism.com/sites/default/files/2022-08/CEP%20Policy%20Paper_Prosecution%20of%20German%20Women%20Returning%20from%20Syria%20and%20Iraq_August%202022_final.pdf > Accessed 11th April 2024.

¹⁸³ Sofia Koller, 'ISIS Women in Court: Nadine K. – What Role in the Yazidi Genocide?' (2023) *Counter Extremism Project*. < <https://www.counterextremism.com/blog/isis-women-court-nadine-k-what-role-yazidi-genocide/> > Accessed 11th April 2024.

¹⁸⁴ UNGA Res 60/1 (16 September 2005) A/RES/60/1.

The challenges with accountability extend beyond failed prosecutions to how jurisdictions ensure accountability by preventing crimes before they occur with effective rules. Gloria Gaggioli recognises how rules prohibiting and criminalising sexual violence become effective when implemented at a national level and supported by robust State institutions.¹⁸⁵ This involves ensuring that the security sector is adequately staffed and trained; the justice system is appropriately equipped to investigate and sanction allegations, and a strong health system with specially trained staff to recognise sexual violence and provide necessary assistance to victims.¹⁸⁶ In many countries, these crimes are prohibited, but prosecutions are rare due to inadequate referral systems for victims, distrust in state institutions and reluctance of the judicial systems to prosecute sexual crimes which deters victims from reporting.¹⁸⁷ It is also noted that this assistance indirectly prevents sexual violence as it reduces vulnerability of the community and concerned parties. In addition, the International Conference of the Red Cross and Red Crescent highlighted the need for States to ensure all feasible measures to prevent SCAW.¹⁸⁸

General accountability avenues for victims in the context of sexual crimes

It is evident that while international law primarily focuses on punishing war criminals, it fails to equally address the rights and interests of the victims. Referring to crimes of violence, Lord Hilborne emphasises the point that “for innocent victims of such crimes we all feel sympathy, but we feel that sympathy alone is not enough”.¹⁸⁹ It is important that victims of war crimes receive reparations for the harm suffered, as “a right without remedy is no right at all”.¹⁹⁰ The General Assembly’s resolution on the Basic Principles of Rights to Reparations (2005 Basic Principles) states that victims “are persons who individually or collectively suffered harm... through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law”.¹⁹¹ In addition, the International Law Association clarifies that ‘reparation’ aims to eliminate harmful consequences resulting from a breach of international law during armed conflict, restoring conditions to their pre-violated state.¹⁹² The principles for reparation to victims of armed conflict are set out in the 2005 Basic Principles following the Final Report of Mr. M. Cherif Bassiouni, which set out four forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.¹⁹³

Restitution refers to restoring victims to their original state, including legal rights, social status and family life.¹⁹⁴ Compensation is provided for economically assessable damage, including material damages, physical or mental harm, or even harm to reputation or dignity.¹⁹⁵ Rehabilitation includes mental and psychological care for the victims.¹⁹⁶ Satisfaction involves full public disclosure, assistance with search and identification of bodies, public apology and acceptance of responsibility, and tributes to victims¹⁹⁷. Guarantees of non-repetition prevent the recurrence of violations.¹⁹⁸

Rights for reparation is also part of customary law as International Committee of the Red Cross rule 150 of IHL states that “a state responsible for violations of international humanitarian law is required

¹⁸⁵ Gaggioli (n 5), 533.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ International Conference of the International Red Cross and Red Crescent Movement, Geneva, 28 November-1 December 2011, 31IC/11/R2.

¹⁸⁹ United Kingdom, ‘Compensation for Victims of Crimes of Violence’, Parliament, House of Lords, House of Lords Debates (Hansard), HL Deb 07 May 1964 vol. 257 cc1351–1419 at 1352.

¹⁹⁰ Lord Denning in *Gouriet v Union of Post Office Workers*, [1978] AC 435 cited in R. Higgins, “The role of domestic courts in the enforcement of international human rights: The United Kingdom”, in B. Conforti and F. Franciani (eds.), *Enforcing International Human Rights in Domestic Courts*, Martinus Nijhoff Publishers, The Hague, 1997, 620.

¹⁹¹ UNGA Res 60/147 (21 March 2006) A/Res/60/147, para 8.

¹⁹² International Law Association, International Committee on Reparation for Victims of Armed Conflict, Article 1.

¹⁹³ ECOSOC (n 127).

¹⁹⁴ Ibid, para 22.

¹⁹⁵ Ibid, para 23.

¹⁹⁶ Ibid, para 24.

¹⁹⁷ Ibid, para 25.

¹⁹⁸ Ibid, para 25(i).

to make full reparation for the loss or injury caused”.¹⁹⁹ The Hague Convention IV demonstrates that “a belligerent party which violates the provisions of the said Regulation shall, if the case demands, be liable to pay compensation”.²⁰⁰ Right for remedy is a secondary right which can only occur based on the primary right under IHL being violated. Therefore, Article 30 of Geneva Convention IV provides that protected persons have the right to file a complaint based on an infringement of the convention.²⁰¹ However, the Geneva Conventions do not provide remedies for the victims; instead, they focus on punishing individuals who commit crimes²⁰² because no general international mechanism allows them to assert their rights. Furthermore, the International Committee for the Red Cross lacks official mechanisms for providing the right to remedy²⁰³ despite claiming to be the primary international body for protection of war victims.²⁰⁴ However, the reasoning behind this is that it lacks capacity to render legally binding decisions regarding claims of individuals who allege to be victims, nor is that its purpose.²⁰⁵

Where IHL seems deficient, human rights treaties provide a platform for addressing violations of humanitarian law. They are equipped with committees, commissions, and courts capable of receiving individual complaints, providing them with a remedy.²⁰⁶ Human Rights tribunals, such as the United Nations Compensation Commission (UNCC) and the Eritrea-Ethiopian Claims Commission (EECC), were set up to provide remedies for victims of violations to IHL following armed conflict. Typically, a claim is submitted directly to the commission by the individual, or they submit their complaint to the government, which then deals with the commissions.²⁰⁷ The latter process is used for the UNCC and EECC, which can be argued to benefit victims due to the difficulty of resolving claims on a case-by-case basis, especially during armed conflict since there is a mass scale of victims, which would overwhelm the bodies’ already limited resources, making compensatory measures problematic.²⁰⁸ Mass claims also mean that individuals have no individual right to compensation and have restricted involvement in the procedure. Consequently, the absence of proceedings for victims results in a lack of individualised resolution.²⁰⁹

Looking at ICL, the Rome Statute incorporates more avenues for redressing victims, following the lack of attention given to victims within the ICTY and ICTR. The Statute established principles for reparations as restitution compensation and rehabilitation.²¹⁰ It did not explicitly exclude the principle of satisfaction and guaranteed non-repetition, acknowledged in the 2005 Basic Principles. This principle involves the state’s official verification of facts and public disclosure, acceptance of responsibility, and an apology.²¹¹ Preventing reoccurrence requires the state to strengthen independence of the judiciary, strengthen human rights training in all sectors of society, and create mechanisms for monitoring conflict resolution.²¹² The ICC has no jurisdiction over states and therefore does not possess the power to ensure states follow these principles.²¹³ However, it recognises two avenues for compensation: payment from convicted defendants through fines and forfeitures and awards from the Victims Trust Fund (VTF),

¹⁹⁹ International Committee Red Cross, Rule 150 Reparation.

²⁰⁰ Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Article 3.

²⁰¹ GC4 (n 80), Article 30.

²⁰² Liesbeth Zegveld, ‘Remedies for victims of violations of international humanitarian law’ (2003) 85(851) *IRRC* 497, 514.

²⁰³ *Ibid* 515.

²⁰⁴ International Committee of the Red Cross, ‘The ICRC’s mandate and mission’ < <https://www.icrc.org/en/mandate-and-mission> > Accessed 11th April 2024.

²⁰⁵ Zegveld (n 202) 515.

²⁰⁶ *Ibid*, 520.

²⁰⁷ *Ibid*, 522.

²⁰⁸ *Ibid*.

²⁰⁹ *Ibid*.

²¹⁰ Rome Statute (n 98) Article 75.

²¹¹ ECOSOC (n 127), 25.

²¹² *Ibid*, 25(i).

²¹³ Linda M. Keller, ‘Seeking Justice at the International Criminal Court: Victims’ Reparations’ (2007) 29 *T Jefferson L Rev* 189,195.

established by the decision of the Assembly of State Parties (ASP).²¹⁴ Issues arise with these avenues due to convicted defendants lacking adequate resources to provide reparations.²¹⁵

Article 79 of the Rome Statute established the VTF²¹⁶ to complement retributive justice achieved through prosecution.²¹⁷ The establishment “reflects a growing international consensus that reparations play an important role in achieving justice for victims”.²¹⁸ The ICC awards reparations individually or collectively²¹⁹ but favours group trials, as they are more efficient and appropriate.²²⁰ This approach is more effective because ‘victims of mass atrocities cannot be made whole by compensation alone’.²²¹ Furthermore, given the limited resources, substantial compensation on an individual basis would not be feasible given the scale of international crimes.²²² Attempting to compensate all victims would exhaust the financial capacities of the trust fund. Victims eligible for reparations are divided into two categories to separate those who suffered at the hands of a defendant being prosecuted by the ICC and victims of the same conflict but whose perpetrator is not being tried by the court. The latter shall benefit from “other resources”²²³ which refers to ‘resources other than those collected from awards for reparations, fines and forfeitures’.²²⁴ As previously mentioned, the OTP is more likely to prosecute commanders or high-ranking individuals, so allowing reparations to indirect victims provides justice for those excluded from court-ordered reparations.²²⁵ Collective awards are also more effective in achieving restorative justice because they are tied to society as a whole, thereby facilitating more comprehensive social healing. They benefit broader society by simultaneously reconciling victims, including unidentified victims and other groups.²²⁶ For instance, initiatives such as memorial museums commemorate victims while educating others, exemplifying how this approach works. The VTF provides examples of successfully supporting victims of SGBV, both economically and with medical and mental health support.²²⁷ There have also been successful reparations in previously mentioned cases, such as *Lubanga*, where the ICC based cost of reparations on the harm suffered by both individual victims and the collective.²²⁸

The Rules of Procedure and Evidence is an instrument for applying the Rome Statute. Section III, subsection four specifically refers to reparations for victims. This highlights limits to victims as there is evidence needed in a request for reparation, which is not feasible for victims within armed conflicts. This is due to victims of war-torn countries often having to flee their homes with nothing, so they hold no material proof, and there are usually no death certificates.²²⁹ It is also particularly difficult for victims of sexual violence as their suffering goes unrecognised due to difficulty being vocal about their hardship.²³⁰ Problems with the reparation are due to the urgent needs of victims being outside of the reach of the ICC, which has lengthy procedures that do not match such urgency.²³¹ Proposed strategies for improving the ICC’s rights to remedy include expanding its framework, specifically within the

²¹⁴ Rome Statute (n 98) Article 79.

²¹⁵ Keller (n 213), 196.

²¹⁶ Rome Statute (n 98), Article 79.

²¹⁷ Keller (n 213), 191.

²¹⁸ Marieke Wierda and Pablo de Greiff, ‘Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims’ (2004) *International Centre for Transitional Justice*.

²¹⁹ International Criminal Court Rules of Procedure and Evidence 2013 (ICC Rules P&E), rule 97.

²²⁰ *Ibid* rule 98(3).

²²¹ Keller (n 213), 191.

²²² *Ibid*.

²²³ ICC Rules P&E (n 219), rule 98(5).

²²⁴ Resolutions adopted by the Assembly of State Parties, Resolution ICC-ASP/4/Res.1, para 47.

²²⁵ Keller (n 213), 204.

²²⁶ *Ibid*, 212.

²²⁷ The Trust Fund for Victims, ‘Supporting victims of gender and sexual-based violence’ <

<https://www.trustfundforvictims.org/en/about/our-impact/supporting-victims-sexual-gender-violence> > Accessed 11th April 2024.

²²⁸ The Prosecutor v. Thomas Lubanga Dyilo (Judgment on appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’) ICC-01/04-01/06 A7 A8 (18 July 2019), para 108.

²²⁹ Amissi M. Manirabona and Jo-Anne Wemmers, ‘Specific Reparation for Specific Victimization: A Case for Suitable Reparation Strategies for War Crimes Victims in the DRC’ (2013) 13(5) *IntlCLR* 977, 999-1000.

²³⁰ *Ibid*.

²³¹ *Ibid*, 1011.

financial capability of the Trust Fund, to adequately support all victims and address their needs effectively. Additionally, strengthening national legal and judicial mechanisms is crucial for preventing recurrence, a pivotal aspect of reparations.²³²

Issues involving reparations specifically affect women due to armed conflict bringing unique burdens onto women as they experience sexual violence and exploitation at a disproportionate rate to men,²³³ more particularly experiences of “torture, mass rape, forced pregnancy, sexual slavery, forced prostitution and trafficking”.²³⁴ It is important to note that the 2005 Basic Principles state that “reparation should be proportional to the gravity of the violations and the harm suffered”.²³⁵ Therefore, due to the physical and psychological trauma inflicted on women at a higher proportion and the significant impact of these heinous crimes on them, it may be inequitable to overlook the issue of reparation for female victims of sexual violence in armed conflicts, particularly when resources are limited for numerous other victims.

Limitations and lacuna within international law relating to sexual crimes

Having dealt with the history of International Law, the limitations of accountability and accountability avenues for victims it is important to look at gaps within the law which leads to these limitations.

Limited resources, which lead to lack of prosecutions, are a barrier to developing accountability for SCAW. *Ad hoc* tribunals such as the ICTY and ICTR were instrumental in proscribing rape and sexual violence amid conflict, but international law may not have the capacity to properly convict these crimes. For example, within the ICTY only seventeen out of the eighty-six cases brought to the tribunal included counts of any form of sexual assault.²³⁶ In comparison, within the seventy-four indictments in the ICTR, only twenty-eight involved charges of rape or sexual violence.²³⁷ Furthermore, even where there have been cases of perpetrators being indicted and convicted for a number of sexual crimes at the same time as other crimes, they may serve their terms concurrently while retaining the opportunity for early release.²³⁸ Looking at the case of *Furundžija*, mentioned in chapter one, the charges for ‘outrages upon personal dignity including rape’ were served concurrently²³⁹ with a ten-year sentence, but he received an early release after serving over six years.²⁴⁰

This punishment may seem gentle in comparison to the severity of his crimes and may give the wrong message to victims who had to endure suffering through his crimes and then throughout the trial. While prison is intended to rehabilitate offenders and protect victims, as opposed to locking them away forever, it sets an example that these severe crimes are not met with adequate punishment which also fails to fulfil the role of deterrence. Likewise, the ICC’s endeavour to convict perpetrators has resulted in a series of “false starts and ‘almosts’”.²⁴¹ This can be seen in the previously mentioned cases of *Lubanga*, *Katanga* and *Bemba*. This highlights the law’s failure to secure convictions for sexual violence due to procedural issues, with *Bemba*’s proving short-lived following his acquittal.²⁴²

²³² Ibid.

²³³ Chile Eboe-Osuji, ‘From Sympathy to Reparation for Female Victims of Sexual Violence in Armed Conflicts’ (2011) 4(3) *African Journal of Legal Studies* 257, 295.

²³⁴ United Nations, ‘Report of the Secretary-General on women, peace and security’, Doc No S/2002/1154 of 16 October 2002.

²³⁵ UNGA Resolution (n 191), para 15.

²³⁶ John D. Haskell, ‘The Complicity and Limits of International Law in Armed Conflict Rape’ (2009) 29 *BC Third World LJ* 35, 60.

²³⁷ Ibid, 61.

²³⁸ See *Furundžija* (n 43)

²³⁹ Ibid, para 295.

²⁴⁰ *Prosecutor v Anto Furundžija* (IT-95-17/1-T) case information sheet, 4.

²⁴¹ Rosie Fowler, ‘Great expectations: A critique of the International Criminal Court’s commitment to victims of sexual and gender-based violence’ (2021) 2 *Journal of International Criminal Law* 27, 39.

²⁴² *Bemba* (n 117).

It is acknowledged that the state also does not have the resources or judicial capacity to offer the survivors access to justice and legal remedies.²⁴³ The judges in the ICTY and ICTR decided not to offer women reparation, as they believed that “the responsibility for processing and assessing claims for compensation should not lie with the tribunal but other agencies within UN systems”.²⁴⁴ This was due to the view that economic consequences experienced by victims of sexual violence are of a political nature rather than a legal one, thereby extending beyond the scope of international law.²⁴⁵ In contrast, the ICC established principles of reparation to victims, which include ‘restitution, compensation and rehabilitation’²⁴⁶ but are only granted ‘upon request’ or ‘in exceptional circumstances’.²⁴⁷ This implies that reparations are still secondary considerations compared to determinations of innocence or guilt.²⁴⁸ As mentioned above, the ICC favours collective reparations. The problem is that Procedural Rules stipulate that the Victims Trust Fund can order collective reparations not paid to the survivors but to intergovernmental, international, or national organisations.²⁴⁹ The procedural and evidentiary requirements for receiving reparation are also likely to impede women from the process, particularly rape victims who cannot offer physical proof of rape or present a witness, given that witnesses may be deceased or unwilling to testify.²⁵⁰

Lacuna in the law is evident due to weak implementation and enforcement. This could be due to regulations on human rights applicable to SCAW being based on non-legally binding soft law instruments²⁵¹ leading to a discrepancy between framework and implementation of the law. It is recognised that violence against women tends to occur in private and thus to exist within the private sphere, which holds less significance in the eyes of the law.²⁵² However, construction of human rights treaties does not consider this private sphere where SCAW occur.²⁵³ This results in not all states recognising that SCAW constitutes a human rights violation directly affecting how the laws are implemented at the national level.²⁵⁴ The introduction of participation schemes for victims seemed like development towards victim-centric ideals;²⁵⁵ however, it instead represents another gap in the law due to the lack of victims’ support discouraging victims from coming forward.²⁵⁶ Victims are hesitant to come forward due to cultural, religious, and personal reasons.²⁵⁷ The law associates sexual violence with dishonour,²⁵⁸ so, logically, women expect shame from their community if they admit to being raped.²⁵⁹ Even where they do come forward, the court does not have capacity to deal with the vast number of victims. For example, the court authorised 5229 victims in *Bemba*, yet only three were permitted to “directly present their views and concerns”.²⁶⁰ Where the opportunity arises for victims to be present in court, the scheme presents as impractical as a ‘victim-centric ideal’. Fowler recognises that the process of ICL is a ‘blunt tool’, which is not suited to victims who have a complex, traumatic

²⁴³ Diana Amneus, ‘Insufficient legal protection and access to justice for post-conflict sexual violence’ (2011) 55 *Development dialogue* 67, 67.

²⁴⁴ Breton-Le Goff, ‘Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda from November 1995 to November 2002 p.92, as cited in John D. Haskell, ‘The Complicity and Limits of International Law in Armed Conflict Rape’ (2009) 29 *BC Third World LJ* 35, 78.

²⁴⁵ Haskell (n 236), 78.

²⁴⁶ Rome statute (n 98), article 75.

²⁴⁷ *Ibid*, Article 75.

²⁴⁸ Haskell (n 236), 79.

²⁴⁹ ICC Rules P&E (n 219) rule 98(4).

²⁵⁰ Haskell (n 236), 79.

²⁵¹ Amneus (n 243), 78.

²⁵² Gardam (n 128) 65.

²⁵³ Amneus (n 243), 78.

²⁵⁴ *Ibid*.

²⁵⁵ Fowler (n 241,) 28.

²⁵⁶ *Ibid* 41.

²⁵⁷ Kas Wachala, ‘The tools to combat the war on women’s bodies: rape and sexual violence against women in armed conflict’ (2012) 16(3) *IJHR* 533, 547.

²⁵⁸ “No one shall be subjected to arbitrary interference with... attacks upon his honour and reputation”, UDHR (n 86), Article 12.

²⁵⁹ Carlo Koos, ‘What Do We Know About Sexual Violence in Armed Conflicts?’ (2015) 275 *GIGA Working Papers*, 19.

²⁶⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) Case information sheet.

and emotional narrative.²⁶¹ This is also likely to clash with the court's prerogative due to the disconnect between what is legally useful and the victim's experience.²⁶²

The law's inability to hold perpetrators accountable is evident in the persistence of war crimes by states, demonstrating the failure of the law to effectively deter such actions in current conflicts. For example, while the UN Security Council have investigated sexual assault on Palestinian women and girls over several decades, it has yet to hold a meeting on the matter²⁶³ of these allegations. The Permanent Observer for the Observer State of Palestine recognised that the lack of accountability for leaders or members of the Israeli Occupation forces regarding their allegations against Palestinians over the last 75 years has enabled the persistence of these actions.²⁶⁴ The aim of the international law on armed conflict and occupation is to prevent unnecessary suffering, but Sumina and Gilmore hold the opinion that the ongoing torture of Palestinian women has displayed where the law fails in its job.²⁶⁵ UN experts found reports of women and girls being subject to sexual assault, including rape and strip searches, which may constitute serious crimes in ICL and grave violations of IHRL and IHL.²⁶⁶ Although these allegations have not yet been verified in court, initiating criminal proceedings would be a measure of the progress, evaluating whether international law has effectively developed to hold perpetrators of SCAW accountable.

Conclusion

International law addressing SCAW in conflicts has developed rapidly in recent years, particularly following the establishment of the *ad hoc* tribunals. The advancements of the developments of ICL within ICC marks significant progress in recognising and addressing grave violations of international law. However, this has not been reflected in accountability of perpetrators. Despite situations where evidence has been obtained,²⁶⁷ there is a notable scarcity of cases and convictions. Landmark cases from *Akayesu* to *Ongwen* highlight the challenges of achieving justice, ranging from jurisdictional limitations to complexities with prosecuting SCAW. These challenges highlight the need for a better legal framework and a more practical investigation process. The advancement of redress for victims and schemes for participation is progressive in theory, yet in practice, it appears challenging to apply for it, or the court simply does not have the capacity for the number of victims. The gap between theory and practice emphasises the need for legal systems to evolve in both victim-centric ways and capable of managing the scale of atrocities encountered.

The significance of the topic extends beyond legal analysis as the persistent occurrence of sexual violence is more than just a violation of individual rights and instead reflects upon the international community. It is a reminder that gender inequalities still exist and are exacerbated by conflict and addressing the issues are important to uphold certain principles, such as the welfare of civilians in a conflict. Advancements made thus far must be retained and built upon. Following the success in *Ongwen*, the ICC must continue this trend of successful prosecutions rather than allow a case like *Ongwen* to be an exception. The international community must punish crimes of sexual violence to ensure the prevention of future reoccurrence and to give justice to the victims of the crimes. Adopting

²⁶¹ Fowler (n 241), 42.

²⁶² Ibid.

²⁶³ Riyadh Mansour, Permanent Observer for the Observer State of Palestine – UN News, Civilians in Israel and Palestine 'cannot be abandoned', says top UN official on sexual violence in conflict. < <https://news.un.org/en/story/2024/03/1147477#:~:text=%E2%80%9CCivilians%20and%20their%20families%20in,We%20annot%20fail%20them.%E2%80%9D> > Accessed 7th April 2024.

²⁶⁴ Ibid.

²⁶⁵ Svetlana Sumina and Steven Gilmore, "The Failure of International Law in Palestine" (2018) 20(2) *The Scholar: St. Mary's Law Review on Race and Social Justice* 135, 187.

²⁶⁶ OHCHR, 'Israel/oPt: UN expert appalled by reported human rights violations against Palestinian women and girls' (19th February 2024) < https://www.ohchr.org/en/press-releases/2024/02/israelopt-un-experts-appalled-reported-human-rights-violations-against?fbclid=PAAabQHVMsBixigPFY4DbDFmjABgh8aFSScbQwMd33ayQgS7jhyd3acMK-_3A_aem_AaBhddevhp99s5CstCGeK6pxbukq04mPeCkfUUw_DXEAtj87dXdNZD26AaKOn_8rmmo > Accessed 7th April 2024.

²⁶⁷ See, *Lubanga* (n 154).

victim-centred approaches may assist with enforcing preventative measures suggested by Gaggioli, including ensuring that national justice systems are staffed and trained appropriately.²⁶⁸

In addition, supporting survivors reduces vulnerabilities (such as cultures not accepting victims of rape) within the community, which indirectly prevents sexual crimes from reoccurring. Providing platforms for victims to come forward and allowing reparations from the Victims Trust Fund without a successful conviction allows a comprehensive response to SGBV that is focused on restoration to victims. The law must continue adapting in order to support victims of these heinous crimes and continue the fight against SCAW in conflict. By doing so, the international community can move closer to a future whereby sexual violence is not viewed as a 'by-product' of war, and women not directly involved in the fighting do not have to fear that they will experience this despicable treatment simply for existing at a time of conflict.

²⁶⁸ Gaggioli (n 5), 533.