The Influence of Gender Stereotyping on International Humanitarian Law

Athena M Nguyen, Monash University

Available at: https://works.bepress.com/athena_nguyen/1/
# The Influence of Gender Stereotyping on International Humanitarian Law

Athena Nguyen

## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abstract</td>
<td>2</td>
</tr>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>Part I – Gender Stereotypes</td>
<td>4</td>
</tr>
<tr>
<td>Part II: Women and War</td>
<td>7</td>
</tr>
<tr>
<td>Part III: International Humanitarian Law</td>
<td>14</td>
</tr>
<tr>
<td>– Protecting Gender Stereotypes?</td>
<td></td>
</tr>
<tr>
<td>Woman as Sexual Object</td>
<td>17</td>
</tr>
<tr>
<td>Akayesu: Rape as Genocide</td>
<td>18</td>
</tr>
<tr>
<td>Furundžija: Rape as Torture</td>
<td>27</td>
</tr>
<tr>
<td>Kunarac, Kovać and Vuković: Rape and Enslavement</td>
<td>33</td>
</tr>
<tr>
<td>The International Criminal Court: Bringing It All Together</td>
<td>38</td>
</tr>
<tr>
<td>Woman as child-bearer/child-rearer</td>
<td>45</td>
</tr>
<tr>
<td>Woman as the ‘weaker sex’</td>
<td>48</td>
</tr>
<tr>
<td>Part IV: Concluding thoughts</td>
<td>52</td>
</tr>
</tbody>
</table>
Abstract

The influence and pervasiveness of gender stereotyping on the law has recently been analysed by Rebecca J. Cook and Simone Cusack in *Gender Stereotyping: Transnational Legal Perspectives*. This Article extends the analytical framework developed by Cook and Cusack to examine the impact of gender stereotyping on international humanitarian law. This Article addresses the question, how has gender stereotyping influenced both the protections, and limitations to protections, for women in international humanitarian law? This Article will argue that three gender stereotypes have shaped the development of international humanitarian law through an examination of the Geneva Conventions, Additional Protocols, case law emerging from the ad hoc Tribunals for the Former Yugoslavia and Rwanda, and the Rome Statute.
Introduction

Rebecca J. Cook and Simone Cusack’s latest work, *Gender Stereotyping: Transnational Legal Perspectives*, has contributed to reviving the debate on the role of gender within national, regional and international law.¹ Building on the feminist jurisprudence of the past few decades developed by Hilary Charlesworth,² Catharine MacKinnon,³ Ngaire Naffine⁴ and Dianne Otto⁵ among others, Cook and Cusack developed and applied an analytical framework of ‘gender stereotyping’ to examine how the law is based upon, and continues to perpetuate, particular ideas about men and women. Concurrently, women’s rights advocates, lawyers and supporters across the world were celebrating the advances that women had made within international humanitarian law (IHL). This particularly followed the landmark decisions of *Akayesu*,⁶ *Furundžija*⁷ and *Kunarac, Kovač and Vuković*,⁸ and

---

⁷ Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Chamber Judgment (July 16, 1998).
the entry into force of the Rome Statute. This article will bring together these two lines of feminist legal scholarship to evaluate the protection regime for women within international humanitarian law. Part I will outline the analytical framework developed by Cook and Cusack in which gender stereotyping becomes the ‘lense’ through which the adequacy of the law can be examined. Part II will discuss how gender stereotypes influence the particular toll that armed conflict takes on women. Part III will extend the line of critique developed by Cook and Cusack to international humanitarian law through an analysis of the Geneva Conventions, Additional Protocols, the case law of the ad hoc Tribunals for Rwanda and the Former Yugoslavia, and the Rome Statute. This Article will use the analytical framework presented by Cook and Cusack to demonstrate how both the protections, and limitations to protections, for women within IHL are based on underlying gender stereotypes. Finally, Part IV will offer some concluding thoughts.

**Part I – Gender Stereotypes**

International humanitarian law may have the ‘higher purpose’ of preserving some semblance of humanity during the ravages of war. However, like all internationally negotiated treaties, the creation of international humanitarian

---


law is influenced by power and politics and, as such, “the dominating, most convincingly powerful party is expected to ‘win’ the negotiations”. This raises a number of interesting questions in regards to the power and politics of gender within IHL. If international humanitarian law, like all treaties, is the product of international negotiations, what happens to women if historically they have not been at the negotiating table? And if women have not been able to represent themselves, how have they been represented by men? In answering these questions, this Article will draw on the analytical framework of gender stereotyping developed by Cook and Cusack.

Within the social complexity of human societies, stereotypes have a functional purpose of maximising simplicity and predictability. Not all stereotypes are negative. However, in a world in which large differences exist in access to power and resources, stereotypes with negative or

---

12 Cook & Cusack, supra note 1, at 14.
13 Id. at 12.
14 For example, women hold only 11.7% of the seats in parliaments across the world and there is currently a 18% pay gap between men and women in Australia. See United Nations Economic and Social Council, Women at a Glance, http://www.un.org/ecosocdev/geninfo/women/women96.htm (last visited 26 June 2010); Equal Opportunity for Women in the Workplace Agency, Equal Pay Day Fact Sheet (2010).
prejudice connotations can devalue and further entrench the disadvantage of particular groups.

Gender stereotypes have been defined by Cook and Cusack as the “social and cultural construction of men and women, due to their different physical, biological, sexual and social functions”.\textsuperscript{15} The impacts of gender stereotypes in international law affect men and women in both positive and negative ways. Considering the current political, social and economic inequalities that women still face in many different cultures, however, gender stereotypes of women can work to maintain their subservient position.\textsuperscript{16}

Gender stereotyping consists of four aspects. These are:

1) \textbf{Sex} stereotyping based on generalised views regarding the physical and biological attributes of men and women;\textsuperscript{17}

2) \textbf{Sexual} stereotypes concerning roles and attributes associated with sexuality (e.g. men as active/women as passive);\textsuperscript{18}

3) \textbf{Sex role} stereotypes which ascribe ‘appropriate’ social roles and behaviours;\textsuperscript{19}

\textsuperscript{15} \textit{Cook} \& \textit{Cusack, supra note} 1, at 20.

\textsuperscript{16} \textit{Id.} at 1.

\textsuperscript{17} \textit{Id.} at 25.

\textsuperscript{18} \textit{Id.} at 27.

\textsuperscript{19} \textit{Id.} at 28.
4) **Compound** stereotypes in which additional traits (e.g. age, race, ethnicity, class, sexual orientation) intersect with gender stereotypes.\(^{20}\)

Gender stereotypes influence both the particular experiences that women (and men) have during armed conflict and the protections that have been developed within international humanitarian law. These will now be examined.

### Part II: Women and War

"It has probably become more dangerous to be a woman than a soldier in an armed conflict."

- Major General Patrick Cammaert, U.N. Peacekeeping Commander\(^{21}\)

---

\(^{20}\) Id. at 29.

\(^{21}\) Former Major General Patrick Cammaert speaking before the UN Security Council during the passage of Resolution 1820. Quoted in Beth Van Schaack, *Obstacles on the Road to*
Armed conflict takes a profound toll on all of society – combatants, peacemakers and those simply caught in the crossfire. As a part of society women have both a shared, and a particularly gendered, experience of war. Similarly to men, women suffer from death, disablement, the destruction of property, displacement and psychological trauma. But women also have a unique experience of war based on their subordinate status in society, and the expected attributes and roles of their gender. The particular toll that armed conflict takes on women will now be analysed through the lens of gender stereotyping both in general and in the specific case of Rwanda.


The International Committee of the Red Cross (ICRC) has provided a summary of the prevailing legal definition of armed conflict. After an analysis of treaty law, case law and legal doctrine the ICRC has stated that international armed conflict is defined as “exist(ing) whenever there is resort to armed force between two or more States” and non-international armed conflicts are “protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State (party to the Geneva Conventions). The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.” For an elaboration, see International Committee of the Red Cross, How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law? (Mar 17, 2008).
The waging of war has historically been, and in many ways continues to be, a predominantly male prerogative. As such, the experiences of women have often been sidelined or considered as an afterthought. The past few decades, however, have witnessed an increasing recognition of the atrocities committed against women during armed conflict. This recognition has been evidenced in the passing of several UN Security Council Resolutions (1325, 1820, 1888 and 1889), the inclusion of sexual violence in the statutes of international criminal tribunals, and the work undertaken by women’s rights activists and non-governmental organisations. Despite these significant achievements, there continues to be "deep concern that, despite (the UN’s) repeated condemnation of violence against women and children


24 For an elaboration on the wars in which the rape of women has been overlooked, see Doris Buss, *Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, 10 FEM LS 91, 321-2 (2002).


in situations of armed conflict... such acts continue to occur, and in some
situations have become systematic and widespread, reaching appalling
levels of brutality.”

Gender stereotyping can underpin, produce and exasperate the
experiences of war for women. This includes gender stereotypes about sex
(biology), sexual roles (sexuality) and ‘appropriate’ gender roles. One of the
ways in which women have become increasingly involved in armed conflict
is as combatants. As such, women have had to confront a military culture
which is strongly linked to hegemonic masculinity and that has “particularly
entrenched gender images of women”. As combatants, women may face
social rejection or ridicule for transgressing their ‘natural’ feminine roles,
whereas male combatants are often glorified as ‘heroes’. Sexual
harassment by male peers is common as women find themselves unable to
escape the role of ‘sex objects’. For example, a Pentagon survey in 1996
found that more than half of the women serving in the U.S. Armed Forces

28 S.C. Res. 1820, supra note 25.

29 40,000 women served in the U.S. forces during the Gulf War, a fifth of the Eritrean armed
forces are female, and a third of the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka are

30 Nantais & Lee, supra note 23, at 182.

have experienced some form of sexual harassment. Gender stereotypes also influence the assignment of tasks, for example, by being assigned only to guard duty. In addition to being combatants, women also serve in many supportive roles. In accordance with their ‘gender roles’, women may work as cooks, cleaners, nurses or prostitutes. Furthermore, many women are forced into these roles against their will. The abduction and enslavement of women during war has occurred on a massive and systematic scale, such as the captivity of up to 200,000 so-called ‘comfort women’ during the Second World War by the Japanese military.

The waging of war, nonetheless, remains a predominantly male activity, and the majority of women continue to experience armed conflict as civilians, refugees and displaced persons. As civilians, war can exaggerate the

33 Nantais & Lee, supra note 23, at 185.
34 Lindsey, supra note 29, at 563.
36 See, e.g., Lindsey, supra note 29; Judith Gardam & Hilary Charlesworth, Protection of Women in Armed Conflict, 22 HRQ 148 (2000).
political, social, economic and physical disadvantages that women face, many of which are related to gender stereotypes.

Women’s secondary status can result in difficulties accessing essentials during conflict situations. For example, food may be diverted to feed combatants, and food that is destined for civilians may reach women last as women and girls are seen to ‘need’ food less than men and boys. Women’s traditional gender role as care-takers may require them to care for additional family members (e.g. injured relatives, orphaned children) which further restrict women’s mobility and ability to flee dangerous situations. Women’s confinement to the home and lack of financial independence becomes particularly acute when large numbers of female-headed households are produced as a consequence of war. Furthermore, women’s ‘sexual roles’ have made them prime targets for sexual violence. The valuing of women’s

37 Globally, women face many disadvantages during peace time which increases their vulnerability during times of conflict. For example, women and children make up 70% of the world’s poorest, women compromise two-third of the world’s illiterate, and 20 to 50% of women worldwide experience some degree of domestic violence. See United Nations Economic and Social Council, supra note 14.

38 Gardam & Charlesworth, supra note 36, at 153.

39 For example, the ICRC has found that the malnutrition rate in Kabul was significantly higher for girls than boys as in Afghan culture boys are fed first and any remaining food is given to girls. Quoted in Judith Gardam, Women and the Law of Armed Conflict: Why the Silence?, 46 ICLQ 55, 61 (1997).

40 Lindsey, supra note 31, at 30.
chastity and the view of women as the ‘symbolic’ bearers of cultural and ethnic identity has fuelled the rape of women during war.\textsuperscript{41} Women’s ‘sexual role’ has also included bearing the burden of ‘relieving’ men’s sexual needs which has resulted in the mass prostitution of women.\textsuperscript{42} This mass sexual exploitation continues even after hostilities cease and women also suffer at the hands of those enlisted to protect them, such as the allegations of rape and demand for prostituted women by UN Peacekeeping Forces.\textsuperscript{43}

A recent example of how gender stereotyping shapes women’s experiences of war can be found in the armed conflict in Rwanda. During April and July 1994, between 500,000 and one million women, men and children were killed in the Rwandan genocide.\textsuperscript{44} The men were mostly tortured and killed, whilst the women were also repeatedly, brutally, and systemically raped by Hutu militia groups (such as the Interahamwe), civilian men, and soldiers of the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 28.
\item See, e.g., ANNE L. BARSTOW, WAR’S DIRTY SECRET: RAPE, PROSTITUTION, AND OTHER CRIMES AGAINST WOMEN (2000).
\end{enumerate}
\end{footnotesize}
Rwandan Armed Forces. These rapes were committed under the encouragement of political, military and administrative leaders.

Reports by Human Rights Watch and the UN Special Rapporteur on Violence Against Women outline how the propaganda disseminated before the genocide contributed to a particular stereotype of Rwandan women of Tutsi ethnicity which motivated and justified their wide scale rape.

The stereotype perpetuated consisted of:

- **Tutsi women as evil temptresses**

  Tutsi women were portrayed as seductive spies in all militant Hutu literature. “These women are very sexual, and they sleep with their Tutsi brothers. You will be deceived by them”.

- **Tutsi women as sex objects**

---


46 Id.

47 Id.


49 Id. at 7.

50 Human Rights Watch, *supra* note 45, at 5.
Tutsi women were described as *Ibizungerezi* (beautiful and sexy) and as objects for men’s sexual pleasure. At the same time, Tutsi women were described as inaccessible to Hutu men because they considered the men to be ugly and inferior. This threatened the masculinity of Hutu men and caused outrage.\(^{51}\)

- **women as virtuous / the destruction of women through the destruction of her ‘virtue’**

The equation of women’s ‘virtue’ with her chastity makes women particularly vulnerable to rape when hatred is mobilised against them. In Rwanda, as elsewhere, survivors of sexual violence carry a heavy social stigma of being ‘damaged’ women.\(^{52}\)

In this example, it is evident that the gender stereotypes outlined by Cook and Cusack influenced the violence faced by Rwandan women, namely sexual stereotypes (e.g. Tutsi women as *Ibizungerezi*), sex role stereotypes (e.g. ‘proper’ women as chaste women) and compound stereotypes (e.g. the alleged view that Tutsi women held of Hutu men).

Gender stereotypes are alive and well in current armed conflicts and motivate the particular violations that are committed against women. These same gender stereotypes, however, also influence the protections that have

\(^{51}\) *Id.* at 12.

\(^{52}\) *Id.* at 3.
been developed for women within international humanitarian law. This paper will now analyse the impact of gender stereotyping on IHL.

Part III: International Humanitarian Law – Protecting Gender Stereotypes?

Women are protected within international humanitarian law through both general provisions (which apply to both men and women) and specific provisions for women. The general provisions include protections for personal safety; displacement; freedom of movement; food, water and essential items; shelter; health and sanitation; family preservation; education; religious and cultural practices; and legal and judicial guarantees. The specific provisions for women include the protection against discrimination; for details of the relevant provisions, see Charlotte Lindsey-Curtet, Florence Tercier Holst-Rones and Letitia Anderson, Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document (2004).

54 Protections against discrimination can be found in Geneva Convention (GC) I art. 12; GC II art. 12; GC III art. 14 & 16; GC IV art. 27; Additional Protocol I art. 75(1); Additional Protocol II art. 75(1); and Common Article 3.

treatment “with all due consideration to their sex”; protections for women civilian internees and female prisoners of war; protections against sexual violence; and specific provisions for pregnant women and women with young children. Additionally, particular protections within human rights law and refugee law may apply during and after conflict situations. The details of these protections have been meticulously documented by various legal academics and international organisations such as the International Committee of the Red Cross (ICRC). Debate remains as to whether the

(Hereinafter Geneva Convention (IV)); Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 (Hereinafter Protocol (I)); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 3 (Hereinafter Protocol (II)).

55 Geneva Convention (I), supra note 54, art. 12; Geneva Convention (II), supra note 54, art. 12; Geneva Convention (III), supra note 54, art. 14.

56 Geneva Convention (IV), supra note 54, art. 76, 85, 97 & 119; Protocol (I), supra note 54, art. 75(5); Protocol (II), supra note 54, art. 5(2)(a).


58 Geneva Convention (IV), supra note 54, art. 27; Protocol (I), supra note 54, art. 76(1); Protocol (II), supra note 54, art. 74(2); Common Article 3, supra note 54.

59 Geneva Convention (IV), supra note 54, art. 14, 23, 38(5), 50, 89 & 91; Protocol (I), supra note 54, art. 8(a), 70(1), 76(2) & 76(3); Protocol (II), supra note 54, art. 6(4).

60 See LINDSEY-CURTET ET. AL., supra note 53.

61 See, e.g., Francoise Krill, The Protection of Women in International Humanitarian Law, 249 IRRC 337 (1985); Mala Tabory, Status of Women in International Humanitarian Law, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY (Yoram Dinstein ed., 1989); Helen Durham, International
protections are adequate and the main challenge is their implementation, as argued by the ICRC,\(^6\) or whether the protections themselves are still insufficient, as argued by Judith Gardam, Hillary Charlesworth and others.\(^6\)

In all areas international humanitarian law (i.e. treaty law, case law and doctrine), gender stereotypes are evident. Although this paper will focus on stereotypes of women, the influences of male stereotypes are also important. Furthermore, women and men are also affected by stereotypes of the opposite sex. For example, the gender role stereotype of women as the primary caregiver for children may limit the opportunities for women by confining them to this role and impacts on men by depriving them of the rewards of childrearing. However, such a broad analysis is beyond the scope of this Article.

This Article will apply three gender stereotypes of women to the analysis of IHL. These are:

- **woman as sexual object** (sexual stereotype)
- **woman as child-bearer/child-rearer** (sex role stereotype)

\(^6\) **LINDSEY-CURTET ET. AL.,** *supra* note 53, at 9.

- woman as the ‘weaker sex’ (sex (biological) stereotype)

The argument of this Article is not that these protections are unimportant. Indeed, all these protections are absolutely essential. However, the wider impact of seeing women in these limited ways is that she may only be protected in these limited ways. These three gender stereotypes will now be analysed.

**Woman as Sexual Object**

The view of women as sex objects is rife within armed conflict. This is evident in the rape of women being considered as simply a part of the ‘spoils of war’; in the mass and systematic rapes of women as a tactic of war; and in the demand for prostituted women. The prevalence and brutality of sexual violence against women, however, has also created much international outrage and calls for action. The historical development of laws prohibiting wartime rape, from the Lieber Code of 1863 to the Rome Statute, has been well documented.\(^6^4\) These laws include the Geneva Convention IV,

\(^6^4\) See, e.g., Christine Strumpen-Darrie, *Rape: A Survey of Current International Jurisprudence*, 7 HUM RTS. BRIEF 3 (2000); Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975). The Furundžija Trial Chamber judgement also provides a good summary: “The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the ‘Martens clause’ laid down in the
Additional Protocol I and Additional Protocol II which protect women from “rape, enforced prostitution, or any other form of indecent assault”.\(^\text{65}\) Instead of providing a historical overview, this Article will focus on the recent developments in international law from the 1990’s onwards which has generally been accepted amongst the legal scholarship as marking a ‘new era’ in addressing sexual violence.\(^\text{66}\) This analysis will examine the recent ‘turning points’ in international law including the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), and

---

\(^{65}\) Geneva Convention (IV), supra note 54, art. 27; Protocol (I), supra note 54, art. 76(1); Protocol (I), supra note 54, art. 74(2)(e).

the case law of developed in Akayesu, Furundžija and Kunarac, Kovač and Vuković.

**Akayesu: Rape as Genocide**

On 2 September 1998, the International Criminal Tribunal for Rwanda rendered its first judgment – a judgment which held great promise for the future prosecution of sexual violence in armed conflict.\(^{67}\) The *Akayesu* judgment articulated the first conceptual definition of rape under international law and produced the first convictions for rape as constituting genocide and as a crime against humanity. Herald as “truly remarkable in its breadth and vision” by Chief Prosecutor Louise Arbour,\(^{68}\) the Tribunal legally recognised once and for all the central role of sexual violence in the genocide in Rwanda.\(^{69}\)

The ICTR was established via UN Security Council Resolution 955 on 8 November 1998 to prosecute violations of international humanitarian law in Rwanda between 1 January and 31 December 1994.\(^{70}\) Within its subject-matter jurisdiction fell genocide, crimes against humanity, and violations of

---

\(^{67}\) Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment (Sept. 2, 1998).


\(^{69}\) Chenault, *supra* note 32, at 221.

Common Article 3 and Additional Protocol II. The ICTR Statute explicitly includes rape as a crime against humanity under Article 2(g) and as a war crime under Article 4(e).

The first trial of the ICTR, Prosecutor v. Akayesu, was significant as it was the first time in which the widespread sexual violence of the armed conflict in Rwanda began to be revealed within the setting of a criminal tribunal. Although the original Akayesu indictment did not include sexual violence crimes, the spontaneous testimonies of female witnesses who had been raped or who had witnessed rapes resulted in an amended indictment which included sexual violence charges. The additional charges consisted of alleged sexual violence under Article 3(g) (crimes against humanity – rape), Article 3(i) (crimes against humanity – other inhumane acts), and Article 4(2)(e)(violation of Common Article 3, outrages against personal dignity).

Seven witnesses took the stand to testify about the events that occurred in the commune of Taba where the Accused served as the ‘bourgmestre’ (mayor) and had “exclusive control” over the communal police and law enforcement agencies.

---

71 ICTR Statute, supra note 26, art. 2, 3 & 4.
72 Id. art2(g) and art 4(e).
enforcement.\textsuperscript{74} The female witnesses presented harrowing but uncorroborated\textsuperscript{75} testimonies of gang rape, mass rape, public rapes, repeated rapes in captivity, rape of girl-children, forced nudity, extensive rapes until victims bled uncontrollably or were no longer able to stand, repeated rape of a pregnant woman until she went into premature delivery, the rape of a woman with a piece of wood as she lay dying, murder of women after rape, women ‘sacrificing’ themselves (i.e. submitting to rape) to avoid death, and women begging for death after being rape.\textsuperscript{76} Although it was not alleged that the Accused perpetrated the rapes himself, the Trial Chamber found beyond reasonable doubt that the Accused knew of the sexual violence and that he had “ordered, instigated and otherwise aided and abetted the sexual violence”.\textsuperscript{77} Akayesu was found guilty of nine counts

\textsuperscript{74} Id. ¶ 77.

\textsuperscript{75} Rule 96 of the Rules of Procedure and Evidence (RPE) specify that the testimony of a victim of sexual violence does not need to be corroborated. This developed from criticisms that the traditional requirement of corroboration holds the assumption that women are untruthful about their experiences of sexual violence, and makes rape, which is often a private act, incredibly difficult to prove. See International Criminal Tribunal for Rwanda, \textit{Rules of Procedure and Evidence} (June 29, 1995); Christin B. Coan, \textit{Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia}, 26 N.C. J. Int’l L. & COM. REG. 183, 213 (2000).

\textsuperscript{76} Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 416-438 (Sept. 2, 1998).

\textsuperscript{77} Id. ¶ 452.
of genocide, incitement to commit genocide and crimes against humanity, including rape\(^78\) and other inhumane acts (sexual violence).\(^79\)

In reaching its verdict, the Trial Chamber was required to develop the definition of rape as there was “no commonly accepted definition of the term in international law”.\(^80\) The Trial Chamber concluded that, within the circumstances of armed conflict, the “mechanical description of objects and body parts” found in many national rape laws did not adequately capture the act of rape as “a form of aggression”.\(^81\) Instead, the Tribunal pronounced a broad and progressive definition of rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”\(^82\) These coercive circumstances may include “(t)hreats, intimidation, extortion and other forms of duress which prey on fear or desperation” and “may be inherent in certain circumstances, such as armed conflict”.\(^83\) Sexual violence, as distinct from rape, “may include acts which do not involve penetration or

---

\(^{78}\) Id. ¶ 696.

\(^{79}\) Id. ¶ 697. However, Akayesu was found not guilty of violations of Common Article 3 (sexual violence as cruel treatment (Count 12) and as outrages upon personal dignity (Count 15)) as the Trial Chamber determined that he did not fall “into class of individuals who may be held responsible”. See Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslavia and Rwandan Tribunals: Current Status*, 93 AJIL 97, 109 (1999).

\(^{80}\) Akayesu, ICTR 96-4-T, ¶ 686.

\(^{81}\) Id. ¶ 687.

\(^{82}\) Id. ¶ 688.

\(^{83}\) Id.
even physical contact”, such as forced nudity.\textsuperscript{84} Furthermore, the Trial Chamber analogised rape with torture (although it was not charged as such) in terms of its purpose to intimidate, degrade, humiliate, discriminate, punish, control and destroy persons.\textsuperscript{85}

The definition of rape articulated within \textit{Akayesu} has been commended for two reasons. First, it departs from traditional definitions of rape in acknowledging that focusing on consent within the violent circumstances of armed conflict is misplaced.\textsuperscript{86} Second, its broad scope does not limit the definition of rape to particular body parts, hence recognising that acts such as vaginal penetration with a piece of wood can constitute rape.\textsuperscript{87} As such, the \textit{Akayesu} definition has been praised for upholding “the aim of international humanitarian law to give full protection to the most vulnerable victims”.\textsuperscript{88}

The \textit{Akayesu} judgment was also significant as the first conviction of rape as a means of genocide.\textsuperscript{89} The Trial Chamber stated that rape, similar to any other act, constitutes genocide if the requisite elements are met – that is, if the act

\footnotesize
\begin{itemize}
  \item \textsuperscript{84} \textit{Id.}
  \item \textsuperscript{85} \textit{Id.}, ¶ 687.
  \item \textsuperscript{86} Chenault, \textit{supra} note 32, at 225.
  \item \textsuperscript{87} \textit{Id.}, at 225; \textit{Akayesu}, ICTR 96-4-T, ¶ 686.
  \item \textsuperscript{88} Dianne Marie Amann, \textit{Prosecutor v. Akayesu}, 93 AJIL 195, 199 (1999).
  \item \textsuperscript{89} \textit{Akayesu}, ICTR 96-4-T, ¶ 731.
\end{itemize}
was committed with the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group. The Tribunal found that the sexual violence was, indeed, “an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”

Furthermore, the Trial Chamber noted that the propaganda campaign which depicted Tutsi women as sexual objects served to mobilise sexual violence against them for being both female and Tutsi.

The final significance of the Akayesu judgment was its conviction of rape and sexual violence as crimes against humanity. Similar to genocide, rape and sexual violence can constitute crimes against humanity if the requisite elements are met – that is, if the act is committed as part of a widespread or systematic attack against a civilian population upon discriminatory grounds.

Despite the expectations set by Akayesu, subsequent convictions for sexual violence have been low. Nine judgments have resulted in five convictions for sexual violence crimes (Akayesu, Semanza, Gacumbitsi, Muhimana and

---

90 Id. ¶ 731; ICTR Statute, supra note 26, art. 2(2).
91 Akayesu, ICTR 96-4-T, ¶ 731.
92 Id. ¶ 731.
93 Id. ¶ 578-584; ICTR Statute, supra note 26, art. 3.
94 Chenault, supra note 32, at 221.
This has been attributed to a number of reasons. First, the Prosecutor’s Office has been accused of undertaking “little genuine and rigorous investigation” into sexual violence and laying few sexual violence charges. This is compounded by a reluctance to amend indictments when testimonies of sexual violence emerge during the first trial. Although it was precisely such amendments that enabled a conviction in Akayesu, these

---

95 The nine ICTR cases to date in which defendants have been tried for sexual violations, including rape, are:

**Guilty**

- Akayesu, ICTR 96-4-T, ¶
- Prosecutor v. Gamcumbitsi, Case No. ICTR 01-64-T, Trial Chamber Judgment (June 17, 2004).
- Prosecutor v. Muhimana, Case No. ICTR 95-1B-T, Trial Chamber Judgment (April 28, 2005).
- Prosecutor v. Renzaho, Case No. ICTR 97-31-T, Trial Chamber Judgment (July 14, 2009).

**Not Guilty**

- Prosecutor v. Musema, Case No. ICTR 96-13-A, Appeals Chamber Judgment (Nov. 16, 2001). (Appeals Chamber overturned original guilty verdict)

Above summary provided by Chenault, *supra* note 32, at 237.


have not been forthcoming post-Akayesu. For example, in *Prosecutor v. Bagambiki*, testimonies of sexual violence from female witnesses were not pursued further, and consequently, the Trial Chamber excluded such evidence for fear of prejudicing the accused.\(^98\)

Another barrier has been the number of acquittals due to insufficient evidence such as in *Kajelijeli, Niyitegeka, Muvunyi and Kamuhanda*.\(^99\) This has been due to difficulties in securing witnesses which has included logistical difficulties, such as locating witnesses and arranging visas,\(^100\) as well as the reluctance of witnesses to testify due to trauma or fears for their physical safety. For example, one female witness testifying against Akayesu was later killed alongside her husband and seven children.\(^101\) Other witnesses have faced attacks and intimidation upon return to their homes or have been threatened to prevent them from testifying.\(^102\) Furthermore, the process of

\(^{98}\) *Id.* at 372-3.

\(^{99}\) *Id.* at 396.


\(^{101}\) Connie Walsh, *Witness Protection, Gender and the ICTR*, Oct. 17, 2007, http://www.ddrd.ca/site/publications/index.php?id=1279&page=7&subsection=catalogue&print=true&shos_all=true. Four of the children killed were the witness’ own children and the three remaining children were other children in the house at the time of the attack.

\(^{102}\) *Id.* at ¶ 2-14.
testifying itself may be traumatic for survivors as it may include confronting perpetrators in public\textsuperscript{103} or being retraumatised by the invasive questioning\textsuperscript{104}.

The final barrier has been the will to prosecute sexual violence crimes. Sexual violence crimes have not been considered of equal severity or gravity\textsuperscript{105} and have “not been an integral part of the prosecution strategy at the ICTR”.\textsuperscript{106} Chief prosecutor Louise Arbour (1999-2000) made some progress by establishing a sexual assault team and adding rape charges to indictments\textsuperscript{107}. However, these developments were effectively reversed under the next chief prosecutor, Carla Del Ponte (2000-2003), who disbanded the sexual assault team and under whom no new indictments contained rape charges\textsuperscript{108}. The following and current chief prosecutor, Hasson Jallow,

\textsuperscript{103} Wood, supra note 100, at 309.

\textsuperscript{104} Van Schaak, supra note 51, at 399. However, a number of ways forward have been suggested, from practical considerations such as transportation in unmarked cars and in camera proceedings to increased gender-sensitive treatment of witnesses. For an elaboration, see Wood, supra note 100.

\textsuperscript{105} Wood, supra note 100, at 365.


\textsuperscript{107} Id.

\textsuperscript{108} Id.
followed suit and has allegedly had “little commitment... at this late point... to change the negative legacy of sexual violence prosecution for the ICTR”.109

At present, five cases with sexual violence charges remain in front of the ICTR, two of which are currently in appeal.110 Interestingly, among these include the first woman to be charged with rape as a crime against humanity (Prosecutor v. Nyiramasuhuko).111 The verdicts of these remaining five cases may salvage the legacy of the ICTR. However, as John D. Haskell has poignantly argued, each “act of inclusion, on the part of international law to women in raped conflicts... corresponds with a simultaneous act of exclusion, which merely reemphasizes uneven relationships which are rooted in a patriarchal, colonial past.”112

109 Id.


111 Nyiramasuhuko, ICTR 97-21-T.

112 Haskell, supra note 66, at 82.
**Furundžija: Rape as Torture**

The International Criminal Tribunal for the Former Yugoslavia has produced a much more impressive record prosecuting sexual violence crimes. Twenty-three people have been convicted of rape or sexual violence crimes. This is particularly commendable considering the fact that far more women were raped in Rwanda (an estimated 250,000) than Bosnia (an estimated 20,000). In addition, 92% of ICTY convictions have been upheld at appeal which speaks strongly of the ICTY’s prosecutorial strategy and the tribunal’s gender-sensitive policies and procedures. Two of the most significant judgments – Furundžija and Kunarac, Kovač and Vuković – will now be examined.

The ICTY was established on 25 May 1993 to prosecute grave breaches of the Geneva Convention, violations of the laws or customs of war, genocide, and crimes against humanity in the former Yugoslavia since 1991. The ICTY

---

113 The full name of the Tribunal is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

114 Haddad, supra note 107, at 103.

115 Id.

116 Id.

117 The ICTY was established through UN Security Council Resolution 808. ICTY Statute, supra note 26, art. 1 (Competence of the International Tribunal); art. 2 (Grave Breaches of the
Statute, which preceded the ICTR Statute, was significant as the first statute of an international tribunal which gave explicit standing to rape as a crime against humanity under Article 5(g).\textsuperscript{118}

Three months after the *Akayesu* judgment, the ICTY rendered its judgment in *Prosecutor v. Furundžija*. The *Furundžija* judgment was hailed as an “enormous moral and legal victory”.\textsuperscript{119} *Furundžija* was the first ICTY trial based on rape and confirmed that the rape of even a single victim was worthy of prosecution.\textsuperscript{120} Furthermore, it established sexual violence and rape as forms of torture and reaffirmed the prohibition of torture as *jus cogens*.\textsuperscript{121} The *Furundžija* verdict also pronounced its own definition of rape\textsuperscript{122} which diverged from *Akayesu* by incorporating the “mechanical description of objects and body parts”\textsuperscript{123} which the *Akayesu* judgment had purposely avoided.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{118}] ICTY Statute, supra note 26, art 5(g).
\item[\textsuperscript{120}] Id.
\item[\textsuperscript{121}] Chad G. Marzen, *The Furundžija Judgement and Its Continued Validity in International Law*, 43 Cre LR, 506 (2010); *Furundžija*, IT-95-17/1-T, ¶ 153.
\item[\textsuperscript{122}] *Furundžija*, IT-95-17/1-T, ¶ 185.
\item[\textsuperscript{123}] *Akayesu*, ICTR 96-4-T, ¶ 687.
\end{itemize}
\end{footnotesize}
Anto Furundžija was a local Commander of the Jokers, a special unit within the Croatian Defence Council. The charges against the Accused concern a day long interrogation conducted by Furundžija and Accused B. Witness A testified to being interrogated by Furundžija about her sons, her activities and her connections. As part of the interrogation she was subjected to repeated acts of sexual violence perpetrated by Accused B. This included being naked in front of 40 soldiers while Accused B “rubbed his knife along her inner thigh and lower stomach and threatened to put his knife inside her vagina should she not tell the truth”, being raped vaginally, anally and orally by Accused B, being raped in front of Witness D whom she knew, and being raped until she “collapsed in a state of exhaustion”. Although Furundžija did not physically perpetrate the sexual violence, Witness A spoke of the “direct relationship” between “the interrogation and the ill-treatment and the abuse”. For this, Furundžija was convicted as a co-perpetrator of

124 Furundžija, IT-95-17/1-T, ¶ 2.
125 Id. ¶ 39-41 & 70-89.
126 Id. ¶ 82.
127 Id. ¶ 40.
128 Id. ¶ 87.
129 Id.
130 Id. ¶ 88. Witness D was also subject to serious physical assaults by Accused B. Id. ¶ 75.
131 Id. ¶ 82.
torture and as aiding and abetting outrageous upon personal dignity
including rape under Article 3 (violations of the laws or customs of war).\textsuperscript{132}

In arriving at its verdict, the Trial Chamber also conducted a broad survey of
treaty law,\textsuperscript{133} customary international law,\textsuperscript{134} and national laws,\textsuperscript{135} as well as
considering the definition of rape in Akayesu.\textsuperscript{136} In contrast to Akayesu, the
Trial Chamber developed a more specific definition which included the
objective elements of “sexual penetration, however slight, of the vagina or
anus of the victim by the penis of the perpetrator or any other object used by
the perpetrator; or of the mouth of the victim by the penis of the perpetrator;
by coercion or force or threat of force against the victim or a third person.”\textsuperscript{137}
The Trial Chamber also noted that coercive oral, anal or vaginal penetration
all equally constituted the crime of rape.\textsuperscript{138} In agreement with the Akayesu
judgment, the Trial Chamber dismissed the need to consider consent as “any
form of captivity vitiates consent”.\textsuperscript{139} Also similarly to Akayesu, the Trial
Chamber noted that rape may be prosecuted as a crime against humanity,

\textsuperscript{132} Id. ¶ 269 & 275.
\textsuperscript{133} Id. ¶ 165-6.
\textsuperscript{134} Id. ¶ 168.
\textsuperscript{135} Id. ¶ 178-82.
\textsuperscript{136} Id. ¶ 176.
\textsuperscript{137} Id. ¶ 185.
\textsuperscript{138} Ashkin, supra note 120, at 948.
\textsuperscript{139} Furundžija, IT-95-17/1-T, ¶ 271.
an act of genocide, a grave breach of the Geneva Conventions, or a violation of the laws or customs of war if the requisite elements are met.\textsuperscript{140}

While the \textit{Furundžija} judgment may have narrowed the definition of rape, it continued to develop the law on sexual violence as wartime torture.\textsuperscript{141} First, the judgment reaffirmed the prohibition of torture as \textit{jus cogens} and as a rule of customary international law after finding the existence of widespread state practice and \textit{opinio juris}.\textsuperscript{142} Following the precedent set by \textit{Celebići},\textsuperscript{143} the

\begin{flushright}
\textsuperscript{140} \textit{Id.} ¶ 172.  \\
\textsuperscript{141} Ashkin, \textit{supra} note 120, at 945.  \\
\textsuperscript{142} \textit{Furundžija}, IT-95-17/1-T, ¶ 144 & 138. To crystallize into rule of customary international law, as defined by the \textit{North Sea Continental Shelf} case, there must be evidence of consistent and extensive state practice and the existence of \textit{opinio juris}. The \textit{Furundžija} judgement found that the prohibition of torture was evinced through the almost universal ratification of applicable treaties and that no State had claimed the right to use torture during armed conflict. See \textit{Id.} ¶ 138; \textit{North Sea Continental Shelf} (F.R.G. v. Neth.) 1969 I.C.J. (Feb. 20).  \\
\textsuperscript{143} Coan, \textit{supra} note 75, at 194. The \textit{Celebići} judgement, from which the \textit{Furundžija} judgement drew its definition of torture, similarly determined that "whenever rape and other forms of sexual violence meet the (elements of torture), then they shall constitute torture" (Prosecutor v. \textit{Celebići}, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 469 (July 14, 1998)). In addition, \textit{Celebići} was significant for recognising that sexual violence crimes may be perpetrated against men. The first trial of the ICTY - \textit{Prosecutor v. Tadić} - similarly resulted in a conviction for aiding and abetting sexual violence crimes men. (See Prosecutor v. \textit{Tadić}, Case No. IT-94-1, Trial Chamber Judgment (Nov. 11, 1998)). For a discussion of sexual violence against men during armed conflict, see, e.g., Hilmi M. Zawati, \textit{Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity}, 17 \textit{TORTURE} 27 (2007);
Trial Chamber drew on the Convention Against Torture and pronounced the elements of wartime torture as an intentional act or omission that caused severe physical or mental pain or suffering; that aimed at obtaining information or a confession, or punished, intimidated, humiliated, coerced or discriminated against the victim or a third person; that was linked to an armed conflict; and where at least one person involved was a public official or a de facto organ of a State.\textsuperscript{144}

The Furundžija definition of torture was progressive in two ways. First, it expanded the list of the purposes of torture to include ‘humiliation’ and affirmed that this upheld “the general spirit of international humanitarian law... to safeguard human dignity.”\textsuperscript{145} Second, the definition recognised the involvement of non-state actors\textsuperscript{146} and that acts of torture are often ‘compartmentalised’ to “‘dilute’ the moral and psychological burden”.\textsuperscript{147} The Trial Chamber judgment also acknowledged that responsibility may ensue from both committing or failing to prevent torture – that is, for both the commission and omission of acts.\textsuperscript{148} Hence, despite Furundžija not being the

\begin{flushleft}
\end{flushleft}

\begin{flushleft}
\textsuperscript{144} \textit{Furundžija}, IT-95-17/1-T, ¶ 162.
\end{flushleft}

\begin{flushleft}
\textsuperscript{145} \textit{Id}.
\end{flushleft}

\begin{flushleft}
\textsuperscript{146} Ashkin, supra note 120, at 946.
\end{flushleft}

\begin{flushleft}
\textsuperscript{147} \textit{Furundžija}, IT-95-17/1-T, ¶ 253.
\end{flushleft}

\begin{flushleft}
\textsuperscript{148} \textit{Id}, ¶ 142.
\end{flushleft}
physical perpetrator of the sexual violence, he was still responsible for the use of sexual violence as torture as he performed his ‘compartmentalised’ role in the torture process and in his failure to prevent the torture.

The recognition of rape as a form of torture has been important in elevating the status of gender-based violence. The historical understanding of torture, which has been epitomised in the ‘male political prisoner’, has often excluded the realities of how women are subject to torture. Incorporating an act which is predominately perpetrated against women moves towards closing the ‘gender division’ in the understanding torture. It also breaks down the private/public dichotomy by recognising that rape is not a ‘private’ matter but, indeed, a public and political matter worthy of deliberation within international tribunals.

**Kunarac, Kovač and Vuković: Rape and Enslavement**

On 22 February 2001, the ICTY rendered another momentous judgment - *Prosecutor v.*

---


150 *Id.* at 537.

151 *Id.* at 537-538.
Kunarac, Kovać and Vuković (hereinafter ‘Kunarac’).¹⁵² The Kunarac trial was significant as the first trial to consider mass rape within the armed conflict of the former Yugoslavia¹⁵³ and in rendering a conviction for rape and enslavement. Kunarac also left its legacy on the definition of rape within international law by discussing the concept of sexual autonomy.¹⁵⁴

The Kunarac trial involved three defendants accused of being involved, in varying capacities, in the rape of women detained during the takeover of Foča by Serb forces in the spring of 1992.¹⁵⁵ Sixty-three witnesses, including sixteen rape survivors, testified against the accused.¹⁵⁶ The testimonies detailed the detention of women in houses, apartments, gymnasiums and schools,¹⁵⁷ as well as the acts of the accused which included personally raping the women; enabling other soldiers to gang rape the women; keeping the women in apartments as the accused’s personal ‘property’ and forcing them to cook, clean, obey all demands, and raping and beating them; and

---


¹⁵³ Buss, supra note 24, at 91.

¹⁵⁴ Marzen, supra note 122, at 93.

¹⁵⁵ Kunarac, IT-96-23/1-T, ¶ 2 & 440.


¹⁵⁷ Kunarac, IT-96-23/1-T, ¶ 2 & 28.
selling some of the women to other soldiers.\textsuperscript{158} Most of the women were between 12 to 20 years old, and endured the rapes for days, weeks and months.\textsuperscript{159} The accused were charged with rape, torture and enslavement as crimes against humanity (Article 5) and as violations of the laws or customs of war (Article 3).\textsuperscript{160}

In determining its verdict, the Trial Chamber recalled the definitions of rape established by Akayesu and Furundžija. The Trial Chamber upheld the Furundžija definition as more satisfactorily fulfilling the criminal law principle of specificity (\textit{nullem crimen sine lege stricta}),\textsuperscript{161} and agreed with the \textit{actus reus} of the crime. However, the Kunarac judgment questioned whether the element in paragraph (ii) ("coercion or force or threat of force") was too narrowly defined.\textsuperscript{162} Returning to a survey of different national legal systems, the Trial Chamber concluded that the "true common denominator" and "basic underlying principle" in national rape laws was the "penalising of violations of sexual autonomy".\textsuperscript{163} Rather than considering only circumstances of coercion or force, the Trial Chamber elaborated on the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{158} Id., ¶ 53-386.
\item \textsuperscript{159} Marzen, supra note 122, at 93.
\item \textsuperscript{160} Prosecutor v. Kunarac and Kovač, Case No. IT-96-23-PT, Third Amended Indictment (Nov. 8, 1999); Prosecutor v. Vuković, Case No. IT-96-23/1-PT, Redacted Indictment (Oct. 5, 1999).
\item \textsuperscript{161} Kunarac, IT-96-23/1-T, ¶ 437.
\item \textsuperscript{162} Id., ¶ 438.
\item \textsuperscript{163} Id., ¶ 440 (emphasis in original).
\end{enumerate}
\end{footnotesize}
different contexts in which sexual autonomy may be compromised. This included circumstances which negated the victim’s ability to refuse, consent or voluntarily participate.\textsuperscript{164} Considerations included the state of the victim (e.g. physical or mental illness, minority of age) and the surrounding circumstances (e.g. psychological pressure, surprise, fraud).\textsuperscript{165} Hence, the Kunarac judgement added to the \textit{actus reus} that the “sexual penetration occurs without the consent of the victim. Consent... must be... given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”\textsuperscript{166} The Kunarac judgment also defined the \textit{mens rea} as “the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”\textsuperscript{167}

The shift to focusing on sexual autonomy is more empowering for survivors of sexual violence as it assumes the inherent right to make decisions over one’s body and counters the gender stereotype of women’s sexual passivity. It also provides a more holistic understanding of the circumstances under which rape can occur by considering factors beyond the more obvious ‘force or threat of force’. The language of ‘consent’, however, continues to be questionable within the overarching violent and coercive circumstances of armed conflict.

\textsuperscript{164} Id. ¶ 442.
\textsuperscript{165} Id. ¶ 452.
\textsuperscript{166} Id. ¶ 460.
\textsuperscript{167} Id.
The *Kunarac* judgment was also groundbreaking in its deliberation on rape and enslavement. The Trial Chamber adopted a broad definition of enslavement\(^{168}\) in which the *actus reus* was stated as “the exercise of any or all of the powers attaching to the right of ownership over a person” and the *mens rea* as “the intentional exercise of such powers.”\(^{169}\) The Trial Chamber stated that conditions determining enslavement may include physical or psychological control, prevention or deterrence from escape, force or threat of force or coercion, assertion of exclusivity, cruel treatment and abuse, the control of sexuality and forced labour, or the ability to buy, sell or trade a person.\(^{170}\)

Both Kunarac and Kovač were found guilty of enslavement and rape as crimes against humanity. In addition, Kunarac was found guilty of torture as a crime against humanity, and torture and rape as violations of the laws or customs of war. Kovač was also found guilty of outrageous upon personal dignity as a violation of the laws or customs of war. And Vuković was found guilty of rape and torture as both crimes against humanity and violations of the laws or customs of war.\(^{171}\)

---

\(^{168}\) Marzen, *supra* note 122, at 96.

\(^{169}\) *Kunarac*, IT-96-23/1-T, ¶ 540.

\(^{170}\) *Id.* ¶ 543.

The captivity of women for the sexual use of soldiers has occurred repeatedly throughout history, and the physical and mental trauma suffered by victims of the continuous raping may never heal.\textsuperscript{172} This decision may be too late to bring solace to the thousands of women who have been formerly held in such captivity. However, as stated by Human Rights Watch, “this decision sets a legal standard for sexual enslavement as a crime against humanity. This interpretation will serve as the basis to prosecute others who enslave women around the world.”\textsuperscript{173} The ICTY Statute, however, did not allow the accused to be indicted for sexual slavery \textit{per se}. Instead, the accused were charged with rape and enslavement which together amounted to sexual slavery. The crime of sexual slavery had to wait until the Statute of the International Criminal Court (ICC) to be explicitly recognised. The ICC Statute will now be examined.

\textbf{The International Criminal Court: Bringing It All Together}

\textsuperscript{172} “It’s the memories of the first night that stay with me for the rest of my life. I knew nothing about sex; that was my first experience of sex, it was just horrific they stripped us of everything that night. It’s a feeling you never lose.” – Jan Ruff O’Herne, former ‘comfort woman’ survivor quoted in Amnesty Int’l, \textit{supra} note 35, at 2.

On 1 July 2002, the Statute of the International Criminal Court (‘Rome Statute’) entered into force. In its creation, the ICC had the advantage of drawing on the developments of both the ICTY and ICTR in regards to the prosecution of sexual violence. In addition, women’s rights activists, NGOs and the Women’s Caucus for Gender Justice were an integral part of its formation and worked to ensure the inclusion of a gender perspective in the statute, procedures and structure. Consequently, the ICC developed both a ‘focused’ and ‘mainstreamed’ approach to gender-related issues. Examples of this include the requirement that gender violence experts are to be involved in all organs of the Court, the establishment of a Gender and Children’s Unit, the appointment of esteemed feminist law professor Catharine Mackinnon as a Gender Advisor, a fair representation of female judges, and procedural protections for witnesses within the Rules of

---

174 Rome Statute, supra note 9.


176 Dianne Luping, Investigation and Prosecution of Sexual and Gender-Based Crimes Before the International Criminal Court, 17 Am UJ GENDER & SOC POLY & L 431 (2009).

177 Id. at 452.

178 Id. at 433.

179 Van Schaak, supra note 51, at 405-6.

180 Lehr-Lehnardt, supra note 176, at 344. This is required by the Rome Statute in Article 36(8)(a)(iii), see Rome Statute, supra note 9.
Evidence and Procedure.\textsuperscript{181} These structural and procedural achievements, alongside the enumeration of sexual violence crimes which have been described as “the most progressive articulation of gender-based international criminal law in history”,\textsuperscript{182} has created an International Criminal Court that holds much promise for achieving gender justice.

The codification of sexual violence crimes in the Rome Statute brings together, and progresses, the developments of the ICTY and ICTR. The Rome Statute lists “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as crimes against humanity in Article 7 and as war crimes in Article 8.\textsuperscript{183} As evinced by the ICTY and ICTR case law, sexual violence may also be charged under other crimes within the Rome Statute, including torture or enslavement as crimes against humanity;\textsuperscript{184} torture or inhumane treatment as grave breaches of the Geneva Conventions;\textsuperscript{185} outrageous upon personal dignity as a violation of the laws and customs of war;\textsuperscript{186} and ‘cruel treatment and torture’ or ‘outrageous upon personal dignity’ as violations of Common

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{181} Van Schaak, \textit{supra} note 51, at 403; International Criminal Court, \textit{Elements of Crimes}, U.N. Doc No. ICC-ASP/1/3 (part II-B) (Sept. 9, 2002).
\item \textsuperscript{182} Van Schaak, \textit{supra} note 51, at 403.
\item \textsuperscript{183} \textit{Rome Statute}, \textit{supra} note 9, art. 7(g), art. 8(2)(b)(xxii) \& art. 8(2)(e)(vi).
\item \textsuperscript{184} Id. art. 7(1)(f)\{torture\}; art. 7(1)(c) \{enslavement\}.
\item \textsuperscript{185} Id. art. 8(2)(a)(ii).
\item \textsuperscript{186} Id. art. 8(2)(b)(xxi).
\end{itemize}
\end{footnotesize}
Article 3.187 The charging of sexual violence under these more generic crimes, however, may become redundant in the light of the more extensive enumeration of sexual violence crimes in the Rome Statute.188

The Rome Statute is significant in developing the international law on sexual violence in several ways. First, the Rome Statute is the first treaty to criminalise sexual violence crimes in both international and non-international armed conflict in the one instrument.189 Furthermore, sexual violence crimes may be prosecuted both during armed conflict (as war crimes or crimes against humanity) and peace time (as crimes against humanity).190 Second, the Statute added the ‘new’ sexual violence crimes of sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and any other form of sexual violence of comparable gravity.191 Finally, ‘gender’ is included as a potential ground for persecution as a crime against humanity, thereby recognising the specific persecutory acts that may be inflicted upon women for being female.192 Nonetheless, rape and sexual violence are still not explicitly recognised as grave breaches. This may be due to the grave

---

187 Id. art. 8(c)(2)(i) (torture); art. 8(2)(c)(ii) (outrageous upon personal dignity).


189 Id. at 177.

190 Lehr-Lehnardt, supra note 176, at 340.

191 de Brouwer, supra note 189, at 86.

192 Rome Statute, supra note 9, art. 7(1)(h).
breaches provision within the Rome Statute (and the ICTY Statute) mirroring the Geneva Conventions which did not explicitly recognise sexual violence.\textsuperscript{193} The case law of the ICTY, however, has clearly stated that rape “may also amount to a grave breach of the Geneva Conventions... if the requisite elements are met” (\textit{Furundžija} judgement).\textsuperscript{194} In addition, rape is also not explicitly recognised as constituting genocide. However, rape may potentially fall within the causing serious bodily or mental harm, deliberately inflicting conditions calculated to bring about the physical destruction of a group, or imposing measures intended to prevent births.\textsuperscript{195} Furthermore, the \textit{Akayesu} has ruled that rape constitutes genocide in the same way as other acts if the requisite elements are met.\textsuperscript{196}

The sexual violence crimes enumerated in the Rome Statute are further elaborated within the ICC Elements of Crimes (EoC). As a non-binding yet authoritative source, the ICC EoC defines the elements of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and

---

\textsuperscript{193} Kirsten Boon, \textit{Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent}, 32 Co HRLR 625, 635 (2001). The grave breaches provision was not contained in the ICTR Statute as the armed conflict in Rwanda is generally regarded as non-international.

\textsuperscript{194} \textit{Furundžija}, IT-95-17/1-T, ¶ 172.

\textsuperscript{195} \textit{Rome Statute}, supra note 9, art. 6 (b), (c) & (d)

\textsuperscript{196} \textit{Akayesu}, ICTR 96-4-T, ¶ 731.
sexual violence.\textsuperscript{197} The definition of rape within the ICC EoC is a combination of the Akayesu, Furundžija, and Kunarac judgments. The definition meets the requirement of \textit{nullem crimen sine lege stricta} (as emphasised by Furundžija and Kunarac) whilst remaining sufficiently broad (as emphasised by Akayesu). The physical acts include penetration of the body of the victim or the perpetrator (e.g. the victim may be forced to sexually penetrate the perpetrator - a newly included act); the penetration may be of “any part of the body” (e.g. anal, vaginal or oral penetration)(Furundžija); and the penetration may be with an object not commonly deemed as sexual (Akayesu).\textsuperscript{198} In addition, the penetration occurred under force or coercion (Akayesu and Furundžija) or without genuine consent or under circumstances negating the ability to consent (Kunarac).\textsuperscript{199} The issue of consent, as noted by

\begin{enumerate}
\item The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
\item The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
\end{enumerate}

\textsuperscript{197} International Criminal Court, \textit{Elements of Crimes}, supra note 182, at 8-11 & 30-32.

\textsuperscript{198} de Brouwer, \textit{supra} note 189, at 135 & 171.

\textsuperscript{199} Id.
the Preparatory Commission, was not included as grounds for defence but rather to clarify circumstances in which consent was not possible.\textsuperscript{200} This approach has been commended by Gender Advisor Catharine MacKinnon, as “(t)he recognition that consent is meaningless for acts of a sexual nature that have a nexus to genocide, armed conflict, and crimes against humanity was a tremendous breakthrough.”\textsuperscript{201} Although the EoC works with the presumption against genuine consent within the context of armed conflict, the issue of consent is not excluded all together as it is in other crimes, such as the crime of mutilation where the EoC explicitly states that “(c)onsent is not a defence to this crime”.\textsuperscript{202} Finally, the elements are defined in gender-neutral terms, thereby recognising that both women and men may be subject to, or perpetrators of, wartime rape.\textsuperscript{203}

\textsuperscript{200} Michael Cottier, quoted in Luping, \textit{ supra} note 177, at 475.

\textsuperscript{201} MacKinnon quoted in \textit{Id.} at 475.

\textsuperscript{202} International Criminal Court, \textit{Elements of Crimes, supra} note 182, art. 8(2)(b)(x)-1, footnote 46.

\textsuperscript{203} \textit{Id.} at footnote 15.
The Rome Statute also defines the term ‘gender’ for the first time in international criminal law.\textsuperscript{204} Article 7(3) states that “‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”\textsuperscript{205} The awkwardly worded and circular definition was a product of the ‘constructive ambiguity’ required to reach consensus on the provision.\textsuperscript{206} Critics have argued that the conflation of ‘gender’ (which is socially constructed) and biological ‘sex’ limits the transformative potential of this provision.\textsuperscript{207} Furthermore, confining the meaning of gender to “within the context of society” presents the danger of deferring to gender stereotypes that may exist within societies.\textsuperscript{208} Hence, it is now within the hands of lawyers and judges to use this ‘constructive ambiguity’ in a progressive and positive precedent-setting way.\textsuperscript{209}


\textsuperscript{205} International Criminal Court, Elements of Crimes, supra note 182, art. 7(3).

\textsuperscript{206} Oosterveld, supra note 204, at 56-7.


\textsuperscript{208} Oosterveld, supra note 204, at 74-5.

\textsuperscript{209} Boon, supra note 194, at 58.
As of 16 June 2010, the ICC has issued charges against fourteen individuals – two trials have begun, two have completed hearings to confirm their charges, eight accused remain at large, and one accused is deceased. Crimes of sexual violence have been charged against half of the accused including sexual slavery, rape, inducing rape, outrageous upon personal dignity, and persecution by acts of rape (as crimes against humanity or war crimes). In addition, the indictment of ICC’s first trial (Prosecutor v. Lubanga) may be amended to include sexual violence crimes upon request by 27 witnesses. The ICC’s second trial, Prosecutor v. Katanga

210 Prosecutor v. Dyilo, Case No. ICC-01/04-01-06, Case In Progress; Prosecutor v. Katanga and Chui, Case No. ICC-01/04-01/07, Case In Progress.

211 Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Case In Progress; Prosecutor v. Abu Garda, Case No. ICC-02/04-01-05, Case In Progress.


215 Press Release, Sonia Robla, Appeals Chamber of the International Criminal Court reverses the decision on the change of the legal characterisation of the facts in the Lubanga Dyilo case (Dec. 8, 2009).
and Chui, is the first trial to include charges for sexual violence crimes. The testimonies currently being presented are significant as the first testimonies of sexual violence at the ICC. The great challenge in front of the ICC now is to heed the words of Sergio Vieira De Mello, former UN High Commissioner for Human Rights, and to “not thwart some of the most important advances in gender justice that are embodied in the Statute by failing to act in practical ways to implement them”.216

In summation, important progress has been made in the protection of women within international humanitarian law in regards to rape and sexual violence. Previous gender stereotypes of women as ‘sex objects’ have given way to protecting women’s ‘sexual autonomy’ – or at least, this is the case within international law, even if this may not be the reality ‘on the ground’ in armed conflict.217 The definition of rape within international law has developed along three lines: a broad conceptual approach (Akayesu, upheld in Muhimana, Ćelebići, Musema and Niyitegeka); a more specific approach including the description of body parts (Furundžija); and an approach which considers consent (Kunarac, upheld in Kvočka et al., Semanza, Kajelijeli and Kamuhanda).218 All of these developments have

216 Quoted in WOMEN’S INITIATIVE FOR GENDER JUSTICE, supra note 214, 3.
217 Sexual violence against women continues to be widespread in current armed conflicts such as Sudan, Chad and the Democratic Republic of Congo. See Amnesty Int’l, supra note 27, at 14.
218 de Brouwer, supra note 189, at 127; Chenault supra note 32, at footnote 49.
influenced the definition of rape found in the Rome Statute and the Elements of Crimes. In addition, the ICTY, ICTR and ICC have also firmly established that rape may be prosecuted as genocide, crimes against humanity and war crimes, thereby casting a wide net for bringing to justice those responsible for wartime rape.

**Woman as child-bearer/child-rearer**

It is the contention of this Article that the protections for women within IHL are influenced by gender stereotypes. The previous section presented an analysis of one gender stereotype – woman as sexual object – and examined the increasing protection of women’s ‘sexual autonomy’ which counteracts and corrects this stereotype. The following section will examine the influence of a second gender stereotype – woman as child-bearer/child-rearer – and analyse the protections, and limitations to protections, that women have been given accordingly. Unlike rape and sexual violence, however, this area of the law does not overlap with international criminal law. Hence, this area of international law has had little opportunity for development since its initial codification several decades ago. In the absence of case law, this section will examine the international humanitarian law contained in the Geneva Conventions and Additional Protocols.

The fourth Geneva Convention, Additional Protocol I and Additional Protocol II contain specific provisions which protect women who are pregnant or who
are caring for young children (under 7 years). These provisions include
‘preferential treatment’\textsuperscript{219} and to ‘not hinder’ preferential treatment.\textsuperscript{220}

Pregnant women and mothers of young children may benefit from the
establishment of hospital and safety zones,\textsuperscript{221} including adequate treatment
for serious cases\textsuperscript{222} and the protection of convoys transporting maternity
cases.\textsuperscript{223} Expectant and nursing mothers shall be provided additional food as
required,\textsuperscript{224} and shall be prioritised during the distribution of relief
packages.\textsuperscript{225} Relief packages which are intended for pregnant women are
to be granted free passage.\textsuperscript{226} Pregnant women or women with young
children who have been detained shall have their cases consider with
“utmost priority”,\textsuperscript{227} including reaching agreement for their release,
repatriation or accommodation in a neutral third country.\textsuperscript{228} Lastly, two

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{219} Geneva Convention (IV), supra note 54, art. 38(5).
\item \textsuperscript{220} This protection against hindering preferential treatment is in regards to “food, medical
care and protection against the effects of war” \textit{id.} art. 50.
\item \textsuperscript{221} \textit{Id.} art. 14.
\item \textsuperscript{222} \textit{Id.} art. 91.
\item \textsuperscript{223} \textit{Id.} art. 21.
\item \textsuperscript{224} \textit{Id.} art. 89.
\item \textsuperscript{225} \textit{Id.} art. 70(1).
\item \textsuperscript{226} \textit{Id.} art. 23.
\item \textsuperscript{227} Protocol (I), supra note 54, art. 76(2).
\item \textsuperscript{228} Geneva Convention (IV), supra note 54, art. 132.
\end{enumerate}
\end{footnotesize}
provisions protect pregnant women and women with young children from the death penalty.\textsuperscript{229}

The above provisions provide important protections for women and their children. If adequately implemented, the access to food, health care, repatriation and protection from the death penalty would certainly benefit women and children. However, a closer examination of how these provisions are anchored in the stereotype of ‘woman as child-bearer/child-rearer’ can reveal some of their limitations.

Critics have noted that of the 43 provisions which specifically address women, 19 provisions are actually designed to protect children.\textsuperscript{230} This is confirmed by the Commentary on the Geneva Convention IV.\textsuperscript{231} The Commentary states that “children represent the future of humanity” and it is for this reason that pregnant women and mothers have been included in these protections.\textsuperscript{232} In Article 89, for example, the provision for additional food is aimed at nourishing children, that is, food is provided for women who are pregnant or breastfeeding in which the nourishment is passed onto the child, hence mothers who are ‘only’ eating for themselves are excluded. The

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{229} Protocol (I), supra note 54, art. 76(3); Protocol (II), supra note 54, art. 6(4).
\item \textsuperscript{230} Gardam & Charlesworth, supra note 36, at 159; Gardam, supra note 39, at 57.
\item \textsuperscript{231} \textit{Jean S. Pictet (ed.), Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War § 284-290 (1958).}
\item \textsuperscript{232} \textit{Id.} at 513.
\end{itemize}
\end{footnotesize}
Commentary notes that “deficiency diseases” are “deplorable” if suffered by children (but not their mothers).\textsuperscript{233} Similarly, the Commentary states that the provision for adequate healthcare for pregnant women is to meet “the requirements of the physical and mental development of children”\textsuperscript{234} and not necessarily to ensure the physical health of the woman carrying the child. Finally, women are to be spared from the death penalty for as long as they are required to nurture children (i.e. until the child is 7 years old). However, once the child has sufficiently grown and is no longer as dependent on the mother for its survival, and the death penalty is no longer explicitly prohibited.

In these provisions, women are valued for their relationship to others, in particular, for their assigned gender-role of child-bearer and carer.\textsuperscript{235} While established with the best intentions, these protections “inadvertently ‘instrumentalize’ women and their bodies”.\textsuperscript{236} Women are not protected and valued in and of themselves and protecting women to the extent that they are needed to nurture children can only ever be limited.

\textbf{Woman as the ‘weaker sex’}

The third gender stereotype which has influenced the protection regime for women within IHL is ‘woman as the weaker sex’. This gender stereotype is

\textsuperscript{233} Id. at 395.

\textsuperscript{234} Id. at 126.

\textsuperscript{235} Gardam & Charlesworth, supra note 36, at 159; Gardam, supra note 39, at 57.

\textsuperscript{236} Bennoune, supra note 63, at 377.
already implicit in the laws examined above (i.e. sexual violence and pregnancy/motherhood). However, the Commentary to the Geneva Convention III acknowledges this stereotype, explicitly and separately, as an underlying reason for other protections.

The Commentary states that “(c)ertain points should... be borne in mind” when considering the situation of women which are “weakness” and “honour and modesty”.237 The intention to protect the honour/modesty of the weaker sex is evident in several provisions. The assumption of female weakness, which can be of benefit to women, is contained in provisions regarding suitable labour for prisoners of war238 and appropriate disciplinary punishment.239 The related concepts of ‘honour and modesty’ have been stated by the Commentary as the reasons for granting women internees and POWs access to separate dormitories and sanitary conveniences.240 Similar protections of modesty can be found in the provisions against public curiosity.241

237 JEAN S. PICTET (ED.), COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR § 147 (1958).

238 Geneva Convention (III), supra note 54, art. 49.

239 Id. art. 97 & art. 88.

240 PICTET, supra note 237, at 464-5. Protections for women civilian internees - Geneva Convention (IV), supra note 54, art. 76 & art. 8, Protocol (I), supra note 54, art. 75(5), Protocol (II), supra note 54, art. 5(2)(a); Protections for female POWs - Geneva Convention (III, supra note 54, art. 25 & art. 29.

241 Geneva Convention (III), supra note 54, art. 13(2).
questioning, the supply of adequate clothing, and allowing body searches to be performed only by other women. This aim of preserving women’s modesty, however, is a much more value-laden and narrow approach then, for example, the right to physical integrity, security of person or privacy.

Two observations may be made regarding the above provisions. First, it may be true that a combination of physical differences, as well as the upbringing of women and men which facilitates the mastering of different skills, has resulted in women and men possessing different strengths. It may also be true that it is beneficial for women to receive additional protection during armed conflict as their traditional gender role may deter them from using violence in their own defence. However, the assumption of women’s weakness and the creation of a legal regime based on this assumption may ultimately not be in the best interests of women. It reinforces a stereotype which places women in a subordinate position to men. If women must be protected due to their weakness, what happens when their protector is not longer able to protect them? Whilst, again, these provisions were created with good intentions, they also reveal a paternalistic view of women and create a legal norm in which

\[242\] Id. art. 17.

\[243\] Id. art. 27.

\[244\] Geneva Convention (IV), supra note 54, art. 97. This is not the case for female POWs. This list was originally provided in PICTET, supra note 237, at 147.

\[245\] Bennoune, supra note 63, at 375-8.
the protection of women depends on the chivalry of men.\textsuperscript{246} Such an approach can limit the scope of protections. If, for example, the protections granted to women aimed at their empowerment and agency, rather than compensating for their weakness, the protection regime for women may be potentially much more effective, progressive and broad.

The second observation is regarding women’s ‘honour’ and modesty. It is clear, both within the Geneva Conventions and the Commentary, that women’s ‘honour’ is based on preventing their sexual violation.\textsuperscript{247} Women maintain their ‘honour’ through maintaining their chastity and modesty. This, again, relates back to gender stereotypes and the attributes that are deemed as important for women and men. In comparison to women’s honour, the idea of men’s honour “is a much more complex concept in IHL, encompassing both mind and bodily attributes” whereas women’s honour is based primarily on “certain sexual attributes, the characterising features of which are what is seen as important to men”.\textsuperscript{248} As discussed in the section on sexual violence, however, much of the language in international law has moved towards ‘sexual autonomy’ rather than ‘honour’ which is more empowering for women.

\textsuperscript{246} Id. at 374.

\textsuperscript{247} Geneva Convention (IV), supra note 54, art. 27 “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”.

\textsuperscript{248} Gardam & Charlesworth, supra note 36, at 159.
Part IV: Concluding thoughts

“Law... is pushed by the social logic of domination and challenge to domination, forged in the interaction of change and resistance to change... Behind all law is someone’s story... The question... is whose experience grounds (t)hat law.”

- Catharine MacKinnon

The law is a social construct and, as such, is influenced by the advances and ongoing prejudices of society. Rebecca J. Cook and Simone Cusack have recently reinvigorated the discussion within feminist jurisprudence about the

---

impact of gender stereotypes on the substance and process of transnational law.\textsuperscript{250} The modest contribution of this Article has been to apply Cook and Cusack’s framework of gender stereotyping to analyse the protection regime for women within international humanitarian law. This Article has examined three gender stereotypes: woman as sexual object, woman as child-bearer/child-rearer, and woman as the ‘weaker sex’. For some areas, such as sexual violence, the progress in legal protection is commendable. For others, the underlying gender stereotypes of women continue to limit the protections available despite their good intentions. Several options to move forward have been suggested. Whilst redrafting treaties is both impractical and may potentially weakening current protections,\textsuperscript{251} alternative proposals have included the drafting of a new conventional instrument such as a Third Optional Protocol to the Geneva Conventions,\textsuperscript{252} a Second Optional Protocol to the Women’s Convention,\textsuperscript{253} or Guiding Principles (analogous to the Guiding Principles on Internal Displacement).\textsuperscript{254} Another suggestion, including by the Special Rapporteur on Violence Against Women, has been to revise

\textsuperscript{250} Cook & Cusack, supra note 1.

\textsuperscript{251} See, e.g., Bennoune, supra note 63, at 388; Judith Gardam & Michelle Jarvis, Women and Armed Conflict: The International Response to the Beijing Platform of Action, 32 Co HRLR 1, 57 (2000); Gardam & Charlesworth, supra note 36, at 163.

\textsuperscript{252} Bennoune, supra note 63, at 387.


\textsuperscript{254} Gardam & Jarvis, supra note 251, at 57-64.
the Commentary to the Geneva Conventions to integrate a gender perspective and to “incorporate developing norms on violence against women during armed conflict.” In the meantime, however, it is important to ensure the effective implementation of the current provisions so that women at least have the protections that they contain.

Gender stereotypes are not static and evolve as society evolves. Nor are gender stereotypes always negative. However, when gender stereotypes influence the codification of international law, the effect can be disempowering and difficult to change. Both women and men should not be confined to gender stereotypes but, instead, should be seen for their full capacities. For example, in armed conflict women also need to be recognised as agents, decision-makers, heads of households, combatants, and peace-makers. Similarly, men should not always be seen as the aggressor but also as victims of sexual violence. To end on an indulgent, idealistic note, however, it should not be the ultimate goal of humankind to ‘better’ regulate armed conflict. Instead, humanity should address the causes of these conflicts – poverty, resources, prejudices, cultural or religious tensions, and power imbalances. As the Dalai Lama once said, “people inflict pain on others in the selfish pursuit of their happiness or satisfaction. Yet true happiness comes from a sense of peace and contentment, which in turn

255 Quoted in Gardam & Charlesworth, supra note 36, at 163-4.

must be achieved through the cultivation of altruism, of love and compassion, and the elimination of ignorance, selfishness, and greed.”