VOICING THE SILENT WAR CRIME:
PROSECUTING SEXUAL VIOLENCE IN THE SPECIAL COURT FOR SIERRA LEONE

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ABSTRACT

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The paradox of violent conflict is that it offers the possibility of advancing the very human rights that were denied in conduct. Given the increased interest of the international community in prosecuting serious crimes against human life and the recognition that it is unacceptable to allow complete impunity for individual perpetrators of grave atrocities, what is the potential for expanding international human rights law, and particularly woman's rights, in the wake of armed conflict? How can the domestic enforcement of international criminal law, through the use of hybrid tribunals, contribute to establishing gender-specific provisions in the judiciary of post-conflict states?

Throughout the conflict in Sierra Leone from 1991 to 2001, Human Rights Watch reported that more than half of all women and girls—as many as 215,000-257,000—were subjected to systematic sexual violence, including widespread rape, gang-rape, sexual slavery, mutilation, and rape with objects such as AK-47s and firewood.

The Special Court of Sierra Leone (SCSL) and the Truth and Reconciliation Commission (TRC), created in response to the conflict, offer a surprisingly progressive take on gender justice. For instance, gender crimes are expressly on the agenda of the TRC investigating gross human rights abuses, and the statute of the SCSL draws upon the gender specific definitions of crimes against humanity in the International Criminal Court Rome Statute as well as expressly establishing that the court draw upon judicial precedents set by the International Criminal Tribunal Rwanda.

The Special Court for Sierra Leone provides a unique empirical basis for evaluating the impact of gender-specific provisions on domestic law. This Article seeks to address the need to progressively develop gender-specific provisions, and to do so in a manner that is consistent with both universal international human rights norms and local cultural differences. It is particularly concerned with the successes and failures of hybrid courts in facilitating gender justice in post-conflict environments. Specifically, this Article will examine the potential of the SCSL to offer substantive and normative post-conflict progress in the development and application of gender provisions aimed at addressing the silent war crime of sexual violence.

Far too little attention has been paid to the development of gender-specific provisions in international law. Sadly, this lack of scholarship might be said to generally reflect the international communities inadequate attention to issues of gender and sexual violence. Despite marked improvements by the international criminal justice system in dealing with gender law, its application remains limited and selective. This Article serves as a preliminary exploration into the development of gender laws through the lens of semi-internationalized courts. It recognizes the need to consider the role of these special hybrid options within the larger context of an emerging system of international criminal justice and provides a preliminary assessment of their potential impact on the prospects of gender justice in Sierra Leone.
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INTRODUCTION

“The Prosecution asks simply that justice be done. We ask for justice for the victims. It has been said that the dead cannot cry for justice. But it is the duty of those of us alive to do so for them. Today in this courtroom, we cry out loud for justice. We ask for justice for the families of the victims. And we ask for justice for the people of Sierra Leone.”

“Human beings have a dignity that deserves respect from laws and social institutions … but human dignity is frequently violated on grounds of sex or sexuality.”

The opening statement from the prosecutor in the recent trial of the alleged Armed Revolutionary Forces Council (ARFC) accused (Brima, Kamara, Kanu) pleas “simply that justice be done” for the people of Sierra Leone. But what form this justice takes remains to be determined as the Special Court for Sierra Leone (Special Court, SCSL, or the Court) seeks to answer the “cry for justice” of the victims of one the most violent conflicts in recent memory. Based on the Special Court’s mandate to try “persons who bear the greatest responsibility” for atrocities committed during the Sierra Leone war, will the perpetrators of attacks on combatants and civilians—including pervasive killing, amputations, sexual violence, and crimes against humanity—be held accountable? In particular, will this “cry for justice” be voiced with respect to the extraordinarily brutal and
widespread crimes of sexual violence,\(^6\) or will the “veil of silence” traditionally surrounding violence against women in international and Sierra Leonean law continue to prevail?\(^7\) This Article considers the prosecution of rape as a war crime in the SCSL. It will focus specifically on the role of “hybrid” or semi-internationalized courts—in incorporating both domestic and international elements—in the development of the universal human rights of women within humanitarian law, and more generally on the power of law to change and give survivors a voice against injustice.

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The dictates of international law, as traditionally understood, have guaranteed that the prevalence of sexual violence against women is equally matched by the tendency not to adjudicate. As Amnesty International recently declared, “violence against women is the greatest human rights scandal of our times.”\(^8\) Every day, in every country throughout the world, women are subjected to gender-based discrimination and violence in astonishing number.\(^9\) At the international level, war and political instability present special dangers for women. In war-torn countries, gender-specific forms of violence are endemic and often used deliberately as weapons of war to intimidate, persecute, and dehumanize women and the community to which they belong.

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\(^6\) For the purposes of this essay the terms “sexual violence,” “violence against women,” and “rape” will be used interchangeably for the sake of simplicity and is meant to include all forms of violence against women including enforced prostitution, sexual slavery, forced pregnancy, forced abortion, female genital mutilation, trafficking for the purposes of enforced prostitution, enforced sterilization, or the perpetration of any other acts against women which cause or could cause them physical or psychological harm.


\(^9\) See Alex Duval Smith, *Amnesty says violence on women is as great an evil as terrorism*, THE INDEPENDENT, March 6, 2004, at 32 (Noting that in the United States “A women is raped every 90 seconds; four women die each day as a result of violence in the family”, in Sierra Leone “More than half of all women suffered sexual violence during the 1999 conflict”, in Egypt “97 percent of married women aged 15 to 49 had female genital mutilation”, and in Pakistan “At least a thousand women a year die in ‘honour’ killings”)

Yet, although rape has long been a violation of international law, and despite being widespread and commonplace during armed conflict, crimes of sexual violence are rarely prosecuted. Historically, rape has remained ambiguously situated as an international crime and this less serious and less visible international legal status has meant that the application of gender law at the international level continues to be limited and selective and the persistence and proliferation of gender violence remains insufficiently addressed.

Taken together, the invisibility of violence against women and the general lack of attention paid to gender crimes enable the international community to avoid holding perpetrators accountable. Violent sexual crime is instead hidden from view or dismissed as the “spoils of war,” “Standard Operating Procedure,” or the “natural” and “inevitable” result of war, and it is only recently that rape has been taken seriously as a grave crime in international law.

To be sure, precedents set by the International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR), along with the codification of progressive gender laws in the Rome Statute of the International Criminal Court (Rome Statute), have gone a long way toward acknowledging the glaring injustices perpetuated by the traditional marginalization of these crimes under international law. But far too

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10 See M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1999) (holding that during war, as well as peace, rape and sexual assault are crimes under both domestic criminal codes and international criminal law. Bassiouni subsequently argues that a normative basis to try rape as a “grave breach” of the Geneva Conventions exists. While rape and sexual assault are not explicitly identified by the 1949 Geneva Conventions as a class of “grave breaches,” Bassiouni argues that they are subsumed as offences contained in the language “inhumane treatment” and “willfully [caused] great suffering or serious injury to body or health” (Geneva Convention IV, art. 147 (protecting civilians)). This will be discussed further infra, at Part II, Section C.


12 See David S. Mitchell, The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine 15 DUE J. OF COMP. & INT’L L. 219 (2005) (discussing the ambiguous legal nature of rape as a war crime and arguing that the failure of international law to clearly name and define rape as a jus cogens crime has contributed to ineffective deterrence and the continuing proliferation of sexual violence against women).

13 See generally, supra note 11 and accompanying sources.

14 See infra Part II, Section C.
often, such advances have been eclipsed by the international community’s willingness to tolerate sexual violence,\textsuperscript{15} rendering it an invisible war crime. As a result, “the legal protections that exist for those who have been victims of rape during war are still quite limited,”\textsuperscript{16} and need to be addressed. Given the current climate of impunity and enduring treatment of sexual violence as “an invisible war crime in a wide variety of contemporary conflicts and mass atrocities,”\textsuperscript{17} new accountability mechanisms need to be explored so that gender violence can be more effectively included in “the post-conflict world of international justice … to condemn these horrors and to make the perpetrators accountable for the particularly brutal violence perpetrated against women in wartime.”\textsuperscript{18}

The silent war crime must be voiced.

In the Sierra Leone conflict from March 1991 to 2001, Human Rights Watch reported that more than half of all women and girls—as many as 215,000-257,000—were subjected to systematic sexual violence, including widespread rape, gang-rape, sexual slavery, mutilation, and rape with objects such as AK-47s and firewood.\textsuperscript{19} One particularly alarming episode from the report describes the story of a woman who was gang-raped by

\textsuperscript{15} See United Nations, \textit{Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, submitted in accordance with Commission on Human Rights resolution 2001/49, Addendum, Mission to Sierra Leone, E/CN.4/2002/85/Add.2} (2002) [hereinafter \textit{Violence Against Women}] (noting that rape “remains the least condemned war crime” despite being commonplace during armed conflict). The law of war has prohibited rape and other forms of sexual violence for centuries. Under international law, rape and other forms of sexual violence can be prosecuted as crimes against humanity, war crimes, genocide, torture, and as grave breaches of the Geneva Conventions. Sexual violence may also be prosecuted under universal jurisdiction as a constituent element of the above crimes, which have attained \textit{jus cogens} status with entailed \textit{ergo omnes} obligations for all nations to prosecute or extradite alleged offenders whom they find on their territory. It may also be argued that rape has risen to the level of a \textit{jus cogens} norm as an international crime in its own right. See Mitchell, \textit{supra} note 12.


\textsuperscript{18} \textit{Id.} at 86.

\textsuperscript{19} See Physicians for Human Rights, \textit{War-Related Sexual Violence in Sierra Leone: A Population-based Assessment} (Boston: Physicians for Human Rights, 2002), at 2-4 [hereinafter \textit{PHR Report 2002}] (noting that the prevalence of war-related sexual violence presented in this study was likely \textit{underestimated} because of willful non-disclosure of sexual violence by survivors, fear to come forward, and the lack of privacy in some interviews).
seven soldiers in her northern Sierra Leone village. After raping her, the soldiers tied her down and placed burning charcoal on her body, threatening to kill her if she cried.\footnote{See “We’ll Kill You If You Cry”: Sexual Violence in the Sierra Leone Conflict, 15 HUMAN RIGHTS WATCH (AFRICA DIVISION) 1(A) (Jan. 2003) [hereinafter We’ll Kill You If You Cry], available at http://www.hrw.org/reports/2003/sierraleone/.

The clear lack of attention paid until recently, both internationally and domestically, to widespread acts of sexual violence and their consequences means that few assistance programs for survivors have been established and the failure to prosecute such crimes has left women in post-conflict Sierra Leone vulnerable to non-conflict related sexual violence. Not surprisingly, rape continues with impunity and women remain reluctant to seek legal redress in the country’s inefficient and corrupt criminal justice system.\footnote{See We’ll Kill You If You Cry, at 73.}

On March 10, 2004, the Special Court for Sierra Leone opened its doors with the promise to provide criminal accountability and affirm the rule of law in a nation that has never known justice.\footnote{See, e.g., The Secretary-General, Press Release, Special Court for Sierra Leone Vital Part of Country’s Healing Process Says Secretary-General in Message to Opening, U.N. Doc. SG/SM/9192 (March 10, 2004).

The SCSL—a so-called “hybrid” or semi-internationalized tribunal—represents a newly emerging mechanism for the enforcement of international criminal law that attempts to combine the resources, standards, and accountability of fully international courts with local needs, conditions, and legitimacy of domestic prosecutions. Similar courts have already been established in East Timor\footnote{See On the Organization of Courts in East Timor, UNTAET Reg. 2000/11, §§ 10.1, 10.3, UN Doc. UNTAET/REG/2000/11 (Mar. 6, 2000).

See On the Assignment of International Judges/Prosecutors and/or Change of Venue, UNMIK Reg. 2000/64, UN Doc. UNMIK/REG/2000/64 (Dec. 15, 2000).

See UN Press Release, UN and Cambodia Reach Draft Agreement for Prosecuting Khmer Rouge Crimes, 17 March 2003, UN Press Release GA/10135 of 13 May 2003, and UN Press Release, UN, Cambodia Sign Agreement to Prosecute Former Khmer Rouge Leaders, 6 June 2003.} and Kosovo,\footnote{See UN Press Release, UN and Cambodia Reach Draft Agreement for Prosecuting Khmer Rouge Crimes, 17 March 2003, UN Press Release GA/10135 of 13 May 2003, and UN Press Release, UN, Cambodia Sign Agreement to Prosecute Former Khmer Rouge Leaders, 6 June 2003.} and may eventually begin operation in Cambodia.\footnote{See On the Assignment of International Judges/Prosecutors and/or Change of Venue, UNMIK Reg. 2000/64, UN Doc. UNMIK/REG/2000/64 (Dec. 15, 2000).} These internationalized domestic courts include a mix of international and local judges, lawyers, investigators, and staff who apply both domestic and international law. From a normative perspective, the hybrid model seeks to individualize justice by meeting the specific needs of the host domestic state while also enforcing international rules and standards of justice. This interaction of local accountability and international legitimacy offers the unique capacity for hybrid tribunals
to improve domestic judicial systems at the ground level, promote post-conflict peace-
building and reconciliation, and provide greater awareness of judicial efforts and
international humanitarian norms within the surviving community.26

Moreover, such courts “are indicative of a growing fusion of national and
international law enforcement … [and] suggest ways in which the international legal
system can accommodate legitimate difference of national choices within a unitary legal
order.”27 Importantly, such tribunals—by including both international and local judges,
prosecutors, and procedures—offer a means by which the international system can
support legitimate local difference while also maintaining a unitary system of international
law.28 The dialogue between local cultural differences and universal international legal
rules is especially salient with regard to violence against women, as gender issue are
among the most contested between cultures.

Indeed, the core arguments advanced by this Article turn on the theoretical debate
“between the rights of individual women and the recognition and development of the
universal human rights of women—particularly the rights of women within humanitarian
law.”29 How can hybrid tribunals negotiate the tension between the expansion of
international women’s human rights and the rights of individual women within different
cultures? As I will discuss further in Part V, the semi-internationalized model potentially
offers an effective means to engage in a pluralist “capabilities approach” to the expansion
of universal women’s rights.30 Rather than a top-down imposition of foreign values, or a
normative cultural relativist approach “according to which the ultimate standard of what is

30 Nussbaum, supra note 2, at 8 (“arguing that an account of the central human capacities and functions, and
of the basic human needs and rights, can be given in a fully universal manner, at least at a high level of
generality, and that this universal account is what should guide feminist thought and planning”).
right for an individual or group must derive from that groups’ internal traditions, a capabilities approach insists “on the universal importance of protecting spheres of choice and freedom, within which people with diverse views of what matters in life can pursue flourishing according to their own lights.” Derived from political liberalism and the rational choice theories of John Rawls and Amartya Sen, Martha Nussbaum’s capabilities approach to justice “shows that a universal account of human justice need not be insensitive to the variety of traditions or a mere projection of narrow Western values onto groups with different concerns.” This Article uses Nussbaum’s argument as a starting point for assessing the potential of semi-internationalized courts to respond to violence against women within the framework of a capabilities approach. As I will argue, the capabilities model is directly built into the structure of hybrid courts, and for this reason, semi-internationalized courts are likely to be central to the future of international criminal law enforcement with regard to enforcing and expanding post-conflict jurisprudence relating to violence against women.

At the international level, the hybridization of international law enforcement points to an emerging “system of multilevel global governance in which the national and international levels are more deeply intertwined than ever before.” This emerging development of a “pluralist” international legal system—one that celebrates “difference [but] remains committed to the existence of universal standards”—is, I will argue, a

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31 Nussbaum, supra note 2, at 8. Nussbaum is rightly very critical of relativist approaches deriving from postmodernism.
32 Id. at 9.
33 See generally JOHN RAWLS, A THEORY OF JUSTICE (1971); Amartya Sen, “Gender and Cooperative Conflicts,” in PERSISTENT INEQUALITIES, ed. Irene Tinker (1990); “Gender Inequality and Theories of Justice,” in WOMEN, CULTURE, AND DEVELOPMENT, ed. MARTHA NUSBAUM AND J. GLOVER (1995) (the “capabilities approach” was first developed within economics by Sen and a version of it is also used by Rawls); see also David Crocker, “Functioning and Capability: the Foundations of Sen’s and Nussbaum’s Development Ethic,” in WOMEN, CULTURE, AND DEVELOPMENT, 152-198.
34 Nussbaum, supra note 2, at 8.
35 Burke-White, International Legal Pluralism, supra note 27, at 977.
potentially crucial one for gender justice in terms of increasing the legitimacy and political acceptability of international legal rules relating to sexual violence in post-conflict states.\(^{37}\)

Rather than doing nothing, doing it alone, or standing by as an *ad hoc* international tribunal administers distant justice, hybrid domestic prosecutions afford post-conflict states the opportunity to deliver justice to their own people through an internationally sanctioned and supported judicial process.\(^{38}\) In this way, the Special Court is expected to not only end impunity, but perhaps more importantly, to rebuild the decimated and fiscally troubled Sierra Leone judicial system by generating institutional skills, training and restructuring the police force, providing resources, and implementing legal reforms that will last long after the Special Court completes its work. Domestic Judicial reform impelled by the work of the Special Court is essential for addressing the current climate of impunity for gender crimes in Sierra Leone and, if implemented effectively, the Special Court could potentially play a key role in promoting and protecting the basic rights of Sierra Leonan women, while also generating greater “compliance pull”—to use Thomas Franck’s term—with international legal rules.\(^{39}\)

However, as a number of scholars point out, rather than incorporate the best of international and domestic processes, the Special Court may reflect the worst.\(^{40}\) For example, when the court commenced trial activity in May 2004,\(^{41}\) it was already behind schedule and set to run out of funding before deciding its first case.\(^{42}\) Many scholars thus

\(^{37}\) *Id.* at 978.  
\(^{41}\) U.N. Doc. A/58/733.  
\(^{42}\) See *UN, Annan Proposes Assessed Dues to Close Sierra Leone Court’s Budget Gap*, UN News Center, 25 Mar. 2004, http://www0.un.org/apps/news/story.asp?NewsID=10044&Cr=sierra&Cr1= (Observing that a report released by the Secretary-General acknowledges that the Special Court faces an estimated budget gap of US$20 million for its third year of operations, from July of 2004 to June 2005, due to a “voluntary contribution shortfall”); See also *UN SC Res. 1436*, 24 Sept. 2002, http://oddsdnsy.un.org/doc/UNDOC/GEN/N02/603/05/PDF/N0260305.pdf?OpenElement (Note that the Special Court is exclusively funded by voluntary contributions from United Nations Member States. This ad hoc funding scheme has frequently been cited by scholars as a major setback for the court that could lead to the
characterize the SCSL as “shoestring justice,” because hybrid courts are asked to accomplish the same goals as the ad hoc Tribunals, but at a faster pace and with fewer resources. It is often noted that the Special Court’s advantages are also its disadvantages, and “the very elements which mark it as a novel development in post-conflict justice—its location, tight budget, and pressure to complete its mandate quickly—also challenge the court’s ability to deliver on its aspirations.” In this sense, the promise of the Special Court as a potentially innovative judicial mechanism contrasts with a number of deficiencies in the structure, resources, and substantive mandate of the court. If left unaddressed, these fundamental flaws could undermine the administration of justice, or even make the situation in Sierra Leone worse by upsetting an already tenuous peace.

The following discussion analyzes the SCSL as an emerging transnational justice mechanism for prosecuting serious crimes of sexual violence, with particular emphasis on comparisons with the jurisprudence and practices of the ad hoc Tribunals and the Rome Statute of the International Criminal Court (ICC), as well as the development of the prosecution of rape as a war crime more generally. It argues that if properly implemented, the SCSL has tremendous potential to develop an effective and efficient means for the enforcement of gender law that is both sensitive to local difference and firmly rooted in universal rules of law. On the one hand, the Special Court can be seen as an ineffectual court with little power and influence—a politically inexpensive means for powerful states to respond to the crisis, offering “strong rhetorical support, but little aid in death of hybrid tribunals); UN GAOR 5th Comm., Press Release, In Fifth Committee, Regular Budget Financing Requested for Sierra Leone Court to Bridge Voluntary Contribution Shortfall, UN Doc. GA/AB/3610 (March 23, 2004) (Noting the representative from Sierra Leone, “a delay in resolving the matter would, among other things, cast a long shadow on the international community’s commitment to deal decisively in ending impunity. The administration of justice was not cheap, just as the struggle against terrorism was not cheap. Such a unique institution in international humanitarian law should not be allowed to fail, especially in midstream.”); Report of the Secretary-General, Request for a Subvention to the Special Court for Sierra Leone, UN Doc. A/58/733 (March 15, 2004) (Recognizing the inadequacy of voluntary contributions, the Secretary-General argues that the success and continued operation of the Special Court for Sierra Leone requires assessed funds provided by UN member states).

See supra note 40 and accompanying texts.

Kendall and Staggs, From Mandate to Legacy, supra note 1, at 2.

Linton, supra note 38, at 62 (arguing that despite the potential of internationalized domestic tribunals, fundamental flaws in their current formation will not only fail to deliver justice, but may cause more damage); see also Cockayne, supra note 40.
enforcement. On the other hand, the SCSL has a unique opportunity to develop and expand the achievements of the ad hoc Tribunals and ICC regarding violence against women, and advance women’s human rights in Sierra Leone by addressing the inequality traditionally accorded women in their culture. If the Special Court can deliver on its promise of hybrid justice—capitalizing on the benefits of “placing the Court in-county and diffusing knowledge to the local legal system and the general population”—it may function as an important model for the future of international criminal law enforcement. Locally, the Special Court has the chance to contribute to restorative justice by compelling citizens to examine and reflect on the conditions that led to such widespread sexual violence and encourage positive social change by developing Sierra Leone’s legal system so that it more adequately reflects the experiences of women. In doing so, the Special Court, through the application of international women’s human rights standards, can give the women of Sierra Leone a voice against injustice within a domestic context in which they have traditionally been silenced. Internationally, the SCSL could serve as a best practices model for prosecuting sexual violence as a war crime and will most likely have broader implications as a paradigm for hybrid justice, as well as for destigmatizing and clarifying the position of violent sexual crimes in the international legal system.

Part I of this Article provides a brief background on the Sierra Leone conflict with a focus on gender-specific violence. It then reviews the status of women under Sierra Leonean law, elucidating an historic pattern of structural, legal, and cultural discrimination against women. Part II critically examines the historical development and current status of sexual violence as a crime in international law in order to establish an illuminating backdrop for the analysis of the Special Court and asks whether the court might prove more successful in handling gender violence than other international fora to date. This

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Christopher Rudolph, Constructing an Atrocities Regime: The Politics of War Crimes Tribunals, 55 INT’L ORG. 655, 665 (2001) (taken further, the interests of power politics might help to explain why the UN Security Council has refused to give the court Chapter VII powers or why the Security Council has failed to ask Nigeria to extradite former Liberian President, Charles Taylor, a key player in the Sierra Leone conflict and one that eludes the Special Court. The courts lack of Ch. VII powers and the indictment of Charles Taylor will be discussed further infra, at Part IV, C); See also Nicole Fritz and Alison Smith, Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone, 25 FORDHAM INT’L L.J. 391 (2001).
Part also examines the most important gender jurisprudence developed by the *ad hoc* Tribunals and gender provisions in the statute of the ICC, and argues that gender crimes need to be codified as *jus cogens* in international law subject to universal jurisdiction. Part III discusses and analyzes semi-internationalized tribunals from a normative perspective, in order to establish why states would find it desirable to choose the hybrid enforcement of international criminal law. Part IV considers the effectiveness of the Special Court in terms of investigating and prosecuting gender crimes, and hopes to show how the model might be better implemented in the future by highlighting areas where the SCSL has been particularly effective and those where it has fallen short. Part V argues for a capabilities approach to prosecuting sexual violence and discusses hybrid courts as the next step in the development of prosecuting rape as a war crime within a framework of women’s universal human rights. Finally, the Conclusion argues that the SCSL “represents an important step forward toward countering the deeply engrained cultural and legal attitudes that tend to minimize rape and other sexual violence crimes.” 47 Although it is too early to know what long-term impact the SCSL will have, the Special Court’s efforts to focus on violence against women at all levels of the judicial process has, at the very least, called into question the inequality of men and women, and the violent crimes committed against them. The SCSL is an important first step in ensuring that the silent war crime be voiced and suggests how semi-internationalized courts might be used as a springboard for assessing gender-based violence as an international crime, and for developing and refining international law in this area.

The questions raised by this Article are particularly relevant given the emergence of the International Criminal Court. There are two reasons. First, the ICC’s jurisdiction is premised on a regime of complementarity—rather than the traditional model of jurisdictional primacy—such that the court only steps in when domestic courts are unable or unwilling to act. Similarly to the hybrid model, a regime of complementarity functions

as a means of empowering domestic courts because it creates an incentive for these courts to prosecute international crimes themselves and encourages states to enact the necessary legislation to do so. As a result, the simultaneous pursuit of justice at the local and international level found in the hybrid model provides a salient experiment for the future operation of the International Criminal Court. Second, the Rome Statute has not proved definitive and hybrid tribunals—located at the intersection between national and international systems—\(^4^8\)—are likely to remain central actors in the emerging system of international criminal law enforcement.\(^4^9\) Notwithstanding the non-retrospective character of the Rome Statute, “for political reasons, the future of international criminal law enforcement will largely be at the domestic level” as part of a decentralized community of domestic, internationalized, and supranational courts.\(^5^0\) The utilization of judicial networks between these courts may work to “improve compliance with international treaties and customary law.”\(^5^1\) This works in two ways: (1) vertical networks of supranational courts directly linked to national government institutions that can exercise coercive authority on the governments behalf; and (2) horizontal networks of national courts interacting to enforce international legal obligations or providing technical assistance to rebuild regulatory or judicial capacity in states where the judicial infrastructure is weak or has collapsed.\(^5^2\)

\(^4^8\) Burke-White, *International Legal Pluralism*, supra note 27, at 976 (noting that “hybrid tribunals are situated precisely at the intersection between the national and international systems, and area likely to be central to the future development of international law”).

\(^4^9\) See Rome Statute of the International Criminal Court art. 11 [hereinafter Rome Statute] (The ICC’s limited temporal and substantive jurisdiction, the primacy accorded national institutions under the principle of complemetarity, and sheer capacity affirm that any comprehensive approach to justice cannot rely solely on the ICC. A number of alternative enforcement measures have recently been established and together indicate a trend toward enforcement becoming more and more rooted in domestic systems interacting with each other to enforce international law. These include: internationalized domestic tribunals in East Timor, Kosovo, and Sierra Leone, the modern use of traditional domestic processes in Rwandan ‘Gacaca’ and Congolese ‘Baraza’ systems, the likely development of an Iraqi tribunal to prosecute Saddam Hussein, as well as national courts exercising universal jurisdiction demonstrated by the Pinochet case).


\(^5^2\) Id.
Hybrid tribunals consolidate the exchange of information, ideas, and personnel that characterize the relationships between both of types of networks and demonstrate that international processes for criminal accountability need to adapt to and enhance local processes directed toward the same end. As the Special Court continues its final year of trial proceedings, a close analysis of semi-internationalized tribunals is necessary to ensure that the SCSL pursues gender crimes in a sensitive and thorough manner and to determine how such tribunals can be improved as innovative and essential components in the enforcement of international criminal law.

I. RAPE AS A SYSTEMATIC WEAPON OF WAR IN THE SIERRA LEONE CONFLICT

A. Sexual Violence Against Women in the Sierra Leone Conflict

The troubled history of Sierra Leone, its independence from the British and subsequent succession of despotic leaders, the Revolutionary United Front’s (RUF) March 1991 insurrection against the government, the 1999 Lomé Peace Accords and Amnesty, and the role of the U.N. in peacekeeping thereafter have been well documented. Still, the history of the ten-year civil war, with a specific emphasis on sexual violence, is worth summarizing here.

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53 Jose E. Alvarez, Crimes of Hate/Crimes of State: Lessons from Rwanda, 24 YALE J. INT’L L. 365, 414 (1999) arguing that the dominant international legalist paradigm inherently seeks to establish the primacy of international legal bodies and that this primacy may in fact undermine the national rule of law, realization of justice, an accurate collective memory, or even the effective development of international criminal law. To the extent that national and international prosecutions are pursued simultaneously, they must not remain insulated from each other.

54 See, e.g., J.D.A. ALIE, A NEW HISTORY OF SIERRA LEONE (1990); Ibrahim Abdullah and Patrick Muana, The Revolutionary United Front of Sierra Leone, in Christopher Clapham (ed.), AFRICAN GUERRILLAS (1998); We’ll Kill You If You Cry, supra note 7, at 12-18; Scott Campbell and Jane Lowicki, Sierra Leone: Sowing Terror: Atrocities Against Civilians in Sierra Leone, Summary, 10 HUMAN RIGHTS WATCH (AFRICA DIVISION) 3(A) (July 1998), available at http://www.hrw.org/reports98/sierra/Sier988-01.htm#P88_2258 [hereinafter Sowing Terror]; Laura R. Hall and Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, 44 HARV. INT’L L.J. 287 (2003); Linton, supra note 13, at 231-232.

55 If nothing else, the succeeding analysis attempts to account for the extreme sexual violence in the Sierra Leone conflict in response to the tendency for violent sexual crime to be hidden from view as ‘unspeakable’ or exclusively private acts not suited for an international public forum; such crimes must be talked about if they are to be effectively addressed. I have adopted much of the foregoing account from the following sources: Sowing Terror, Id.; We’ll Kill You If You Cry, supra note 20; Violence Against Women, supra note 15; PHR Report 2002, supra note 19; Sierra Leone: Getting Away with Murder, Mutilation, and Rape, 11 HUMAN RIGHTS WATCH (AFRICA DIVISION) 3(A) (July 1999) [hereinafter Getting Away with Murder]; Hall and Kazemi, Id.
The long period of conflict began in 1991 when the RUF, led by Foday Sankoh with backing from rebel leader and exiled Liberian President Charles Taylor, launched an offensive against the government of Sierra Leone. The RUF was formed in 1984 as a political movement aiming to salvage the country from the corruption and mismanagement of the All People’s Congress (APC), who had retained single-party rule over Sierra Leone since it gained independence from the United Kingdom in 1961. Local discontent and regional instability made it almost effortless for the RUF to take control of the region when they invaded Sierra Leone from Liberia on 23 March 1991, triggering one of the decade’s most shocking conflicts—a conflict that “focused largely on gaining control of Sierra Leone’s diamond mines rather than establishing a legitimate government” as the RUF’s “ideology of salvation quickly degenerated into a campaign of violence whose principle aim was to gain access to the country’s diamond and other mineral wealth.” The brutality of rebel forces was marked by the systematic and widespread perpetration of all classes of gross human rights abuses against the civilian population including amputations, the conscription of child soldiers, and extreme gender violence.

In November 1996, peace negotiations were held with the RUF, which resulted in the Abidjan Accords and the democratically elected government of Ahmad Tejan Kabbah. However, the peace accords proved to be short lived as fighting broke out almost immediately after the signing. President Kabbah was subsequently overthrown when the Armed Forces Revolutionary Council (AFRC), fighting alongside the RUF, took control of the capital in 1997. After gathering support from the Economic Community of West African States and Security Council authorization, an armed monitoring group (ECOMOG) of primarily Nigerian soldiers was able to return President Kabbah to power. Under

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56 Eaton, supra note 29, at 876.
57 See We’ll Kill You If You Cry, supra note 20, at 10.
58 Admittedly, it was not only the RUF forces who committed human rights abuses, but also the Armed Forces Revolutionary Council (AFRC), pro-government forces, and peacekeeping forces.
59 Hall and Kazemi, supra note 54, at 288.
pressure from Nigeria, which was threatening to pull its forces out of Sierra Leone, the government initiated negotiations with the RUF leading to the 1999 Lomé Peace Accords. Amidst a momentary cease-fire, the Lomé Accords—brokered by Reverend Jesse Jackson—called for a power-sharing agreement between the government and the RUF and controversially granted general amnesty to all members of the RUF. As part of the peace agreement, a Truth and Reconciliation Commission (TRC) was established as a reconciliatory measure along with the U.N. Mission in Sierra Leone (UNAMSIL) to monitor military and security conditions and ensure that all parties respected the provisions of the Lomé Accords.

Under Article 9(1) of this agreement, RUF commander Foday Sankoh was granted absolute and free pardon. In addition, as part of a political compromise to restore peace and order, Article 9 (3) controversially granted general amnesty to all combatants for crimes committed during the conflict between the years 1991-1999. However, at the last minute of negotiations the UN added a hand-written caveat that the amnesty and pardon provided by Article 9 only applied to Sierra Leonean law and did not apply to “international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international law.” As the Special Court is only expected to try between 25-35 offenders, this amnesty unfortunately has profound implications for prosecuting gender crimes committed between 1991-1999 under domestic law.

The Lomé Accords, in addition to the troubling amnesty provisions, failed to establish lasting peace. Almost from the start, rebel forces failed to comply with the peace agreement and resumed attacks on the government, peacekeeping forces, and the population of Sierra Leone. Human rights abuses were unimpeded by the paper principles of the Lomé Accords, as the abducting, raping, mutilating, and killing of

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60 Eaton, supra note 29, at 879.
63 Hall and Kazemi, supra note 54, at 288-289.
civilians continued with violent urgency. During the RUF invasion of the capital in 1999, shortly after the Accords were signed, thousands of women and girls were reportedly rounded up and an estimated ninety percent were brutally raped in one of the bloodiest episodes—chillingly named by RUF commanders as “Operation No Living Thing”—during the Sierra Leone war.

In response, the U.N. Security Council expanded UNAMSIL troop strength to 11,100 and then 13,000 from the initial 6,000 sent. However, considerable delays in deployment of U.N. peacekeeping forces and the RUF capture of over five hundred UNAMSIL personnel caused the conflict to erupt. Finally, the combined efforts of UNAMASIL personnel, the Sierra Leone Army, independently acting British Forces, and United States troops involved in training Nigerian ECOMOG troops, were able to put pressure on Sierra Leone combatants to disarm and eventually put an end to the fighting. Disarmament and demobilization centers were set up around the country and the U.N. continues to maintain a presence in Sierra Leone. In order to provide accountability for the crimes committed during the conflict and to redress the blanket impunity granted by the Lomé amnesties, the Security Council passed Resolution 1315, calling for the creation of the Special Court for Sierra Leone.

Throughout the long course of the war, extreme sexual violence was widespread and used systematically as a weapon to terrorize, humiliate, and punish the civilian population. Thousands of women of all ages, including very young girls, were subjected

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64 Getting Away with Murder, supra note 55; Human Rights Watch, Fresh Reports of RUF Terror Tactics, May 26, 2000; Amnesty International, Sierra Leone, Rape and Other Forms of Sexual Violence Against Women and Girls, June 29, 2000, p.2
65 Violence Against Women, supra note 15, at 12.
to extraordinarily violent crimes on the basis of their gender. Most of the documented cases occurred between 1991 and 2000, with a concentration of cases between 1997 and 1999. The perpetrators include soldiers of the RUF and AFRC, pro-government forces, local police, civilians, and sadly, international peacekeeping forces. Physicians for Human Rights suggests that as many as 50,000 to 64,000 women have been subjected to sexual violence as a result of the war. This figure is likely an underestimate given the prevalence of willful non-disclosure or lack of privacy in some interviews, despite efforts to ensure privacy and the actual number is probably closer to 215,000-257,000. Although there are no exact figures, and the precise numbers may never be known, it is important to ascertain the scale of the tragedy so that the assessment of each individual case will be more meaningful in prosecutions that will only try a handful of perpetrators.

For the most part, the rapes were not random acts, but appeared to be carried out as deliberate policy. Rape was used as a means to boost morale or as a reward after

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72 Rape and other forms of sexual violence were also committed, albeit on much smaller scale, against boys and men by both male and female rebels. For the purposes of this essay, however, discussion will focus on sexual violence committed against women, though the analysis should be applied to sexual crimes against men as well. In Sierra Leone, male victims were raped by male rebels or forced to have intercourse with other men at gunpoint. Due to the widespread use of child soldiers in the conflict, young men between ages nine and fifteen were often rape victims. In this way, the rebels used sexual violence as a tool to emasculate and perpetuate domination over young boys. Indeed, the kidnapping of boys into the ranks of the rebels itself contained a gendered component as it was cloaked as a part of Sierra Leonean passage into manhood. These crimes have been considerably underreported due to the stigma attached to homosexuality in Sierra Leone. Male victims of rape fear coming forward and few are willing to tell their story for fear they would be perceived within the community as homosexuals. See generally, We’ll Kill You If You Cry, supra note 20.


74 We’ll Kill You If You Cry, supra note 20, at 29 (Most of the sexual attacks, when known by survivors, where attributed primarily to RUF rebels and associated factions. While most survivors reported being raped by rebel forces, they were often not able to tell which faction the rebel perpetrators belonged or whether they were even rebels; “Survivors explained that they often deliberately did not want to look at their rapists out of fear and because they did not want to make eye contact”).

75 Id., at 51-52 (“UNAMSIL investigations into allegations of sexual violence by peacekeepers indicate a lack of appreciation for the seriousness of the problem of sexual violence”).

76 See PHR Report 2002, supra note 19, at 2 (The actual number of women and girls affected by sexual violence probably ranges from 215,000-275,000; “reasons for willful non-disclosure often include fear of retribution by an assailant, being stigmatized and rejected, being blamed for the attack, and/or the psychological consequences of disclosure”).


78 Id. Niarchos identifies five patterns for the rapes in the Former Yugoslavia that can also be applied to Sierra Leone: (1) rape committed before fighting breaks out in a region, often including gang rape atmosphere; (2) rape in conjunction with invasion or capture of villages; (3) rape while women are held in detention, where gang rapes are common and associated with beatings/torture/murder; (4) rape in so-called
conquering a city during military operations such as “Operation No Living Thing” and “Operation Pay Yourself.” Many of the rapes involved multiple human rights abuses including murder, sexual slavery, forced marriage, forced pregnancy, mutilation, and torture. The victims ranged from four to seventy-five, with the average age between twelve and thirty-two. Young women and girls were targeted specifically by the RUF/AFRC because they were virgins. Women were sexually assailed with objects, such as weapons, burning wood, broken bottles, and hot oil. Women were abducted and forced to become sex slaves for their rebel “husbands.” Many of the rapes were extremely violent and victims often bled to death as a result of these crimes.

B. The Status of Women Under Sierra Leonean Law

The crimes of sexual violence committed during the conflict “are particularly disturbing because they reflect the low status of women in Sierra Leone and the general acceptance of sexual violence against them.” At least in part, the horrifying widespread and systematic sexual violence in the war can be seen as a direct manifestation of the liminal status of women in Sierra Leonean society.

Legally and socially, women are not equal to men in Sierra Leone and this inequality is deep-seated in Sierra Leonean customary tradition. Indeed, the unequal treatment of men and women with regard to laws concerning “adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law” is not illegal according to Article 27 of the Sierra Leone Constitution. It is important to note that these provisions are meant to preserve the customary practices of different ethnic

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79 We’ll Kill You If You Cry, supra note 20, at 29-30 (“After capturing a town or a village, the combatants rewarded themselves by looting and raping women and girls, many of whom they later abducted”).
81 See generally, We’ll Kill You If You Cry, supra note 20.
82 Id., at 6.
83 Id.
84 Id., at 16.
85 Eaton, supra note 16, at 880.
groups in Sierra Leone, but in doing so, they also authorize and support traditions that discriminate against women.\textsuperscript{87} Unfortunately, “by codifying such inequalities in the law, the Sierra Leone Constitution explicitly sanctions inequality between men and women and perpetuates gender discrimination.”\textsuperscript{88} The unequal status of women is also reflected socially in relationships between men and women. For instance, the rape of a non-virgin is not considered rape and it is legally impossible to rape one’s wife under Sierra Leonean law.\textsuperscript{89} Women are also forced into arranged marriages at a young age and the rate of domestic violence in Sierra Leone is extremely high.\textsuperscript{90} The unequal status of women is further perpetuated by a dysfunctional judicial and legal infrastructure that lacks adequate financial and human resources. Zaniab Joaque writes: “Although rape is a crime under our law, historically, the response of the police and judiciary to reports of rape has been minimal … rapes are not made a priority and generally not handled professionally due to improper/insufficient training, lack of finances, and structural discrimination against women resulting in a lack of understanding that rape is a serious crime.”\textsuperscript{91} Joaque goes on to note that the first successful rape prosecution in Sierra Leone did not take place until 1999.\textsuperscript{92}

Given this cultural background, it is not difficult to imagine a direct and troubling relationship between wartime rape and women’s status in society. Eaton notes: “Women are victims of sexual violence during war precisely because of their subjugated position in society.”\textsuperscript{93} Moreover, gender crimes in Sierra Leone have the additional element of violating cultural norms and shaming the victim, family and the wider community, making

\textsuperscript{87} Eaton, supra note 16, at 881.
\textsuperscript{88} Eaton, supra note 16, at 881.
\textsuperscript{89} See e.g., Eaton, supra note 16, at 881; Douglas Farah, A War Against Women, Sierra Leone Rebels Practiced Systematic Sexual Terror, \textit{WASH Post}, April 11, 2000, at A1. It should be noted that the discussion of Sierra Leonean culture does not apply equally for all people and tribes of Sierra Leone.
\textsuperscript{90} \textit{We’ll Kill You if You Cry}, supra note 20, at 23.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} Eaton, supra note 16, at 906 [emphasis added].
it difficult for victims to come forward. As a result of both factors, most of the survivors remain silent and do not report these crimes because there is an expectation of impunity within Sierra Leone culture for violence against women. Taken together, the marginal legal and social status of women has created a culture of silence surrounding violence against women. This culture of silence and deep-seated inequality has translated, historically, into a climate of impunity for perpetrators of violence against women in Sierra Leone and makes the SCSL’s mission to provide accountability, raise awareness, and impel judicial reform all the more urgent.

II. THE HISTORY OF RAPE AS A CRIME IN INTERNATIONAL LAW

Classical international law makes the assertion that sovereign states function as unitary actors in a fundamentally anarchic world order. In this conception, international law treats states as a single coherent entity, rather than a collection of individuals, interests, and groups. As the principle constituent unit and legal personality in the international order, states, the argument goes, are the only entities capable of being wronged or having their rights violated. The rights of the state are absolute. Individuals, on the other hand, are largely disregarded by traditional international law. This realist conception of the international system views war as between states and the armies that defend them, such that civilian security, for much of history, has not been a major concern of international law.

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94 We’ll Kill You If You Cry, supra note 20, at 38:
The rebels have forced civilians to commit incest, one of the biggest taboos in any society. One survivor witnessed the RUF trying to force a brother to rape his sister … [w]hen the brother refused to do so, the rebels shot him. Fathers were forced to rape their daughters. Fathers were forced to dance naked in front of their daughters and vice versa. In Sierra Leone, postmenopausal and breastfeeding women are presumed not to be sexually active, but rebels violated this cultural norm by raping old women and breastfeeding mothers. Child combatants raped women who could have been their mothers or in some instances even their grandmothers. Many rapes were committed in full view of other rebels and civilians. Victims were also raped in mosques, churches, and sacred places of initiation.

95 See We’ll Kill You If You Cry, supra note 20.

96 This section is based in part upon my previous research on sexual violence in international humanitarian law, see generally Mitchell, supra note 12.
Even today, this classical conception of the international legal order holds true for the majority of international legal transactions and remains fundamentally embedded in the international legal structure. Indeed, the basic sources of international law all center upon state consent: treaty, custom, and general principles. Ultimately, the approach defended by this Article argues that the realist philosophy of international order is limited for ensuring the efficacy of the international legal system in a modern world were interstate warfare has declined and been replaced by “civil conflict arising from ethnic, religious, and nationalist strife.” Throughout recent decades, countless examples—from the Rwanda genocide to the events of September 11th—have demonstrated that international violence is no longer limited to war between states. In response, Slaughter and Burke-White argue that international law “must embrace and elevate the principle of civilian inviolability to an absolute prohibition on the deliberate targeting or killing of civilians in armed conflict of any kind, by states or individuals, for any purpose” as a foundational principle of the international order. International criminal law must continue to protect “civilian inviolability” and individualize justice as it has with the ICTY, ICTR, and ICC, as well as with universal jurisdiction prosecutions such as the extradition of Augusto Pinochet to stand trial for acts of torture committed while president of Chile, or the development of hybrid courts. As the international legal order moves from a unitary system of states to a pluralist model willing to treat individuals as agents capable of violence and create “a web of prohibitions and penalties around the principle of civilian inviolability,” it must ensure that this principle embraces violence against women as part of that inviolability and affirmative responsibility to protect civilians.

97 See Statute of the International Court of Justice (ICJ) Article. 38 (1)
99 Id. at 2.
100 Id. at 3.
101 Id.
At the end of this Article I will discuss the movement toward a pluralist international legal system—an international legal order closely connected to national law—exemplified by the advent of hybrid tribunals, as well as the need to reconceptualize the international legal framework toward a principle of civilian inviolability that fully considers the justice of women. However, at this stage I want to emphasize the importance of the realist mental paradigm that has so shaped the development of international law, because it has profound implications in terms of the nature and scope of the international legal order, and helps to explain why individuals, and particularly women and crimes of sexual violence, have been so ignored. While there is clearly no military justification for rape or sexual assault, and although sexual violence during armed conflict has long been a violation of international law, its prohibition is rarely enforced. At least in part, this lack of prosecution can be attributed to an international legal system made by men that has, for much of its history, proceeded to construct world order from the top-down through the mental paradigm of the unitary state. In its broadest sense, this conception of international world order ignores the constituent parts of the state; those networks of

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103 See M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, supra note 10.
104 See generally for a discussion of feminist theory on why rape has not been prosecuted at the international level: SUSAN BROWN MILLER, AGAINST OUR WILL (1975); YOUGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS (1982); Rhonda Copelon, Surface Gender: Reconceptualizing Crimes Against Women in Time of War, in MASS RAPE 197 (Alexandra Stiglmayer ed., 1994); Catharine A. Mackinnon, Rape, Genocide, and Women’s Human Rights, 18 HARV. WOMEN’S L. J. 139 (1994); Rosalind Dixon, Rape as a Crime in International Humanitarian Law: Where to from Here? 13 EJIL 697 (2002); Catherine N. Niarchos, Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia, 17 HUM. RTS. Q. 649 (1995). See also, KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTIONS IN INTERNATIONAL WAR CRIMES TRIBUNALS (1997); M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1999). Further reasons for the marginalization of gender crimes might be that many cultures associate sex with morality, and that legal definitions of rape and sexual violence typically hinge on whether or not the victim consented. This affects our view of rape in two ways: (1) victims are not believed and; (2) rape is not viewed to be harmful or as harmful as it should. First, when sex is committed outside of marriage, it is often the woman, not the man, who is shamed or punished by society. Furthermore, when sex crimes are committed, the shamefulness of the act is displaced onto the victim instead of the perpetrator where it belongs. Consequently, victims of sexual violence tend to be doubted, fear coming forward, and bear the burden to prove that they did not consent. On the second point, the violence in rape is not as ‘visible’ as in other physically violent crimes. Sex crimes are likely to be surrounded with secrecy as something taboo and not to be discussed. This has led to a tendency for international legal instruments to define sexual violence as crimes against ‘honour’ or ‘dignity’, which do not sound nearly as serious as other violent international crimes defined specifically against the person. Such language obscures the violent elements of rape and sexual assault and the lasting physical and psychological damage that these crimes cause. Taken as a whole, the above factors have kept sexual violence from being prosecuted on a wide scale or explicitly criminalized in international instruments.
individuals, groups, and interests that make up and constitute the arbitrary label “state.” As Eric Posner argues, “States are not people, and although we anthropomorphize them in common speech by saying that states make decisions or take actions, they are not moral agents.” Indeed, it is important to remember that states are not in fact monolithic decision-making entities, but instead contain a plurality of voices, both powerful and silent, which contribute to and shape policy outcomes.

Questions of law at the international level tend to be politically relative and, overwhelmingly, they reflect the interests of powerful states and the powerful voices that influence and shape state policy. In respect to recognizing sexual violence as crimes motivated by gender, international criminal law must be seen as a gender-biased body of law, largely constructed in terms of a unitary, homogenous, and western male ideal that excludes many who live in the international system:

Male reality has become human rights principle, or at least the principle governing human rights practice. Men have and take liberties as a function of their social power as men ... So the model of human rights violations is based on state action. The result is, when men use their liberties socially to deprive women of theirs, it does not look like a human rights violation. But when men are deprived of theirs by governments, it does. The violations of human rights of men better fit the paradigm of human rights violations because that paradigm has been based on the experiences of men.

This male-centered paradigm of international law and human rights practice neatly imposes order from the top-down, and as a result, the system does not typically view violent acts that harm women as violations of those women’s human rights on the basis of their gender. Put bluntly, the international legal system’s sorry record of dealing with

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105 See generally, Anne-Marie Slaughter, A NEW WORLD ORDER, supra note 51. To be sure, this conception of the international system as a conglomerate of unitary states is changing, indeed being forced to change to account for globalization and the rising level of non-state actors (transnational terrorist networks, corporations, international organizations, NGO’s, etc.), but remains the dominant analytical lens for predicting and organizing the international system. Generally speaking, this paper takes as foundational, Anne-Marie Slaughter’s argument for a “new world order,” rethinking the international order through the paradigm of the “disaggregated” state and a world of government networks, by exploring the role of hybrid courts in the development of gender provisions.


107 This is built into the international legal system. Two of the basic sources for international law as defined by the Statute of International Court of Justice, Article 38 (1), are custom and general principles, both of which tend to be formed by powerful states.


these problems can be seen as a failure to recognize women as fully human in a patriarchal international legal order.

From a feminist perspective, international criminal law has traditionally mischaracterized crimes of sexual violence and ignored their gendered aspects. As Catharine MacKinnon writes:

The configuration of acts and actors of September 11, 2001 is not one that international law, centered on states, has been primarily structured to address. Neither was most of men’s violence against women in view when the laws of war, international humanitarian law, and international human rights guarantees were framed. MacKinnon argues that September 11th and violence against women parallel each other as forms of nonstate violence against civilians in dispersed, nonstate conflict. Yet, as she notes, the response to these crimes has been anything but parallel. Rather, the “same international community that turned on a dime after September 11th has, despite important initiatives, yet even to undertake a comprehensive review of international laws and institutions toward an effective strategic response to violence against women.”

This Part hopes to show the history of this response gap in a brief discussion of the prosecution of rape as a war crime in international humanitarian law leading up to the prosecutions at the ICTR and ICTY, and establishment of the ICC.

While this Part does not seek to provide a comprehensive analysis of international gender law developments throughout the long history of international law, it is intended to provide a brief historical overview of important successes and failures that situate the most recent possibilities for the prosecution of gender specific crimes at the international level—including hybrid courts, _jus cogens_ status, and universal jurisdiction. As such, international human rights law and the major human rights treaties and documents are not considered. Nor are a number of important human rights conferences dealing with women’s issues such as the UN Declaration on the Elimination of Violence Against Women (1973), the 1979 UN Convention on the Eliminating of All Forms of Discrimination

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111 _Id._ at 2.
Against Women (CEDAW), or the Beijing Declaration and Platform for Action. Suffice it to say that while these conventions are certainly not perfect and do not carry legal force as nonbinding international documents, they do provide a global framework, however limited, for promoting many fundamental human rights for women that can work in conjunction with binding international law to mainstream gender provisions and provide increased visibility for violence against women.

A. Rape as an International Crime Before World War II

The law of war has long prohibited rape in men’s wars—or at least considered it to be an unfair consequence—but it is only in recent times that violent crime against women has been taken seriously under humanitarian law and adjudicated internationally. As Theodore Meron observes, rape has been considered a crime for centuries and “violators have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419).” The international codification of rape as a war crime begins with the drafting of the Lieber Instructions (1863) during the United States Civil War. Derived from international custom and usage, the Lieber Instructions served as the official U.S. Army regulation guide on the laws of land warfare for the treatment of civilians, including women, during the civil war.

Two provisions are relevant to violence against women, and taken together, they represent the dominant legal formulation of rape in international law at the time: (1) rape as a violent crime by itself and, (2) rape as a crime subsumed in the language “family honor and rights.” The first provision grants “special protection” to women and problematically links crimes against women with violations of family honor and the private sphere by identifying such crimes with the “sacredness of domestic relations.”

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112 See Meron, supra note 11, at 425.
113 Francis Lieber, Instructions for the Government of the United States in the Field by Order of the Secretary of War, April 24, 1863 (Lieber Code; also known as General Orders No. 100). For a discussion of developments prior to the Lieber Code see Bassiouni, supra note 10; Meron, supra note 11.
114 See Askin, supra note 11, at 36.
115 Article 37 of the Lieber Code provides:
Significantly, however, the Lieber Code also prohibits rape as a capital crime. The second provision, regarding sexual assault, mandates “all rape … [is] prohibited under the penalty of death.” As the first codification of international customary laws of land warfare, it is significant that the Lieber Instructions firmly outlaw rape as a serious crime demanding severe punishment.

Yet, as the atrocities during World War I and World War II would soon prove, the visibility and codification of a legal norm is not equivalent to the acceptance or enforcement of that norm. Nowhere is this more salient than at the international level. As we would be reminded for nearly the next century, this was the last time that rape or any other crime of sexual violence would find itself expressly prohibited in a document of international legal force.

Following the Lieber Code, international documents abandoned the characterization of rape as a violent crime and begin to adopt the concept of “family honor and rights” as the basis for prohibiting and prosecuting rape as a war crime. Although the language concerning women’s honor enshrined in the sanctity of family rights may reflect “a sensitivity to the fact that victims are punished a second time by societies that value women’s chastity as a measure of worth,” it nonetheless “obscures the fact that rape and sexual assault are violent crimes which cause lasting physical and

The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; … the persons of the inhabitants, especially those of women, and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished [emphasis added].

Lieber Code, supra note 113, art. 37

116 Article 44 of the Lieber Code provides:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking … all rape, wounding, maiming, or killing such inhabitants, are prohibited under penalty of death … [emphasis added].

Id. art. 44.

Throughout history, rape has been closely associated with crimes of property rather than crimes against the person. Hence the phrase ‘rape and pillage’. It is important to note how at this stage rape remains a property crime perpetuated against man’s honour. It was rare to find rape reported as a crime against the person akin to murder or torture. See Askin, supra note 11, at 51.

117 See Catharine N. Niarchos, supra note 77, at 673.
psychological harm." Significantly, for the development of the prosecution of rape as a war crime, the association of women with the domestic and private sphere in language such as “family honor and rights,” has served to keep violent sexual crimes behind closed doors as second-class crimes, ignoring both their seriousness and gender-specific components.

Indeed, in the wake of the Lieber Code, the language “family honor and rights” was frequently used in international documents as a catchall phrase for the prohibition of rape and sexual assault. The “Oxford Manual,” created by the Institute of International Law in 1880 to serve as a model for legislation on the laws and customs of war on land proclaimed “human life, female honour … must be respected. Interference with family life is to be avoided.” Another example is found in The Declaration of Brussels (1874), which attempted to codify the laws of war on an international level. In a provision recognizing a women’s right to dignity and honor, the Declaration provided that “the honour and rights of the family … should be respected.”

Along with the Lieber Code, these international documents directly influenced the Hague Peace Conventions of 1899 and 1907. Most importantly, the Hague Conventions continued the use of vague language to refer to sexual violence as a war crime. The Conventions dealt predominantly with prisoners of war and the relationship between military personnel of an occupying power and noncombatant civilian inhabitants, and were aimed at preventing unnecessary suffering in war by regulating methods of warfare. The 1907 Hague Convention does not explicitly prohibit rape, but instead seeks to “protect” women under the veiled and gendered language of Article 46, which states, “family honour and rights, the lives of persons, and private property … must be

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118 Bassiouni, supra note 10, at 345.
119 Id. at 347, quoting the “Oxford Manual” (emphasis added).
120 Id., quoting The Declaration of Brussels, Article 38.
121 See, Askin, supra note 11, at 39.
respected.” Article 46 can be legally construed to cover wartime rape, but it has seldom been interpreted in this way.

Clearly, the absence of explicit language prohibiting rape in the Hague Conventions is regrettable, especially given the status of the Hague Conventions as the primary regulations of codified humanitarian law in effect at the beginning of the First and Second World Wars. However, as M. Cherif Bassiouni argues, “the general nature of Article [46] should not be taken to mean that it does not prohibit sexual violence.” Indeed, many argue that Article 46 could have been used to prosecute World War II criminals for sexual violence if the political will to prosecute had been present. However, even allowing that Article 46 does not prohibit sexual violence, the preamble provides language that establishes rape and sexual violence as crimes under customary international law. The preamble of the 1899 Hague Convention, called the Martens Clause states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of public conscience [emphasis added].

The Martens Clause evokes customary international law to protect individuals in cases where they are not protected under the Hague Conventions—such as when a crime is not listed or when new atrocities emerge. It also affirms existing customary international law, which was general to all nations and arguably includes a prohibition of sexual violence.

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122 Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [Hague Convention No. IV].
123 Meron, supra note 11, at 425.
124 Bassiouni, supra note 11.
125 See, Askin, supra note 11, at 40; Bassiouni, supra note 11, at 348; Meron, supra note 11, at 425 (The 1907 Hague Convention was drafted nearly thirty-eight years before the Nuremberg and Tokyo Trials, thus the Hague provisions had probably already attained the status of customary international law. This is important because several participants were not parties to Hague Convention IV).
126 Preamble to the 1907 Hague Convention.
127 See generally, supra note 11. Rape was already considered a violation of customary international law.

Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 AM. J. INT’L LAW 424, 425 (1993) (“Rape by soldiers has of course been prohibited by the law of war for centuries.”). M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, at 348 (1999) (“…Rape has long been considered a war crime under customary international law...”).
On the whole, the Hague Conventions—along with the above-mentioned international treaties on the rules of war—provide compelling evidence that violence against women constitutes an international crime, albeit in a very limited sense. Further evidence can be found during World War I, when the War Crimes Commission drafted a report to prosecute war criminals that included rape and forced prostitution as two of the thirty-two enumerated offences. \(^{128}\) Although the attempt to prosecute individual war criminals for these crimes failed miserably, it set the stage for trials at Nuremburg and Tokyo and further established that sexual violence is considered a violation of the rules of warfare in international criminal law. \(^{129}\)

B. Nuremburg, Tokyo, and Control Council Law No. 10 \(^{130}\)

As a crime purported to be a violation of customary international law, rape is surprisingly absent from the Statutes of the Nuremburg and Tokyo Tribunals. The language used in law determines what is possible in terms of prosecution. Under restrictively interpreted language or absent definitions, it is difficult to prosecute gender violence successfully. The omission of gender-specific language in the major codifications of international humanitarian law leading up to and during World War Two consequently produces the “inescapable conclusion that the prosecutors [at Nuremburg] did not consider it a grave offense to brutally sexually assault unarmed women.” \(^{131}\)

The London Charter \(^{132}\) and the Tokyo Charter \(^{133}\) do not list rape and sexual assault as war crimes. As a result, rape was not prosecuted as a war crime at Nuremburg under

\(^{128}\) They were offence numbers five and six respectively. See UN WAR CRIMES COMMISSION, XIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 122, 124 (1949); “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,” Report Presented to the Preliminary Peace Conference, March 29, 1919, 14 AM. J. INT’L L. 95, 114 (1920); Askin, supra note 11, at 42, citing HISTORY OF THE UN WAR CRIMES COMMISSION 34 (1948).

\(^{129}\) Askin, supra note 11, at 47.

\(^{130}\) Allied Control Council Law No. 10, reprinted in Benjamin Ferencz, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE 488 (1980) [hereinafter CCL10].

\(^{131}\) Askin, supra note 11, at 95.

\(^{132}\) London Charter at art. 6(b) (notably, the indexes of the Nuremburg proceedings included 3 1/2 pages for the crime ‘looting’, while the headings ‘rape’, ‘prostitution’, or even ‘women’, are not included at all).

\(^{133}\) Tokyo Charter at art. 5(b).
customary international law, but it was prosecuted in Tokyo (though these prosecutions were, in comparison to other war crimes, not taken as seriously). Although rape and sexual assault do not appear explicitly in the charters, evidence that they constitute war crimes is implicitly referenced in both under the term “ill treatment.” Also, the Nuremburg Principles, as general principles of international law adopted by the United Nations General Assembly in 1946, established that certain offences may be punished which have not previously been prohibited in international law. Sexual assault clearly could have been prosecuted as a war crime under Article 6(b) of the London Charter in conjunction with the Nuremburg Principles, especially since sexual assault and rape were included in the evidence submitted by prosecutors to the Tribunal.

Significantly, the Nuremburg trials mark the first time in history that individuals were tried before an international criminal tribunal and along with the 1949 Geneva conventions, establish the emergence of an overarching regime to protect civilians during war. Among the crimes prosecuted before the tribunals were war crimes and crimes against humanity. Analysis of these crimes will focus on the Nuremburg Tribunal, although Tokyo will be discussed briefly regarding its progressive prosecutions of rape.

### i. War Crimes

War crimes indictments before the International Military Tribunal at Nuremburg (IMT) included most violations of the law of war codified at the Hague Conventions and were much easier to prosecute than the newly developed crimes against humanity because of their indisputable customary status in international law. These included

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134 Meron, supra note 11, at 426 (although rape was not prosecuted at Nuremburg, “In some cases, enforced prostitution was prosecuted in national courts outside Germany”).
135 Bassiouni, supra note 11, at 348.
136 Id.
137 UN Resolution adopting the Nuremburg Principles, GA Res. 174, UN Doc A/180 (1948); “Affirmation of the principles of International Law Recognized by the Charter of the Nuremburg Tribunal,” UNGA Res. 95(I), UN GAOR, 1st Sess., Part II, at 175; UN Doc A/64/Add.1 (1946).
138 See Askin, supra note 11, at 329 (she argues that the Nuremburg Principles provide a key foundation for punishing certain offences, “such as forced impregnation or forced maternity, which have not previously been explicitly prohibited in international law.” The Nuremburg Principles evoke provisions similar to the Martens Clause discussed supra).
139 Id. at 138 (noting Askin’s assertion that “this indicates why gender specific crimes need to be expressly enumerated in conventions and charters, and not left solely to judicial interpretation or prosecutorial discretion”).
murder, pillage, destruction of towns, and looting. The IMT indictment did not enumerate rape.

As previously discussed, rape clearly constituted a serious violation of the laws of war, however limited in its definitions: the Lieber Code specifically prohibited rape as a capital crime, the Hague Conventions asserted the duty to respect “family honour and rights,” and rape was an enumerated offence in the report of the War Crimes Commission of World War I. Significantly, the Hague Conventions have also become part of customary international law and are thus binding universally on all states. Furthermore, Article 6(b) under war crimes includes the phrase “…but not to be limited to,” expressly allowing for other violations of the laws of war to be prosecuted that were not already enumerated. Finally, clearly documented evidence of sexual violence was submitted to the Nuremburg Tribunal as part of some indictments. Undoubtedly, a significant case could have been made to prosecute gender crimes, and at the very least rape, before the Nuremburg Tribunal. That it was not, leads to the conclusion that the drafters and prosecutors did not have the will to do so. 140

In contrast, the Tokyo Tribunal did include rape as a war crime in its indictment, and “it was regularly included in the IMTFE trial testimony and transcripts.” 141 Specifically, rape was charged under “inhumane treatment,” “ill treatment,” and “failure to respect family honour and rights.” The inclusion of rape in the indictments established, for the first time, international precedent to prosecute rape as a war crime. Rape was also included in the Yamashita case, 142 which articulated the principle of command responsibility—that a superior officer can be held accountable for the actions of his troops—establishing precedent to prosecute leaders for gender-specific crimes. The

140 Id. (Askin develops the possibility that rape was not prosecuted by the allies because it was a crime committed by both sides).
141 Id. at 163.
command responsibility principle has proven important for recent trials involving gender crimes at the ICTY, ICTR, and will likely be used in prosecutions of rape at the SCSL.\textsuperscript{145}

\textit{ii. Crimes Against Humanity}

The Martens Clause made it clear that when the laws of nations were incomplete, rules of humanity prevailed. At the time of the Nuremburg Trials, crimes against humanity in their current formulation scarcely existed, such that there had been no specific category in international or municipal criminal law known as “crimes against humanity.” Although prosecuting crimes against humanity at Nuremburg technically violated the basic international legal principle of \textit{nullem crimen sine lege},\textsuperscript{144} the gravity of the atrocities necessitated the application of substantially new law because it would have been immoral to let the perpetrators go unpunished.

As previously discussed, crimes against humanity did not include rape or crimes of sexual violence in the list of enumerated offences. Yet, significantly, Bassiouni argues that rape was “subsumed within the words ‘or other inhumane acts.’”\textsuperscript{145} At first blush, the failure to prosecute is not surprising given the relative newness of crimes against humanity, the general position of women in international law at the time, and the desire to prosecute charges related to waging an aggressive war.\textsuperscript{146} Yet, neglecting to include rape and thereby overlooking gender grounds is inconsistent with the inclusion of atrocities committed on the basis of ethnicity or religion, both of which were a major focus of the trial. Still, as Bassiouni asserts, the IMT could have prosecuted rape under Article 6(c) of crimes against humanity under the heading “other inhumane acts.”

\textsuperscript{145} This would be used in the \textit{Akayesu} case (ICTR) to establish command responsibility for his troops committing genocide under the legal standard “knowing or ought to have known.” Rape and sexual violence were linked to genocide. See Prosecutor v. Akayesu, Judgment, ICTR-96-4-T, 2 Sept. 1998.
\textsuperscript{144} Fundamental international legal principle, whereby the application of retroactive law is prohibited; criminal actions committed before the legal proscription of that action are not subject to the new law (similar to the \textit{ex post facto} provision of the US Constitution.) See generally Antonio Cassese, \textsc{International Criminal Law} (2003), at 139-145.
\textsuperscript{145} Bassiouni, \textit{supra} note 11, at 125, 186.
\textsuperscript{146} Askin, \textit{supra} note 11, at 142.
One of the most important seeds for the development of gender provisions after WWII came from outside of the Nuremburg and Tokyo Trials, with the creation of Control Council Law No. 10 (CCL 10) by the four occupying powers in Germany. CCL 10 was established for the trial of war criminals other than those dealt with by the IMT and whose crimes had a specific locale. In contrast to the IMT, CCL 10 specifically lists rape under crimes against humanity. Control Council Law No. 10 also removed the war nexus from crimes against humanity allowing for a person to be charged with committing a crime against humanity regardless of the existence of war. Nevertheless, no one was prosecuted in any of the twelve subsequent trials under CCL 10. Yet, CCL 10 did establish several principles that are salient for the future of prosecution of gender crimes in international law. First, crimes against humanity require proof of government participation or conscious approval of “systematic procedures … amounting to atrocities and offenses” committed against a “civilian population.” This established that rape on a wide scale would be prosecuted as a crime against humanity, while an isolated case would be prosecuted as a war crime. Second, sexually violent crimes committed during peacetime can also be considered crimes against humanity. Third, responsibility is not limited to military personal and liability can include any persons occupying key positions.

Despite its enormous importance for international law, the Nuremburg trials failed to advance international law concerning sexual violence significantly. Because no one was punished for gender crimes, international law could not be progressively developed to protect women. Prosecutors and decision makers failed to recognize rape as a distinct

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147 Meron, supra note 11, at 426.
148 It was not until the Kunarac case (ICTY, 2001) that rape was prosecuted as a crime against humanity. See infra Part II, Section C.
149 See generally Bassiouni, supra note 11.
151 The nexus to an armed conflict for crimes against humanity appears in the ICTY Statute but does not appear in the ICTR or ICC Statutes, discussed infra Part II, Section C.
152 Niarchos, supra note 77, at 678. (Arguing that this provision could be used to cast a wide net of accountability, and in the case of the former Yugoslavia “medical personnel monitoring forced pregnancies in the ‘rape camps’ could be punished”).
criminal category and as a particular way in which women suffer as noncombatants in war on the basis of their gender.\textsuperscript{153} To be sure, it may be unrealistic to expect the Nuremburg Tribunal to have grasped this concept, as it is still relatively new today. Yet, as Catharine Niarchos argues, “it now would be unthinkable to cast the Holocaust as the persecution of civilians, without taking into account the ethnic and religious aspects of the crime,”\textsuperscript{154} and the same must be said for the recognition of rape and other crimes of sexual violence as extreme forms of gender discrimination.

\textit{C. Modern Developments}

It was time for a change. The failure to recognize the widespread use of sexual violence in WWII tacitly affirmed that the international community did not take violence against women seriously. It would take fifty years and the horrifying events and widespread violence against women in Yugoslavia and Rwanda, but after ignoring women and the violent crimes committed against them, international law finally began to wake up to the urgency of this problem. Part of the change stems from an overall shift in thinking about the place of individuals in the international system. The unitary state still ruled the day and sovereignty remained somewhat sacred, but increasingly, the international rights of individual citizens were being recognized.

Modern international law asserts that sovereignty is not absolute and that states are actually bound by certain obligations, one being the responsibility to protect individual members of society. In addition to state responsibility, there is individual responsibility for committing international crimes. After World War Two, the modern international legal framework began to shift from regulating the unitary state to regulating the actions of individuals, not only against governments but also against other human beings. This progressive individualization of international law to protect and prosecute individuals as international actors set the stage for recognizing crimes against women. The shift is

\textsuperscript{153} Id. at 679.
\textsuperscript{154} Id.
subtle; it represents a century of fits and starts motivated by war, genocide, globalization, and the need to find an appropriate framework for international legal order and accountability. But after briefly stumbling in some respects with the 1949 Geneva Conventions and additional protocols, international law finally began to regulate and prosecute gender crimes.

i. The 1949 Geneva Conventions and 1977 Additional Protocols

Possibly the most important achievement in international humanitarian law regarding the prohibition of violence against women, the Fourth Geneva Convention of 1949 unequivocally prohibits rape and forced prostitution. Importantly, the 1949 Geneva Conventions, along with the Hague Conventions, are considered to be customary international law binding upon all nations. Article 27, relating to the protection of civilian persons during time of war, provides in part:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.\textsuperscript{155}

Yet, as the language indicates, the Fourth Geneva Convention also reflects the primary inadequacies of international humanitarian law with regard to sexual violence, and further confirms why rape has not been viewed as a serious crime. First, the language of the convention is vague and continuous to perpetuate destructive stereotypes by treating rape as a crime against a woman’s honor. Violations of “honor” and “family rights” resurrect the notion that the raped women is disgraced or soiled, fail to account for the scale of wartime violence, and “are wholly inadequate to express the suffering of women raped during war.”\textsuperscript{156} Second, as Catharine Niarchos discusses, rape is attached to the wrong category of rights in the Geneva Conventions. Rather than being defined under Article 32

\textsuperscript{155} “Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War,” 12 August 1949, at Art. 27.

\textsuperscript{156} Niarchos, supra note 77, at 674.
expressing violations of physical integrity “which have shocked the conscience of the world,”157 rape is included in Article 27, protecting “family rights” rather than the physical integrity of the person.

Finally, and most importantly, rape and sexual assault are omitted from Article 147, which lists “grave breaches” under the Geneva Convention that give rise to universal jurisdiction.158 While a strong empirical case can be made that rape and sexual assault are included in the terms of Article 147 and thus constitute a grave breach,159 the omission indicates that rape is not perceived as a serious international war crime. Furthermore, an examination of what the list does include reveals that “destruction of property” and “forcing a person to serve in the forces of a hostile power” are considered with more gravity than rape.

The 1977 Additional Protocols, not widely ratified and only rising to the level of customary international law in part, essentially bring international humanitarian law up to date and offer a slightly more enlightened approach to gender issues. Article 76 (1) of Protocol I states “that women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”160 Article 75 of Protocol I prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.”161 Here, the gender-neutral language “personal dignity” replaces “honour” and provides a step in the right direction, though still not recognizing sexual assault as a violent crime.

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157 Id. citing COMMENTARY ON IV CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 308 (Jean S. Pictet et al. Eds., 1958) [hereinafter COMMENTARY ON GENEVA CONVENTION IV].
158 Article 147 lists the following crimes as grave breaches:

Willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, ... taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

GENEVA CONVENTION IV, art. 147 (protecting civilians).
159 See Bassiouini, supra note 11, for a detailed argument of why sexual assault and rape clearly fall under “grave breaches”. Rape and sexual violence as grave breaches subject to universal jurisdiction will be discussed further infra at Part III.
160 Protocol I, art. 76.
161 Protocol II, art. 75.
Significantly, the Additional Protocols “distinguish sexual assaults from crimes of violence”\textsuperscript{162} by including “outrages upon personal dignity” as a separate category from “violence to the life, health, or physical or mental well-being of persons”\textsuperscript{163} including murder, torture, corporal punishment, or mutilation. As Niarchos points out, while rape is a violation of dignity it is also and primarily a physical assault, and “the failure to “recognize the violent nature of rape is one reason that it has been assigned a secondary status in international humanitarian law.”\textsuperscript{164}

\textit{ii. Prosecuting Rape as a War Crime Before the International Criminal Tribunals}

The two \textit{ad hoc} Tribunals—the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda—represent much needed progress over women’s traditionally marginalized position in international law. Taken together, the successes of the Tribunals include expanding the definition of crimes against humanity to include rape, increasing the visibility and participation of women in high-level positions, increasing staff sensitive to gender issues, and effectively prosecuting various forms of sexual violence as instruments of genocide, war crimes, crimes against humanity, means of torture, forms of persecution and enslavement.\textsuperscript{165}

Yet, while the jurisprudence, practices, and contributions of the ICTY and ICTR will have a profound impact on the development and articulation of gender-based international crimes, the Tribunals themselves are unlikely to have a meaningful role in future enforcement because of their limited jurisdiction. The ICTY only has jurisdiction over crimes on the territory of the former Yugoslavia since 1991,\textsuperscript{166} while the ICTR can

\begin{footnotesize}
\begin{enumerate}
\item Niarchos, \textit{supra} note 77, at 675.
\item Protocol I, article 75(2)(a) and Protocol II, article 4(2)(a) included “violence to life...” as a separate category to “outrages upon personal dignity” that specified sexual violence.
\item Niarchos, \textit{supra} note 77, at 676.
\item Mitchell, \textit{supra} note 12, at 240.
\end{enumerate}
\end{footnotesize}
only hear cases from the Rwandan Genocide of 1994. In terms of rape prosecutions, this is a significant factor, because while their jurisprudence will have far-reaching consequences as applied by other courts, the Tribunals themselves are not likely to be long-lasting mechanisms to combat impunity. The core provisions dealing with violence against women are discussed below.

1. Gender-Related Provisions in the Statutes of the ICTY and ICTR

The Statutes of the ad hoc Tribunals provide important confirmation of existing principles of international criminal law and therefore reinforce customary law regarding violence against women. The Rwandan Tribunal can try offenders for crimes provided in Articles 2-4 of its statute, specifically, crimes against humanity, genocide, and violations of common Article 3 of the Geneva Conventions and Additional Protocol II. Similarly, the ICTY has jurisdiction over crimes enumerated in Articles 2-5, namely, grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity. As already discussed, rape is not explicitly a grave breach under the Geneva Conventions; however, the language of the conventions is meant to be broadly protective and rape and sexual violence have since been recognized as falling under “inhumane treatment.”

Rape is listed as a crime against humanity in Article 5 of the ICTY Statute and Article 3 of the ICTR Statute. Both formulations follow CCL 10, and the inclusion of rape as a crime against humanity in the Statutes clearly establishes precedent for prosecuting rape as a crime against humanity in international law. However, despite

108 William W. Burke-White, supra note 50 (arguing that the ad hoc tribunals are a phenomenon of the nineties and not likely to play a role in the enforcement of international criminal law in the future.)
109 Common Article 3 is the term used to designate the identical language of Article 3 of the Four Geneva Conventions of 1949.
110 Bassiouni, supra note 11.
111 ICTY Statute at art. 5 and ICTR Statute at art. 3.
112 Meron, Rape as a Crime, supra note 11, at 428 (arguing that the “confirmation of the principle stated in Control Council Law No. 10, that rape can constitute a crime against humanity, is, both morally and legally, of ground-breaking importance”).
these advances, the Statutes do have a number of shortcomings: they fail to clearly define rape as an individual crime, do not include other forms of sexual violence under crimes against humanity, and rape is not included as a war crime or a grave breach of the Geneva Conventions. In particular, the inclusion of rape as a grave breach would have been an important step in providing specificity on the status of rape in the Geneva Conventions.

The ICTY definition of crimes against humanity contains a nexus to an armed conflict, which limits rape prosecutions to those committed only at the time of war, while the Rwanda Tribunal does not. Also important, the Rwanda Tribunal defines Crimes against humanity “as a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds,” where gender is not included as one of the enumerated grounds and a high threshold of proof is set under “widespread or systematic.” The inclusion of rape as a crime against humanity, but not as a crime by itself, means that the higher threshold pertaining to crimes against humanity needs to be met before sexual violence can be prosecuted. While the ICTY has managed to overcome this by creatively interpreting the statute, it would have been preferable for other crimes of gender violence to be identified from the outset.

The Statutes of the ICTY and ICTR reproduce the definition of Genocide contained in the Article II of the Genocide Convention because it is widely agreed to have reached customary law status. Sexual violence can potentially fall under each of the sub-elements listed under Genocide:

[Al]ny of the following acts committed with intent to destroy, in whole or in part, a national, racial, ethnic, or religious group: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d)

173 Bassiouni, supra note 11. As a result, questions still remained as to whether other forms of sexual violence could be prosecuted as crimes against humanity. The ICC would answer many of these questions with its comprehensive definition of crimes against humanity, discussed infra Part II, Section C.
174 Significantly, the ICTY has interpreted the Geneva Conventions and their protocols to give protection to citizens in both international and non-international conflicts.
175 ICTR Statute at art. 3.
imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.\textsuperscript{177}

Sex or gender crimes such as rape or otherwise violating a woman, sexual mutilation, forced pregnancy, forced abortion or miscarriage, rape by a different ethnicity with the intent to impregnate the victim with a child of that ethnicity, or forcing an HIV/AIDS-infected person to repeatedly rape the victim, can constitute instruments of genocide.\textsuperscript{178}

Structurally, the \textit{ad hoc} Tribunals also represent a significant step forward. Women serve in various high-level capacities in both Tribunals, and their presence in the decision-making process has proved vital. Undoubtedly, women’s participation, as well as staff with expertise in issues of gender in the various organs of the court have led to the progressive interpretation of the Tribunal’s Statutes in sync with the development of law, the inclusion of gender charges in a number of indictments, and have contributed to the development of procedural provisions in the Rome Statute ensuring proper investigation methods in gender violence cases.\textsuperscript{179} The jurisprudence of the Tribunals greatly reflects women’s participation and it is unlikely the Tribunals would have reached such innovative decisions if women had not participated.\textsuperscript{180}

\textbf{2. Jurisprudence: Prosecuting Gender Crimes In the ICTY and ICTR}

Since the establishment of the Tribunals, the jurisprudence has been almost revolutionary, proceeding in a much more progressive direction than the Statutes seemed to allow. While the restrictive precedent of only including rape limited the range of prosecutable crimes, several of the indictments have brought charges of sexual or gender-based violence and a number of judgments have recognized sexual violence as an instrument of genocide, torture, crimes against humanity, or war crimes. The


\textsuperscript{179} Id.

\textsuperscript{180} For example, Judge Gabrielle Kirk McDonald was responsible for including sexual violence and rape charges in many of the indictments and decisions before the Yugoslav Tribunal, and it is unlikely the \textit{Akayesu} decision would have been reached without South African Judge Navanethem Pillay’s participation in both the trial and judgment.
jurisprudence of the Tribunals has reinforced crimes of sexual violence as among the most serious in international law. As a result, the decisions of the ad hoc Tribunals paved the way for the groundbreaking gender provisions in the Rome Statute and will have significant influence on future trials before the International Criminal Court, domestic courts exercising universal jurisdiction, and internationalized tribunals in Sierra Leone, East Timor, and potentially Cambodia. As such, a brief consideration of the case precedents most salient to crimes against women follows:

ICTY

- The Kunarac et al. judgment was the first to prosecute rape as a crime against humanity, and the first ever to convict enslavement in conjunction with rape. The Trial chamber also upheld convictions of torture on the basis of sexual violence, and specifically rape.\(^{182}\)
- The \textit{Celebici} judgment recognized sexual violence as torture.\(^{183}\) The case also established superior responsibility for gender crimes, and can be used as precedent for prosecuting superiors who fail to adequately monitor, supervise, control, train, or punish subordinates who commit rape. Finally, the case is significant for its consideration of sexual violence committed against male detainees.
- The \textit{Tadic} judgment, the first held by either UN Tribunal, and was expected to be the first international trial in history to prosecute rape separately and not in conjunction with other crimes.\(^{184}\) While the prosecutor was compelled to remove the rape charges because a witness was not willing to testify, the judgment included specific references to sexual violence and convicted Tadic of sex crimes. This trial set an important precedent for the future of gender crimes before both Tribunals, and indeed, in international law generally.
- The \textit{Furundzija} judgment further developed international law on torture by means of sexual violence and found that female judges with gender advocacy backgrounds are not inherently biased to rule on rape cases against men. It also concluded that a rule on the definition of rape had come into being at the customary law level and confirmed that acts of torture, consisted in part, of the rape of Bosnian women.\(^{185}\)

ICTR

- The \textit{Akayesu} judgment characterized rape as an instrument of genocide. This was the first ever conviction of genocide or crimes against humanity for sexual violence. While not complicit in the acts himself, Akayesu was convicted for his ordering, instigating, aiding and abetting the rapes. The Trial Chamber also articulated seminal definitions of rape and sexual violence under international law: rape is “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”\(^{186}\) Sexual violence is “any act of a sexual nature which is committed on a person under circumstances which are coercive.”\(^{187}\)

\(^{183}\) Prosecutor V. Delalic, Judgment, IT-96-21-T, 16 Nov. 1998 at Para. 394.
\(^{184}\) See Prosecutor v. Tadic, Jurisdiction, No. IT-94-1-AR72, 10 Aug. 1995.
coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.\textsuperscript{187}

\textit{iii. The International Criminal Court}

The ratification of the Rome Statute on April 11, 2002 to create an International Criminal Court marks an important moment for international criminal law, as the ICC creates a permanent mechanism to ensure individual accountability for crimes against humanity, war crimes, genocide, and grave breaches of the law of war. In terms of violence against women, the Rome Statute follows the precedent of the \textit{ad hoc} Tribunals and provides for the specific legal codification of a range of progressive gender provisions in international law. As I have argued elsewhere, “It is the first international treaty to recognize a number of violent sexual crimes as among the most serious in international law and represents a significant step forward for the international community in combating impunity for gender-related violence.”\textsuperscript{188}

Articles 7 and 8 of the Rome Statute define crimes against humanity and war crimes, respectively, and each contains separate sub-paragraphs identifying a broad range of gender-specific crimes. Article 7 (1)(g) of the Rome Statute definitively articulates the international law definition of crimes against humanity, a definition that includes “…rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”\textsuperscript{189} This list also appears in Article 8, enumerating war crimes. Importantly, the additional language “also constituting a grave breach of the Geneva Conventions”\textsuperscript{190} and “also constituting a serious violation of Article 3 common to all four Geneva Conventions”\textsuperscript{191} is found in relation to sexual violence. As Cate Steains notes, the “grave breach” reference was included not only to identify sexual

\textsuperscript{187} Id.
\textsuperscript{188} Mitchell, supra note 12, at 242.
\textsuperscript{189} ICC Statute at art. 7.
\textsuperscript{190} Article 8(2)(b)(xxii), Rome Statute.
\textsuperscript{191} Article 8(2)(c)(vi), Rome Statute.
violence as a breach of the Geneva Conventions, but also to signify that only serious crimes of sexual violence should fall within the definition.\textsuperscript{192} 

In general, the Rome Statute departs from the more restrictive approach to sexual violence found in prior international instruments, and the Statute’s recognition and codification of many other forms of sexual violence is an important international legal precedent. For instance, it is the first international treaty to codify crimes such as sexual slavery, forced pregnancy, and gender-based persecution.\textsuperscript{193} With respect to war crimes, the language of the Statute confirms that rape and other forms of sexual violence do in fact constitute grave breaches of the Geneva Conventions.\textsuperscript{194} Finally, the Statute adds “gender” as a ground of persecution under crimes against humanity, reversing precedent set by the \textit{ad hoc} Tribunals that “perpetuated the unhelpful perception that the international community continued to regard gender-based persecution as less prevalent—or less important—than persecution on the other grounds.”\textsuperscript{195}

The Rome Statue follows the experience of the ICTR and ICTY by including extensive structural mechanisms to ensure the effective investigation, prosecution, and trial of gender crimes. The Statue incorporates provisions relating to: (1) the participation of women in various organs of the court, (2) legal advisors and court staff with expertise in issues including violence against women and children, (3) special care for victims and witnesses in gender and sexual violence cases, (4) special protective measures for victims and witnesses both during and after the trials, and (5) respect for the personal circumstances of victims and witnesses.\textsuperscript{196} These provisions go a long way toward creating

\textsuperscript{192} Steains, \textit{supra} note 176, at 364.

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} See Mitchell, \textit{supra} note 12, at 243-44 (“Technically speaking, the Rome Statute cannot be seen as an amendment to the Geneva Conventions despite the large number of signatory states. However, the ICC did not establish rape as a grave breach afresh in international law as the provision follows declarations by the International Committee of the Red Cross (ICRC), various states and scholars, as well as the formal recognition by the United Nations investigating commission in Rwanda that rape constitutes a grave breach of the conventions. Hence, the ICC statute effectively codifies a customary law rule that rape is a grave breach. Nonetheless, while the codification of rape as a grave breach is significant, leaving it to the interpretation of the Rome Statute and not actually amending the Geneva Conventions leaves the grave breach status of rape unclear and allows relativism on this issue when it is not allowed for other violent crimes.”).

\textsuperscript{195} Steains, \textit{supra} note 176, at 370.

\textsuperscript{196} \textit{See Id.}, at 375-389 for a detailed discussion of these provisions.
a gender balanced and gender sensitive judicial body that will help the Court avoid many of the problems faced by the ad hoc Tribunals and ensure that jurisdiction relating to sexual violence is exercised in an appropriate manner.

**iv. Universal Jurisdiction and the Jus Cogens of Gender Crimes**

The most recent development in the treatment of rape as a crime in international humanitarian law is the movement toward codifying rape as a *jus cogens* norm subject to universal jurisdiction. Despite the progress made by the ICC and ad hoc Tribunals, sexual violence, including rape, remains ambiguous as a crime when prosecuted on its own in international law. While it is held to be among the most serious international crimes, it is only so determined in relation to other crimes, such as genocide or war crimes. This section attempts to ask why, notwithstanding the explosion of gender law in the last decade, rape is not considered a *jus cogens* norm subject to universal jurisdiction in its own right.

*Jus cogens* or peremptory norms represent the very top of the international legal hierarchy. The Vienna Convention on the Law of Treaties defines a peremptory norm under general international law as “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.” Peremptory norms are based, at a normative level, on the notion of agreement and community expectations. They embody the highest values of the international community as a whole and override all other legal norms, taking precedent over national law and other international law treaties or customary rules and rendering anything contrary to be illegal. *Jus cogens* functions as a binding source of international legal duty, which creates an *erga omnes* obligation upon all states, above all, not to allow

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197 For a more detailed treatment of the argument that rape in humanitarian law should be named *jus cogens*, see Mitchell, *supra* note 12.

198 I will use these terms interchangeably.

impunity for such crimes. In this way, peremptory norms uphold and identify those values deemed most important to the international community.

The principle of universal jurisdiction enables any state to arrest and prosecute those who have violated *jus cogens* norms, regardless of the victim’s nationality or where the offense may have occurred. Not only does it enable states to prosecute, but some scholars argue that it may actually place a positive obligation on states to either try or extradite such perpetrators when found on their territory. In this respect, universal jurisdiction derives its force from peremptory norms and the *erga omnes* obligations they entail. Consider, for instance, the example of two states signing a treaty where they agree to carry out genocide against individuals of a third state. Under universal jurisdiction, all states have the legal right and obligation to exercise jurisdiction over this unquestionably illegal action, because it is in the interest of the community as a whole to stop such conduct. Although there is no definitive list of accepted peremptory norms, consensus confirms that universal jurisdiction attaches to piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture as *jus cogens* violations.

Significantly, the jurisprudence of the *ad hoc* Tribunals and regional human rights courts have interpreted rape and sexual violence as evidence of slavery, genocide, torture, war crimes, and crimes against humanity—all of which are accepted *jus cogens* norms. As discussed above, *Celebici, Kunarac, and Furundzija* all recognized rape as an act satisfying the *actus reus* of torture. Kunarac also prosecuted rape as a crime against humanity, and rape is an enumerated offense under crimes against humanity and war.

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200 In the *Barcelona Traction Case*, the International Court of Justice (ICJ) held:

> [An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.]


202 See generally PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001) [hereinafter PRINCETON PRINCIPLES]. Universal jurisdiction attaches to piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture.

203 Id. See generally, supra Part II, Sections ii-iii on the *ad hoc* tribunals and ICC.
crimes in the Rome Statue of the International Criminal Court. The Akayesu judgment found rape to be an instrument of genocide and sexual violence to satisfy genocidal acts. Additionally, former Serbian President Slobodan Milosevic, until his recent death, was on trial at The Hague for charges of genocide including rape and sexual violence, and sexual violence is linked to genocide in the Rome Statute.204

Undoubtedly, in recent decades, rape has been recognized under international humanitarian law as an act constituting torture, crimes against humanity, war crimes, and genocide. It follows that rape and sexual violence—as essential component offenses—may be considered jus cogens violations subject to universal jurisdiction when they meet the constituent elements of these crimes.205 But is rape subject to universal jurisdiction as a crime in its own right? Can the prohibition of rape by itself be regarded as a peremptory norm?

First, let us consider if rape meets the requisite legal basis sufficient to reach the status of a peremptory norm. Bassiouni argues that this legal basis consists of the following:

I. International pronouncements, or what can be called international opinio juris, reflecting the recognition that these crimes are deemed part of general customary law.
II. Language in preambles or other provisions of treaties applicable to these crimes, which indicates the higher status of these crimes in international law.
III. The large number of states which have ratified treaties related to these crimes.
IV. The ad hoc international investigations of perpetrators of these crimes.206

To be sure, international pronouncements that deem rape or violence against women as part of customary law are few and far between. Such instruments would include treaties and agreements between states, general custom, and scholarly writings or judgments. Although scholarly writings and judgments of the ICTY and ICTR clearly recognize the prohibition of rape, they represent only “a secondary or subsidiary source of international

205 Id. (detailing the argument that rape can be prosecuted as jus cogens as an element of genocide, crimes against humanity, torture, and slavery).
law.\textsuperscript{207} While the judgments of the \textit{ad hoc} Tribunals might rely upon general norms of international law in their conclusions, they do not create them.

What about custom and treaties? As mentioned before, the Statutes of the Nuremburg and Tokyo Tribunals fail to mention rape at all. And rape was not included in the Nuremburg Principles, which eventually became customary law. The Geneva Conventions have become customary international law, but do not expressly recognize rape as a grave breach. The Statutes of the \textit{ad hoc} Tribunals, while they do enumerate rape as a crime against humanity, only obligate the organs of the Tribunal to judge and punish international crimes and are not binding on all states to act in the prohibition of rape. An argument can be made that the Rome Statute—as a widely endorsed multilateral treaty that includes rape under the provisions of war crimes and crimes against humanity—can evidence the \textit{jus cogens} status of sexual violence, or at the very least rape. It does bind signatory states to prosecute sex crimes under their own national jurisdiction, or if unable or unwilling, under the jurisdiction of the ICC. However, the \textit{jus cogens} status of the Rome Statute is hindered by states, including the United States, who remain persistent objectors to the “object and purpose” of the treaty and have not ratified. This is not an insignificant detail, considering that the United States is the leading opponent of the ICC and the world’s foremost power.\textsuperscript{208}

Numbers II and III of Bassiouni’s criteria fall victim to the same lack of explicit evidence or true customary status as number I. Consider the major human rights conventions that do not prohibit rape outright: The Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights, International Covenant of Economic and Social Rights, the Convention of the Child, the European Convention of Human Rights, the African Charter of Human Rights, the American Declaration of the Rights of man, and perhaps most surprisingly, the Convention for Elimination and

\textsuperscript{207} Sellers, \textit{supra} note 204, at 297.

Discrimination Against Women and the Additional Protocol for the Convention for Elimination and Discrimination Against Women.209

Number IV is somewhat helpful, given the jurisprudence of the ad hoc Tribunals and the use of semi-internationalized to prosecute international crimes, including gender crimes. But emergent practice, by itself, is not sufficient to establish jus cogens.

Given the above considerations, it is certainly questionable whether the crime of rape under international humanitarian law imposes a non-derogable duty upon states other than protection against the infliction of violence against women under Article 27 of the Geneva Conventions.210 Yet given the troubled history of rape as a war crime within a patriarchal international legal system, we ought to ask: Might the absence of explicit jus cogens indicia be the result of a history of ambiguity and silence when dealing with the prohibition of rape? How can a crime, often prosecuted among international law’s most serious violations, fail to cross the threshold of peremptory norm?

To be sure, the technical legal basis for rape as a jus cogens norm is thin. However, I want to argue that a sound and sufficient legal basis exists for rape as a peremptory norm. First, consider the historical legal evolution of the crime. The number of legal instruments expressly prohibiting rape has increased substantially over time. Clearly, the more legal instruments that prohibit rape, the more one can argue it has become a peremptory norm. Second, the domestic law of every state in the world, to some degree, outlaws rape.211 Even while the law of one state does not bind another and does not translate directly into a peremptory norm, the universal condemnation of rape in national legal systems creates a general international norm expressing the illegality of rape and

209 Sellers, supra note 204, at 301.
210 Id. at 303.
211 Id. at 302. See e.g., Section 361(2) of the Chilean Code, Código Penal del Chile, Biblioteca del Congreso Nacional, COD-18742 (2001); Art. 236 of the Chinese Penal Code (1997); Art. 177 of the German Penal Code (StGB); Art. 177 of the Japanese Penal Code, translated in THE CRIMINAL CODE OF JAPAN (Thomas L. Blakemore, trans., 1954); Art. 179 of the Socialist Federal Republic of Yugoslavia Penal Code; §132 of the Zambian Penal Code, reprinted in 7 LAWS OF THE REPUBLIC OF ZAMBIA (REVISED) 1995; Art. 201 of the Austrian Penal Code (StGB); French Code Penal Arts. 222-22; Art. 519 of the Italian Penal Code reprinted in 23 THE AMERICAN SERIES OF FOREIGN PENAL CODES, ITALIAN PENAL CODE (1978); COD. PEN. art. 119 (Arg.). PEN. CODE § 375 (Pak.). PEN. CODE art. 375 (India). PEN. CODE § 117 (Uganda). PEN. CODE art. 242 (Neth.). CRIM. CODE ch. XXXII, art. 297 (S. Korea); CRIM. CODE ch. 24, art 216(1) (Den.); CRIM. CODE § 271-75 (Can.); CRIMES ACT OF 1961 § 128 (N.Z); COD. PEN. art. 195 (Nicar.).
provides further evidence of its customary status. Third, the slowly increasing number of international prosecutions for rape forms a basis for *jus cogens*. The characterization of rape in judgments by the *ad hoc* Tribunals clearly shows that it is among the worst international crimes and defines an explicit condemnatory attitude on the part of international actors toward sexual violence. From this it follows that we might potentially derive a positive obligation on all states to prosecute or extradite alleged offenders of sexual violence. Fourth, the jurisprudence of the *ad hoc* Tribunals, the Rome Statute, and other scholarly writings strongly indicate the peremptory status of rape. While these may only be subsidiary sources of international law, in the context of the evolution of gender crimes they further the argument that rape is prohibited as a *jus cogens* norm with *erga omnes* obligations.

Clearly, an argument can be made that rape has risen to the level of a peremptory norm.\(^2\) However, that is not nearly enough. The ambiguous position of women and the crimes committed against them must be clarified. As Nowrojee argues:

> The lack of attention to these crimes enables the international community to downplay women’s particular suffering and, as such, renders women invisible … Although rape and other forms of sexual violence often legally constitute torture, genocide, mutilation, and enslavement, they have, with rare exceptions, not been treated with the same seriousness as other war crimes.\(^3\)

This lack of naming ensures the invisibility and silence of the particularly brutal violence committed against women during war. Violence against women needs to be pursued more vigorously within international fora and needs to be explicitly recognized as a peremptory norm subject to universal jurisdiction. Rather than having sexual violence subsumed in the elements of other crimes, future international treaties and conventions need to identify rape and sexual violence, standing alone, as explicit violations of international law. To this end, an international convention firmly denouncing sexual violence as a violation of the international communities highest values whose prohibition extends as a duty to all nations, would go a long way toward clarifying the ambiguous

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\(^2\) For an argument on the legality of rape as *jus cogens*, see Mitchell, *supra* note 12.

treatment of rape in international law. More practically, is the enforcement of the prohibition of rape by semi-internationalized tribunals and national courts as a way to end impunity and further establish visibility for violence against women as *jus cogens* through legal practice. The following Parts provide an initial exploration of the prosecution of rape in semi-internationalized tribunals using the SCSL as a case study to examine the potential of hybrid courts to offer substantive and normative post-conflict progress in the development and application of gender provisions aimed at addressing the silent crime of sexual violence.²¹⁴

III. INTERNATIONALIZED DOMESTIC COURTS AND THE HYBRIDIZATION OF INTERNATIONAL LAW

In the beginning of this Article I argued that one of the remaining challenges for international law is the development of an effective and efficient means for the enforcement of gender laws. No matter how developed one feels international law is regarding gender provisions, one thing remains certain: violence against women is thriving. Important breakthroughs have been made in recent years, including the jurisprudence of the *ad hoc* Tribunals and the ratification of the Rome Statute, but they continue to fall miserably short of the promises contained within them. The real needs of victims are not being addressed because compliance and accountability at both the international and national level remains largely ephemeral.

This Part attempts to do two things. First, it recognizes that nothing has changed for women in the international order and that we need to began thinking about the international system differently. Second, it considers the potential of semi-internationalized criminal courts and national governments exercising universal jurisdiction

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²¹⁴ The Special Court provides a unique empirical basis for evaluating the impact of gender-specific provisions on domestic law because of its emphasis on sexual violence at all levels of the judicial process and its generally progressive take on gender justice. For instance, the Statute of the SCSL draws upon the gender specific definitions of crimes against humanity in the ICC statute as well as expressly establishing that the court draw upon judicial precedents set by the ICTR. This would include the Akayesu judgment’s progressive approach to rape. Still, problems may arise with respect to charging perpetrators with gender-specific acts of violence that are not yet enumerated in the ICTR’s or ICTY’s respective statutes. The top-down imposition of international legal norms as defined by the ICTR/ICTY may limit the progressive or innovative development of gender provisions by the SCSL, especially considering international pressures for the court to establish itself as a legitimate international tribunal.
to provide effective justice and “translate paper principles into individual and organizational action”\textsuperscript{215} that might shape compliance at the ground level.

To be sure, the state remains the dominant unit of political organization in the international community. However, we must keep in mind that “the state,” so-called, is no more than an arbitrary social construct, and one that is no longer useful in explaining increasingly complex international spaces. The unitary state has long dominated international legal and political analysis—it is the wrong analytical lens to deal with gender issues. In order to think more productively about gender crimes, we must shake off the fixed boundaries of “the state” and imagine the international order in ways more appropriate to today’s networked world.

In this regard, I want to elucidate Anne-Marie Slaughter’s argument for thinking of the world order differently, more openly, and in more complicated ways by shifting to the analytical lens of the “disaggregated” state.\textsuperscript{216} Using the disaggregated state as a cognitive construct permits us to see “that government networks pop up everywhere”\textsuperscript{217} and that utilizing these networks may “also improve compliance with international treaties and customary law.”\textsuperscript{218} In terms of judicial networks, this works in two ways: (1) vertical networks of supranational courts with direct links to national government institutions that can exercise coercive authority on their behalf; and (2) horizontal networks of national courts interacting to enforce international legal obligations or providing technical assistance to rebuild regulatory or judicial capacity in states where the judicial infrastructure is weak or has collapsed.\textsuperscript{219}

One effect of the Rome Statute was that its complementarity regime works to pierce the veil of international organizations and devolves power locally to domestic courts. This system runs contrary to traditional international law paradigms, where order

\textsuperscript{215} Slaughter, \textit{supra} note 51, at 271.
\textsuperscript{216} \textit{Id.} (This section leans heavily on Slaughter’s ideas. The goal here is not originality; but to use her analysis as a means to enter into dialogue about rethinking gender crimes and the judicial networks created by internationalized tribunals.)
\textsuperscript{217} \textit{Id.} at 13.
\textsuperscript{218} \textit{Id.} at 24.
\textsuperscript{219} \textit{Id.}
is imposed from the top-down. Vertical networks, like the ICC’s complementarity regime, can strengthen, encourage, and enforce their domestic counterparts. The possibility that the ICC will exercise jurisdiction maximizes the likelihood domestic trials will take place. It thereby prompts nations to implement the proper legislation and attempt to prosecute their own war criminals or perpetrators of genocide or crimes against humanity.

As Burke-White argues, the future of international criminal law enforcement will be at the national or quasi-national level conceived as a “community of courts”—domestic, semi-internationalized, and supranational—a decentralized system of international criminal law enforcement comprised of “a set of adjudicatory bodies in interdependent, self-organizing relations.” In this emergent community of courts, “national courts form the front line of a system of enforcement,” while “supranational tribunals act as a backstop where national courts are unwilling or unable to adjudicate.” The interdependent, complementary interaction of national and supranational courts is paramount in such a system, including overlapping jurisdictions, the application of a common set of laws and procedural standards, and the pursuit of a common endeavor of “ensuring accountability for serious international crimes.” For example, the presence of the ICC backstopping national courts is likely to create greater compliance at the national level, monitored and enforced by domestic courts enforcing international law. National courts may exercise national or territorial jurisdiction, or potentially, universal jurisdiction over foreign nationals for crimes committed elsewhere, casting a wide net of accountability when combined with the ICC.

When national courts are unable or unwilling to prosecute, say, due to a collapsed judicial system in the wake of armed conflict, international bodies may step in to provide assistance to rebuild judicial capacity and reconstruct civil society. Burke-White rightly

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221 Burke-White, supra note 50, at 3.

222 Id.
maintains that semi-internationalized tribunals are likely to be central to this emerging community of courts as they exemplify the emerging community of courts functioning in a pluralist international legal order. These tribunals “are based in domestic legal systems while drawing on international judges, jurisprudence, and resources.” Operating at the intersection between domestic and international law, semi-internationalized courts are uniquely positioned to enforce international criminal law. Semi-internationalized tribunals are the most recent enforcement mechanisms to emerge and they offer a distinctive combination of both vertical and horizontal networks, providing the benefits of both models discussed above. Specifically, they have the advantage of including a mixture of international and national law and participants. Such a formation potentially allows the court to adapt to the needs of a specific social context while also applying international norms. Crucially, the hybrid character of semi-internationalized tribunals allows them to adapt to political concerns and contexts as well. In this respect, the hybrid courts are more effectively positioned to enforce the law with respect to domestic politics and legitimate cultural differences due to their geographic proximity to the crimes in question and knowledge of cultural differences. Whereas the future political prospects for the creation of new, fully international courts like the ad hoc Tribunals remain limited, semi-internationalized enforcement bodies may arise within a variety of political alignments.

From a normative perspective, internationalized domestic courts offer the legitimacy and judicial experience of an international tribunal, provide potentially lower costs of prosecution than international tribunals, are proximal to the crimes in question, and may be able to play a crucial role in the local processes of reconciliation and judicial

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223 Id.
224 Id. at 61 (identifying five political conditions that could give rise to the domestic enforcement of international criminal law: “First, domestic tribunals may emerge where political divides within an illiberal State’s elite generate political benefits for powerful members of that elite who support international criminal justice. Second, where the U.N. serves as administrator of a territory in the wake of international crimes, the U.N. may establish such a mechanism. Third, semi-internationalized tribunals may be created where they shift policy interdependence and allow a vulnerable state to externalize the costs of prosecution vis-à-vis a more powerful neighbor onto the international community. Fourth, in liberal States strong preferences of domestic interests may result in a government policy of accountability. Finally, resource constraints may lead governments to pursue creative strategies for the enforcement of international criminal law.”)
reconstruction.\textsuperscript{225} By being proximate to the location of the crimes, internationalized
criminal courts offer greater local legitimacy and avoid alienating the victims and civil
society—a principal criticism of the \textit{ad hoc} Tribunals.\textsuperscript{226} In places where the judiciary has
collapsed or is corrupt, internationalized courts provide an important balance of
international and domestic resources and are likely to effect positive domestic judicial
reform in the post-conflict state. In effect, hybrid courts are “grafted onto the domestic
judiciary, applying international norms within the overall structure of the domestic
courts.”\textsuperscript{227} The court’s judicial panels typically consist of local and international judges
sitting together. Because hybrid courts are effectively part of the domestic judicial system,
the mixed panel allows judicial cross-fertilization and reconstruction, both legal and
physical. For instance, working side by side to prosecute international crimes, local
judges are able to offer an invaluable cultural perspective and, learning from their
international colleagues, newly trained judges gain the experience and competence to
eventually take over and continue to uphold international standards long after the
internationalized court is finished.

If properly implemented, internationalized courts have the potential to expand
international human rights law, and particularly woman’s rights, in the wake of armed
conflict. By enforcing international justice in a quasi-domestic forum, internationalized
courts could potentially impart a powerful new mechanism for establishing and enforcing
gender provisions in the judiciary of post-conflict states. This could be crucial in post-
conflict states arising from mass violence, such as Sierra Leone, where the judiciary is left
completely decimated and therefore unable to provide adequate justice or reconciliation
to victims on its own. The interaction of local with international law could improve the
domestic judicial system at the ground level while also providing greater awareness of

\textsuperscript{225} Id. at 24.
\textsuperscript{226} See Alvarez, \textit{supra} note 52; PHILLIP GOUREVITCH, \textit{WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE
\textsuperscript{227} William W. Burke-White, \textit{Regionalization of International Criminal Law Enforcement: A Preliminary
Enforcement}].
judicial efforts and international humanitarian norms within the victimized community due to the proximity of the court. Long-term, this could translate into greater compliance with international norms being enforced at the local level and help to mainstream gender provisions in communities that have never before had them enforced. This is particularly salient in a community such as Sierra Leone, where existing domestic law regarding violence against women has a long history of discrimination and corruption. As Burke-White suggests: “The most effective means of preventing individuals from committing international crimes is the sure knowledge that they will face justice, either before domestic or supranational courts, if they transgress the law.” The effective existence of internationalized courts turns on the obligation of states to exercise jurisdiction over individual violators. This principle takes on particular urgency for the responsibility to adjudicate violence against women, as crimes that have been traditionally silenced in international law.

The following Part considers the prosecution of sexual violence at the Special Court for Sierra Leone. It closely analyzes the effectiveness and operation of the SCSL as a hybrid tribunal against the backdrop of internationalized courts as key actors in the emergent community of courts. The central premise of this Part asks a simple, but important question regarding the efficacy of this paradigm for the future of international criminal law’s adjudication of crimes against women: If semi-internationalized tribunals are to be central within a pluralist international legal system as a best practices model, what is the potential for such courts to progressively develop and enforce gender law as a fully meaningful and visible component of international criminal law? If the future of international criminal law is a predominantly horizontal framework, “comprised of a variety of different domestic and semi-internationalized courts … [articulating and applying] general overarching norms” within and adapted to specific localities, how will this affect the way in which the international community addresses male violence against

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228 Burke-White, supra note 50, at 79.
women? Given the increased interest of the international community in prosecuting serious crimes against human life and the recognition that it is unacceptable to allow complete impunity for individual perpetrators of grave atrocities, what is the potential for expanding international human rights law, and particularly woman’s rights, in the wake of armed conflict? How can the domestic enforcement of international criminal law, through the use of hybrid tribunals, contribute to establishing gender-specific provisions in the judiciary of post-conflict states?

Part I of this Article traced of Sierra Leone’s conflict and the situation of its legal infrastructure with respect to sexual violence. Part IV builds on that discussion, providing a focused study of the SCSL and its sexual violence prosecutions. As an initial exploration of the development and application of gender law by a semi-internationalized tribunal, this Part is not meant to be exhaustive, particularly since the Court’s work is still ongoing. Instead, it serves as a preliminary exploration into the development of gender laws through the lens of the SCSL as a semi-internationalized criminal court.

IV. PROSECUTING SEXUAL VIOLENCE BEFORE THE SPECIAL COURT FOR SIERRA LEONE

The SCSL was established by an agreement between the United Nations and the government of Sierra Leone (Security Council Resolution 1315) to try war criminals and violators of humanitarian law in the Sierra Leone civil war. In contrast to the ICTR and ICTY, “the Special Court for Sierra Leone is different from earlier ad hoc courts in the sense that it is not being imposed upon a state.” The Special Court is thus not a U.N. body, but is instead an ad hoc international treaty-based court created by agreement between the U.N. and Sierra Leone—at the request of the Government of Sierra Leone.

The SCSL is mandated to “prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law.”\textsuperscript{232} Although the Court is located in Freetown, Sierra Leone, its proceedings operate autonomously from the Sierra Leone domestic legal system. Instead, the Court has “concurrent jurisdiction with and primacy over the domestic courts of Sierra Leone.”\textsuperscript{233} Reflecting the hybrid model, the Special Court draws on international and domestic law and is therefore competent to prosecute “violations of international humanitarian law and Sierra Leonean law.”\textsuperscript{234} Specifically, the Statute vests the Special Court with the ability to prosecute crimes against humanity, violations of Article 3 of the Geneva Conventions, and other serious violations of international humanitarian law.\textsuperscript{235}

Unlike the ICTY or the ICTR, the SCSL is the “first international criminal tribunal to sit in the country where the war crimes took place,”\textsuperscript{236} and in and of itself, this may make the SCSL more relevant to the population of Sierra Leone and addresses the principle criticism of the \textit{ad hoc} Tribunals in terms of its physical distance from victims.\textsuperscript{237}

In addition to the SCSL, a Truth and Reconciliation Commission (TRC) was established in 1999 through cooperation between the United Nations and Sierra Leonean government.\textsuperscript{238} Notably, this is the first time the international community has created two mechanisms operating concurrently to address past atrocities. Whereas “international courts play a definably limited role in post-conflict justice, since they prosecute only the chief architects of the violence … Truth Commissions offer a larger number of victims the opportunity to recount the wrongs committed against them.”\textsuperscript{239} The TRC, modeled on the

\begin{itemize}
\item Statute of the Special Court for Sierra Leone, art. 1, available at http://www.sierraleone.org/specialcourtstatute.html.
\item SCSL Statute, art. 1.
\item Kendall and Staggs, \textit{supra} note 1, at 2.
\item See \textit{e.g.}, Alvarez, \textit{supra} note 53.
\item Hall and Kazemi, \textit{supra} note 54, at 289.
\item Nowrojee, \textit{supra} note 17, 103.
\end{itemize}
Truth Commission in South Africa, operated between 2002 and 2004, and has since finished its hearings.\textsuperscript{240} The purpose of the TRC is to create an impartial historical record of the human rights abuses that occurred during the war in Sierra Leone.\textsuperscript{241} During the time of its operation, the TRC recorded the written statements of victims, perpetrators, and witnesses. The TRC also held public hearings where victims, perpetrators, and witnesses to the events of the conflict could provide their own story of what had occurred.\textsuperscript{242}

The Truth and Reconciliation Commission describes the TRC as a body meant to “address impunity, respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.”\textsuperscript{243} The TRC is designed to go beyond the limited accountability provided by the SCSL and provide a mechanism to serve the wider population by promoting truth-telling, at least in part. In this regard, the Commission notes that the function of the TRC is “to work to help restore the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered and for perpetrators to relate their experiences, and by creating a climate which fosters constructive interchange between victims and perpetrators.”\textsuperscript{244} Of particular importance, the TRC mandate emphasizes that the Commission ought to “work to help restore the human dignity of victims and promote reconciliation … [and] pay special attention to the subject of sexual abuses.”\textsuperscript{245} Like the SCSL, the TRC is notable for using gender-sensitive strategies and placing a special emphasis on addressing crimes against women, and the TRC did a commendable job of assuring that gender crimes were addressed in a serious manner.\textsuperscript{246} For example, the TRC held hearings dedicated solely to violence against

\begin{itemize}
\item \textsuperscript{240} Id. at 88.
\item \textsuperscript{242} Nowrojee, \textit{supra} note 17, at 93.
\item \textsuperscript{243} TRC Act, \textit{supra} note 232, at Pt. III (6)(1).
\item \textsuperscript{244} \textit{Id.}, at Pt. III (6)(2)(a)(b).
\item \textsuperscript{245} \textit{Id.}, at Pt. III (6)(2)(b) [emphasis added].
\item \textsuperscript{246} See generally Nowrojee, \textit{supra} note 17.
\end{itemize}
women. Binaifer Nowrojee, who was present at the hearings, notes: “Sierra Leonean women’s groups spoke positively about the special hearings on the situation of women in Sierra Leone. The TRC later reported that the hearings on gender violence had garnered the largest attendance of all the TRC Sessions. Rape victims who testified before the TRC appeared to have few complaints about their experience testifying.”

The TRC also allowed rape victims to choose the degree to which their testimony would be public or private, by giving victims the option to speak before the commission using three different options: (1) testifying in camera; (2) speaking openly before a public audience with their identity concealed by a screen; or (3) speaking openly in public without hiding their identity. By giving rape victims the choice of public or private testimony, the TRC demonstrated sensitivity to the stigma attached to rape. Additionally, only female members of the TRC questioned rape victims and the TRC commissioners prepared the physical space of the hearings to provide “a comfortable, private space for women before and after they testified, protecting their identity as they entered and left the hall, ensuring their privacy by shielding them with a screen throughout their testimony … and had a nurse and ambulance available throughout the hearings in case a witness became emotionally distraught.” Such measures are especially relevant in a post-conflict environment like Sierra Leone, where many victims of rape may feel ashamed or afraid to testify in a climate of shame for victims and continued violence and impunity.

As a semi-internationalized tribunal, the SCSL seeks to deliver a hybrid approach to justice, “an approach that must continually balance adherence to international legal precedents, conventions and norms with a localized interpretation of how justice would best be served in Sierra Leone.” The SCSL’s approach to justice attempts to make a dual impact: “on the one hand, it seeks to positively affect the social and judicial circumstances

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247 Id. at 95.  
248 Id.  
249 Id. at 94.  
250 Id. (noting that Nowrojee was present at the hearings).  
251 See Kendall and Staggs, From Mandate to Legacy, supra note 1, at 4.
within Sierra Leone, and on the other it seeks to create a model for future courts and tribunals that adopt a similarly mixed composition. This notion of hybridity is built into the personnel of the SCSL as well. The Special Court has two operating trial chambers, each consisting of two judges appointed by the UN and one who is nominated by the government of Sierra Leone. The staff of the Special Court—including prosecutors, investigators, and other officials—also consists of a mix of international and Sierra Leonean members.

Thus far, the chief U.N. prosecutor of the SCSL, David Crane, has indicted thirteen individuals who were associated with the RUF, AFRC, and CDF forces during the conflict. Nearly all of the indictments include crimes of sexual violence, ranging from rape, sexual slavery, forced marriage, and command responsibility for sexual violence. The special emphasis of sexual violence as crimes prosecuted on their own accord shows that gender crimes can be effectively addressed if the political will exists—despite the SCSL’s constraints of having fewer financial and personnel resources than the ad hoc Tribunals—and represents an important development for the women of Sierra Leone “gaining both a measure of control over their bodies and a chance to assert control over their own lives through the prosecution of such crimes.” Yet, while the presence of sexual violence in the indictments is certainly an encouraging sign, it remains to be seen how such crimes will be treated in the prosecutions—although early indicators in the CDF case are not encouraging. Presently, nine of the thirteen individuals are on trial as individual participants in the conflict and are being housed at the Special Court’s

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252 Id.
253 Nowrojee, supra note 17, at 97.
254 Id. at 98.
255 Id. at 99 (noting that “the efforts in Sierra Leone contrast sharply with the experience of the International Criminal Tribunal for Rwanda (“ICTR”), where ten years after the genocide, international justice for Rwandan women remains unrealized largely because of a lack of political will in the Prosecutor’s Office to investigate comprehensively or to reflect fully in the indictments the widespread sexual violence that occurred during the genocide”).
256 See Eaton, supra note 16, at 908.
257 See infra Part IV, Section C, iii.
Current cases at trial include Issa Sesay, Augustine Gbao, and Morris Kallon of the RUF; Alex Tamba Brima, Ibrahim Bazzy Kamara, and Santigie Borbor Kanu of the AFRC; and Samuel Hinga Norman, Moinina Fofana, and Allieu Kondew of the CDF. The prosecutor expects the RUF, AFRC, and CDF cases to be completed by the end of 2006. Of the remaining four indictments, two high-level RUF commanders have died, AFRC leader Johhny Paul Koroma is at large with whereabouts unknown, and former Liberian president Charles Taylor was recently arrested as he attempted to flee Nigeria and currently sits in a jail cell at the SCSL, although he is expected to be tried at the Hague for fear that his presence in Sierra Leone will lead to political unrest. Wherever he is eventually tried, the arrest of Taylor—whose indictment was the first issued by the prosecutor—represents a significant development for the SCSL and for sending a clear message of accountability to the people of Sierra Leone that no individual, no matter how powerful, is exempt from prosecution.

Given the foregoing general background, this Part considers the SCSL in detail, looking specifically at the treatment and prosecution of sexual violence. Each aspect that makes the SCSL unique—the hybrid structure, location, cheaper costs, swift mandate, a conflict without ethnic cleansing, and the concurrent use of a TRC—will have an effect on how crimes of sexual violence are prosecuted and will be examined in turn. Because the Special Court is currently in its trial phase and prosecutions are currently ongoing, the analysis of actual cases will be limited and preliminary. As a result, much of this section discusses procedural and legal aspects of the Special Court. The analysis is not meant to be exhaustive, but rather is intended to focus on the SCSL as a model for semi-internationalized courts, and hopes to highlight some areas of success and potential

258 Kendall and Staggs, From Mandate to Legacy, supra note 1, at 3.
259 Id. at 8.
260 Nowrojee, supra note 17, at 98.
262 See Kendall and Staggs, From Mandate to Legacy, supra note 1, at 7.
challenges facing the Special Court when dealing with violence against women in the hybrid context.

A. The Statute

The Special Court’s Statute places particular emphasis—implicitly and explicitly—on the significance of prosecuting sexual violence. In part, the inclusion of this emphasis signifies the willingness of the international community to “combat a culture of impunity that has historically surrounded sexual violence in times of war” and the general significance of these crimes in international criminal law.\footnote{Sara Kendall and Michelle Staggs, Silencing Sexual Violence: Recent Developments in the CDF Case at the Special Court for Sierra Leone (U.C. Berkeley War Crimes Studies Center, 2005) at 6 [hereinafter Silencing Sexual Violence].} Additionally, the inclusion of such a strong gender component in this foundational document can be seen as both a reflection of the prevalence of sexual violence in the Sierra Leone conflict, as well as a direct reaction to the groundbreaking jurisprudence emerging from the \textit{ad hoc} Tribunals that has “firmly established sexual violence among the most serious crimes committed in the course of an armed conflict.”\footnote{Id.}

The Statute of the SCSL provides the mandate to “prosecute persons who bear the greatest responsibility for serious violations” of international humanitarian and Sierra Leonean law, including sexual violence as crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, as well as other serious violations of international humanitarian law and crimes under Sierra Leonean law.\footnote{Id.} Article 2 of the Statute defines crimes against humanity as those committed “as part of a widespread or systematic attack against any civilian population” and follows the ICC definition by explicitly including “rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence” as a specific category.\footnote{Id. Art. 2.} However, the Statute eliminates national, cultural, and gender grounds from the persecution category.
within crimes against humanity. This is an unfortunate and inappropriate step given the developments by the ICC, ICTR, ICTY, and is especially concerning due to the Sierra Leone conflict’s high incidence of sexual violence and the use of boy-soldiers by rebel forces. However, it should not have an effect on the ability of the SCSL to prosecute sexual violence, because such crimes are enumerated separately.

Article 3 provides for violations of Article 3 common to the Geneva Conventions, which covers crimes committed in non-international conflicts.\(^{267}\) The inclusion of Article 3 is important as a second avenue for prosecuting sexual violence, but its inclusion without revision of the terms “outrages upon personal dignity” continues the unhelpful use of language that places shame on the victim rather than the perpetrator. Additional international crimes that are not covered under Articles 2 and 3 may be prosecuted under Article 4, which provides for “other serious violations of international humanitarian law.”\(^{268}\) Although Article 4 does not explicitly mention rape, sexual violence can be easily construed under Article 4 under the provision giving the SCSL power to prosecute persons “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”\(^{269}\)

Article 5 specifically allows the SCSL to prosecute a selection of crimes under Sierra Leonean law, including crimes under the Prevention of Cruelty to Children Act of 1926, “abusing a girl under 13 years of age,” “abusing a girl between 13 and 14 years of age,” “abducting a girl for immoral purposes,” and a handful of provision relating to the destruction of property. It is unlikely that Article 5 will be helpful in prosecuting sexual violence because of the very restrictive age limits imposed by Sierra Leonean law on violence against women. The provisions were included to help ensure the punishment of perpetrators of sexual violence, but the provisions instead appear to “perpetrate cultural stereotypes, and as a result … [are] generally less protective than international

\(^{267}\) Id. Art. 3.

\(^{268}\) Id. Art. 4.

\(^{269}\) Id. Art. 4 (a).
standards.” Moreover, while it may be sensitive to Sierra Leonean legal and cultural norms, the language included in Article 5 of the Statute is highly problematic for two glaring reasons: “first, it may serve as a bar to victims of sexual violence through the perpetration of gender stereotypes under Sierra Leonean law … furthermore, it provides a sliding scale with regard to the seriousness of the sexual assault based on the victim’s age.” Specifically, these provisions continue to perpetuate the idea that only the rape of a virgin constitutes rape in Sierra Leonean culture. If part of the Special Court’s mission is to build a lasting legacy in Sierra Leone that rebuilds and implements social change and progressive standards of justice, these backward provisions are certainly not an appropriate signifier of that mission to the women of Sierra Leone. Yet, despite the unfortunate codification of these regressive domestic laws, rape may still be prosecuted by the SCSL as a crime against humanity, a breach of the Geneva Conventions as an “outrage against personal dignity,” or as an attack “against the civilian population” under Article 4. In addition, the Statute calls for the “due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes” because of the “nature of the crimes committed and the particular sensitivities of girls, young women, and children victims of rape, sexual assault, abduction and slavery of all kinds.”

Finally, it is notable that Article 15 obligates the Prosecutor to include staff experienced in gender-related crime. Article 15 states that “given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.” The addition of this gender-

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270 Eaton, supra note 16, at 912.
271 Id.
272 See We’ll Kill you if You Cry, supra note 20, at 24.
273 Nowrojee, supra note 17, at 98.
274 SCSL Statute, Art. 15.
specific mandate signifies, from the outset, that the Special Court places significant emphasis on sexual violence and recognizes the particular harm such crimes cause, as well as the need for gender sensitive procedures, experienced staff, medical and psychological staff, as well as adequate protection for witnesses and victims\(^{275}\) of sexual violence who testify.\(^{276}\)

\textit{i. Temporal Jurisdiction}

The Special Court has jurisdiction to prosecute crimes committed during the conflict in the territory of Sierra Leone after 30 November 1996.\(^ {277}\) Due to the mixed jurisdiction of the SCSL and amnesty under the Lomé Peace Agreement, the temporal jurisdiction of the court is twofold. First, the temporal jurisdiction for crimes listed under Articles 2-4 covering international humanitarian law starts on 30 November 1996, the date when the Abidjan Peace Agreement failed and war crimes escalated.\(^ {278}\) Second, due to crimes under Sierra Leonean law not being exempt from the Lomé amnesty, temporal jurisdiction for crimes listed under Article 5 covering crimes under Sierra Leone’s domestic law starts on 7 July 1999. In both domestic and international law cases, jurisdiction is open-ended to allow for future crimes during the trials.\(^ {279}\) Most likely, the more limited jurisdiction for domestic laws imposed by the amnesty will not have any effect on prosecutions. Although, one could imagine a situation where an accused cannot be prosecuted for crimes under international law, but could under Sierra Leonean law and would not be able to be charged due to the crimes taking place before 1999, though this situation is unlikely.

\(^{275}\) SCSL Statute, Art. 16., para. 4 (providing “protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses”).

\(^{276}\) See Kendall and Staggs, \textit{From Mandate to Legacy}, supra note 1, at 21 (for a discussion of witness protections).


\(^{278}\) SCSL Statute, Art. 10 (“An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution”).

\(^{279}\) See Schocken, supra note 236, at 445.
ii. Personal Jurisdiction

The SCSL has personal jurisdiction over those “who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”\(^{280}\) This language is meant to include individual criminals in both leadership and subordinate positions, civilians, as well as all peacekeepers or related personnel, although the latter are not likely to be tried by the court.

Article 6 firmly enshrines the principle of individual criminal and command responsibility that has been developed since the Nuremburg Trials by the *ad hoc* Tribunals and the ICC. Article 6 follows Article 6 of the ICTR, Article 7 of the ICTY, and Article 28 of the Rome Statute. Article 6 (3), in particular, defines what is required to prove command responsibility. This provision holds that crimes committed by a subordinate “do not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measure to prevent such acts,” and that the superior will be held responsible.\(^{281}\) The command responsibility standard is particularly important because of the SCSL’s limited mandate to only prosecute a handful of those “persons who bear the greatest responsibility.”\(^{282}\)

Article 6 will also be important to prosecuting sexual violence, and brings up a number of considerations. As shown by the *Celebici* case at the ICTY, “in the absence of direct evidence of the superior’s knowledge of the offences committed by his subordinates, such knowledge cannot be presumed, but must be established by way of circumstantial evidence.”\(^{283}\) Thus, in order to prosecute sexual violence under a theory of

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280 SCSL Statute, Art. 1.
281 SCSL Statute, Art. 6 (3).
282 SCSL Statute, Art. 1.
command responsibility, the prosecutor must be able to establish a link between the acts committed by individuals and the knowledge of those acts by the commander. According to the Trial Chamber in Celebici, one way to show that such knowledge existed is through “the widespread occurrence of the acts” in question. 284 Given estimates that 215,000 to 257,000 women and girls were subjected to sexual violence during the Sierra Leone conflict, establishing circumstantial evidence should not be too difficult. Indeed, Eaton argues that by using this data as evidence of the widespread and systematic use of sexual violence as a general component of military campaigns like “Operation No Living Thing,” that “the prosecutor at the SCSL has a strong case for charges of command responsibility for sexual violence, despite the lack of clear indication that rapes were ordered as a tool for a specific end.” 285 However, if the prosecutor is unable to convincingly establish “widespread occurrences” sufficient enough to meet the “knowing or should have known standard,” holding individuals accountable for rape under the theory of command responsibility will prove difficult. 286

C. Areas of Success

i. Physical Proximity to the Alleged Crimes: Judicial Reconstruction and Restorative Justice

In contrast to other international courts, the SCSL is located in the country where the alleged crimes took place. One of the chief criticisms of the ICTR and ICTY, and the supranational adjudication of international criminal law in general, is the physical distance of the tribunals from the crimes and events in question. 287 Two central problems emerge from having courts far removed from the events in question: (1) supranational tribunals fail to assist in judicial reconstruction, an important goal of international criminal justice;

284 Id.
285 Id.
286 Id., at 910-11 (Eaton brings up an interesting paradox: “the fewer the number of women raped, the more difficult it may be to prosecute the crime, at least in terms of holding high-level officials accountable for the actions of their subordinates”).
287 See Burke-White, Regionalization of International Criminal Law Enforcement, supra note 227, at 734 (arguing that “the International Criminal Tribunal for the Former Yugoslavia (ICTY) has been much criticized for its lack of connection to the national context of the cases it adjudicates”); David Tolbert, The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, 26 FLETCHER F. WORLD AFF. 7, 12 (2002).
supranational tribunals do not promote restorative justice—restoring dignity, visibly holding perpetrators accountable, and creating social conditions where human rights are promoted and respected.\textsuperscript{289}

Semi-internationalized tribunals answer both of these concerns due to their physically proximal location. First, by having the court in-country, the SCSL is situated to provide significantly greater opportunities for judicial reconstruction. The simple fact that the Special Court functions as an international tribunal grafted onto the Sierra Leone domestic judicial system makes it more likely for the court to directly engage and enhance the domestic judiciary. For example, by including a mix of international and national staff, the Special Court is constantly training and providing experience for key future players in the national judiciary. Dickinson argues that “Sierra Leonean legal professionals involved in the work of the court will be more likely to use and develop these principles, not only within the hybrid court but perhaps in future cases in domestic Sierra Leonean courts as well.”\textsuperscript{290} In terms of prosecuting sexual violence, this kind of judicial cross-fertilization could change the way rape is prosecuted and perceived in society, if domestic courts incorporate international norms and legal precedents over their own, severely limited, domestic rape laws. This idea is built into the structure of the court and has been emphasized by the Statute, Prosecutor, as well as diplomats who argue that the “court’s location will facilitate the diffusion of legal knowledge from international to local judicial officials, which will assist in rebuilding the country’s judicial system.”\textsuperscript{291} The process may also help to internalize international human rights norms by creating judicial dialogue between international and Sierra Leonean law.\textsuperscript{292}

\textsuperscript{288} For a discussion of these points in greater detail, see Burke-White, \textit{Regionalization of International Criminal Law Enforcement}, supra note 227, at 735.
\textsuperscript{291} Eaton, supra note 16, at 913.
\textsuperscript{292} Id. (arguing that the “ ‘diffusion of legal knowledge’ may also have the effect of helping Sierra Leone, through both its government and people, to internalize international human rights norms”).
Second, and perhaps more importantly, the diffusion of legal knowledge from international law may aid in restorative justice by impacting the practices of the government and citizens of Sierra Leone. Indeed, the physical proximity of the trials allows Sierra Leoneans to directly follow the proceedings or even attend the trials. For example, Cockayne observes that radio talk-shows often discuss the day's events at the Special Court, and that the “activities of the Court have entered mainstream public discourse in the country … catalyzing a careful reconsideration of the nature and causes of the armed conflict that raged in Sierra Leone over the last decade.”\(^\text{293}\) In the area of gender inequality, the potential for international legal knowledge to impact the everyday lives of women is substantial due to the increase physical and psychological proximity between the SCSL and the local community. Consider, for instance, the rapid increase in women’s organizations and NGOs dedicated to women’s rights, such as UNIFEM or the Urgent Action Fund, that have proliferated Sierra Leonean civil society since the advent of the SCSL.\(^\text{294}\) An important, but often-overlooked benefit of semi-internationalized courts is the creation of civil society through the increased presence of NGOs and establishment of women’s human rights within the local human rights discourse.\(^\text{295}\) Eaton observes that “the work of the SCSL in this area … provides these domestic NGOs with a solid basis from which to speak and a platform from which to launch their agendas.”\(^\text{296}\) Or consider even the act of being able to walk into the Special Court and hear testimony reflecting a woman’s experience of rape or the Prosecutor condemning violence against women, as well as being able to listen to debates about sexual violence on the radio on a daily basis. While these acts might seem insignificant, it is arguable that the development of civil society discussions, public debate and deliberation, participation, and democratic empowerment around taboo issues such as sexual violence would not be initiated if the SCSL were far removed from the country. On this point, former Secretary-General

\(^{293}\) Cockayne, supra note 40, at 13.  
\(^{294}\) Nowrojee, supra note 17, at 94-95.  
\(^{295}\) Eaton, supra note 16, at 919.  
\(^{296}\) Id.
Boutros-Ghali has observed that regional proximity can “contribute to a deeper sense of participation, consensus, and democratization in international affairs.”What’s more, the increased opportunities for the Special Court to aid in judicial reconstruction and restorative justice add to the perceived legitimacy of the tribunal, as both processes signify a direct, dialogic, and concerned engagement with the local population.

While supranational courts might be seen as an imposition of foreign norms or an instrument of Western hegemony, semi-internationalized tribunals are far more likely to be perceived as legitimate in affected communities. These benefits are especially significant given the rather limited role of international courts in post-conflict justice, since they prosecute only those most responsible. Hybrid tribunals are able to mitigate this concern by creating long-term constructive benefits to the affected population that will last long after the trials take place. Taken together, the direct representation provided by the presence of local prosecutors, judges, and staff, along with the psychological proximity of the affected community to the proceedings, increases the perceived legitimacy of hybrid tribunals. By achieving a close and meaningful connection with the people of Sierra Leone, the Special Court has a far greater chance of achieving two core goals of international criminal justice: judicial reconstruction and restorative justice.

ii. Reduced Financial Costs

Another benefit of semi-internationalized tribunals is the prospect of greatly reduced financial costs and much greater efficiency. As Burke-White notes, “the monetary costs of international criminal law enforcement have been and will continue to be a significant hindrance to the effective operation of international tribunals.” The cost of the ICTY for 2002-2003 is around $256 million and the U.N. has spent over $1.6 billion.

298 See Burke-White, Regionalization of International Criminal Law Enforcement, supra note 227, at 737.
299 This will be discussed further infra Part V relating to a “capabilities approach” to gender justice.
300 Burke-White, Regionalization of International Criminal Law Enforcement, supra note 227, at 738.
over eight years of operation.\textsuperscript{301} In comparison, the SCSL budget is approximately $56 million over the three years of its operation, and is financed largely through donor contributions rather than U.N. funding.\textsuperscript{302} While the cheaper costs of semi-internationalized tribunals rightly raise concerns about the quality of justice when compared with the \textit{ad hoc} Tribunals, the reduced financial burden for such courts may make it more likely for the international community to implement hybrid courts in the future.

\textit{iii. Rules of Procedure and the Office of the Prosecutor}

As noted above, the Prosecutor has indicted thirteen individuals with various charges of sexual violence, crimes against humanity, and war crimes. The Prosecutor has made a concerted effort to emphasize violence against women and nearly all of the indictments explicitly include sexual violence. Nowrojee has observed that “all of the indictments against the rebel factions included sexual violence charges and were brought as original indictments, rather than belatedly through an amendment (which has been the pattern at the ICTR).”\textsuperscript{303} Indeed, the SCSL Statue “directs the court prosecutor to pay special attention to gender-based violence in investigations and staff hires.”\textsuperscript{304} Following this mandate, Prosecutor David Crane has “spearheaded a prosecution strategy that has incorporated sexual violence crimes from the outset and which was consistently followed by the staff on a daily basis.”\textsuperscript{305} In this regard, a team specializing in sexual assault investigations was created for the SCSL, consisting of two dedicated and experienced female investigators (out of a total of ten total investigators for the SCSL) for sexual assault prosecutions.\textsuperscript{306} Overall, the Prosecutor has articulated a consistent and dedicated strategy

\begin{footnotesize}

\textsuperscript{301} \textit{Id.} at 739.
\textsuperscript{302} \textit{Id.}
\textsuperscript{303} Nowrojee, \textit{supra} note 17, at 100.
\textsuperscript{304} Eaton, \textit{supra} note 16, at 913.
\textsuperscript{305} Nowrojee, \textit{supra} note 17, at 99.
\textsuperscript{306} Nowrojee, \textit{supra} note 17, at 100 (observing that “an estimated twenty percent of his [the prosecutor’s] investigations team as opposed to, for example, the ICTR, which has never dedicated more than one to two percent of its investigative team of approximately 100 persons to this issue”).
\end{footnotesize}
toward prosecuting sexual violence that is reflected in the indictments, staff appointments, and prosecutorial strategies, and should be commended as a significant development.

iv. Prosecuting Forced Marriage as a Crime Against Humanity

One of the most significant initial developments in the SCSL is the prosecution of “forced marriage” as a new gender-specific category of crimes against humanity. This new category was approved by the Trial Chamber of the Special Court in May 2004 in cases against the AFRC and RUF, and “marks the first time that an international court will recognize ‘forced marriage’ as a possible category of ‘other inhumane acts’ within the legal category of crimes against humanity.”\(^\text{307}\) These prosecutions mark a new development in the adjudication of sexual violence in international law by going beyond “sexual slavery” to include the specific offense of forcible marriage during war as a high-level offense. The inclusion of forced marriage reflects the “bush wife” phenomenon during the Sierra Leone conflict, whereby women were forced to become “wives” of combatants, have sex and bear their children. In this case, forced marriage is a crime that goes beyond rape and sexual slavery, due to the forced conjugal component along with the stigma of having been married to a rebel combatant. Delineating forced marriage as a separate offense is a significant development because it recognizes a specific contextual situation in which gender crimes where committed based on patriarchal gender ideologies, and thus represents an opportunity “to expand the legal recognition for the types of sexual violence that women endure in conflict.”\(^\text{308}\)

D. Challenges and Difficulties

i. Lack of Funding and Financial Uncertainty

As previously mentioned, the Special Court’s strengths are also, potentially, its weaknesses.\(^\text{309}\) One of the most frequent criticisms of the Special Court, and of hybrid

\(^{307}\) Nowrojee, \textit{supra} note 17, at 101.

\(^{308}\) \textit{Id.}

\(^{309}\) See \textit{supra} note 40 and accompanying texts for a discussion of the SCSL’s potential weaknesses as a hybrid court.
tribunals generally, is its significantly smaller budget.\textsuperscript{310} Critics fear that the numerous resource constraints will have a detrimental effect on the quality of justice delivered by the SCSL.\textsuperscript{311} In many respects, hybrid tribunals like the SCSL are asked “to do more than their \textit{ad hoc} cousins, but with fewer resources.”\textsuperscript{312} This leads many to speculate that hybrid courts—as a low-cost alternative to the \textit{ad hoc} Tribunals—are merely international justice on the cheap, providing “shoestring” rather than “hybrid justice.”\textsuperscript{313} If this wasn’t enough, the Special Court was designed to be more expedient by taking advantage of the capacity and resources of the domestic judicial system.\textsuperscript{314} This combination of lower costs and swifter justice sounds good on paper, but as commentators point out, these benefits present numerous problems in practice.

Sierra Leone is one of the world’s poorest countries and ranks near the bottom of the UNDP Human Development Index.\textsuperscript{315} The poor financial situation of the country is problematic since the Special Court depends on voluntary donor contributions for its operations budget as recommended by Security Council Resolution 1315.\textsuperscript{316} From the beginning, the Secretary-General expressed concern about voluntary contributions. He writes: “The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continues availability of funds, are very high, in terms of both moral responsibility and loss of credibility … a special court based on voluntary contributions would be neither viable nor sustainable.”\textsuperscript{317} The financial uncertainty created by voluntary contributions from U.N. Member States is certainly a major concern, particularly with the donor fatigue that typically accompanies such humanitarian interventions. In 2003, the Special Court reported that Member States

\textsuperscript{310} $56 million for three years operating SCSL compared with $1.6 billion for eight years operating the ICTY.
\textsuperscript{311} See supra note 40 and accompanying texts.
\textsuperscript{312} Cockayne, supra note 40, at 2.
\textsuperscript{313} Id.
\textsuperscript{314} Id., at 6.
\textsuperscript{315} UNDP Human Development Index (2005), available at http://hdr.undp.org/reports/global/2005/pdf/HDR05_complete.pdf (noting that Sierra Leone ranks second to last of 177 countries for human development, and second to last of 177 in the gender-related development index).
\textsuperscript{316} Schocken, supra note 236, at 452 (discussing problems of funding the Special Court).
were woefully inadequate in providing funds, such that court had received enough contributions to cover its future operations or meet the tight three-year budget of $57 million. Since that rough start, however, the SCSL has been successful in raising enough money to continue operations, and even build a second trial chamber. Still, future financial uncertainty and potential budget crises remain a concern for the Special Court, especially since its operations may go past the projected three-year timeline.

The potential funding problems of hybrid courts creates an important question for the functioning and future development of hybrid courts, as to whether the international community is willing to commit itself to providing the necessary resources and funds to accomplish the task. Without the political will of international donors to support these courts, their ability to provide adequate justice will be severely compromised.

\[ \text{ii. Proximity to the Alleged Crimes and the Balance of Peace} \]

One of the SCSL's primary advantages—its proximity to the alleged crimes—is also a potential disadvantage. First, the location of the Special Court makes it harder to provide witness protection and anonymity, than if the court were located comparatively far away in a purely international venue. Having the SCSL in-country means that extra precautions must be taken to ensure witness protection and respect for victims rights, though it appears the Special Court has done a commendable job on this point heretofore. Indeed, the Special Court has done such good job protecting victims' rights that some fear the court is at risk of harming the rights of defendants. The Special Court must continue to emphasize witness protections, while also balancing protections for defendants, in order to ensure fair and just trials.

\[ \text{318 Cockayne, supra note 40, at 8.} \]
\[ \text{319 Id.} \]
\[ \text{320 Id.} \]
\[ \text{321 Cockayne, supra note 40, at 18.} \]
A second concern is that many Sierra Leoneans “realistically fear that arrests and prosecutions by the Special Court could upset the fragile peace.” For instance, in the first month of proceedings, “the Court was forced to hold closed hearings against former Internal Affairs Minister Sam Hinga Norman at an undisclosed location … for security reasons … as Hinga is still regarded as a hero by many Sierra Leoneans.” The recent arrest of Charles Taylor is another example of potential security concerns for the Special Court. After his arrest, both Liberia and Sierra Leone requested that Taylor be transferred to the Hague for trial. The New York Times reports:

Tamba Ngawucha, whose hands were amputated by rebels backed by Mr. Taylor during the war in Sierra Leone, said he was glad the tyrant arrested (sic). But when asked if he should be tried here, Mr. Ngawucha’s eyes widened.

“We don’t want any Charles Taylor here,” Mr. Ngawucha said, flailing the dimpled stumps where his hands once were for emphasis. “We are too afraid he will hurt us again. We just want peace.”

Mr. Ngawucha’s concerns of Taylor’s presence upsetting the balance of peace in Sierra Leone, reflects a realistic concern many Sierra Leoneans have about the Special Court’s proceedings in general. The SCSL will have to take extra care—for instance by sending Taylor to the Hague to avoid political or social unrest—to ensure that peace is maintained. If the Court provides justice without peace, it will have failed in its mission.

### iii. Silencing Sexual Violence in the CDF Case

A recent, and troubling, report by the Berkeley War Crimes Studies Center, entitled “Silencing Sexual Violence: Recent Developments in the CDF Case at the Special Court for Sierra Leone,” presents problematic evidence that the court has excluded sexual violence in the recent CDF case. This recent development in the actual jurisprudence of the Special Court represents a potentially detrimental precedent in the prosecution of sexual violence and its treatment as a serious international crime.

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322 Nowrojee, supra note 17, at 103.
323 Eaton, supra note 16, at 913-914.
325 *Id.*
326 Kendall and Staggs, *Silencing Sexual Violence*, supra note 263 (which has established a permanent monitoring program at the Special Court).
The decision to exclude sexual violence allegations in the CDF case turned on an evidentiary rule interpretation, finding that sexual violence and rape charges could not be included in the indictment because they were not charged as specific offenses under the original indictment, but rather discovered at a later time.\textsuperscript{327} The judges argued that the prosecution was attempting to bring in evidence “through the back door,” thus infringing upon the due process rights of the accused.\textsuperscript{328} As a result of this decision, “all considerations of serious allegations of systematic sexual violence on the part of one of the main parties to the Sierra Leone conflict has been excluded by the Special Court.”\textsuperscript{329}

However, while this is certainly an unfortunate development, the CDF case was the only original case not including sexual violence in the indictment, so it was not expected to try these crimes from the outset and the ruling should not effect the other cases prosecutions of sexual violence. Still, the exclusion of “all testimony ‘tainted’ by sexual violence was effectively silenced” and nine women affected by these crimes will not be able to testify and tell their stories.\textsuperscript{330} In doing so, “the Special Court has lost an important opportunity to clarify for Sierra Leoneans the nature and scope of the violence unleashed in the conflict and the role of those who bear ‘the greatest responsibility’ for its perpetration.”\textsuperscript{331}

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Before concluding this section, a few brief observations are appropriate about the successes and potential challenges of the SCSL. While it is too soon to know how these challenges will affect the operation of the court or what the long-term impact of the Special Court might be, a number of preliminary observations and recommendations can be made.

\textsuperscript{327} Id. at 3.
\textsuperscript{328} Id. at 23.
\textsuperscript{329} Id. at 2.
\textsuperscript{330} Id. at 3.
\textsuperscript{331} Id. at 23.
First, despite having less funding, fewer resources, and a much smaller staff than its ad hoc counterparts, the Special Court has made tremendous strides to overcome many of these difficulties, answering concerns about the courts ability to deliver adequate justice. One commentator notes: “Overall, the Special Court has done a remarkable job in maintaining financial propriety and in achieving good management practices … if the Special Court fails because of under-resourcing, it will not be the Court that has failed the international community, but the international community that has failed the Court.”

Another observes: “The experience of the Special Court illustrates that sexual crimes can be effectively addressed if the appropriate political will exists. Despite having significantly fewer resources and staff at his disposal than the ad hoc Tribunals possess, Prosecutor David Crane has made a concerted effort to deliver justice to Sierra Leonean victims of sexual violence.”

Indeed, the experience of the Special Court thus far shows that many of the difficulties that plague hybrid courts and the prosecution of gender crimes can be overcome if political will and an effective prosecutorial strategy exist.

Second, it should be emphasized that the problems and challenges facing the Special Court, as well as other hybrid courts, are easily solved. In large part, they are caused by resource and capacity constraints that can be resolved by providing additional resources. In addition, good management by the Prosecutor and mindfulness of judges of the importance of prosecuting sexual violence will alleviate most of the difficulties the SCSL has experienced.

From the perspective of prosecuting sexual violence, the advantages of semi-internationalized tribunals are significant: (1) hybrid courts have the ability to catalyze judicial reconstruction and restorative justice, establishing women’s rights within the rule of law discourse; (2) hybrid courts have a great potential to create judicial and cultural cross-fertilization, and foster the development of women’s humans rights norms within the emerging legal system; (3) hybrid courts have a higher likelihood of being perceived as

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332 Cockayne, supra note 40, at 9.
333 Nowrojee, supra note 17, at 99.
legitimate by the affected community due to their proximate location, and thus have a greater opportunity to create a meaningful and lasting legacy; (4) hybrid courts posses the ability to develop more progressive laws because of the interaction of domestic and international law, such as the forced marriage provisions developed by the SCSL that reflect very specific acts committed within the Sierra Leone war as well as the cultural circumstances surrounding sexual violence in Sierra Leone.

Importantly for the future of international criminal law enforcement, the advantages of hybrid courts offer a promising alternative and contrast with the limitations of purely international or purely domestic courts: (1) a perceived lack of legitimacy due to the far removed location of the court; (2) a considerably diminished degree of norm penetration and compliance pull within the affected community, as international humanitarian law does not often penetrate local judicial institutions or the populations it is intended to help; (3) the inability to have a significant impact on local judicial reconstruction or capacity building within the post-conflict state, which as an extremely urgent need in post-conflict states where the judicial infrastructure (court buildings, equipment, police, etc.) is often decimated and severely underdeveloped. 334

While hybrid courts are often troubled by a number of disadvantages, such as financial uncertainty and resource constraints, they also have profound potential to address and remedy most, if not all, of these difficulties as the Special Court has demonstrated in its operations. The overriding lesson from looking at the SCSL might be that semi-internationalized tribunals offer an innovative and effective means for prosecuting sexual violence, but only if they are given sufficient resources and international support. While semi-internationalized courts are by no means a panacea for prosecuting sexual violence, and should only be considered within a larger community of courts, they do offer a number of benefits. In contrast to supranational tribunals, hybrid courts have greater legitimacy, are less expensive, aid in judicial reconstruction and

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restorative justice, engage domestic populations and potentially create greater compliance pull and international norm-penetration. Assuming that hybrid courts are at the very least, worth considering for prosecuting sexual violence, the following Part considers a model for prosecuting sexual violence in the Special Court and future semi-internationalized tribunals.

V. THEORIZING A CAPABILITIES APPROACH TO PROSECUTING SEXUAL VIOLENCE: THE SCSL AS A MODEL FOR HYBRID JUSTICE AND HUMAN FUNCTIONING

“Women in much of the world lack support for the most central human functions, and this denial of support is frequently caused by their being women.”

“Being a woman is not yet a way of being a human being.”

The marginal position accorded women by traditional cultural norms in Sierra Leone, and the war crimes committed against them as women occupying this position of inequality, represents a problem of justice. The answer to this problem, and the guiding idea behind this Article, is the liberal notion “of the citizen as a free and dignified human being, a maker of choices.” According to Martha Nussbaum, a “capabilities approach” to human justice defines certain basic human capabilities and functions as more central than others to the core of human life. Importantly, her normative conception of capabilities is meant to allow for a significant degree of pluralism in specification by individual cultures in their conception of the good. Nussbaum notes that “the capabilities approach urges us to see common needs, problems, and capacities, but it also reminds us that each person and group faces these problems in a highly concrete context.” Strikingly, both in function and theory, Nussbaum’s capabilities approach and hybrid courts have the same goal: to promote the flourishing of human beings (although one from a specific legal perspective) using a universal human rights framework within a highly concrete context allowing for a plurality of local difference. More clearly, the hybrid approach to justice

335 Nussbaum, supra note 2, at 54.
336 Id. at 21, quoting Catherine A. MacKinnon.
337 Id. at 46.
338 Id. at 47.
found in the semi-internationalized tribunal can be seen as an example of how to implement Nussbaum's capabilities approach practically and with real effect in expanding basic legal guarantees and judicial functioning. In this regard, semi-internationalized tribunals represent a real and practical proposal for implementing a capabilities approach to sexual violence at the ground level, precisely because the hybrid approach to justice emphasizes human functioning and capacity building within “unjust and unreflective social arrangements.”

Nussbaum’s capabilities approach to justice begins with a simple question: “What activities characteristically performed by human beings are so central that they seem definitive of a life that is truly human? In other words, what are the functions without which (meaning, without the availability of which) we would regard a life as not, or not fully, human.” The answer to this question leads one to a list of attributes necessary for human functioning and flourishing—a list that peoples of many cultures and traditions can agree on as essential to pursuing a good life, no matter what their own conception of the good might be—much like John Rawls list of primary goods in A Theory of Justice, which sets the stage initially and then allows for individuals to make their own choices from an original position of equal opportunity and justice.

Nussbaum’s list of Central Human Functional Capabilities is also left deliberately general, in order to “leave room for plural

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339 Id. at 53.
340 Id. at 39.
341 JOHN RAWLS, A THEORY OF JUSTICE, supra note 33.
342 Nussbaum lists the following Central Human Functional Capabilities:

1. **Life.** Being able to live to the end of a human life of normal length; not dying prematurely or before one’s life is so reduced as to be not worth living.
2. **Bodily health and integrity.** Being able to have good health, including reproductive health; being adequately nourished; being able to have adequate shelter.
3. **Bodily integrity.** Being able to move freely from place to place; being able to be secure against violent assault, including sexual assault, marital rape, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. **Senses, imagination, thought.** Being able to use the senses; being able to imagine, to think, and to reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training; being able to use imagination and thought in connection with experiencing and producing expressive works and events of one’s own choice (religious, literary, musical, etc.); being able to use one’s mind in ways protected by guarantees of freedom and expression with respect to both political and artistic speech and freedom of religious exercise; being able to have pleasurable experiences and to avoid nonbeneficial pain.
specification and also for further negotiation” within cultures of how the list would be actualized by public planning in practice.\textsuperscript{343} Finally, Nussbaum argues that any life lacking any one of these capabilities “no matter what else it has, will fall short of being a good human life.”\textsuperscript{344}

Although this is a metaphysical idea—and to be sure some of Nussbaum’s capabilities are decidedly more essential than others, particularly in a post-conflict situation like Sierra Leone where some needs like bodily integrity, life, and health take immediate president over other capacities like play and imagination\textsuperscript{345}—it remains an important one, particularly in the context of semi-internationalized courts expanding the enforcement of sexual violence within a framework of universal women’s human rights. Indeed, Nussbaum argues that the metaphysical character of a universal list of human capabilities “does not mean it is not a basic and pervasive empirical idea, an idea that underwrites many of our daily practices and judgments.”\textsuperscript{346} And, as Nussbaum points out, “without some such notion of the basic worth of human capacities, we have a hard time

5. \textit{Emotions}. Being able to have attachments to things and persons outside ourselves; being able to love those who love and care for us; being able to grieve at their absence; in general, being able to love, to grieve, to experience longing, gratitude, and justified anger; not having one’s emotional developing blighted by fear or anxiety. (Supporting this capability means supporting \textit{forms of} human association that can be shown to be crucial in their development).

6. \textit{Practical Reason}. Being able to form a conception of the good and to engage in critical reflection about the planning of one’s own life (this entails protection for the liberty of conscience).

7. \textit{Affiliation}. (a) Being able to live for and in relation to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; being able to imagine the situation of another and to have compassion for that situation; having the capability for both justice and friendship. (Protecting this capability means, once again, \textit{protecting institutions that constitute such forms of affiliation}, and also protecting the freedoms of assembly and political speech.) (b) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others (this entails provisions of nondiscrimination).

8. \textit{Other Species}. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. \textit{Play}. Being able to laugh, to play, to enjoy recreational activities.

10. \textit{Control over one’s environment}. (a) \textit{Political}: being able to participate effectively in political choices that govern one’s life; having the rights of political participation, free speech, and freedom of association. (b) \textit{Material}: being able to hold property (both land and movable goods); having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Nussbaum, \textit{supra} note 2, at 41-42 [emphasis added].

\textsuperscript{343} Id.

\textsuperscript{344} Id.

\textsuperscript{345} See Nussbaum’s list of \textit{Central Human Functional Capabilities}, \textit{supra} note 342.

\textsuperscript{346} Nussbaum, \textit{supra} note 2, at 43.
arguing for women’s equality and for basic human rights.” By defining a basic conception of basic human capabilities, it allows for such capabilities to become just that—moral claims for the exercise of basic human functioning. Put differently, a basic list of guarantees of human justice—much like a set of constitutional guarantees—provides a framework demanding and nurturing human agency. Recalling MacKinnon’s quote at the beginning of this section—“Being a woman is not yet a way of being a human being—a capabilities approach helps to imagine a way in which being a woman is a way of being a human by asserting a moral claim for women to function fully and flourish as human beings in society.

It is my contention that hybrid courts model and actualize this link between metaphysical idea and practice, specifically in the area of maximizing legal guarantees and women’s universal human rights within previously unjust and unequal social arrangements. Like Nussbaum’s theory, semi-internationalized tribunals are, at a normative level, concerned with shaping social preferences and expanding international legal guarantees within specific localities. By creating legal guarantees in societies that previously functioned from an unjust position, semi-internationalized tribunals are essentially creating capacities and agency for individuals—particularly for those individuals in groups marked as marginal in status. As Nussbaum argues, such “legal guarantees do not erode agency: They create a framework within which people can develop and exercise agency.” There is nothing “right” or “natural” about the unequal, second-class position of women in Sierra Leonean society according to culture and “tradition.” And indeed, this kind of marked gender ideology contributes to “the perception that women are not the legal and social equals of men” and “feeds into many ways of viewing women as sexual objects that deny them full humanity and agency,” a point distressingly made by the high-level of sexual violence in the Sierra Leone conflict.

347 Id.
348 Id. at 43 (“We begin, then from a notion of the basic capabilities and their worth, thinking of them as claims to a chance for functioning”).
349 Id. at 19.
Yet, rightly or not, “laws and institutions shape these ideas for better or for worse.” But just as the law may shape the operations of society, the law also offers the power to change. And, Nussbaum’s theory, operationalized through hybrid courts, “enables us to focus directly on the obstacles to self-realization imposed by traditional norms and values and thus to justify special political action [or, in this case, international legal action] to remedy the unequal situation.”

Part IV of this Article put forward the normative proposition that using semi-internationalized courts to prosecute sexual violence should, at the least, be considered. Having established this proposition, questions emerge about how to implement the hybridization of international criminal law with regard to violence against women. Why are hybrid courts a desirable option for post-conflict justice? In what way can such courts help to dissolve gender ideologies and gaps between legal principles and practice? How can semi-internationalized courts to respond to violence against women utilizing a capabilities approach to justice, and in doing so, aid in the development and application of gender provisions? The answer to these questions must be found in a theory of using a capabilities approach to prosecuting sexual violence. In order for the hybridization of international criminal law to be developed with gender justice as a primary concern, a capabilities approach is essential for ensuring that women are constructed as active subjects in the law, rather than passive subjects of law. By drawing on political liberalism and the ideas of Nussbaum and Rawls particularly, a theoretical basis can be found for achieving the normative benefits of hybrid tribunals discussed at the end of Part III. This theory begins with liberal international relations theory and the idea that “individuals and private groups” are the “fundamental actors in international politics.” Importantly, a capabilities approach to hybrid justice shifts the unit of analysis to the individual level, and looks at specific contexts rather than imposing a “one-size-fits-all” approach to gender

350 Id.
351 Id. at 46.
justice. Hilary Charlesworth brings up a similar concern with regard to the failure of most recent attempts at gender mainstreaming when she notes that responding to inequalities between women and men requires “a redefinition of the strategy of gender mainstreaming so that its focus is on the complexity of gender relations in specific contexts … it must require transforming the structure and assumptions of the international order.”

Nussbaum’s capabilities approach, applied to hybrid courts prosecuting gender crimes, offers such a redefinition.

Taking the individual agent as a starting point, I want to briefly theorize a capabilities and functionings approach to prosecuting sexual violence through hybrid courts as a means of creating visibility and accountability for gender crimes and, more generally, advance the cause of justice for women in Sierra Leone and other post-conflict situations. What emerges from this discussion is a theoretical and practical explanation for a move toward the hybridization of international criminal law and mainstreaming progressive gender provisions through the use of hybrid tribunals. This gender analytical approach, following Nussbaum, asserts that a capabilities approach to prosecuting sexual violence through hybrid courts leads previously unequal and gendered legal and social arrangements to potentially empower women as active and knowing subjects. Hybrid courts, like the SCSL, have the advantage of including a mixture of international and national law and participants—a formation that could potentially allow the court to adapt to the needs of a specific social context while also applying international norms. Semi-internationalized courts address the crimes in the state where they were committed, giving a sense of legitimacy, local ownership, participation, and visibility to justice. The interaction of local with international has the unique capability of improving the domestic judicial system at the ground level while also providing greater awareness of judicial efforts and international humanitarian norms by the victimized community. By providing

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354 Nowrojee, supra note 17, at 88 (noting that “visibility and accountability for gender crimes through international justice mechanisms can advance the cause of justice for women”).
accountability for violence against women and establishing international norms benefiting women at the ground level, while also producing domestic judicial reconstruction and reform, hybrid courts effectively create a framework of legal guarantees within which previously silenced individuals can develop and exercise agency as functioning subjects in law.\footnote{Nussbaum, \textit{supra} note 2, at 19.}

\textbf{CONCLUSION: VOICING THE SILENT WAR CRIME}

“Survivors of sexual abuse, torture, genocide, trafficking in human beings, have taken tremendous risks to say what happened to them to ensure that law calls their abuse by its real name in public. This … is what law can mean. It can give people back the humanity that the violation took away. This is what gives law the power to change.”\footnote{CATHARINE A. MACKINNON, \textit{WOMEN’S LIVES, MEN’S LAWS} (2005) 108.}

“Public acknowledgment and condemnation of egregious abuses suffered are important steps in providing recognition and redress to victims of violence. Speaking the truth and condemning the atrocities committed against a person constitute steps to restore the humanity of the victim and her value in society. This is an especially critical step for a person who has been stripped of everything, including her essential humanity.”\footnote{Nowrojee, \textit{supra} note 17, at 104.}

On May 22, 2003, thousands of women marched in Freetown, Sierra Leone to symbolically mark the beginning of sexual violence hearings at the TRC and the upcoming SCSL trials. Binaifer Nowrojee was present at these hearings in Freetown and her poignant narrative account is worth retelling:

It seemed as though women were everywhere that day in May 2003. Morning traffic came to a halt as women marched en masse on the road from Victoria Park in the center of Freetown, Sierra Leone to the YMCA Hall where the TRC was about to commence three days of dedicated hearings on violence against women. Accompanied by several school marching bands playing rousing music, women walked with signs aloft that read “No Violence Against Women” and “Justice for Women.” Women continued to join the march as it approached the TRC Hall. By the time the hearings began, women packed the large auditorium, demonstrating solidarity with the rape victims and others who would speak about the atrocities committed against women and girls during the decade-long civil war in Sierra Leone. Gasps and tears could be heard throughout the session as rape victims, hidden behind a screen, recounted their harrowing experiences to the commissioners. The voices of victims were finally being heard by the nation.\footnote{\textit{Id.} at 86-87 (Making a parallel and complementary argument to the one advanced by this Article: “Just as women appeared to be everywhere that day in Freetown at the TRC special hearings, however they seemed paradoxically invisible during the war. Throughout the decade of conflict, most journalists and international observers paid little or no attention (and subsequently failed to publicize) the widespread and ongoing attacks directed against women and girls. \textit{Sexual violence was Sierra Leone’s invisible war crime.} Tragically, the lacunae surrounding sexual crimes in Sierra Leone closely resemble the treatment of these crimes in other conflict situations. The lack of attention to these crimes enables the international community to downplay women’s particular suffering and, as such, renders women invisible. This invisibility usually continues after a conflict ends, exacerbated by the stigma attached to sexual violence. Although rape and other forms of sexual violence are often used as weapons of war, they are frequently ignored in reports and analyses of such conflicts.”).}
In addition to Nowrojee’s powerful story, a recent documentary, “Operation Fine Girl,” depicts women in Sierra Leone demonstrating against sexual violence while carrying signs that bluntly say “Stop Raping Us.” Both of these examples reveal a cultural moment of profound change for the women in Sierra Leone—a moment of public acknowledgment and condemnation of violence against women and shift from inequality to the first glimmerings of agency and empowerment. In large part, this basic shift in the way women are viewed in an unequal society is due to the work of the TRC and SCSL publicly acknowledging and condemning the violence committed against them. Nowrojee writes that the Special Court has succeeded in raising awareness about gender-based violence, “thus building consensus among Sierra Leoneans that rape and other forms of sexual violence are serious crimes.” In the long-run, “this will hopefully mean that sexual violence crimes will have an enhanced likelihood of being prosecuted in the local judiciary and will perhaps mobilize women to organize around this issue.” It is also a critical moment for the “struggle for meaning” in Sierra Leonean society as it recovers from major atrocities and seeks to find answers for what happened. Punishing those responsible and publicly condemning the brutality their crimes is especially important in the struggle for meaning, “in order to reestablish at least the semblance of a moral universe.” This point of crisis in Sierra Leone is a crucial opportunity to break the silence surrounding rape and shift the way in which violence against women is perceived and prosecuted in Sierra Leone. As Eaton writes, “the SCSL must ensure that women can speak freely about the sexual violence committed against them, for it is only when

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violence often legally constitute torture, genocide, mutilation, and enslavement, the have, with rare exceptions, not been treated with the same seriousness as other war crimes”) [emphasis added].


360 Nowrojee, supra note 17, at 104.

361 Id.

362 Id. at 104.

363 Id.
women’s voices are heard and accounted for that their experiences will be reflected in the laws that protect and govern them.  

The SCSL remains at a critical juncture, with the opportunity to have a meaningful and long-lasting impact on the women of Sierra Leone and the prosecution of sexual violence as an international crime. Above all, the success or failure of the Special Court will depend upon its ability to complement local efforts for accountability and resonate with the ordinary citizens of Sierra Leone. If the Court is able to accomplish its mission of hybrid justice and voice the silent war crimes, the SCSL will succeed in breaking the stigma and silence surrounding rape as a less serious crime and contribute to building the capabilities of women and profoundly expanding their role in society. But, if the Court is not supported with adequate financial contributions from U.N. Member States or continues to make more conservative rulings along the lines of the CDF Case that silence sexual violence, it will only have a marginal and limited impact on the lives of most Sierra Leoneans and will represent a failure of hybrid justice. The price of silencing sexual violence is high, as the brutal conflict in Sierra Leone shockingly revealed to the world. With the Special Court entering its last year of trials, it must continue to emphasize sexual violence in its prosecutions and voice the silent war crime.

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364 Eaton, supra note 16, at 919.