

**Background Paper**

Asia-Pacific Regional Women's Hearing on Gender-Based Violence in  
Conflict

10-11 October 2012

Phnom Penh, Cambodia

## **EXECUTIVE SUMMARY**

This paper serves as a background to the Asia-Pacific Regional Women's Hearing on Gender-Based Violence in Conflict. It examines the nature of gender-based violence, the various forms it takes, and how gender-based violence has been used as a weapon of war in conflicts throughout the world. By exploring the treatment of gender-based violence in past military tribunals, international courts, hybrid courts, and truth commissions, the paper summarizes lessons learned to be applied in future post-conflict reconciliation. In conclusion, the paper emphasizes the transformative potential of the Asia-Pacific Regional Hearing for participants, regional human rights networks, and women in transitional justice.

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## I. INTRODUCTION & BACKGROUND TO THE REGIONAL HEARING

From April 1975 to January 1979, Cambodia was ruled by a violent totalitarian regime known as the Khmer Rouge. As part of its rule, the Khmer Rouge used widespread and systematic sexual violence to pursue its goal of building a new Cambodia based on communist ideology. However, like many issues of gendered-based violence stemming from conflict, gender-based violence has largely been ignored by the hybrid court formed to bring senior leaders and those most responsible to trial, the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>1</sup> As noted in the concept paper for this panel,

The ECCC has failed to incorporate and advance lessons from past tribunals such as ICTY, TCTR, SCSL and risks missing the opportunity to leave a profound legacy to the Cambodian national courts and Cambodian society more generally by combating impunity for sexual violence perpetrated during Khmer Rouge rule and, by extension, that occurring in present-day Cambodia.<sup>2</sup>

In response to the ECCC's failure to prosecute gender-based crimes, the Cambodia Defenders Project (CDP) convened a non-judicial truth-telling forum to provide an opportunity for survivors of sexual violence under Khmer Rouge rule to participate in the transitional justice process. On 7-8 December 2011, a panel of international and national human rights experts heard from four survivors and witnesses of sexual violence under the Khmer Rouge and experts on gender-based violence and the Khmer Rouge. The panel closed the Hearing with a public statement on its findings as well as recommendations to the Royal Government of Cambodia, the ECCC, the United Nations and civil society on actions to increase access to justice for survivors of sexual violence during Khmer Rouge rule and to end impunity for crimes of sexual violence.<sup>3</sup>

Survivors have noted that the Women's Hearing was one of the first times that the issue of sexual violence during the Khmer Rouge era had been discussed in public. In addition, "[f]or many of the testifiers and other survivors, it was the first time they really understood the prevalence and nature of sexual violence during this period, which for many, was the first time they realized that they were not the only victims of these crimes."

Given the success of the prior hearing, this hearing seeks to provide an additional platform for survivors of gender-based violence to discuss common issues while offering a comparative perspective on questions of shared concern. The countries participating in the panel are Cambodia, Timor-Leste, Bangladesh, and Nepal.

This paper serves as a backdrop to the 10-11 October 2012 hearing. It explores the nature of gender based violence in conflict and analyzes how legal or quasi-legal mechanisms can best serve women in transitional justice. It further explores the fora available to redress past sexual

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<sup>1</sup> Cambodia Defenders Project, *Regional Women's Hearing on Gender Based Violence in Conflict, Concept Paper* (2012).

<sup>2</sup> *Id.* at 2

<sup>3</sup> *Id.*

violence in conflict and summarizes lessons learned from the various international tribunals that have attempted to bring justice and redress to women.

## II. EXPLORING GENDER-BASED VIOLENCE IN CONFLICT

### A. Defining Gender-Based Violence

Gender-based violence (“GBV”) is a complex, multifaceted phenomenon experienced differently by all women. The United Nations has identified male GBV against women as a globally recognized health, economic, development and human rights concern.<sup>4</sup> The United Nations defines GBV as “any act that results in, or is likely to result in physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”<sup>5</sup>

The term “gender-based” is used because such violence is shaped by gender roles and status in society.<sup>6</sup> Gender refers to the designation that determines a person’s social status and position in society, which often translates into the provision of less power, privilege, and fewer resources to women than their male counterparts.<sup>7</sup> Gender roles and expectations, sexual objectification, and discrepancies in power and status have legitimized, rendered invisible, sexualized and further perpetuated violence against women.<sup>8</sup> A recent transnational review of population-based

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<sup>4</sup> Nancy Felipe Russo, *Gender-Based Violence: Concepts, Methods, and Findings*, 2006, p. 178, 182 available at <http://www.ncbi.nlm.nih.gov/pubmed/17189506> [last visited Aug. 28, 2012].

<sup>5</sup> *Id.* at 18; see also UN Declaration on the Elimination of Violence Against Women, A/RES/48/104 (20 Dec. 1993). See also United Nations Department of Public Information DPI/1772/HR--February 1996, stating

Violence affects the lives of millions of women worldwide, in all socio-economic and educational classes. It cuts across cultural and religious barriers, impeding the right of women to participate fully in society. Violence against women takes a dismaying variety of forms, from domestic abuse and rape to child marriages and female circumcision. All are violations of the most fundamental human rights. In a statement to the Fourth World Conference on Women in Beijing, in September 1995, the United Nations Secretary-General, Boutros Boutros-Ghali, said that violence against women is a universal problem that must be universally condemned. But he said that the problem continues to grow. The Secretary-General noted that domestic violence alone is on the increase. Studies in 10 countries, he said, have found that between 17 per cent and 38 per cent of women have suffered physical assaults by a partner. In the Platform for Action, the core document of the Beijing Conference, Governments declared that ‘violence against women constitutes a violation of basic human rights and is an obstacle to the achievement of the objectives of equality, development and peace.’

See also Maya Steinitz, *The Role of International Law in the Struggle Against Sex-Based and Gender-Based Violence Against Refugee Women*, 2001, pp. 22-23, available at <http://www.rhrc.org/resources/steinitz.pdf> [last visited Aug. 28, 2012].

<sup>6</sup> *Id.* at 181. Thus, not all violence against women is necessarily considered gender-based because being threatened by a weapon during a robbery may not be initiated solely on account the person’s gender being female. *Id.*

<sup>7</sup> *Id.* at 180. Gender encompasses many interconnected elements, including gender traits, emotions, values, expectations, norms, roles, environments and institutions that change and evolve within and across cultures and over time. *Id.*

<sup>8</sup> Felipe Russo, *supra* note 4 at 181.

survey data found the “lifetime proportion of women experiencing physical assault by an intimate partner range from [ten] to [sixty-nine percent].”<sup>9</sup> Yet, many parts of the world continue to view violence against women as a private matter often being condoned and inappropriate for public intervention.<sup>10</sup>

## B. Subcategories of Violence Against Women

GBV takes many forms including rape, rape as a war crime, violence against women in situations of armed conflict, sexual assault within the family, sexual harassment, domestic violence, female genital mutilation, prostitution and trafficking, and forced marriage.<sup>11</sup> Rape may occur anywhere: in the family, community and situations of armed conflict and in refugee camps.<sup>12</sup> Rape is also widely used as a weapon of war whenever armed conflicts arise between different parties and has been used all over the world.<sup>13</sup> In the case of the Khmer Rouge, forced marriage was a prevalent form of gender-based violence. Forced marriages, unlike arranged marriages, are carried out in the context of a widespread or systematic attack against the civilian population. This, according to international criminal law jurisprudence, is an element that must be present for forced marriage to be prosecuted as a crime against humanity.<sup>14</sup>

## C. Exploring the Roots of Gender-Based Violence

Social structures often reflect inequitable gender relationships, which may serve to legitimate male violence (e.g. relationships between female workers and male employers, wives and husbands, etc.) and place women in positions of subordination to men.<sup>15</sup> Such inequities reinforce a patriarchal worldview in which women’s subordination is normal, natural and expected.<sup>16</sup>

GBV reflects assumptions of male entitlement and privilege and functions as a form of social control that maintains a subordinate social and political status for women.<sup>17</sup> Men who connect masculinity with control and domination of their partners are more likely to be abusive.<sup>18</sup> Across cultures, there is a link between male violence and a variety of socially controlling behaviors.<sup>19</sup> Additionally, stigma and the associate emotion of shame combine to become a powerful form of social control; GBV is experienced as both stigmatizing and shameful.<sup>20</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Steinitz, *supra* note 5 at 24-30; Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of “Forced Marriage”*, 7 NW. U. J. INT’L HUM. RTS. 128, (2009).

<sup>12</sup> Steinitz, *supra* note 5 at 24.

<sup>13</sup> *Id.* at 25.

<sup>14</sup> Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-2004-16-A, Judgment, ¶¶ 181-203 (Feb. 22, 2008), available at <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCCase/AppealJudgment/tabid/216/Default.aspx>.

<sup>15</sup> Felipe Russo, *supra* note 4 at 187.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 185.

<sup>18</sup> *Id.* at 185-86.

<sup>19</sup> *Id.*

<sup>20</sup> Felipe Russo, *supra* note 4 at 187.

GBV occurs precisely because it is motivated by gender subordination. GBV is not a private, random act, but rather an offense against women as women that reinforces existing gender relations.<sup>21</sup> Women are targeted for certain types of violence, such as rape, mainly “because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender.”<sup>22</sup>

#### D. Gender-Based Violence as a Weapon of War

The international prevalence of violence against women during times of conflict indicates a larger phenomenon of the use of gender-based violence as a “weapon of war.” Sexual violence as a weapon of war targets individuals not only because of group membership (e.g. ethnicity, tribe, race, etc.) but also because of gender.<sup>23</sup> An extremely common form of gendered violence in conflict takes the form of rape. Rape is often inflicted to diminish the dignity of the victims and and/or to reinforce the policy of ethnic cleansing in war.<sup>24</sup> Rape is the product of an unequal power relationship and is compelling evidence of the subordination of women by men.<sup>25</sup> Rape affects women as individuals, women as members of ethnic groups, and women as a whole, in war as well as in peace.<sup>26</sup>

However, violence in conflict is varied and many commentators have noted that to reduce the consequences of conflict to violations of physical integrity fails to account for the many gendered ways women experience harm in conflict. For example, camps for the internally displaced or refugees offer little protection from gender-based violence.<sup>27</sup> In the aftermath of violence, women often face a level of structural and economic insecurity that leaves them without proper housing, food, health care, or networks of support.<sup>28</sup> The effects of such insecurity can be just as devastating as rape or other violations of physical integrity. In post-conflict settings, the risk of exposure to gender-based violence increases, as does coerced prostitution and trafficking.<sup>29</sup>

In other instances, gender-based violence takes the form of forced-marriage. For examples, the Khmer Rouge adopted the role of the parents, randomly selecting spouses

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<sup>21</sup> Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WMN. L. J. 157, 166 (1994).

<sup>22</sup> *Id.*

<sup>23</sup> Jennifer Park, *Sexual Violence as a Weapon of War in International Humanitarian Law*, available at <http://www.ucl.ac.uk/ippr/journal/downloads/vol3-1/Park.pdf> [last visited Aug. 28, 2012].

<sup>24</sup> Steinitz, *supra* note 5 at 25.

<sup>25</sup> Darren Anne Nebesar, *Gender-Based Violence as a Weapon of War*, 4 U.C. DAVIS J. INT'L L. & POL'Y 147, 148 (1998).

<sup>26</sup> *Id.*

<sup>27</sup> Office for the Coordination of Humanitarian Affairs and Integrated Regional Information Networks (IRIN), *The Shame of War: Sexual Violence Against Women and Girls in Conflict*, 20 (2007) [hereinafter *Shame of War*].

<sup>28</sup> SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (The University of Chicago Press 2006).

<sup>29</sup> *Shame of War*, *supra* note 27 at 23.

for people and officiating the ceremony.<sup>30</sup> Marriage was conducted for the achievement of the revolution, not for the happiness of an individual.<sup>31</sup> To the Khmer Rouge, a successful society required unyielding loyalty and total control of the public. They aspired to achieve this by systematically breaking down the family structure, and replacing it with government-imposed structures. By controlling and officiating marital unions, the Khmer Rouge operationalized their plan to replace the family unit.<sup>32</sup>

Different theories exist as to why violence against women is used as a tool during wartime, yet the gender and cultural specificity of GBV is no accident.<sup>33</sup> First, in some cultures women are considered the property of men and thus, when men rape the property of their enemy, it is soiled, tainted and devalued.<sup>34</sup> Thus, women are used as a means of male communication and a tool to harm the enemy.<sup>35</sup> Furthermore, in conflicts defined by racial, religious, or ethnic conflict, gender based violence may form part of the strategy of ethnic cleansing or a deliberate attempt to alter the demographics in a given society.<sup>36</sup>

Second, the notion of honor is central to some traditional cultures and loss of honor creates great shame.<sup>37</sup> Thus, to some it is important women are chaste at marriage and monogamous afterwards because it upholds the entire family's honor.<sup>38</sup> If a woman has sex outside the marriage, all men related to her lose their honor temporarily, while the women's honor is lost indefinitely.<sup>39</sup> Rape is therefore a strategy of war, an organized and deliberate policy used to destabilize populations and destroy bonds within communities and families.<sup>40</sup>

Soldiers use rape as a way to scare and intimidate enemy civilians, to create a sense of power and assault upon a women's identity.<sup>41</sup> Rape and other forms of gender-based violence are used to quell resistance by instilling fear in local communities or in opposing armed groups.<sup>42</sup> During flight from areas of fighting, women and girls remain at high risk for gender-based violence from border guards, paramilitary, and insurgency groups<sup>43</sup> and once displaced, may submit for survival. In some conflicts, women have been used as sex slaves for combatants.<sup>44</sup>

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<sup>30</sup> See Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 DUKE J. COMP. & INT'L L. 247 (Winter 2010).

<sup>31</sup> *See id.*

<sup>32</sup> Kalyanee Mam, *An Oral History of Family Life Under the Khmer Rouge*, Yale Ctr. Int'l & Area Studies (2000).

<sup>33</sup> *Id.* at 151.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Shame of War*, *supra* note 27 at 16.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Nebesar, *supra* note 25 at 151.

<sup>40</sup> *Id.* at 152; *see also Shame of War*, *supra* note 27 at 15 (noting that "In Timor Leste, Indonesian military reportedly raped women in front of their families and forced Timorese men to rape Timorese women.")

<sup>41</sup> Nebesar, *supra* note 25 at 152-53.

<sup>42</sup> *Shame of War*, *supra* note 27 at 16.

<sup>43</sup> *Id.* at 19.

<sup>44</sup> *Id.* at 16.

The underlying subordination of women on a global level is an additional explanation for the extreme brutality of certain sexual acts during conflict. Violence against women is often the bi-product of a collapse in the social and moral order that accompanies conflict,<sup>45</sup> revealing the violence and gender-based discrimination that was already occurring in the private sphere.<sup>46</sup>

### III. PROSECUTION OF GENDER-BASED VIOLENCE IN INTERNATIONAL TRIBUNALS

For centuries, violence against women, particularly rape, was thought of as an unavoidable consequence of war.<sup>47</sup> Over the years, the international community has slowly changed how international courts and communities affected by conflict address GBV during period of transitional justice. The following is a survey of the historic treatment of gender-based violence in international tribunals and commissions.

#### A. International Military Tribunals

International Military Tribunals (IMT) were organized after World War II to try major German and Japanese war criminals. IMTs later were referred to as “victors’ courts” because the IMTs were organized and controlled by the victorious allied forces.<sup>48</sup> Accordingly, their legality has been called into question by members of the international community.<sup>49</sup>

##### 1. Nuremburg IMT

The Nuremburg IMT was the first modern international military tribunal.<sup>50</sup> Even though the tribunal recorded evidence of a number of sex crimes committed by both sets of armed forces, the procedural rules of the IMT, the IMT Charter, failed to include any form of sexual violence, and did not expressly prosecute such crimes despite the fact that many countries had previously established domestic laws that deemed certain forms of sexual violence as criminal acts.<sup>51</sup>

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<sup>45</sup> *Id.* at 15.

<sup>46</sup> Rashida Manjoo & Calleigh Mcraith, *Gender Based Violence and Justice in Conflict and Post-Conflict Areas*, 44 CORNELL INT’L L.J. 11, 14 (2011).

<sup>47</sup> Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. PUB. L. 17 (2002).

<sup>48</sup> JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS*, 567 (3d ed. 2010).

<sup>49</sup> Kirsten Sellers, *Imperfect Justice at Nuremburg and Tokyo*, 21 (4) EUR. J. INT’L LAW 1085 (2011).

<sup>50</sup> DUNOFF, *supra* note 48 at 16.

<sup>51</sup> *Id.*; Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 301 (2003); Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of “Forced Marriage,”* 7 NW. U. J. INT’L HUM. RTS. 128, 138 (2009).

## 2. Tokyo IMT

Like the Nuremburg Tribunal, the Tokyo IMT Charter did not specifically identify prosecutable sex crimes.<sup>52</sup> Yet, unlike Nuremburg, the Tokyo Indictment included allegations of gender-related crimes, indirectly referring to rape.<sup>53</sup> It characterized rape of civilian women as “inhumane treatment,” “mistreatment,” “ill-treatment,” and a “failure to respect family honour and rights.”<sup>54</sup> This departure from the gender-blind prosecution of the Nuremburg Tribunals might owe to the presence of women in the tribunal process.<sup>55</sup> In the Tokyo Tribunal, three women were included as assistant prosecution counsel, in comparison to the Nuremburg Tribunal, where no women occupied influential decision-making positions.<sup>56</sup> Although the representation of gender violence and the role of women in the Tokyo Tribunal is notable, it is difficult to call it a success. The Tokyo IMT failed to prosecute the systematic rape and slavery by the Japanese Imperial Army of as many as 200,000 former “comfort women” as a crime of war.<sup>57</sup>

### B. International Ad-Hoc Tribunals

International ad-hoc tribunals were formed by the United Nations (UN) Security Council in response to intra-state conflict in the former Yugoslavia and Rwanda.<sup>58</sup> The Security Council tasked each court with prosecuting perpetrators of genocide, crimes against humanity, and war crimes, targeting individuals responsible on all sides of the conflict.<sup>59</sup> Both courts were limited to investigating matters that occurred during the intra-state conflict.<sup>60</sup>

The international criminal tribunals of the Former Yugoslavia and Rwanda established a legal foundation for the international prosecution of GBV related crimes in times of war. The UN established the International Criminal Tribunal for Yugoslavia (ICTY) to prosecute those responsible for the “ethnic cleansing” of various ethnic groups in the region formally known as Yugoslavia.<sup>61</sup> Also the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) to prosecute the genocide of the Tutsi minority by the Hutu majority.<sup>62</sup> The

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<sup>52</sup> Askin, *supra* note 51 at 302.

<sup>53</sup> *Id.*; Dianne Luping, *Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal Courts*, 17 AM. J. J. GENDER SOC. POL’Y & L. 431, 460-61 (2009).

<sup>54</sup> Askin, *supra* note 51 at 302.

<sup>55</sup> Lehr-Lehnardt, *supra* note 47.

<sup>56</sup> *Id.* at 323.

<sup>57</sup> *See* Palmer, *supra* note 51.

<sup>58</sup> Dunoff, *supra* note 48 at 609-10.

<sup>59</sup> *Id.*

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See* Palmer, *supra* note 51 at 140.

“ethnic cleansing” and “ethnic genocide” in these two countries included unlawful detention, mass murders, torture, and sexual and gender related crimes.<sup>63</sup>

### 1. *International Criminal Tribunal for Rwanda*

The ICTR was the first ad-hoc tribunal to address GBV. The ICTR convicted a former mayor, Jean-Paul Akayesu, of rape.<sup>64</sup> *Akayesu* established that rape was a form of torture and later served as the precedent case defining rape as a crime of genocide.<sup>65</sup> The *Akayesu* case did not limit “sexual violence” to physical invasion, penetration, or physical contact, thus expanding criminal liability to not only the alleged rapists but also individuals who order the rape, individuals present at the time of the rape, and those who knew or should have known about the rape and could have prevented it.<sup>66</sup>

The ICTR continues to highlight the importance of recognizing GBV in the amended indictment of Idephonse Nizeyimana. As a captain in the Rwandan Armed forces and the second-in-command at the Ecole des Sous Officiers, the military school in the Butare prefecture, Nizeyimana allegedly ordered the rape and murder of women at the Butare Hospital and female students at Butare University.<sup>67</sup> The ICTR has recently amended his indictment to include rape not only as a crime against an individual but also as a crime against humanity.<sup>68</sup>

### 2. *International Criminal Tribunal for the Former Yugoslavia*

The ICTY charged Dusko Tadic, a member of a prominent Serbian family with aiding and abetting the commission of rape, gang rape, sexual mutilation, and other crimes of sexual violence during the Yugoslav conflict.<sup>69</sup> However, the ICTY failed to convict Tadic because the only witness to the rape refused to testify, alleging that she and her family received threats. As a result, the GBV charges against Tadic were dropped.<sup>70</sup>

Nonetheless, the *Tadic* case was the first international case that significantly raised awareness of sex crimes during an internal conflict.<sup>71</sup> Also, it provided a valuable lesson regarding victim protection. In 2001, the ICTY and ICTR gender issues legal officer, Patricia Viseur Sellers, made efforts to improve witness protection, obtained anonymity and privacy for

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<sup>63</sup> UN ICTY, “About the ICTY,” available at <http://www.icty.org/sections/AbouttheICTY>.

<sup>64</sup> Lehr-Lehnardt, *supra* note 47 at 327.

<sup>65</sup> *Id.*; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) (conviction for rape as a form of genocide because the perpetrators sought to change the demographic of Rwanda through systematic rape) available at <http://www.unhcr.org/refworld/pdfid/402790524.pdf>.

<sup>66</sup> Luping, *supra* note 53 at 327, 482.

<sup>67</sup> Valerie Oosterveld, *Atrocity Crimes Litigation Year in Review(2010): A Gender Perspective*, 9 NW. U. J. INT’L HUM. RTS 325, 343 (2011).

<sup>68</sup> *Id.*

<sup>69</sup> Lehr-Lehnardt, *supra* note 47 at 326.

<sup>70</sup> *Id.* at 326-27.

<sup>71</sup> *Id.* at 327.

testifying rape survivors, and educated members of the tribunals to better understand gender issues.<sup>72</sup>

In the *Kunarac et al.* case, the ICTY convicted the defendants for enslavement in conjunction with rape and rape as a crime against humanity.<sup>73</sup> Known as the “rape camp case,” Kunarac was convicted for his participation as a perpetrator, instigator, and aider and abettor of sexual violence for raping and torturing several Muslim women and girls.<sup>74</sup> The Trial Chamber wrote an extensive opinion regarding enslavement, and under international law, it clarified the elements of rape and torture.<sup>75</sup> It addressed a person’s lack of consent as a necessary factor of rape and other GBV crimes.<sup>76</sup> According to the Trial Chamber, a violation of sexual autonomy occurs “when the person subjected to the act has not freely agreed to it or is otherwise not a voluntarily participant.”<sup>77</sup>

The *Kunarac et al.* decision incorporated this progressive understanding of consent into the court’s procedural rules. Among other things, the Rules state that consent is not permissible as a defense if the victim was “threatened with or had reason to fear violence, duress, detention or psychological oppression, or reasonably believed that if the victim did not submit, another...might threatened or put in fear.”<sup>78</sup> Rule of Procedure 96 and others like it value the rape survivors’ voice and give legitimacy to victims of GBV.

### C. The International Criminal Court

In July 2002, the International Criminal Court (ICC) became the first permanent and independent international body to address genocide, war crimes, and crimes against humanity.<sup>79</sup> The ICC is the result of the Rome Statute, a 128-article multilateral treaty developed over several years.<sup>80</sup> It has since expanded to bind over 121 party states and has established common ground on how to address the world’s most reprehensible crimes.<sup>81</sup>

The Rome Statute codifies many aspects of the ICTY and ICTR decisions in the area of GBV, proscribing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as a crime against

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<sup>72</sup> *Id.* at 324.

<sup>73</sup> Palmer, *supra* note 51 at 142.

<sup>74</sup> Askin, *supra* note 51, at 336; Luping, *supra* note 53 at 331.

<sup>75</sup> Askin, *supra* note 51, at 333.

<sup>76</sup> *See id.* at 334.

<sup>77</sup> Askin, *supra* note 51 at 334 (quoting *Prosecutor v. Kunarac*, Amended Indictment, IT-96-23-T, (Dec. 1, 1999 & IT-96-23/1-T, Mar., 2000).

<sup>78</sup> *Id.* at 335 (quoting Rule 96 of the Rules of Procedure and Evidence of the ICTY, evidence in Cases of Sexual Assault, IT32/Rev. 21, 12 July 2001).

<sup>79</sup> DUNOFF, *supra* note 48 at 614.

<sup>80</sup> *Id.*

<sup>81</sup> International Criminal Court, “About the Court,” available at <http://icc-cpi.int/Menus/ICC/About+the+Court/>.

humanity.<sup>82</sup> The Rome Statute also provides for representation of women in the ICC staff<sup>83</sup> and affirms the rights of victims, including Article 68(3), which “establishes the unequivocal statutory right for victims to present their views and concerns in person where their personal interests are affected....”<sup>84</sup>

Nonetheless, even with these provisions in place, victims’ participation is limited by procedural rules that give the prosecutor power to determine who is a victim and how they may participate.<sup>85 86</sup>

### 1. *The Case of Thomas Lubanga Dyilo*

Thomas Lubanga Dyilo was a militia leader convicted of conscripting and enlisting children soldiers during the internal conflict in the Democratic Republic of Congo. In spite of advocacy efforts by women’s rights groups, the prosecution did not charge Lubanga with any sexual or GBV crimes although evidence was present that “girls had been kidnapped into Lubanga’s militia and often raped and/or kept as sex slaves.”<sup>87</sup> The effect of the prosecutor’s charges immediately limited the field of witnesses, and the opportunity to later present evidence regarding GBV.<sup>88</sup> The Court cited judicial efficiency to explain its actions.<sup>89</sup> In the recent case of Callixte Mbarushiman, however, ICC prosecutors charged the defendant with eleven counts: the crimes against humanity of murder, torture, rape, gender-based persecution and inhumane acts, and the war crimes of attacks against the civilian population, murder, torture, rape, inhuman treatment and destruction of property.<sup>90</sup>

## D. Hybrid Courts

Hybrid courts are created as a combination of international and domestic courts, and the law applied also consists of a blend of international and domestic authority.<sup>91</sup> As seen in

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<sup>82</sup> Rome Statute of the International Criminal Court, Art. 7(1), U.N. Doc. A/CONF.183/9\*.

<sup>83</sup> Lehr-Lehnardt, *supra* note 47 at 327.

<sup>84</sup> Susana SáCouto, *Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?*, 18 MICH. J. GENDER & L. 297, 318 (2012) (citing Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 Art. 68(3)).

<sup>85</sup> *Id.* at 322 (modeling rule 89(2) as a hindrance to victim participation. “under Rule 89(2), either the prosecution or defense may request that the court deny an application to participate on the grounds that the applicant is not a ‘victim’....”).

<sup>86</sup> *See id.* at 344-47.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 338 (noting that after the Pre-Trial Chamber issued Lubanga’s charges, the Trial Chamber heard additional fact, not described in the original charging document that could have been used to issue new charges, such as GBV. Nonetheless, the Appeals chamber held that the Trial Chamber was not permitted from changing the charges based on the facts and circumstance not present in the original charging document.)

<sup>89</sup> SáCouto, *supra* note 85 at 338.

<sup>90</sup> *Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges (Dec. 16 2012) available at <http://www.iccklamberg.com/Caselaw/DRC/Mbarushimana/PTCI/465.pdf>.

<sup>91</sup> Palmer, *supra* note 51 at 151.

Cambodia and Timor-Leste, each hybrid court country determines what mix of domestic and international law should influence the proceedings.<sup>92</sup>

### 1. *Special Court for Sierra Leone*

From 1991 to 2002, the Revolutionary United Front (RUF), Civil Defense Forces (CDF), and Armed Forces Revolutionary Council (AFRC) were all actors in the Sierra Leonean civil war.<sup>93</sup> The Special Court for Sierra Leone (SCSL) was born from the 1999 Lomé Peace Agreement and subsequent compromises.<sup>94</sup> The UN Security Council symbolized the SCSL as an instrument of peace building “expected to undertake gender-sensitive prosecutions.”<sup>95</sup>

GBV was used as a weapon of war in Sierra Leone’s eleven-year conflict, as Sierra Leonean soldiers abducted women and girls and forced them to become their sexual partners.<sup>96</sup> Women often lived with their soldier partners and were considered their wives.<sup>97</sup> The husbands exercised violence and/or used threat of violence to coerce their victims to take on the normal duties of a wife, such as cooking, cleaning, bearing and raising children.<sup>98</sup> The UN Special Rapporteur on the Elimination for Violence Against Women estimated that as many as 215,000 to 275,000, of Sierra Leonean women and girls were victims of sexual violence.<sup>99</sup>

*Prosecutor v. Brima, Kamara and Kanu*, also known as the Armed Forces Revolutionary Council (AFRC) case, is acclaimed as the first judgment issued by the Special Court for Sierra Leone (SCSL), and the first trial case that presented the charges of forced marriage and sex slavery as two separate crimes against humanity.<sup>100</sup> The acknowledgment of forced marriage and sex slavery as two separate crimes legitimized the notion that GBV should not be synonymous with sexual violence.<sup>101</sup>

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<sup>92</sup> David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 42 STAN. J. INT’L L. 1, 2 (2007).

<sup>93</sup> Valerie Oosterveld, *The Special Court for Sierra Leone’s Consideration of Gender-based Violence: Contributing to Transitional Justice?*, 10 HUM. RTS. REV. 73, 76 (2009).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 76.

<sup>96</sup> *Id.* at 145.

<sup>97</sup> *Id.*

<sup>98</sup> Oosterveld, *supra* note 94 at 145.

<sup>99</sup> Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Final Report of the TRC* available at <http://www.sierraleonetruc.org/index.php/view-report-text-vol-3b/item/volume-three-b-chapter-three>.

<sup>100</sup> Oosterveld, *supra* note 94 at 75.

<sup>101</sup> *See id.* However, later, SCSL folded the charge of forced marriage into sex slavery, sending the flawed message that sex slavery is the same as forced marriage. In opposition to the conjoined crimes, Justice Doherty stated that the term wife “is indicative of forced marital status which had lasting and serious impacts of the victims.” Justice Doherty concluded that “[t]he primary concern of the crime is the mental and moral suffering of the victim.” On appeal, the Appeals Chamber relied on Justice Doherty’s dissent and concluded that a forced marriage and sex slavery could not reasonably be subsumed into one another. *Id.*

Even though the conflict has ended in Sierra Leone, some abducted women have remained in a relationship with their captor husbands.<sup>102</sup> Lessons from the SCSL can be applied to other societies in transition from conflict, such as Cambodia, where forced marriage was a form of GBV. The SCSL teaches that women who remain in forced marriages should not be left out of the transitional justice process. Moreover, the recognition of forced marriage as an international crime during times of conflict ought not to overshadow other cultural practices such as arranged marriages that occur in times of peace.<sup>103</sup>

## 2. *Special Panel for Serious Crimes for Timor-Leste*

The Special Panel for Serious Crimes (SPSC) for Timor-Leste has been heralded as the first hybrid court. It was created by the UN Security Council to try crimes defined as “serious crimes,” including genocide, crimes against humanity, and sexual violence, and committed between January 1 and October 25, 1999 in Timor-Leste.<sup>104</sup>

The SPSC is a heavily critiqued court, and many lessons were learned throughout the course of proceedings. The Court has been criticized for failing to meet significant international standards because it lacked a clear mandate from the UN, had no framework for deliverable goals and lacked adequate resources and funding. As a result, GBV prosecutions suffered. Nonetheless, in the *Loctoe* trials, the SPSC convicted three militia commanders of rape as a crime against humanity. The *Loctoe* prosecutors utilized the decisions from the ICTR and the ICTY, and used the Rome Statute for the first time in GBV prosecution.<sup>105</sup>

## 3. *Extraordinary Chambers in the Courts of Cambodia*

In 1997, to prosecute the senior leaders of the Khmer Rouge the Cambodian government requested that the UN assist Cambodia in establishing a trial court.<sup>106</sup> In June 2003, the UN and Cambodian government reached an agreement detailing the hybrid operations of the Extraordinary Chamber in the Courts of Cambodia (ECCC).<sup>107</sup>

On February 3, 2012, the ECCC issued its first and thus far, only sentence.<sup>108</sup> The ECCC found Kaig Guek Eav, also known as Duch, the former Chairman of the Khmer Rouge S-21, guilty of crimes against humanity and grave breaches of the Geneva Conventions.<sup>109</sup> None of the

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<sup>102</sup> *Id.* at 145.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 8. For a full discussion of the conflict in East Timor, see Regional Women’s Hearings, *Country Briefs: Timor-Leste*, September 2012.

<sup>105</sup> Susan Harris Rimmer, *Wearing His Jacket: A Feminist Analysis of the Serious Crimes Process in Timor-Leste*, 19 AUSTL. INTL. L. J. 81, 85,95 (2009) .

<sup>106</sup> Extraordinary Chambers in the Courts of Cambodia, *supra* note 131 at 83.

<sup>107</sup> *Id.*

<sup>108</sup> Extraordinary Chambers in the Courts of Cambodia, *Case 001 available at <http://www.eccc.gov.kh/en/case/topic/1>*.

<sup>109</sup> *Id.*

charges directly implicated GBV.<sup>110</sup> While evidence of rape was present in the *Duch* case, the charges were collapsed into the crime against humanity of torture, and then torture was collapsed into the crime against humanity of persecution.<sup>111</sup> In a second case, Case 002, senior members of the Khmer Rouge Central Committee and/or Standing Committee, Ieng Sary, Khieu Samphan, Nuon Chea, and Ieng Thirith, are charged with the use of forced marriage within the Khmer Rouge regime.<sup>112</sup> Forced marriage is charged as an inhumane act and as rape under the category of crimes against humanity.

While the gender jurisprudence of the ECCC is still evolving, commentators have noted that the victim participation scheme of the Court may cede too much power to the prosecution to decide who is “in control, having a say, being listened to, or being treated with dignity and respect.”<sup>113</sup> Moreover, the efficacy of the Court cannot be divorced from the cultural context in which it operates. For example, in the case of the ECCC, contrary to evidence of GBV, there is a prevailing belief in Cambodia that sexual violence did not occur under the rule of the Khmer Rouge because the Khmer Rouge prohibited rape.<sup>114</sup> “[T]he issue of whether this policy was consistently enforced and whether it served to prevent sexual violence is highly contested.”<sup>115</sup> Accordingly, it is likely that sexual crimes will not be fully addressed at the trials before the ECCC.<sup>116</sup>

## E. Truth Commissions

Truth commissions distinguish themselves from the adversarial process by adhering to a victim-centered format. Victims are invited to testify with the goal of compiling a more complete historical record of conflict. Generally, truth commissions are non-judicial, and thus cannot prosecute and convict in the same sense as an international or hybrid court. However, freed from the confines of limiting testimony and evidence to the criminal charges, truth commissions have offered an opportunity for victims to participate in a more holistic, and some claim, restorative manner.<sup>117</sup> Timor-Leste and Sierra Leone have both had a court and a TRC operate simultaneously.<sup>118</sup> South Africa and East Timor are the only two truth commissions that have

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<sup>110</sup> *See id.*

<sup>111</sup> Oosterveld, *supra* note 67.

<sup>112</sup> *Prosecutor v. Ieng et. al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Indictment (Sept. 15, 2010) available at <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>.

<sup>113</sup> Susana SáCouto, *supra* note 85 at 324; *see also id.* at 315 (citing Ian Edwards, *An Ambiguous participant: The Crime Victim and the Criminal Justice Decision marking*, 44 BRIT. J. OF CRIMINOLOGY 967, 973 (2004)).

<sup>114</sup> Cambodian Defenders Project, *supra* note 1 at 1, fn. 1.

<sup>115</sup> *Id.*

<sup>116</sup> Regional Women’s Hearing: *Country-Briefs: Cambodia*, September 2012.

<sup>117</sup> Carrie J. Niebur Eisnagle, *An International “Truth Commission”: Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT’L L. 209, 213 (2003).

<sup>118</sup> *See Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste* [hereinafter CAVR] (2005) available at <http://www.cavr-timorleste.org/cheгаFiles/finalReportEng/00--Preface.pdf>.

established programs to illicit confessions from perpetrators and also involve them in a public hearing.<sup>119</sup>

### 1. *South African TRC*

The South African Truth and Reconciliation Commission helped to garner respect for truth commissions as a mechanism of transitional justice.<sup>120</sup> From 1995 to 1998, the South African TRC heard evidence of atrocities committed from 1960 to 1994 related to racial discrimination and the apartheid era.<sup>121</sup> Shortly after its inception, the TRC became aware that women were not testifying about their own experiences.<sup>122</sup> It became clear to the commissioners that “the context of a public hearing made it difficult for women to overcome the stigma attached to sexual violence.”<sup>123</sup> Civil society groups made recommendations with the hope that more women would testify. They suggested that the TRC adopt a provision to allow “statements to be given confidentially, [assure] women that they do not need to testify publicly, [allow] women deponents to request that their statements be taken by women... that women be allowed to testify in closed hearing before only women commissioners,” and to organize a series of women’s hearings.<sup>124</sup>

Even after the TRC adapted its proceedings to make them more accessible to women, turnout was lower than expected.<sup>125</sup> Most of the women who testified were political leaders or leaders in the anti-apartheid movement.<sup>126</sup> Some women simply did not testify due to other issues of social stratification.<sup>127</sup> Despite obstacles to women’s participation, in its final report, the TRC concluded that women “suffered direct gross violations of human rights, many which were gender specific”...including rape, other forms of sexual violence, psychological abuse, torture, and death.<sup>128</sup>

### 2. *Sierra Leone TRC*

The Sierra Leone TRC was established on July 5, 2002 and operated from November 2002 until October 2004.<sup>129</sup> The Lomé Peace Agreement mandated the TRC to “address

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<sup>119</sup> Louis Bickford, *Unofficial Truth Projects*, 29 HUM. RTS. QUARTERLY 994, 997 (2009).

<sup>120</sup> *Id.* at 999.

<sup>121</sup> *Id.*

<sup>122</sup> Tristan Anne Borer, *Gendered War and Gendered Peace: Truth Commissions and Postconflict Gender Violence: Lessons from South Africa*, 15 VIOLENCE AGAINST WOMEN 1169, 1177 (2009).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1177-78.

<sup>126</sup> Borer, *supra* note 123 at 1177-78.

<sup>127</sup> *Id.* at 1185.

<sup>128</sup> *Id.* at 1177-78.

<sup>129</sup> Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Final Report of the TRC* available at [http://www.sierraleonetr.com/index.php/view-report-text-vol-3b/item/volume-three-b-chapter-three?category\\_id=9](http://www.sierraleonetr.com/index.php/view-report-text-vol-3b/item/volume-three-b-chapter-three?category_id=9); United States Institute of Peace, *Truth Commission: Sierra Leone* available at <http://www.usip.org/publications/truth-commission-sierra-leone>.

impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, [and] get a clear picture of the past in order to facilitate genuine healing and reconciliation.”<sup>130</sup> Similar to Timor-Leste, Sierra Leone TRC functioned simultaneously with the operation of the hybrid court.<sup>131</sup> The UN Secretary-General recognized Sierra Leone’s TRC and SCSL as an exemplary model for transnational justice despite initial doubts that perpetrators would be discouraged from testifying because of the fear of prosecution.<sup>132</sup>

The TRC focused attention on needs of women and girls due to the widespread sexual violence that occurred in the conflict.<sup>133</sup> Women’s groups formed the Women’s Task Force, a coalition of civil society groups, women’s groups and international and local NGOs, to serve as the primary consultant for the TRC to ensure that crimes suffered by women were adequately identified and addressed.<sup>134</sup> The Women’s Task Force facilitated meetings in both urban and rural areas to provide women an opportunity to voice their individual needs, which included assistance for victims of sexual abuse, increased land ownership, opportunity for education, reconstruction of destroyed social structures, and reparations for victims.<sup>135</sup>

The Women’s Task Force not only channeled concerns regarding post-conflict rebuilding but also issues on the gender divide in Sierra Leonean social structure.<sup>136</sup> In addition, the Women’s Task Force advocated for more female representation in the transitional justice process, as the presence of women would ensure gender-sensitive means were adopted, and more women would be encouraged to testify.<sup>137</sup> Eventually three out of the seven TRC commissioners selected were women.<sup>138</sup> As in South Africa, the Sierra Leone TRC held special closed hearings for women.<sup>139</sup> During these hearings, women’s groups marched through the streets in support of the hearings, carrying banners and calling on the government to address the violence women suffered during the conflict and continue to suffer.<sup>140</sup> Because of the actions of women’s groups, more women were encouraged to testify to their experience, the TRC was able to produce a more accurate understanding of its history, and women are now moving toward a more egalitarian role in the Sierra Leonean society.

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<sup>130</sup> *Id.* at [http://www.sierraleonetr.com/index.php/view-report-text-vol-1/item/vol-one-chapter-one?category\\_id=19](http://www.sierraleonetr.com/index.php/view-report-text-vol-1/item/vol-one-chapter-one?category_id=19) (quoting the Lomé Peace Agreement).

<sup>131</sup> William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 15 CRIM. L.FORUM 3, 5 (2004).

<sup>132</sup> *Id.*

<sup>133</sup> Jasmina King, *Gender and Reparations in Sierra Leone: The Wounds of War Remain Open*, 246, 252 (2006). Section 5 of anthology, *What Happened to the Women? Gender and Reparation for Human Rights Violations* (Ruth Rubio-Marín ed., 2006).

<sup>134</sup> *Id.* at 254.

<sup>135</sup> *Id.* at 255.

<sup>136</sup> *See* King, *supra* note 134.

<sup>137</sup> *Id.* at 255.

<sup>138</sup> *Id.*

<sup>139</sup> *See* King, *supra* note 134 at 256.

<sup>140</sup> *Id.*

### 3. *Comissão de Acolimento, Verde e Reconciliação de Timor-Leste*

The Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR-the Portuguese acronym) was established in 2001, and was in session from 2002 to December 2005.<sup>141</sup> The UN mandated that the CAVR support the SPSC. While the UN intended the SPSC to handle the serious crimes, CAVR was designed to address less serious crimes for the same period of 1974 to 1999.<sup>142</sup>

Advocates for victim participation were pleased to learn that SPSC and CAVR would take place where the conflict occurred, making it easier for victims to be involved in the tribunal and truth commission.<sup>143</sup> However, some critics viewed the community outreach by the UN and Timorese government as weak.<sup>144</sup> Furthermore, the unit designated to conduct outreach for CAVR was the same entity responsible for ensuring victims' rights, placing pressure on an already stressed organization.<sup>145</sup>

CAVR implemented many of the recommendations from the South African TRC in order to encourage women's participation. Yet, even after designating women panel members and commissioners and conducting outreach to women in local communities, the vast majority of victim participants and deponents were male.<sup>146</sup> CAVR staff identified several logistical reasons for women's lack of participation, including the fact that men acted as representatives of the household, thereby silencing women's voices.<sup>147</sup> In addition, the hearing occurred in the evening at a time when women were already burdened with household and childcare responsibilities.<sup>148</sup> Finally, CAVR staff noted that in order to engender equal participation, additional time and resources were needed to gain the trust of women.<sup>149</sup> The final CAVR report concluded that the dearth of women participants was also caused by a lack of societal acceptance of women victims of sexual GBV crimes and the culturally divided gender roles.<sup>150</sup>

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<sup>141</sup> CAVR, *supra* note 119..

<sup>142</sup> *See id.*

<sup>143</sup> *See* Cohen, *supra* note 93 at 18.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 35.

<sup>146</sup> CAVR, *supra* note 119 at 37.

<sup>147</sup> *Id.* at 39.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> CAVR, *supra* note 119.

#### IV. GENDER LESSONS LEARNED FROM INTERNATIONAL TRIBUNALS

Although every country has a different and unique conflict and post conflict history, there are common obstacles and lessons to share on how to address GBV in future post conflict transitional justice efforts.

First, for victims of GBV to be recognized, women must begin to be recognized as leaders in society. Without recognition of the gender-specific role women play and the importance of their occupation of positions of leadership, GBV will go unaddressed. As seen in the Tokyo Military Tribunal and subsequent transitional justice mechanisms, women's visibility in leadership positions challenges preconceived gender roles and helps to bring societal value to women. As demonstrated in the South African and Sierra Leonean TRCs, the presence of women panelists provide a more welcoming space for women victims to come forward and share their unique experience in conflict.

Second, women represent a disproportionate number of GBV victims. Transitional justice mechanisms should acknowledge the patterns of subordination that lead to GBV and that decrease the agency of women to speak out against their victimization and be heard. For example, in Sierra Leone, the TRC was utilized as both a forum for women to share their experiences in conflict, but also as a way to challenge accepted societal inequality that led to women's victimization. The Sierra Leone TRC recommendations included reparations for victims as well legal changes to increase the societal value of women.<sup>151</sup>

Third, there are daily operational changes in these judicial and quasi-judicial mechanisms that can increase women's access to transitional justice. For example, highlighting gender-based crimes prior to the prosecution stage in the international courts can ensure that gender-based crimes are recognized and included in any subsequent criminal charges. Recognizing women's competing demands as workers and mothers can make tribunals and TRCs such as the CAVR more accessible. The Sierra Leone and South African TRCs even experimented with women-only hearings.

Finally, transitional justice mechanisms need to improve outreach and education to the post conflict community as well as those delegated the responsibility of prosecuting crimes involving GBV. The SPSC, the ICC and ECCC victim participation protocols, and the CAVR outreach efforts demonstrate that more resources are necessary to explain the complex ways

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<sup>151</sup> Sierra Leone Truth and Reconciliation Commission's Recommendations Matrix *available at* [http://www.sierraleonetrc.org/images/recommendations\\_matrix/matrix/matrix/matrix/finalmatrix.html](http://www.sierraleonetrc.org/images/recommendations_matrix/matrix/matrix/matrix/finalmatrix.html). These recommendations included eliminating gender as a consideration for citizenship, and repealing constitutional sections that permit discrimination against women.

GBV, sexual violence and social inequality of women intersect. The education and involvement of the community in the transitional justice process will help to promote gender justice in post conflict society.

## V. WOMEN'S CONTRIBUTION TO TRANSITIONAL JUSTICE

To date, the ECCC civil party lawyers have had limited success in advocating for the inclusion of sexual violence in the prosecution of Khmer Rouge leaders.<sup>152</sup> The UN Transitional Administration in East Timor has faced many challenges with respect to developing a strategy to address GBV.<sup>153</sup> The outcome of prosecution for gender-based crimes in Bangladesh remains uncertain,<sup>154</sup> and Nepalese women are left to wonder about the potential for gender justice in the deadlock surrounding the creation of a TRC in their country.<sup>155</sup>

As such, the Regional Women's Hearing on Gender-Based Violence in Conflict will provide an important opportunity for women from participating countries to share their experiences of GBV as well as for the greater NGO community to build regional strategies around addressing GBV in post-conflict. As scholar Susana SáCouto has noted, because of the tainted history of gender-based prosecutions through international tribunals, it is wise for the international community to invest more in exploring other possibilities that might obtain the feminist goal of visibility of GBV.<sup>156</sup> The Regional Hearing provides one such possibility.

### A. Transformative Potential for the Regional Hearing

At the Regional Hearing, women will have the space and opportunity to share their experiences of sexual violence as part of the restorative process of healing. As noted above, past truth commissions and informal truth-telling panels have served an important role in giving victims of gender-based violence a platform upon which to make their voices heard.

The Regional Hearing is an alternative mechanism that holds out the possibility of complementing the inevitably limited narratives that emerge through criminal proceedings alone.<sup>157</sup> The information gathered at the Regional Hearing and the inclusive nature of the forum should benefit participants. The narratives shared do not have to be confined to legal relevancy, but instead can provide a more "comprehensive understanding of patterns of violations,"<sup>158</sup>

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<sup>152</sup> Recently, the VSS in the ECCC has expanded its mandate to include the development and of non-judicial programs to address the broader interests of victims.

<sup>153</sup> Regional Women's Hearing, *Country Briefs-Timor Leste* (Sept. 2012).

<sup>154</sup> Regional Women's Hearing, *Country Briefs-Bangladesh* (Sept. 2012).

<sup>155</sup> Regional Women's Hearing, *Country Briefs-Nepal* (Sept. 2012).

<sup>156</sup> SáCouto, *supra* note 85 at 302.

<sup>157</sup> *Id.* at 304.

<sup>158</sup> *Shame of War*, *supra* note 27 at 101.

serving as a “cathartic fora for investigating the extent of sexual abuse and gender-based violence.”<sup>159</sup>

The Regional Hearing may also expose the systematic inequality experienced by women across conflicts and cultures<sup>160</sup> and create a record<sup>161</sup> that will serve as a comparative learning tool for victims and NGOs from the participating countries. Furthermore, the hearing has the potential to illustrate that the problem of gender-violence in conflict cannot be relegated to the sidelines in international criminal prosecution and post-conflict transition.<sup>162</sup>

The Regional Hearing aims to contribute to the psycho-social process of healing for each of the participants involved. The participants will benefit from the opportunity to share their stories, break the silence, and find support and solace in knowing that they are not alone in their experience of gender-based violence. As exhibited in the first hearing, victims of violence have stayed in touch with each other and have served as a mutual form of support.<sup>163</sup> Organizers hope to continue this pattern of camaraderie and support between participants into the future.

Finally, the Regional Hearing presents an opportunity for the communities and countries of the women participating to strengthen human rights networks across the Asia-Pacific region. “There exists a right for people to know that truth about human rights abuses visited on their communities.<sup>164</sup> The “why” of what happened is sometimes just as important as the “how” of what happened in order to bring voices of victims to the public stage and help a society understand and acknowledge a contested or denied history.”<sup>165</sup> Accordingly, the Regional Hearing and the record it will develop hope to serve as one method of reconstruction and healing, not only for the participants but also for the communities and families to which they will return.

## **B. The Role of NGOs and Civil Society in Promoting Transitional Justice Initiatives**

The first Women’s Hearing and the Regional Hearing are promising transitional justice initiatives. Both hearings have been driven by the NGO sector and members of civil society and

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<sup>159</sup> *Id.*

<sup>160</sup> FIONNUALA AOLÁIN, DINA FRANCESCA HAYNES, & NAOMI CAHN, *ON THE FRONTLINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS* 177 (2011).

<sup>161</sup> United Nations Office of High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States, Truth Commissions* (2006) [hereinafter *Rule of Law Tools*].

<sup>162</sup> AOLÁIN, *supra* note 161 at 179 (“Identifying these patterns is essential to seeing gender as a relational construction, and not merely to utilize gender as a term to justify uncovering the experience of women in truth recovery processes. Instead, attention to broader and deeper patterns of economic and social exclusion . . . enable truth processes to advance a more considered understanding of how differently men and women experienced life in a conflict zone. It . . . demonstrate[s] how gross human rights violations impact[] men and women differently.”)

<sup>163</sup> Concept paper, *supra* note 1.

<sup>164</sup> See *Rule of Law Tools*, *supra* note 162.

<sup>165</sup> *Id.*

supported through voluntary contributions from members of the international community. Given the success of the first hearing and the potential of the Regional Hearing, regional human rights networks stand to benefit.

As a primary matter, the NGO-driven hearing process is based on developing a truth-telling forum in a local context with input from local actors. This embedded structure better positions the Hearing to serve as a site for understanding sexual and gender-based violence in the cultural contexts in which it occurs and to tackle the societal causes of violence against women.<sup>166</sup> As many commentators have noted, “[i]n order for human rights ideas to be effective . . . they need to be translated into local terms and situated within local contexts of power and meaning.”<sup>167</sup>

Second, truth-telling panels such as the Regional Hearing may have the effect of galvanizing human rights activists. This larger consensus can generate pressure on governments to expand their human rights systems and the provision of services to victims of violence.<sup>168</sup> From past experience, gender justice has included not only the recognition and prosecution of gender-based crimes, but has also addressed other fundamental issues of inequality,<sup>169</sup> including the broader social and economic deprivations that women and their children suffer in situations of conflict.<sup>170</sup> An NGO and civil society-led process can ease the transition between identifying the many manifestations of gender-based violence, including hunger, lack of access to maternal and reproductive care, and broader economic and health challenges,<sup>171</sup> to providing for victims in need of these services.

Finally, non-judicial truth-telling fora led by NGOs and civil society have the potential to train women leaders, strengthen national legislation,<sup>172</sup> and contribute to regional human rights networks.<sup>173</sup> In removing the transitional justice process from the exclusive arena of international and governmental bodies, NGOs and civil society are better able to shed light on the gender inequalities that perpetuate GBV.<sup>174</sup> Regional efforts at addressing GBV may be more relevant and based upon principles agreed upon in the Asia-Pacific region. “Such a system could stand to educate citizens, states, corporations, and organizations on the importance of respecting human dignity, and to serve as a deterrent for those who assume that impunity is the norm.”<sup>175</sup>

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<sup>166</sup> *Shame of War*, *supra* note 27 at 123.

<sup>167</sup> MERRY, *supra* note 30 at 1.

<sup>168</sup> *See generally, id.* at 177.

<sup>169</sup> Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, 14 S. CAL. REV. L. & WOMEN'S STUD. 167, 171 (2005).

<sup>170</sup> AOLÁIN, *supra* note 161 at 181.

<sup>171</sup> *Id.*

<sup>172</sup> Manjoo, *supra* note 46 at 31.

<sup>173</sup> *Shame of War*, *supra* note 27 at 101.

<sup>174</sup> AOLÁIN, *supra* note 161 at 185

<sup>175</sup> Kelly Dawn Askin, *Issues Surrounding The Creation of a Regional Human Rights System for the Asia-Pacific*, 4 ILSA J. INT'L & COMP. L. 599, 600 (1998).

## VI. CONCLUSION

Gender-based violence is endemic to conflict. It reflects societal attitudes of male entitlement and privilege and functions as a form of social control that subordinates women. The international prevalence of violence against women during times of conflict indicates a larger phenomenon of the use of GBV as a “weapon of war.” Sexual violence as a weapon of war targets individuals not only based on group membership (e.g. ethnicity, tribe, race, etc.) but also based on gender.

International tribunals and truth commission have attempted, sometimes with success and sometimes unsuccessfully, to address GBV and bring redress to victims. The lessons learned from these experiences demonstrate the need for women to be involved in post justice mechanisms, to have their voices heard, and for transitional justice mechanisms to lead to additional challenges to women’s subordination in society. Accordingly, the Asia-Pacific Regional Women’s Hearing provides an opportunity for women to voice their experience of violence in conflict and for participants to construct a historical record from a gender-based perspective. In addition to offering the individual participants an opportunity to share their stories, the Regional Hearing will provide an opportunity to learn from comparative experience and develop strategies to strengthen regional responses to GBV.