

Fordham International Law Journal

Volume 36, Issue 4

2013

Article 7

Ending War Rape: A Matter of Cumulative Convictions

Leila Mokhtarzadeh*

*Fordham University School of Law

Copyright ©2013 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

ENDING WAR RAPE: A MATTER OF CUMULATIVE CONVICTIONS

*Leila Mokhtarzadeh**

INTRODUCTION.....	1022
I. THE DEVELOPMENT OF RAPE AS A WEAPON OF WAR AND ITS PROSECUTION IN INTERNATIONAL CRIMINAL SETTINGS.....	1026
A. The Use of War Rape and its Development as an International Crime.....	1026
B. The Reasons Rape is Used in War and the Sui Generis Nature of Rape.....	1030
II. VIEWS AND APPLICATIONS OF CUMULATIVE SENTENCING.....	1041
A. Cumulative Sentencing of Rape and Torture.....	1042
B. Against Cumulative Convictions in the ICC.....	1043
C. In Favor of Cumulative Convictions in the ICC.....	1045
D. Cumulative Convictions for Rape and Torture in Practice.....	1048
1. The Approach of the ICTR in <i>Semanza</i>	1048
2. The Approach of the ICC in <i>Bemba</i>	1050
III. CUMULATIVE CONVICTIONS ARE NECESSARY IN ORDER TO FULLY CAPTURE THE HARM CAUSED BY RAPE AND DETER THE USE OF RAPE AS A WEAPON OF WAR.....	1054
A. Cumulative Convictions are Necessary to End Sexual Violence in Armed Conflict.....	1054

* J.D., May 2013, cum laude, Fordham University School of Law; B.A., Economics and Iberian Studies, May 2008, cum laude, New York University. The Author would like to extend her gratitude to Professors Joy Chia, Professor Greg Milne, and the editors and staff of the *Fordham International Law Journal* for their editing and guidance. She would like to thank the Leitner Center, Janet Benshoof, Phyu Phyu Sann, Akila Radhakrishnan Julaine Eberhard, Kim Azzarelli, and her mother for inspiring her to write this note. She would also like to thank her friends, family, and her fiancé Jeremy for their love and support. The author dedicates this note to Nazanin Fatehi, Gulnaz, Chang Chang, and survivors of sexual violence around the globe.

B. The ICC Misapplied the Test for Cumulative Convictions and Undermined the Intent of the Rome Statute	1057
C. Cumulative Convictions Should Be Extended Beyond Rape and Torture	1059
CONCLUSION	1061

INTRODUCTION

“When the night fell the soldier came to get me. There were many women and the soldiers forced them too. I heard their screams. I told them I was pregnant and begged them not to do any harm. He forced me anyway and slapped my face. I was so scared and I screamed. Then he threatened me, ‘If you continue screaming I will force your baby through your stomach.’ I could only cry while he brutally raped me. Not only one person, but one after another . . . up to four. I could only cry while I was brutally raped. There were many women who lost their [lives] in this way.”

— Anonymous, 22 year-old Burmese rape survivor¹

The preceding quote recounts the story of a pregnant, twenty-two year old, Burmese woman.² The military junta forced her, and many others, into long hours of manual labor, only to be raped by multiple soldiers when night fell.³ She later learned that the rapes had caused permanent damage to her reproductive organs.⁴ After returning to her village, several soldiers came to her home to force her into manual labor.⁵ Her father attempted to plead with the soldiers and stood in their way.⁶ In retaliation, the military brutally murdered her father in

1. Video: Burma Tribunal Webcast, Part I (English) (Nobel Women’s Initiative 2010), *available at* <http://nobelwomensinitiative.org/burma> (depicting original testimony of a twenty-two year old survivor of rape at the hands of the Burmese military).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

front of her and burned down her home, along with other houses in her village.⁷

The targeted use of rape in armed conflict is one of the most powerful and damaging weapons used against civilians throughout history and today.⁸ Historical records indicate that women have been victims of war rape since Biblical times.⁹ More recently, during WWII, both German and American soldiers committed acts of rape, and Japanese soldiers subjected approximately 200,000 “comfort women” to sexual slavery.¹⁰ Studies estimate that seventy percent of these “comfort women” died from their injuries and a majority of survivors lost their reproductive abilities.¹¹ In addition, Japanese soldiers murdered

7. *See id.*

8. *See* 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, 297 (2003) (“History is replete with reports of women being raped . . . during periods of armed conflict, mass violence, occupation, resistance, and transition.”); *see also* Joshua H. Joseph, *Rethinking Yamashita: Holding Military Leaders Accountable for Wartime Rape*, 28 *WOMEN’S RTS. L. REP.* 107, 107–08 (2007) (“While it is undisputed that sexual violence has long been a part of . . . armed conflict, a significant amount of evidence exists to suggest that it is beginning to play a more central role in military combat.”); INGER SKJELSBÆK, *PEACE RESEARCH INST. OSLO, THE ELEPHANT IN THE ROOM: AN OVERVIEW OF HOW SEXUAL VIOLENCE CAME TO BE SEEN AS A WEAPON OF WAR* 6, 45–48 (2010) [hereinafter *PRIO REPORT*] (“Sexual violence is as old as war itself.”).

9. *See* Patricia H. Davis, Comment, *The Politics of Prosecuting Rape as a War Crime*, 34 *INT’L L.* 1223, 1226 (2000) (“Rape and other forms of sexual abuse of conquered women have been common, tragic aspects of warfare for as long as there has been written history of war”); Joseph, *supra* note 8, at 108 (“Rape has played a crucial role in war and armed conflict for centuries.”). It should be noted that men are also victims of war rape, as seen in Liberia, the former Yugoslavia and the Iraqi invasion of Kuwait. *See* Sandesh Sivakumaran, *Male/Male Rape and the “Taint” of Homosexuality*, 27 *HUM. RTS. Q.* 1274, 1285 (2005) (arguing that sexual violence against men tends to be reported even less than crimes against women due, in part, to the additional “taint” of homosexuality attributed to male survivors).

10. *See* *Prosecutors v. Hirohito Emperor Showa*, Case No. PT-200-I-T, Final Judgment, para. 539 (Women’s Int’l War Crimes Trib. for the Trial of Japan’s Military Sexual Slavery Dec. 4, 2001), available at <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgement.pdf> (estimating that 200,000 victims were held as “comfort women”); *see also* Rhonda Copelon, *Gender Violence as Torture: The Contributions of CAT General Comment No. 2*, 11 *N.Y. CITY L. REV.* 229, 23–36 (2008) (“[A]pproximately 200,000 ‘comfort women’ [were] forced to serve the Japanese military during the Second World War.”).

11. *See* *Hwang Geum Joo v. Japan*, 172 *F. Supp.* 2d 52, 55 (D.D.C. 2001) (describing the plaintiff’s estimate that only twenty-five to thirty-five percent of the “comfort women” survived the war, and those who did suffered health effects, including damage to reproductive organs and sexually transmitted diseases); Susana SaCouto, *Advances and Missed Opportunities in the International Prosecution of Gender-Based*

many survivors before surrendering to the Allies in an attempt to conceal their crimes.¹² The United Nations reports that approximately 250,000 to 500,000 women and young girls were raped in Rwanda's 100-day genocide.¹³ In Liberia, studies suggest that seventy-five percent of the female population was raped during the conflict from 1999–2003.¹⁴ In the Bangladesh Liberation War, approximately 200,000 to 400,000 women were raped in a nine-month period, leading to approximately 25,000 children born as a result of rape.¹⁵

Unfortunately, the use of war rape, seems to have increased in the twentieth century.¹⁶ Despite increased awareness about sexual violence in conflict and the creation of international tribunals, the use of sexual violence in conflict remains pervasive.¹⁷ This Note argues that because of the *sui generis* nature of rape, in its ability to damage the lives of its victims and

Crimes, 15 MICH. ST. J. INT'L L. 137, 141 (2007) (noting that a majority of comfort women lost their reproductive abilities).

12. See Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women"*, 14 TEX. J. WOMEN & L. 121, 126 (2004) ("[O]nly about twenty-five percent of the 'comfort women' survived the end of the war."); GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 152–58 (1997) (discussing comfort women).

13. See U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report on the Situation of Human Rights in Rwanda*, Report on the Situation of Human Rights in Rwanda, ¶16, E/CN.4/1996/68 (Jan. 29, 1996) (finding that between 250,000 and 500,000 women were likely raped during the Rwandan genocide).

14. See PRIO REPORT, *supra* note 8, at 47 (stating that three out of four women were raped); Nicholas D. Kristof, *After Wars, Mass Rape Persists*, N.Y. TIMES, May 20, 2009, at A35 (finding that seventy-five percent of women were raped).

15. See PRIO REPORT, *supra* note 8, at 9 (stating that between approximately 200,000 and 400,000 women were raped in the Bangladesh war of independence); see also KATHERINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 805 (4th ed. 2006) (reporting that Pakistani soldiers raped an estimated 200,000 women during the Bangladesh Liberation War).

16. See Askin, *supra* note 8, at 297 (stating that it appears that women's situations during armed conflict actually worsened in the twentieth century); see also Joseph, *supra* note 8, at 109 (stating that the "scale of rape and sexual violence . . . appears to have grown exponentially during the twentieth century.").

17. See Joseph, *supra* note 8, at 108 ("[A]n increase in awareness concerning violence against women has done little to reduce wartime rape."); NOBEL WOMEN'S INITIATIVE, *WAR ON WOMEN: TIME FOR ACTION TO END SEXUAL VIOLENCE IN CONFLICT* 2 (May 2011), available at http://www.nobelwomensinitiative.org/wp-content/archive/stories/Conference_Outawa_Women_Forging_a_New_Security/war-on-women-web.pdf [hereinafter *WAR ON WOMEN*] (stating that despite efforts to raise awareness, "the level of violence against women is by no means abating").

destroy communities, international tribunals should implement cumulative convictions to acknowledge, punish and deter the crime.¹⁸ Cumulative convictions should be permitted where a single criminal “‘act,’ ‘deed,’ or ‘transaction’” could be charged under multiple criminal offenses.¹⁹

This is particularly important given the ongoing use of rape as a weapon of war in conflicts today.²⁰ Soldiers have been using rape against Burmese civilians for fifty years without facing repercussions.²¹ In addition, new conflicts such as the uprising in Libya have brought with them horrific new ways to perpetrate rape, including the use and distribution of sexual enhancement drugs, such as Viagra.²²

18. See Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 53–55 (2004) (asserting that rape differs from other assaults); Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1449 (1993) (stating that rape is sui generis). Black's Law Dictionary defines sui generis as, “[o]f its own kind or class; unique or peculiar.” BLACK'S LAW DICTIONARY (9th ed. 2009).

19. Suzanne Walther, *Cumulative Offenses*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, Volume I 475, 475–76 (Antonio Cassese et. al., eds., 2002) (defining cumulative convictions).

20. See GLOBAL JUSTICE CENTER, THE RIGHT TO AN ABORTION FOR GIRLS AND WOMEN RAPED IN ARMED CONFLICT, 2 (2011) available at <http://globaljusticecenter.net/publications> (stating that sexual violence has been documented in at least 36 recent conflicts); WAR ON WOMEN, *supra* note 17, at 2 (reporting that violence against women is not abating).

21. See BETSY APPLE & VERONIKA MARTIN, REFUGEES INTERNATIONAL, NO SAFE PLACE: BURMA'S ARMY AND THE RAPE OF ETHNIC WOMEN 43 (2003), available at <http://www.unhcr.org/refworld/docid/47a6eb9a0.html> (stating that rape by the military has been documented for at least fifty years) (citing BERTIL LITNER, BURMA IN REVOLT: OPIUM AND INSURGENCY SINCE 1948 (Thailand: White Lotus, 1995)). The United Nations has acknowledged these crimes for nearly twenty years. See INT'L. HUMAN RIGHTS CLINIC AT HARVARD LAW SCHOOL, CRIMES IN BURMA 52 (2010) available at www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf.

22. See Prosecutor v. Pauline Nyiramasuhuko, Case No. ICTR-98-42-T, Judgment and Sentence, paras. 4915–29 (Int'l Crim. Trib. For Rwanda June 24, 2011) <http://www.unictt.org/Cases/tabid/127/PID/83/default.aspx?id=4&mnid=3> (finding that Nyiramasuhuko ordered soldiers to rape Tutsis in Rwanda and provided them with condoms); see also CNN Wire Staff, *ICC to Investigate Reports of Viagra-Fueled Gang-Rapes in Libya*, CNN WORLD (May 17, 2011), <http://www.cnn.com/2011/WORLD/africa/05/17/libya.rapes.icc/index.html> (reporting on now-former International Criminal Court (“ICC”) Prosecutor Luis Moreno-Ocampo's description of Viagra as a “tool of massive rape”); Owen Bowcott, *Libya Mass Rape Claims: Using Viagra Would Be Horrific First*, GUARDIAN (June 9, 2011), available at <http://www.guardian.co.uk/world/2011/jun/09/libya-mass-rape-viagra-claim> (describing distribution as intended “to enhance the possibility to rape women”); *Rape Used ‘as a weapon’ in Libya*, AL JAZEERA (Mar. 27,

This Note explores different viewpoints on the use of cumulative convictions in international criminal courts, both from a conceptual and practical point of view, focusing on the use of cumulative convictions in *Prosecutor v. Laurent Semanza* in the International Criminal Tribunal for Rwanda (“ICTR”), and *Prosecutor v. Jean-Pierre Bemba Gombo* in the International Criminal Court (“ICC”).²³ Part I explores the reasons rape is used in war and considers the development of rape as an international crime, including the use of cumulative convictions. Part II presents the different legal and conceptual viewpoints on using cumulative convictions to prosecute rape, and the practical outcomes adopted by the ICTR and the ICC. Finally, Part III argues that the ability to charge cumulatively, both as a theoretical and practical matter, is essential to fully acknowledge and punish the harm caused by rape, and thus end its rampant use and continued impunity.

I. *THE DEVELOPMENT OF RAPE AS A WEAPON OF WAR AND ITS PROSECUTION IN INTERNATIONAL CRIMINAL SETTINGS*

Part I provides background on this issue. Part I.A focuses on the use of sexual violence as a weapon of war and the development of rape as a crime under international law. Part I.B provides a detailed discussion of the reasons rape is used in war, including the effects of sexual violence on individuals, families, and entire communities.

A. *The Use of War Rape and its Development as an International Crime*

On September 2, 1998, Jean Paul Akayesu, a former mayor of the Taba commune, was convicted of rape as a result of his role in the 1994 Rwandan genocide.²⁴ The verdict marked the

2011), <http://www.youtube.com/watch?v=ISLz8Fv0eik> (reporting that evidence of condoms and Viagra was found on Gaddafi soldiers and in their tanks).

23. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 (June 15, 2009); see also *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, (Int’l Crim. Trib. for Rwanda May 15, 2003).

24. *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, paras. 415–60, (Int’l Crim. Trib. for Rwanda Sept. 2, 1998), available at <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (describing sexual violence charges).

first time an international tribunal convicted an individual for rape as a crime against humanity, thereby establishing the first definition of rape under international law.²⁵ The original indictment charged Akayesu with twelve counts, including genocide, crimes against humanity, and violating the Geneva Conventions.²⁶ Despite evidence of sexual violence against Tutsi women, no rape or sexual violence charges were included in the original indictment.²⁷ In fact, the issue of rape was only raised when a Tutsi woman testified that her six-year-old daughter was raped by three *Interahamwe* soldiers and that young girls were being raped at the bureau communal.²⁸ Subsequently, another Tutsi woman testified that she had been raped and personally witnessed other Tutsi women being raped in the presence of commune police officers, including Akayesu.²⁹ After hearing this testimony, Judge Navanethem Pillay, the only female judge on the panel, amended the indictment to include the crime of genocide by rape.³⁰

In its groundbreaking definition of rape in *Akayesu*, the ICTR drew a parallel between the crime of rape and that of torture, stating that both crimes are “used for such purposes as

25. See ANNE-MARIE L.M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 105 (2005) (noting that Akayesu established the first definition of rape under international law); see also Kingsley Chiddu Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT'L L. REV. 273, 284 (2002) (stating that Akayesu marked the first time an individual was convicted of rape as a crime against humanity by an international tribunal).

26. *Jean Paul Akayesu*, Case No. ICTR-96-4-I, Indictment (charging Akayesu with genocide, crimes against humanity, and violations of the Geneva Conventions).

27. See Rhonda Copelon, *Toward Accountability for Violence Against Women in War: Progress and Challenges*, in SEXUAL VIOLENCE IN CONFLICT ZONES 232, 244 (Elizabeth D. Heineman ed., 2011) (explaining that rape was not included in Akayesu's original indictment); see also Alexandra A. Miller, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN STATE L. REV. 349, 363 (2003) (“Akayesu's initial indictment did not include a charge of rape.”).

28. *Jean Paul Akayesu*, Case No. ICTR-96-4-T, para. 416 (summarizing witness testimony).

29. *Id.* (describing the testimony of a Tutsi woman who witnessed rape).

30. Margaret A. Lyons, *Hearing the Cry Without Answering the Call: Rape, Genocide, and the Rwanda Tribunal*, 28 SYRACUSE J. INT'L L. & COM. 99, 105 (2001) (stating that Judge Pillay amended the indictment to include rape after hearing the testimony of two witnesses); see Miller, *supra* note 27, at 363 (stating that the *Akayesu* Tribunal allowed the Office of the Prosecutor to amend the indictment to include rape).

intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person” and are “a violation of personal dignity.”³¹ The *Akayesu* court defined rape as “a physical invasion of sexual nature, committed under circumstances which are coercive.”³² The ICTR and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) have further developed *Akayesu*’s definition of rape.³³ In a 2001 case against a military leader of the former Yugoslavia, *Prosecutor v. Dragoljub Kunarac*, the ICTY limited the definition of rape as an international crime.³⁴ *Kunarac* added an additional element to the *Akayesu* definition of rape, by requiring the prosecution to prove that the victim did not consent to the act of rape or sexual violence.³⁵ In 2003, the ICTR used this definition when it prosecuted Laurant Semanza, a former mayor of the Bicumbi commune, for his role in the Rwandan genocide.³⁶

The jurisprudence of the ICTR and ICTY greatly influenced the development of the Rome Statute of the ICC (the “Rome Statute”).³⁷ The Rome Statute, adopted the same year as the

31. *Jean Paul Akayesu*, Case No. ICTR-96-4-T, para. 597.

32. *Id.* at para. 598 (putting forth the court’s definition of rape).

33. *See e.g.*, *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, paras. 344–46 (Int’l Crim. Trib. for Rwanda May 15, 2003) <http://www.unhcr.org/refworld/pdfid/48abd5a30.pdf> (adopting the *Kunarac* definition of rape which requires the additional element of consent); *Prosecutor v. Dragoljub Kunarac*, Case IT-96-23 and IT-96-23/1, Judgment, paras. 436–42, (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (narrowing the definition of rape by requiring the prosecutor to prove that the victim did not consent).

34. *Dragoljub Kunarac*, Case No. IT-96-23 and IT-96-23/1, para. 442 (requiring the additional element of consent in rape); *see Jean Paul Akayesu*, Case No. ICTR-96-4-T, para. 597 (defining rape without the element of consent); *see also* Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT’L & COMP. L. 135, 152 (2005) (“To many legal scholars, the *Prosecutor v. Kunarac* judgment was a step backward from the *Akayesu* threshold.”).

35. *Dragoljub Kunarac*, Case No. IT-96-23 and IT-96-23/1, paras. 436–42 (adding the additional element of consent to the crime of rape); *see Obote-Odora, supra* note 34, at 152 (describing the element of consent in *Kunarac*).

36. *Laurant Semanza*, Case No. ICTR-97-20-T, paras. 344–46 (enumerating the elements of the rape).

37. Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1267 (2007) (describing the relationship between the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), International Criminal Tribunal for Rwanda (“ICTR”), and other sources of international humanitarian law); *see* Kathleen Maloney-Dunn, *Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of Suspects, and*

Kunarac decision, established the function, jurisdiction, and structure of the International Criminal Court.³⁸ It contains the Elements of Crimes, a set of guidelines drafted to “assist the court in the interpretation and application of articles 6, 7, 8.”³⁹ The Rome Statute defines the elements of rape as:

- 1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any part of the body;
- 2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁴⁰

In a departure from the definition of rape in *Kunarac*, consent is used as an affirmative defense in the ICC, not an additional element the prosecution must prove.⁴¹ The ICC’s rules of procedure and evidence further define the element of consent by stating that “[c]onsent cannot be inferred by reason of any words or conduct of a victim . . . or taking advantage of a coercive environment undermin[ing] the victim’s ability to give voluntary and genuine consent.”⁴² In addition, under the Rome Statute, the crime of rape constitutes a crime against humanity if it forms “part of a widespread or systematic attack

Fundamental Human Rights at the ICC, 8 SANTA CLARA J. INT’L L. 69, 80 (2010) (explaining the ICC’s process of drawing on precedents of international criminal tribunals).

38. See Rome Statute of the International Criminal Court arts. 1, 4, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

39. Rome Statute, *supra* note 38, art. 9(1).

40. Elements of Crimes of the Int’l Crim. Court art. 7(1)(g)-1, Sept. 10, 2002, ICC-ASP/1/3 (Part II-B).

41. See John D. Haskell, *The Complicity and Limits of International Law in Armed Conflict Rape*, 29 B. C. THIRD WORLD L.J. 35, 56 (2009) (recognizing that recent ICC decisions have used consent as an affirmative defense to rape); Thekla Hansen-Young, *Defining Rape: a Means to Achieve Justice in the Special Court for Sierra Leone*, 6 CHI. J. INT’L L. 479, 488–89 (2005) (explaining the use of the affirmative defense to rape in the ICC).

42. Rules of Procedure and Evidence of the International Criminal Court R. 70, Sept. 10, 2002, ICC-ASP/1/3 (Part II-A).

directed against any civilian population, with knowledge of the attack.”⁴³

B. *The Reasons Rape is Used in War and the Sui Generis Nature of Rape*

To fully prosecute and prevent the widespread use of rape as a weapon of war, it is important to consider the motivations for using rape, and to address the powerful effects rape has on its victims and their communities.⁴⁴ Throughout the world, rape is being systematically used as a targeted weapon of war to commit torture, and genocide, and to destroy the lives of women and the fabric of their communities.⁴⁵ Evidence indicates that, rape is increasingly being commanded down from the highest levels of the military and/or government.⁴⁶ Perpetrators often target women of specific ethnicities and age ranges.⁴⁷

43. Rome Statute, *supra* note 38, arts. 7(1)(g).

44. See Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 *COLUM. HUM. RTS. L. REV.* 1, 58 (2000) (finding that the effects of sexual violence in conflict are not recognized); see also Michelle Scyler, *Rape in Conflict: Battling the Impunity that Stifles its Recognition as a Jus Cogens Human Right*, 15 *GONZ. J. INT'L L.* 30, 36 (2011) (emphasizing the importance of recognizing the effects of rape).

45. See Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, 483 (Int'l Crim. Trib. for Rwanda May 15, 2003) (recognizing that rape constitutes torture); see also Jeanine Oury, *The Rape Epidemic in the Congo: Why Impunity in the Congo can be Solved by International Intervention*, 6 *LOY. U. CHI. INT'L L. REV.* 421, 425 (2009) (“[R]ape is systematic, planned, [and] ordered.”); SaCouto, *supra* note 11, at 141 (stating that “sexual violence can communicate an intent to destroy the very foundation of a particular group”).

46. See Andrew Harding, *Libya: ‘Forced to Rape in Misrata’*, BBC NEWS (Afr.), May 23, 2011, available at http://www.bbc.co.uk/_news/world-africa-13502715 (interviewing Libyan soldiers who state that they were commanded to rape by high ranking officers and paid to do so); Prosecutor v. Pauline Nyiramasuhuko, Case No. ICTR-98-42-T, Judgment and Sentence, para. 6207 (Int'l Crim. Trib. for Rwanda June 24, 2011) (convicting Nyiramasuhuko of ordering members of the *Interahamwe*, including her son, to rape Tutsi women).

47. See Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-T, Judgment and Sentence, para. 2698 (June 24, 2011) (stating that Nyiramasuhuko targeted Tutsi women); see also Stephanie N. Sackellares, *From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict*, 20 *WIS. WOMEN'S L. J.* 137, 138 (2005) (stating that in the Sudan the *Janjaweed* is targeting women between the ages of eight and eighty). Evidence also shows that Gaddafi soldiers in Libya were ordered to rape and kill women between the ages of five and forty. See *Gaddafi Forces Accused of Rape*, AL JAZEERA (May 3, 2011), <http://www.aljazeera.com/video/africa/2011/05/20115381016787271.html> (stating Gaddafi's forces carried Viagra and were ordered to rape).

Sexual violence is also used as a punishment against powerful women or women with political connections.⁴⁸ Furthermore, perpetrators commit rape in front of family members, in public, and repeatedly on the same victim.⁴⁹ Most recently, military leaders in several conflicts have distributed condoms and sexual enhancement drugs, such as Viagra, as tools to further institutionalized rape.⁵⁰

This leads to the question of why rape is such a powerful weapon, and why its use has become so widespread.⁵¹ One of the reasons often cited for the historical use of rape in warfare is the concept of rape as one of the “spoils of war,” where conquerors raped women as a reward for victory.⁵² Sexual violence was also a symbolic act of conquering the enemy.⁵³ The notion that a woman is a man’s property added a further dimension to the

48. See AIDS-FREE WORLD, ELECTING TO RAPE: SEXUAL TERROR IN MUAGBE’S ZIMBABWE 12 (2009), available at <http://www.aidsfreeworld.org/Publications-Multimedia/Reports/Electing-to-Rape.aspx> (stating that thousands of women were raped in Zimbabwe as a strategy to influence the election of President Robert Mugabe in 2008); see also PRIO REPORT, *supra* note 8, at 12, 22 (discussing the use of political rape in Argentina, East Timor and Peru).

49. See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 165 (June 15, 2009) (stating that soldiers in the Congo raped victims in public and in front of family members); *Gaddafi Forces Accused of Rape*, AL JAZEERA (May 3, 2011), <http://www.aljazeera.com/video/africa/2011/05/20115381016787271.html> (reporting that Gaddafi soldiers forced a father and brother to watch the rape of a mother and two daughters); Oury, *supra* note 45, at 425 (examining the use of gang rape as a tactic in the Congo).

50. See *Pauline Nyiramasuhuko*, Case No. ICTR 98-42-T, paras. 1182–97 (convicting Nyiramasuhuko of providing soldiers with condoms to rape Tutsi women); CNN Wire Staff, *ICC to investigate reports of Viagra-fueled gang-rapes in Libya*, CNN WORLD (May 17, 2011), available at http://articles.cnn.com/2011-05-17/world/libya.rapes.icc_1_rapes-viagra-pills-libyan-leader-moammar-gadhafi?s=PM:WORLD (reporting on the alleged use of Viagra in Libya).

51. See CASSANDRA CLIFFORD, RAPE AS A WEAPON OF WAR AND ITS LONG-TERM EFFECTS ON VICTIMS AND SOCIETY, 7TH GLOBAL CONFERENCE ON VIOLENCE AND THE CONTEXTS OF HOSTILITY 4 (2008), available at <http://ts-si.org/files/BMJCliffordPaper.pdf> (describing rape as “one of the worlds most powerful and destructive weapons”); GLOBAL JUSTICE CENTER, *supra* note 20, at 2 (“[T]he sheer scale of [] targeted violence against women and girls is shocking.”).

52. See Davis, *supra* note 9, at 1227 (describing rape as a spoil of war); JOCELYN KELLY, UNITED STATES INSTITUTE OF PEACE, RAPE IN WAR: MOTIVES OF MILITIA IN DRC 8 (2010) (explaining that women in the Congo were given as a reward to soldiers and high ranking officers).

53. See Sackellares, *supra* note 47, at 139 (suggesting that sexual violence is an expression of nationalism); PRIO REPORT, *supra* note 8, at 28 (highlighting how rape is a symbol of conquering an enemy nation).

crime as the victors dominated the “property” of the men they were conquering.⁵⁴

Men, especially those with political power, may also be targets of sexual violence and mutilation.⁵⁵ In these instances, rape may be used to demonstrate dominance over victims by emasculating them and inflicting physical trauma.⁵⁶ Men may also be forced to commit incest or to rape and castrate other men.⁵⁷ One survey, published in 2010 by the *Journal of the American Medical Association*, found that over twenty-three percent of men in the Eastern Congo were sexual violence survivors.⁵⁸ Sexual violence, particularly against gay men, was also documented in the former Yugoslavia.⁵⁹

High-ranking women also authorize the use of rape as a weapon, challenging the normal gender roles associated with its use in war.⁶⁰ A recent study shows that rape is even being

54. See Christine Cameron, *A Feminist Critique of the Distinction Between Penile Rape and Rape with an Object*, 7 AUCKLAND U. L. REV. 647, 648 (1992) (stating that rape laws were founded in property law); Adrienne Katherine Wing & Sylk Merchan, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1, 34–35 (1993) (describing the treatment of rape as a crime of trespass).

55. See Sivakumaran, *supra* note 9, at 1274, 1293–97 (2005) (discussing the rape of men in armed conflict); PRIO REPORT, *supra* note 8, at 12 (discussing the use of politically motivated male and female rape in Argentina).

56. See Clifford, *supra* note 51, at 5 (explaining that sexual mutilation is used to sterilize, humiliate and demoralize men); see generally Sivakumaran, *supra* note 9 (explaining the harm caused by stigmatizing male rape victims as homosexuals).

57. See Clifford, *supra* note 51, at 6 (stating that men are forced to rape family members or other men); Sivakumaran, *supra* note 9, at 1296 (finding that men were forced to rape and castrate one another, were raped and sexually mutilated by guards, and were forced to commit incest).

58. Kirsten Johnson et al., *Association of Sexual Violence and Human Rights Violations With Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo*, J. OF THE AMER. MED. ASS'N (Aug. 4, 2010), <http://jama.jamanetwork.com/article.aspx?articleid=186342> (documenting sexual violence against men in Eastern Congo); see Will Storr, *The Rape of Men*, GUARDIAN (July 16, 2011), <http://www.guardian.co.uk/society/2011/jul/17/the-rape-of-men> (reporting on the male rape endemic).

59. See Sivakumaran, *supra* note 9, at 1294 (accounting how men were mutilated and forced to perform fellatio on guards and sex acts on each other); James D. Wilets, *Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1008–09 (examining rape and genital torture against Bosnian males as a punishment for being “overly gay-tolerant”).

60. See, e.g., Prosecutor v. Pauline Nyiramasuhuko, Case No. ICTR 98-42-T, Judgment and Sentence (Int'l Crim. Trib. For Rwanda June 24, 2011) (finding that Nyiramasuhuko, the female Minister of Family and Women's Development in Rwanda,

ordered down the chain of command against the will of perpetrators, including by threat of violence or death.⁶¹ Rape is also seen “as a way of affirming the manhood of soldiers” and creating a sense of cohesion among combatants.⁶² By subjecting victims to trafficking and using sexual violence as a terror tactic to clear an area for mining or other purposes, rape further serves economic benefits.⁶³

The harm caused by rape begins with pain and physical trauma.⁶⁴ As a result of their injuries, many women develop gynecological, rectal and internal hemorrhaging, fistulas, infections, lose their reproductive abilities, or even die.⁶⁵ In addition, many women contract life-threatening sexually transmitted diseases (“STDs”) including HIV/AIDS, which can cause further complications including the development of

ordered members of the *Interahamwe*, including her son, to rape Tutsi women); Josephine Hazcley, *Profile: Female Rwandan killer Pauline Nyiramasuhuko*, BBC NEWS AFRICA, June 24, 2011, <http://www.bbc.co.uk/news/world-africa-13907693> (profiling Nyiramasuhuko and her role in organizing militias to kidnap and rape women and girls).

61. See Arden B. Levy, *International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 U.C.L.A. WOMEN'S L.J. 255, 264 (1994) (stating that Serbian troops forced soldiers to rape civilians under threat of death); Harding, *supra* note 46 (reporting on Libyan soldiers who were beaten when they refused to rape girls).

62. See Davis, *supra* note 9, at 1227; WAR ON WOMEN, *supra* note 17, at 12 (concluding that rape is used as a method of creating cohesion within units of fighters).

63. See Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 FORDHAM INT'L L. J. 415, 417 (2008) (stating that children are trafficked for economic profit in armed conflict); WAR ON WOMEN, *supra* note 17, at 12 (explaining how rape is used for the economic goals of trafficking and as a method of terror for clearing populations from mining areas).

64. See Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEO. L. J. 1913, 1932 (1996); U.N. Econ. & Soc. Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, ¶ 36, E/CN.4/1998/54/Add.1 (Feb. 4, 1998) [hereinafter U.N. Report 1998] (discussing injuries to women's reproductive organs in Rwanda); Oury *supra* note 45, at 425 (estimating that one fifth of rape survivors in the Congo sustained injuries to their internal organs).

65. See CLIFFORD, *supra* note 51, at 5 (stating that rape can cause hemorrhaging, fistulas, infections, sterilization and death); Levy, *supra* note 61, at 265 (citing Anna Quindlen, *Is Rape of Bosnians a Sophisticated Form of Genocide?*, DALLAS MORN. NEWS, Mar. 17, 1993, at A27 (noting that many Serbian women who were repeatedly raped were killed in the process). A fistula is “an abnormal opening between the vagina and the bladder or rectum . . . [that can result from] laceration, rape, and other sexual trauma.” D. HINRICHSSEN, THE INFO PROJ., OBSTETRIC FISTULA: ENDING THE SILENCE, EASING THE SUFFERING 2 (2004), available at <http://www.k4health.org/toolkits/INFO-publications/obstetric-fistula-ending-silence-easing-suffering>.

cervical cancer.⁶⁶ Women who are exposed to the HIV virus through rape are more likely to contract HIV/AIDS because “cuts and abrasions compound the danger of infection and greatly increase the likelihood of HIV transmission if the aggressor is HIV-positive.”⁶⁷ Women raped by military forces face an even higher rate of infection because soldiers tend to carry STDs, including HIV/AIDS, at a higher rate than the civilian population.⁶⁸ Young girls are at an even greater risk of contracting the virus “because their genital tracts are not yet fully developed, and are therefore even more vulnerable to tears and lesions that allow the virus to enter the body.”⁶⁹ The lack of adequate medical care increases the severity of these physical infections and wounds.⁷⁰ For those who become pregnant with their assailant’s child, the lack of safe abortion services greatly increases the mortality rate of women, especially those who are unable to endure childbirth.⁷¹

66. See Clifford, *supra* note 51, at 4 (concluding that women may contract AIDS and HPV, which can lead to cervical cancer); Jocelyn Kelly, *supra* note 52, at 9 (interviewing soldiers in the Congo who recognize the spread of HIV/AIDS and other STDs as a method of destroying a community).

67. AIDS-FREE WORLD, *supra* note 48 at 13; see Barbara Crossette, *Atrocities against Women Widespread in Congo War*, WOMEN’S E-NEWS (Aug. 22, 2002), <http://womensenews.org/story/war/020822/atrocities-against-women-widespread-in-congo-war> (asserting that STDs are more likely to be transmitted with rape).

68. See UNAIDS, AIDS AND THE MILITARY 3 (1998), *available at* http://data.unaids.org/Publications/IRC-pub05/militarypv_en.pdf (finding that STD infection rates for soldiers in conflict may be fifty times higher than in civilian populations); Clifford, *supra* note 51, at 5 (discussing soldier STD infection rates).

69. AIDS-FREE WORLD, *supra* note 48, at 13; see HIV/AIDS AND THE GLOBAL COMMUNITY, GLOBAL MOBILIZATION FOR HIV PREVENTION, *reprinted in* 1 SEATTLE J. SOC. JUST. 297, 321 (2002) (stating that girls are more physiologically vulnerable than boys to HIV infection).

70. See Oury, *supra* note 45, at 425 (describing a situation in which women had to walk days to receive medical attention); U.N. Report 1998, *supra* note 64, para. 36 (documenting that, at the time (1998), there were only five gynecologists in all of Rwanda). Even where there are general medical services, specialized treatment for sexual violence may not be available. U.N. Report 1998, *supra* note 64, para. 36.

71. See CLIFFORD, *supra* note 51, at 5 (reporting that many survivors risk death by having unsafe abortions); GLOBAL JUSTICE CENTER, *supra* note 20, at 5 (highlighting that the lack of abortion services is “deadly and cruel” and leads to higher rates of maternal mortality).

For rape survivors, the emotional and psychological trauma is often debilitating.⁷² Symptoms may include post traumatic stress disorder (“PTSD”), dissociative identity disorder (“DID”), obsessive compulsive disorder (“OCD”), severe depression, humiliation, shame, stigma, flashbacks, sexual dysfunction, fear of intimacy, eating disorders, self-injury, self-blame, panic attacks, sleeping disorders, and loss of self-worth.⁷³

Many survivors commit suicide, experience suicidal thoughts, or describe life as a “living death” or worse than death.⁷⁴ Women who become pregnant with their attacker’s child also face the agonizing decision of aborting or abandoning the child.⁷⁵ Women who raise their attacker’s child may do so at the cost of losing their own families.⁷⁶ In these cases, it is not only the mother who suffers, but also the child, who faces a life of stigma, poverty and/or rejection by their families and communities.⁷⁷ Many survivors also live in fear of retaliation by

72. See Davis, *supra* note 9, at 1245 (“Rape in wartime [] has a devastating emotional impact on women.”); Obote-Odora, *supra* note 34, at 141 (“[S]urvivors refer to rape as a ‘living death’ and view it as worse than death.”).

73. See, e.g., AIDS-FREE WORLD, *supra* note 48, at 30 (describing the psychological effects of rape in Zimbabwe); CLIFFORD, *supra* note 51, at 5 (listing the psychological effects of rape).

74. Obote-Odora, *supra* note 34, at 141 (“[S]urvivors refer to rape as a ‘living death’ and view it as worse than death.”); HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 47 (1996) [hereinafter SHATTERED LIVES], available at <http://www.hrw.org/reports/1996/09/24/shattered-lives> (stating that suicidal thoughts and actions are often common among rape victims).

75. See CLIFFORD, *supra* note 51, at 6 (discussing the issues raised by rape induced pregnancy); Lisa Avery, *The Women and Children in Conflict Protection Act*, 51 LOY. L. REV. 103, 111–12 (2005) (describing the experience of women raped by Bosnian forces).

76. See e.g., HUMAN RIGHTS WATCH, SEEKING JUSTICE: THE PROSECUTION OF SEXUAL VIOLENCE IN THE CONGO WAR 47 (2005) (explaining that women with children born out of rape are often rejected by their families); GLOBAL JUSTICE CENTER, *supra* note 20, at 5 (identifying familial ostracization as a common consequence of rape induced pregnancies).

77. See ANN FIRTH MURRAY, FROM OUTRAGE TO COURAGE 156 (2008) (stating that children born in Rwanda through a pregnancy caused by rape are often called “children of bad memories”); Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348, 364–65 (1998) (providing an example in Yugoslavia where such children were referred to as “filth” or “that thing,” even by their own mothers).

military forces or their communities, particularly if they have reported the crime.⁷⁸

Rape also destroys its victims' families and the very fabric of their communities.⁷⁹ Survivors are often ostracized and/or stigmatized following the crime and may be considered unfit for marriage.⁸⁰ Married women may be rejected by their husbands, or be emotionally, or physically unable to be intimate.⁸¹

Many survivors face rejection and retaliation by their family members and communities, which can take the form of physical violence.⁸² This is illustrated by the story of Chang Chang, a seventeen-year-old Burmese schoolgirl who was raped along with four friends by a group of Burmese soldiers.⁸³ When the community learned of the rape, Chang Chang was expelled and caned in front of her entire school.⁸⁴ She was later forced out of her community and sentenced to one year in prison for prostitution.⁸⁵

Women who are rejected by their families, particularly those who bear their attackers' children, have few economic

78. See Pascale Harter, *Libya Rape Victims Face Honour Killings*, BBC NEWS, June 14, 2011, available at <http://www.bbc.co.uk/news/world-africa-13760895> (reporting that rape survivors in Libya face the risk of being murdered by their own families); APPLE & MARTIN, *supra* note 21, at 35 (stating that in Burma survivors fear of retaliation by the troops that attacked them if they report the crime).

79. See Askin, *supra* note 8, at 298 (asserting that the "impact and the harms [of rape] often extend to families, local communities, and society at large"); SaCouto, *supra* note 11, at 141 ("[S]exual violence can communicate an intent to destroy the very foundation of a particular group.").

80. See Davis, *supra* note 9, at 1245 (reporting that rape survivors may be viewed as "tainted" or "unclean" within their communities); Sackellares, *supra* note 47, at 140–41 (explaining that rape survivors may be ostracized by their communities, rejected by their husbands, and considered "unsuitable for traditional marriage").

81. See Levy, *supra* note 61, at 266 (stating that rape survivors may be rejected by their husbands or avoid sexual intimacy); Sackellares, *supra* note 47, at 140–41 (explaining that psychological trauma is used as a genocidal tool due to its ability to render a woman unable to have sexually intimate experiences).

82. See Davis, *supra* note 9, at 1245 (stating that family and friends may hold survivors responsible for their attacks); Sackellares, *supra* note 47, at 140–41 (explaining that stigmatization of rape survivors may lead to murder by their families or communities).

83. NOBEL WOMEN'S INITIATIVE, INTERNATIONAL TRIBUNAL ON CRIMES AGAINST WOMEN OF BURMA 10 (2010), available at <http://www.nobelwomensinitiative.org/wp-content/archive/stories/burma.pdf> (providing details of the survivor's experience).

84. *Id.* (explaining how the community punished the victim for the sexual encounter).

85. *Id.* (reporting the criminal charges levied against Chang Chang).

prospects, and are often subjected to lives of poverty.⁸⁶ The isolation is particularly severe in societies that place high importance on a woman's purity and role as a mother and wife.⁸⁷

International courts have held that rape can be used as a weapon of genocide.⁸⁸ This is accomplished by killing women of a particular ethnicity, causing women to become physically sterile, rendering women emotionally incapable of intimate relationships, causing societal stigmatization, or forcing them to bear children of their attacker's ethnicity.⁸⁹ For example, in the Balkan war, women and young girls were raped by Serbian forces and kept in rape camps until their pregnancies could no longer be terminated, ensuring the birth of Serbian children to "dilute" the Muslim population.⁹⁰ Similarly, Muslim men were castrated or forced to castrate one another to prevent procreation of the Muslim population.⁹¹

86. See AIDS-FREE WORLD, *supra* note 48, at 31–32 (explaining that many rape survivors face poverty in Zimbabwe and abroad); HUMAN RIGHTS WATCH, SEEKING JUSTICE: THE PROSECUTION OF SEXUAL VIOLENCE IN THE CONGO WAR 47 (March 2005) (discussing the repercussions of a survivor being rejected by her family).

87. See Levy, *supra* note 61, at 266 (discussing the additional stigma in Muslim communities where virginity has a high cultural importance); Fionnuala Ni Aolain, *Sex-Based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law*, 12 YALE J.L. & FEMINISM 43, 63 (2000) (describing the increased shame and humiliation faced by women in religious communities).

88. See Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest, para. 215 (Mar. 4, 2009), available at www.icc-cpi.int/iccdocs/doc/doc639096.pdf (considering rape as satisfying one of the elements necessary to find genocide); Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, Judgment, para. 416 (Int'l Crim. Trib. For Rwanda Sept. 2, 1998), available at <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (reviewing allegations of rape in context of genocide trial).

89. See Sackellares, *supra* note 47, at 140–43 (identifying rape as a genocidal practice); Siobhan K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.J. 91, 113 (1996) (discussing genocidal rape by Serbian soldiers).

90. Jonathan M.H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 MICH. J. RACE & L. 503, 512 (2003) (discussing genocide by forced pregnancy); see Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793, 800–01 (1997) (describing forced pregnancy in the former Yugoslavia).

91. See Davis, *supra* note 9, at 1240 (stating that Tadic was found guilty of forcing one prisoner to castrate another); Sivakumaran, *supra* note 9, at 1295–96 (stating that Muslim men were castrated or forced to castrate one another as a form of sterilization and genocide).

Perpetrators know of the harm caused by sexual violence and have sought to multiply its effects.⁹² For example, during the Balkan War, the Yugoslav National Army Psychological Operations Department observed that raping young girls and children would more easily crush Muslim morale.⁹³ In addition, HIV positive men have intentionally raped victims to infect them with the virus.⁹⁴

The physical damage caused by rape is amplified by the use of foreign objects such as guns, sticks, knives, broken bottles, acid, sharpened sticks, boiling water, and melted rubber.⁹⁵ Perpetrators have also employed methods of extreme sexual violence by cutting off women's breasts, genitalia, or lips, and blinding them so they cannot identify their attackers.⁹⁶ There are also reports of branding women, slashing open a women's pelvic area, cutting open or exploding women's reproductive organs, and killing women by shooting them in the vagina.⁹⁷

92. See Rebecca A. Corcoran, *Justice for the Forgotten: Saving the Women of Darfur*, 28 B.C. THIRD WORLD L.J. 203, 216–17 (2008) (“The *Janjaweed* are acutely aware of the ramifications of rape, and use it deliberately to dismantle the family and social relationships at the core of Darfurian society.”); Salzman, *supra* note 77, at 356 (finding that rapists intentionally targeted Muslim women and young girls in Yugoslavia to cause panic and crush morale).

93. See Salzman, *supra* note 77, at 356 (stating that the Yugoslav army knew that raping women would crush morale); Adriana Kovalovska, *Rape of Muslim Women in Wartime Bosnia*, 3 ILSA J. INT'L & COMP. L. 931, 933–34 (1997) (stating that Serbian strategy was to deliberately rape Muslim women to demoralize their society).

94. See ELISABETH REHN & ELLEN JOHNSON SIRLEAF, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, WOMEN, WAR, PEACE: THE INDEPENDENT EXPERTS' ASSESSMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN'S ROLE IN PEACE-BUILDING 52 (2002) (documenting the *Interwahame's* strategy of encouraging HIV-infected Hutu men to rape Tutsi women as a “more effective means of genocide”); AIDS-FREE WORLD, *supra* note 48, at 29 (finding that Zimbabwe several survivors were told by their attackers that they would contract HIV/AIDS and die).

95. See Joseph, *supra* note 8, at 107, 109 (discussing sexual mutilation through the use of knives, sticks, boiling water, acid and guns); Sackellares, *supra*, note 47, at 142–43 (discussing sexual violence with broken bottles and weapons).

96. See Clifford, *supra* note 51, at 7 (stating that perpetrators have cut off women's lips and blinded them so they cannot identify their attackers); APPLE & MARTIN, *supra* note 21, at 45 (reporting on a woman who saw soldiers cut off her sister's breasts).

97. See e.g., Oury, *supra* note 45, at 425 (citing Stephanie Nolan, *Rape Again Rampant in Congo*, VDAY (Oct. 18, 2008), available at <http://newsite.vday.org/node.1204>) (discussing how the *Interahamwe* branded women); *Prosecuting Wartime Rape*, *supra* note 8, at 298 (documenting the mutilation and explosion of sexual organs); WAR ON WOMEN, *supra* note 17, at 4 (reporting that perpetrators shot victims in the vagina).

Perpetrators have also cut open the stomachs of pregnant women to tear out the fetus.⁹⁸

The emotional trauma of rape is intensified by the practices of gang raping, public rape, forcing family members to watch, and forcing individuals to rape friends or family members under threat of death.⁹⁹ The use of technology to record schedule violence has escalated the level of shame and humiliation survivors face, and serves as a permanent reminder of the crime that may be circulated throughout the community.¹⁰⁰

Finally, the use of sexual violence as a weapon is particularly advantageous because of the persisting failure to fully prosecute rape.¹⁰¹ For example, rape was deliberately omitted from the Nuremberg trials.¹⁰² This was due in part to the fact that evidence revealed that rape was perpetrated by both Axis and Allied powers, causing fear that such charges would be brought against the Allies themselves.¹⁰³

98. See e.g., Sackellares, *supra* note 47, at 142–43 (stating attackers “slic[ed] open pregnant women’s stomachs to torture them and murder the fetus within”); SHATTERED LIVES, *supra* note 74, at 37 (reporting that a woman overheard Rwandan soldiers talking about “cutting open a pregnant women just to see the child’s position inside.”).

99. See AIDS-FREE WORLD, *supra* note 48, at 22 (documenting the stories of women raped in front of their children and/or witnessing their children being raped); Clifford, *supra* note 51, at 6 (“[F]amily members are forced to rape each other, adding to the torment feelings of incest.”).

100. Harding, *supra* note 46 (citing evidence rape videos recorded by Gaddafi soldiers being circulated in and around Misrata); NOBEL WOMEN’S INITIATIVE, *supra* note 83, at 11 (stating that Burmese soldiers videotaped the sexual violation of political activist Saw Myat Mar).

101. See Lindsay Peterson, *Shared Dilemmas: Justice for Rape Victims under International Law and Protection for Rape Victims Seeking Asylum*, 31 HASTINGS INT’L & COMP. L. REV. 509, 510 (2008) (stating that rape is rarely prosecuted under international law); U.N. Report 1998, *supra* note 64, para. 45 (“[D]espite the existence of an extensive legal framework for action with regard to rape and sexual violence during the genocide, only very few individuals have been charged with these crimes.”); WAR ON WOMEN, *supra* note 17, at 3 (“The culture of impunity that often surrounds sexual violence in conflict perpetuates the crime . . . Perpetrators are rarely held accountable for their actions and do not fear prosecution or punishment for their acts.”).

102. See PRIO REPORT, *supra* note 8, at 7 (explaining that sexual violence was not prosecuted by the Allies during the Nuremberg Trials); Yael Weitz, Note, *Rwandan Genocide: Taking Notes from the Holocaust Reparations Movement*, 15 CARDOZO J.L. & GENDER 357, 363–64 (2009) (stating that rape was not prosecuted at the Nuremberg Trials).

103. See PRIO REPORT, *supra* note 8, at 7 (arguing that the Allies feared that accusations of sexual violence would be brought against themselves); Weitz, *supra* note

High evidentiary standards may also prevent perpetrators from being held accountable. For example, survivors may be required to file a police report or undergo medical examinations.¹⁰⁴ Survivors may also be reluctant to report the crime to family members or officials, particularly in societies where rape is highly stigmatized.¹⁰⁵ Some survivors may not want to testify in court, due to the humiliation associated with rape, retraumatization in retelling the story, fear of retaliation, ostracization or stigmatization.¹⁰⁶ Women may also be fearful of reporting the crime where the perpetrators are members of the government, military or police.¹⁰⁷ For this reason, in Zimbabwe, one study found that forty-six percent of survivors did not even attempt to report the rapes.¹⁰⁸ Refugees International calls this a “double abuse” since “[t]o avoid retaliation, [victims] seek to bring as little attention as possible to themselves, even if they are victims deserving of redress for the crimes they suffered.”¹⁰⁹

Moreover, women may face criminal charges, such as adultery, for reporting sexual violence.¹¹⁰ For example, Gulnaz,

102, at 363–64 (stating evidence existed to show that sexual violence was perpetrated by both sides).

104. See Davis, *supra* note 9, at 1245 (stating that women who report rape may be subjected to “invasive medical investigations, interrogations and unpleasant involvement with the court system”); WAR ON WOMEN, *supra* note 17, at 6 (stating that in the Sudan obtaining medical treatment for rape requires filling out a police report, and proving rape requires a confession or four male witnesses to prove that the act was not consensual).

105. See *U.N. Report 1998*, *supra* note 64, para. 49 (stating that women from traditional backgrounds are reluctant to report sexual violence); PRIO REPORT, *supra* note 8, at 21 (arguing that difficulty of survivors in reporting rape is exacerbated by having “male NGO worker using a loudspeaker in a refugee settlement asking whether any raped victims would like to report their stories”).

106. See Stephanie K. Wood, *A Woman Scorned for the “Least Condemned” War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 *COLOM. J. GENDER & L.* 274, 285–86 (2004) (noting women who “self-aborted their rape-conceived pregnancies or committed infanticide to spare themselves from cultural ostracization”); Davis, *supra* note 9, at 1245 (describing the stigma associated with rape).

107. See AIDS-FREE WORLD, *supra* note 48, at 27 (finding that in one case authorities in Zimbabwe told women that they could not report their rapes); APPLE & MARTIN, *supra* note 21, at 35 (stating that in Burma many survivors choose to remain silent for fear of retaliation).

108. See AIDS-FREE WORLD, *supra* note 48, at 27.

109. APPLE & MARTIN, *supra* note 21, at 35.

110. See NOBEL WOMEN’S INITIATIVE’, *supra* note 83, at 10 (stating that a school girl who was raped by Burmese soldiers was sentenced to one year in prison for

a nineteen-year-old rape survivor in Afghanistan, was sentenced to twelve years in prison for adultery.¹¹¹ The judge offered to drop the charges only if Gulnaz agreed to marry her rapist.¹¹²

II. VIEWS AND APPLICATIONS OF CUMULATIVE SENTENCING

Part II considers various views on cumulative sentencing and the application of cumulative sentencing in international courts. Part II.A provides background on the issue of cumulative convictions for rape and torture. Part II.B evaluates the arguments against the use of cumulative convictions in the ICC. Part II.C explores the arguments in favor of permitting cumulative convictions in the ICC. Part II.D examines the practical application of cumulative convictions by the ICTR in *Prosecutor v. Laurent Semanza* and the ICC in *Prosecutor v. Jean-Pierre Bemba Gombo*.

The Preamble to the Rome Statute states that “the most serious crimes of concern to the international community as a whole must not go unpunished and . . . their effective prosecution must be ensured.”¹¹³ The now-former ICC Prosecutor Luis Moreno-Ocampo has even stated that one of the most important goals of the ICC is to end impunity for the “most serious crimes.”¹¹⁴ According to many scholars, rape falls

prostitution); WAR ON WOMEN, *supra* note 17, at 6 (women in Sudan who cannot prove rape are charged with adultery which may be punishable by flogging and stoning).

111. See Jeremy Kelly, *Afghan women freed from jail after agreeing to marry rapist*, GUARDIAN (Dec. 1, 2011), <http://www.guardian.co.uk/world/2011/dec/01/afghan-woman-freed-marry-rapist> (noting victim had spent last two and a half years in jail); Alissa J. Rubin, *For Afghan Woman, Justice Runs Into Unforgiving Wall of Custom*, N.Y. TIMES, Dec. 2, 2011, at A1 (describing initial announcement of Afghan government to pardon victim as a “clear victory”). Women face a similar fate in Iran, as highlighted by the story of Nazanin Fatchi, a seventeen-year-old rape survivor who was sentenced to death for defending herself against her attackers. Following media attention Nazanin was released and the case was overturned. See AMNESTY INT’L, IRAN: THE LAST EXECUTIONER OF CHILDREN 27 (2007).

112. See Rubin, *supra* note 111 (reporting on the story); Nick Paton Walsh & Masoud Popalza, *Afghan woman’s choice: 12 years in jail or marry her rapist and risk death*, CNN (Nov. 22, 2011), http://articles.cnn.com/2011-11-22/asia/world_asia_afghanistan-rape_1_gulnaz-rapist-jail?_s=PM:ASIA (describing a nineteen year old rape victim who was found guilty of adultery).

113. Rome Statute, *supra*, note 38, at Preamble.

114. Luis Moreno-Ocampo, *How Prosecution Can Lead to Prevention?*, Opening Address at the Law and Inequality Symposium: International Wrongs, International

into this category due to its *sui generis* ability to cause widespread physical, mental, and social harm.¹¹⁵

A. *Cumulative Sentencing of Rape and Torture*

The availability of cumulative convictions rests on whether one “criminal act, deed or transaction” can be charged as multiple criminal offenses.¹¹⁶ Suzanne Walther offers the example of a bank robber that uses violence against the bank employees in the course of an armed robbery.¹¹⁷ This one act can encompass multiple crimes including “robbery, extortion, theft, coercion, unlawful entering, and possession and use of a weapon without a license.”¹¹⁸ This type of aggregation also applies in the ICC and ad hoc tribunals where a perpetrator can be charged with multiple crimes under the umbrellas of genocide, war crimes, and crimes against humanity.¹¹⁹ Cumulative convictions, which apply “when an accused is convicted of multiple offenses under different legal headings for the same conduct,” are distinguishable from cumulative charges, which “involve drafting an indictment in a manner that alleges various offenses for the same conduct.”¹²⁰ The test employed by the ICC and ICTR to determine whether the act can be charged as multiple crimes is whether the two crimes each contain at

Rights: The Use of Criminal Law to Protect Human Rights (Sept. 28, 2010), in 29 *LAW & INQ.* 477, 494 (2011).

115. See David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 *DUKE J. COMP. & INT’L L.* 219, 235 (2005) (“[R]ape is now considered to be among the most serious international crimes by the community of states.”); West, *supra* note 18, at 1449 (discussing the *sui generis* nature of rape).

116. See Walther, *supra* note 19, at 475–76 (defining cumulative convictions); Attila Bogdan, *Cumulative Charges, Conviction, and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda*, 3 *MELBOURNE J. INT’L L.* 1, 2–3 (2002) (explaining the practice of cumulative convictions).

117. See Walther, *supra* note 19, at 476.

118. *Id.*

119. *Id.* (explaining cumulative convictions in the ICC and ad hoc tribunals).

120. Ildikó Erdei, *Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue*, 34 *SUFFOLK TRANSNAT’L L. REV.* 317, 318 (2011); see Nisha Valabhji, *Cumulative Convictions Based on the Same Acts Under the Statute of the I.C.T.Y.*, 10 *TUL. J. INT’L & COMP. L.* 185, 186 (2003) (stating that cumulative convictions and cumulative charging are two separate issues). While this Note focuses on the issue of cumulative convictions, cumulative charges are mentioned to the extent that they are a precursor to convicting cumulatively.

least one material element not contained within the other.¹²¹ “An element is considered materially distinct if it requires proof of a fact not required by the other.”¹²² In the case where only one of the crimes contains a materially distinct element, the defendant would only be convicted of that one crime.¹²³ If neither crime has a materially distinct element, the court would determine which crime most accurately reflects the defendant’s conduct.¹²⁴

B. Against Cumulative Convictions in the ICC

Many concerns arise when a defendant is sentenced for various crimes based on the same act or action. One such concern is the prejudice and social stigmatization that arise when an individual is convicted of a crime.¹²⁵ This may lead to practical consequences such as being ineligible for early release under the laws of the state enforcing the sentence, or other ‘habitual offender’ laws.¹²⁶

121. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 202 (June 15, 2009) (describing the test for cumulative convictions in the ICC); *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, para. 409 (Int’l Crim. Trib. for Rwanda May 15, 2003) (describing the test for cumulative convictions in the ICTR).

122. *Laurent Semanza*, Case No. ICTR-97-20-T, para. 409; Bogdan, *supra* note 116, at 22 (defining a materially distinct element).

123. *Prosecutor v. Zejnil Delalic*, Case No. IT-96-21-A, Judgment, para. 413 (Int’l Trib. For the Former Yugoslavia February 20, 2001) (explaining that one crime may be subsumed by the other); Bogdan, *supra* note 116, at 17 (explaining that one crime may be “subsumed” by the other). In this case it would be said that the lesser crime was merged into the crime containing the materially distinct element. See Hong S. Wills, Comment, *Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR*, 17 EMORY INT’L L. REV. 341, 353 (2003) (comparing the doctrine of “merger” to the common law doctrine of “lesser included offence”).

124. See *Prosecutor v. Delalic*, Case No. IT-96-21-A, Partial Dissenting Opinion of Judge Shahabudden, paras. 41–45 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 14, 1999), <http://www.icty.org/x/cases/jelisc/acjug/en/jel-aj010705.pdf> (discussing the difficulty of a situation in which no crime contains one materially distinct element); Bogdan, *supra* note 116, at 31 (stating that the legal prerequisites will be reviewed to determine which crime will prevail).

125. See Bogdan, *supra* note 116, at 17 (explaining prejudice of double convictions to the defendant); Wills, *supra* note 123, at 385 (quoting *Prosecutor v. Kunarac, Kovac & Vukovic*, Case No. IT-96-23, 169 (Appeals Chamber June 12, 2002)) (discussing stigma associated with being convicted of multiple crimes).

126. See Bogdan, *supra* note 116, at 17 (discussing both prejudicial effects to the defendant); Wills, *supra* note 123, at 385 (citing *Prosecutor v. Dragoljub Kunarac*, Case

Another foremost concern is the principle of ‘double jeopardy’ or *non bis in idem*.¹²⁷ Under these related doctrines, a defendant cannot be prosecuted multiple times for a single act or event.¹²⁸ Rape and torture, are simple examples of this problematic relationship; rape has been considered as a form of torture, so a single rape could be prosecuted first as a crime against humanity (under either a rape as torture or rape alone theory) and then as a war crime (under a rape as torture theory).¹²⁹

Double jeopardy is not, however, the only problem that arises when convicting a defendant for multiple crimes based on the same action. Charging, and subsequently convicting, a defendant for multiple crimes potentially places an undue burden on a defendant who is forced to prepare multiple, varied defenses.¹³⁰ Cumulative sentencing is also potentially inconsistent with the legal principle of *nulla poena sine lege* (“no punishment without law”).¹³¹ Although cumulative convictions

No. IT-96-23, 169 (Appeals Chamber, June 12, 2002)) (noting ineligibility for early release as a practical effect of the prejudice from double convictions based on one act).

127. See Bogdan, *supra* note 116, at 4–5 (defining ‘double jeopardy’ and *non bis in idem* in relation to cumulative convictions); Erdei, *supra* note 120, at 319–23 (suggesting that principles of ‘double jeopardy’ and *non bis in idem* found in the Rome Statute and other ad hoc Tribunals stem from view “something intrinsically wrong with convicting someone for multiple crimes stemming from the same act”). *But see* Wills, *supra* note 123, at 375 (“On its face, however, the language of the [Rome] Statute does not indicate whether cumulative convictions practice is barred.”). Although the concepts of double jeopardy and *non bis in idem* are similar, “[d]ouble jeopardy is usually held to apply within a given legal system,” while *non bis in idem* protects against multiple prosecutions for the same action, regardless of the prosecuting system. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 *DUKE J. COMP. & INT’L L.* 235, 288 (1993) (defining the terms).

128. See Bassiouni, *supra* note 127, at 288 (stating that the doctrine is “designed to prevent the state from repeatedly subjecting a person to prosecution for offenses arising out of the same event until the desired results are achieved”); Erdei, *supra* note 120, at 319–20 (“discussing the protections created by the doctrines”).

129. See Erdei, *supra* note 120, at 319 (“Rape and torture are simple examples of potential cumulative convictions because rape has been found to constitute torture.”).

130. See Laurie Green, *First Class Crimes, Second Class Justice: Cumulative Charges for Gender Based-Crimes at the International Criminal Court*, 11 *INT’L CRIM. L. REV.* 529, 533 (2011) (noting the ICC’s hostility toward cumulative convictions because of the undue burden placed on the defendant); Valabhji, *supra* note 120, at 186 (stating that cumulative convictions raise fairness issues for the accused).

131. See Bogdan, *supra* note 116, at 9 (explaining that this principle ensures that the accused is tried for crimes for which he or she had notice); *see also* Rome Statute, *supra* note 38, arts. 22–23 (defining the principles).

were used before the establishment of the ICC, the Rome Statute does not include any explicit provision that allows a defendant to be sentenced for cumulative crimes based on a single act.¹³²

Furthermore, scholar Ildiko Erdei argues that cumulative convictions are not necessary to end impunity and ensure international justice.¹³³ In fact, the force of a conviction may be undermined if defendants are charged with too many crimes.¹³⁴ The author further argues cumulative convictions do not ensure that the accused receives appropriate punishment.¹³⁵ This is due to the fact that the Rome Statute limits the maximum sentence of the ICC to thirty years, with a life sentence available in only certain cases.¹³⁶

C. *In Favor of Cumulative Convictions in the ICC*

The ICC has stated that one of its main objectives is to end impunity for the most serious crimes, in hopes of ending their continued and widespread perpetration.¹³⁷ Laurie Green, former War Crimes fellow at the Center on Human Rights, argues that the failure to fully capture the extent of the crime undermines the legitimacy of the ICC, and as a result,

132. See Wills, *supra* note 123, at 375 (stating that the Rome Statute does not have a provision specifically addressing cumulative convictions); see generally Rome Statute, *supra* note 38. It should be noted that the statute of the ICTY and the ICTR also lack explicit provisions allowing cumulative convictions despite the fact that they have been used in both tribunals. See Wills, *supra* note 123, at 377 (asserting that the neither the ICTY nor ICTR contain a provision allowing cumulative convictions).

133. See Erdei, *supra* note 120, at 322–23 (stating that cumulative convictions are not necessary to end impunity); see also David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 474 (1999) (arguing that international prosecutions have little effect on deterrence of future atrocities).

134. See Erdei, *supra* note 120, at 323 (“The emotive force of a conviction for genocide is arguably undermined if the Chamber down the hall convicts for genocide, crimes against humanity, and war crimes.”).

135. See Erdei, *supra* note 120, at 323 (“[T]he idea that cumulative convictions are necessary to ensure the offender receives the appropriate sentence is not grounded in reality.”).

136. See Rome Statute, *supra* note 38, art. 77(1) (discussing sentencing); Erdei, *supra* note 120, at 323 (discussing sentencing in the ICC).

137. See *supra* notes 113–14 and accompanying text (stating that the ICC aims to end impunity).

diminishes “its expressive power to bring social change and normative evolution.”¹³⁸

As ICTY Judge Mohamed *Shahabuddeen* noted in his partial dissenting opinion in *Prosecutor v. Goran Jelusic*, failing to convict cumulatively “is to leave unnoticed the injury to the other interest of international society and to fail to describe the true extent of the criminal conduct of the accused.”¹³⁹ Thus, without cumulative charging, these types of crimes lose their potency, and are illegal only in a “formal and empty sense.”¹⁴⁰

Ignoring survivors’ experiences and failing to charge the defendant with the crime of rape can have a negative psychological effect on survivors, affecting their recovery and mental well-being.¹⁴¹ Specifically, such charges can alleviate fear that the defendant will retaliate, and help survivors overcome the stigmatization that is associated with victims of sexual violence.¹⁴² If survivors feel that the crime will not be adequately acknowledged and punished, they will be less likely to report the crime or testify about their experiences, ultimately making rape harder to prosecute.¹⁴³

Proponents of cumulative convictions argue that support of the practice is found in the introduction to the Elements of

138. Green, *supra* note 130, at 532.

139. See *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Judgement, para. 42 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 14, 1999) (Shahabuddeen, J., dissenting), <http://www.icty.org/x/cases/jelusic/acjug/en/jel-aj010705.pdf>; see also Green, *supra* note 130, at 535 (discussing Judge Shahabuddeen’s opinion).

140. See Green, *supra* note 130, at 535 (“[D]iscussing the need for cumulative charging of sexual and gender-based violence.”); Joel Feinberg, *The Expressive Function of Punishment*, in *PHILOSOPHY OF LAW* 633 (2008).

141. See K’Shaani O. Smith, *Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo*, 54 *HOWARD L.J.* 467, 486 (“By bringing about appropriate charges, the victims are more apt to deal with the physical violation.”); see also Erin Ann O’Hara, *Victim Participation in the Criminal Process*, 13 *J. L. & POL’Y* 229, 244 (2005) (noting that active victim participation in criminal proceedings is of great importance to the survivor’s mental wellbeing).

142. See Corcoran, *supra* note 92, at 226 (2008) (stating that prosecution can help reduce cultural stigma); Smith, *supra* note 141, at 489 (“The prosecutor should have had the[] potential [psychological] effects in mind when deciding which charges to bring.”).

143. See Smith, *supra* note 141, at 489–90 (discussing the link between a failure to prosecute and a failure to report); see also O’Hara, *supra* note 141, at 244 n.69 and accompanying text (stating that unsuccessful trials can lead to a failure to report).

Crimes.¹⁴⁴ Paragraph nine states, “[a] particular conduct may constitute one or more crimes.”¹⁴⁵ The commentary notes that this language was originally included to refer to sexually-based crimes, but was later generalized to avoid the implication that cumulative convictions would only apply to those sections.¹⁴⁶

Furthermore, Laurie Green points out that in drafting the Rome Statute, certain crimes, such as outrages upon personal dignity, that were initially included within the crime of rape, were recharacterized as separate crimes.¹⁴⁷ Green believes that including such acts as separate crimes is evidence of the intention that they should be charged along with rape.¹⁴⁸ Otherwise, according to Green, such crimes would lose their purpose and meaning since in practice, such crimes would not be charged at all.¹⁴⁹

Scholars argue that prosecuting international crimes enables the international community to identify the conduct as a crime and condemn it.¹⁵⁰ Generally, a more serious crime should warrant graver punishment.¹⁵¹ But in many cases,

144. See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Amicus Curiae Observations of the Women’s Initiative for Gender Justice Pursuant to Rule 103 of the Rules of Procedure and Evidence, para. 29 n.34 (July 13, 2009), <http://www2.icc-cpi.int/iccdocs/doc/doc719028.pdf> (citing the introduction to the Elements of Crimes in examining cumulateness); Green, *supra* note 130, at 536 (relying on the introduction to the Elements of Crimes to support cumulative charges for sexual crimes).

145. Elements of Crimes, *supra* note 40, Introduction, para. 9.

146. See *Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Amicus Curiae’, para. 17 (discussing the introduction to the Elements of Crimes); Green, *supra* note 130, at 536 (discussing the gender and sexual violence origins and later expansion of this provision of the Elements of Crimes).

147. See Green, *supra* note 130, at 537 (noting that “sexual violence crimes were delinked from outrages upon personal dignity”).

148. See *id.* (concluding that the drafters intended for rape and other crimes to be charged separately).

149. See *id.* (analyzing Rome Statute and its impact).

150. See Amrita Kapur, *The Rise of International Criminal Law*, 20 EUR. J. INT’L L. 1031, 1038 (2009) (arguing that international criminal law facilitated the identification and condemnation of crimes); Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 373, 386–87 (G. Sluiter & S. Vasiliev, eds., 2009) (suggesting that “the whole point of such sentences is to express society’s condemnation of such horrendous activity”).

151. See Marisa R. Bassett, *Defending International Sentencing: Past Criticism to the Promise of the ICC*, HUM. RTS. BRIEF 16, no. 2, 22, 22 (2009) (arguing that that the punishment for international crimes should “reflect the gravity of the crime”); Ohlin,

individuals would receive harsher punishments for a single crime under domestic law, than they would for committing mass atrocities under international law.¹⁵² Jens David Ohlin poses the question of whether sentencing an individual responsible for genocide, or thousands of deaths, to ten to twenty years in prison, is tantamount to “genocidal criminals . . . getting away with murder.”¹⁵³ Proponents of cumulative convictions also argue that the failure to recognize the pervasiveness of sexual and gender based crimes in armed conflict contributes to the indifference and impunity that surrounds these crimes, masks their pervasiveness, and increases their prevalence.¹⁵⁴ The fact that such crimes mostly affect women and girls exacerbates the low status of women in the international community and trivializes sexual violence.¹⁵⁵

D. *Cumulative Convictions for Rape and Torture in Practice*

1. The Approach of the ICTR in *Semanza*

The ICTR and the ICC have varied greatly in their applications of cumulative convictions.¹⁵⁶ Laurent Semanza was

supra note 150, at 373–74 (arguing that “the special gravity of international crimes requires greater punishment.”).

152. See Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 693 (2010) (stating that sentences would likely be longer for most convicts if the ICC applied domestic law); Ohlin, *supra* note 150, at 373 (stating that in many instances perpetrators receive sentences usually associated with “garden-variety crimes”).

153. See Ohlin, *supra* note 150, at 387 (questioning sentencing practices of international tribunals).

154. See Corcoran, *supra* note 92, at 226 (“[P]rosecution is one of the only tools that can bring a permanent end to sexual violence.”); Green, *supra* note 130, at 540 (arguing that the failure to prosecute sexual violence is “detrimental to its eradication”).

155. See Smith, *supra* note 141, at 491 (stating that the failure to prosecute rape exacerbates the low status of women); see also INT’L FED’N FOR HUMAN RTS., DEMOCRATIC REPUBLIC OF CONGO (DRC): “BREAKING THE CYCLE OF IMPUNITY” 8 (2008), available at <http://fidh.org/IMG/pdf/DRCsexualcrimeseng2008.pdf> (stating that impunity contributes to the trivialization of rape).

156. Compare Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009) (permitting cumulative convictions as a theoretical matter but prohibiting them in practice), with Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgment and Sentence (May

indicted by the ICTR on October 16, 1997 on charges of genocide, crimes against humanity, and serious violations of the Geneva conventions for his role in the Rwandan genocide.¹⁵⁷ The indictment alleged that Semanza planned, incited, and organized massacres against the Tutsi population while instigating, ordering, and encouraging militiamen under his control “to commit acts of rape or other outrages against the personal dignity of Tutsi women, and . . . fail[ing] to take necessary and reasonable measures to prevent such acts, which were subsequently committed.”¹⁵⁸ Specifically, Semanza’s indictment included charges of rape and torture as well as crimes against humanity.¹⁵⁹

During the genocide, Hutu officials and media disseminated propaganda to encourage sexual violence against Tutsi women.¹⁶⁰ While accurate numbers are difficult to obtain, it is estimated that 250,000 to 500,000 women were raped.¹⁶¹ According to Human Rights Watch, such figures suggest that the use of rape was “the [rule] and its absence the exception.”¹⁶²

15, 2003) *available at* <http://www.unhcr.org/refworld/pdfid/48abd5a30.pdf> (permitting cumulative convictions).

157. *Laurent Semanza*, Case No. ICTR-97-20-T, paras. 5-14 (reviewing indictment).

158. *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Third Amended Indictment, para. 3.16 (May 15, 2003), *available at* <http://www.unictt.org/Portals/0/Case%5CEnglish%5CSemanza%5Cindictment%5Cindex.pdf> (indicting Laurent Semanza).

159. *See Laurent Semanza*, Case No. ICTR-97-20-T, para. 12 (enumerating the charges against Semanza).

160. *See Wood*, *supra* note 106, at 284–85 (discussing the dissemination of propaganda); *PRIOR REPORT*, *supra* note 8, at 18–19 (stating that propaganda played on sexual stereotypes of Tutsi women).

161. *See Lori A. Nessel*, *Rape and Recovery in Rwanda*, Keynote Address at the Mich. St. J. Int’l L. Symposium: Women’s Status in the Wake of Conflict (Feb. 24, 2006), in 15 MICH. ST. J. INT’L L. 101, 107–08 (2007) (noting that virtually every woman and girl who survived the genocide was raped); *Wood*, *supra* note 106, at 285 (citing Rhonda Copelon, *Surfacing Gender: Reengraving Crimes against Women in Humanitarian Law*, in *WOMEN AND WAR IN THE TWENTIETH CENTURY: ENLISTED WITH OR WITHOUT CONSENT* 333 (Nicole A. Dombrowski ed., 1999)) (referencing approximation of 250,000 to 500,000 rape survivors).

162. *See SHATTERED LIVES*, *supra* note 74, at 17 (describing level of gender based violence); *see also Wood*, *supra* note 106, at 285–86 (noting that this number does not reflect the number of women who could no longer conceive children as a result of the rape, the number of multiple rapes and gang rapes suffered by individual women, the number of women who self-aborted rape-conceived pregnancies or committed infanticide to avoid cultural ostracization, or the number of women who died as a result of the sexual violence).

In determining whether to allow cumulative convictions against Semanza for rape and torture as crimes against humanity, the ICTR followed the ICC's decision in *Prosecutor v. Alfred Musema*, and held that "multiple criminal convictions under different statutory provisions, but based on the same conduct, are permissible if each statutory provision involved has a materially distinct element not contained in the other."¹⁶³ The court further held that "an element is materially distinct from another if it requires proof of a fact not required by the other."¹⁶⁴ In its judgment, the Court concluded that based on the same incident or set of facts, alleged in paragraph 3.17 of the Judgment and relating to the rape of Victim A, Semanza was guilty for the crimes against humanity of rape and torture.¹⁶⁵ Without further explanation, the court found that the crimes against humanity of rape and torture contained at least one materially distinct element not contained in the other, and thus Semanza could be convicted of both crimes cumulatively.¹⁶⁶

2. The Approach of the ICC in *Bemba*

On May 23, 2008, the ICC issued an arrest warrant for Jean-Pierre Bemba Gombo for his role in the Central African Republic rebel movement.¹⁶⁷ Bemba was indicted and charged with rape as a war crime and a crime against humanity, torture as a war crime and a crime against humanity, outrages upon personal dignity, and pillaging.¹⁶⁸ From October 25, 2002 to March 15, 2003, Bemba led the combatants of the *Movement de*

163. *Laurent Semanza*, Case No. ICTR-97-20-T, para. 409; see *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, paras. 289–99 (Jan. 27, 2000) (discussing cumulative charges).

164. *Laurent Semanza*, Case No. ICTR-97-20-T, para. 409.

165. *Id.* para. 553 (recording guilty verdict on charges of rape and torture); see *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Third Amended Indictment (May 15, 2003). 3.17 (charging Semanza with rape and torture).

166. *Laurent Semanza*, Case No. ICTR-97-20-T, para. 506 (stating that rape and tortured each contained one materially distinct element).

167. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Warrant of Arrest, paras. 12–24 (May 23, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc535163.pdf> (providing the facts that amount to "reasonable grounds" that defendant committed the alleged crimes).

168. *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, paras. 159, 189, 280, 289 (June 15, 2009) (providing factual basis for charges').

Libération du Congo (“MLC”) which remained loyal to Ange-Félix Patassé, the President of the Central African Republic at the time, against rebel forces led by François Bozizé.¹⁶⁹ The arrest warrant alleged that MLC forces led by Bemba committed acts of rape, torture, murder, outrages upon personal dignity and pillaging during the conflict.¹⁷⁰ In a decision similar to *Semanza*, the Court held that cumulative convictions would only be allowed where “each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.”¹⁷¹ Unlike *Semanza*, however, the court found that the crime against humanity of torture was completely subsumed within the crime against humanity of rape.¹⁷² Specifically, the court held that “the definition of torture as a crime against humanity, unlike the definition of torture as a war crime, does not require the additional element of specific purpose.”¹⁷³ Thus, the mens rea necessary for torture did not have an additional material element not contained within rape.¹⁷⁴ The court further explained that the “severe pain and suffering and control by the perpetrator” necessary to prove torture “are also the inherent specific material elements of the act of rape. However, the act of rape requires the additional specific material element of penetration, which makes it the most appropriate legal characterization in this particular case.”¹⁷⁵

Due to the additional element of specific purpose in proving torture as a war crime, the court upheld cumulative convictions for the war crimes of torture and rape, as a theoretical matter.¹⁷⁶ In this particular case, however, the court found that the prosecutor did not meet the evidentiary burden

169. See *Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Warrant of Arrest, para. 12 (explaining Bemba’s role in the conflict).

170. See *id.* paras. 15–19 (enumerating the charges).

171. See *Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, para. 202.

172. See *id.* para. 205 (concluding that the two charges were not separate).

173. *Id.* para. 195.

174. See *id.* paras. 194–95 (noting that the knowledge requirement is not necessary for torture).

175. *Id.* para. 204.

176. See *id.* para. 195 (distinguishing between elements of torture as a war crime and a crime against humanity).

to prove torture as a war crime.¹⁷⁷ Specifically, the prosecutor “did not elaborate on the specific intent of alleged MLC soldiers which would have clearly characterized the alleged acts as acts of torture as a war crime.”¹⁷⁸

The court also held that in this particular case, the crime of outrages upon personal dignity was subsumed by the crime of rape.¹⁷⁹ The prosecutor argued that the MLC soldiers committed outrages upon personal dignity by gang raping, raping at gunpoint, ripping off clothing, raping them in front of family members or in public.¹⁸⁰ The court rejected this argument and determined that it was insufficient to plead that “any act of rape is humiliating, degrading and a violation of a person’s dignity.”¹⁸¹ The prosecutor failed to meet the evidentiary burden required to convict cumulatively as the evidence constituted the same conduct that would prove the elements of force or coercion in the crime of rape.¹⁸²

Critics argue that the ICC misapplied the test for cumulative convictions in its *Bemba* decision.¹⁸³ In determining whether each crime contained at least one materially distinct element, the court failed to consider that “[a] physical invasion of sexual nature is not required to prove torture, nor is a certain level of pain and suffering required to prove rape.”¹⁸⁴ Similarly,

177. *See id.* para. 299 (finding that the prosecutor did not meet its evidentiary burden of proving specific intent).

178. *Id.*

179. *See id.* para. 312 (holding that outrages upon personal dignity is subsumed by rape).

180. *See id.* para. 308 (presenting the prosecutor’s argument that *Movement de Libération du Congo* (MLC) soldiers committed outrages upon personal dignity). The prosecutor also considered the powerlessness of the witnesses, the severity of the rapes, and the impact on the families of victims and the CAR population. *See id.* para. 308.

181. *Id.* (quoting Pre-Trial Chamber III, ICC-01/06-01/08-T-11-ENG, para. 9, lines 17–19).

182. *See id.* para. 310 (finding that the presented facts reflect the element of force or coercion in rape).

183. *See* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Amicus Curiae Observations of the Women’s Initiative for Gender Justice Pursuant to Rule 103 of the Rules of Procedure and Evidence, paras. 25–29 (July 13, 2009) (arguing that the Chamber applied the test too narrowly, and even under the Chamber’s rational, reached the wrong result); *Green, supra* note 130, at 535–36 (stating that the court “erroneously conflated the crimes of rape, torture and outrages upon personal dignity).

184. *Green, supra* note 130, at 536; *see* ICC Case of Jean-Pierre Bemba Gombo, Amicus Curiae, para. 28.

humiliation or degradation is not a required element of rape, while a sexual invasion is not an element of outrages upon personal dignity.¹⁸⁵ Although it is true that an act of rape may be both painful and humiliating, Laurie Green argues that these are not required statutory elements of the crime and should not be treated as such.¹⁸⁶

The Amicus Curiae brief submitted in *Bemba* by the Women's Initiative for Gender Justice provided specific instances in which the court misapplied the mutually distinct elements test.¹⁸⁷ For example, the brief argues that the rape of a ten-year-old girl should have been charged as torture.¹⁸⁸ The brief argued that even if the elements of rape, namely force and coercion, are generally subsumed under the control and custody elements of torture, a minor's inability to give genuine consent constitutes an additional element.¹⁸⁹

The brief also points to the example of a boy who was lashed while his sister was being raped.¹⁹⁰ In that example, the brother did not experience any sexual penetration himself.¹⁹¹ Thus, the test for cumulative convictions was not applicable, and separate convictions for rape (for the sister) and torture (for the brother) could be charged.¹⁹² The brief argues that the court should also allow charges of torture when a person who is a rape victim, or soon to be one, is forced to watch the rape of a family member.¹⁹³ Finally, the element of coercion that supports the

185. See *Jean-Pierre Bemba Gombo*, Amicus Curiae, para. 29 (arguing that the Chamber's application of test was too narrow with respect to outrages upon personal dignity); *Green*, *supra* note 130, at 536 (arguing that rape and outrages upon personal dignity have distinct elements).

186. See *Green*, *supra* note 130, at 536 (arguing pain and humiliation are not elements of rape); see also *Jean-Pierre Bemba Gombo*, Amicus Curiae, paras. 26, 29 (arguing that the court's application of the test was too narrow).

187. *Jean-Pierre Bemba Gombo*, Amicus Curiae, para. 25–30 (arguing that the Chamber misapplied the test in at least three cases).

188. *Id.* para. 26 (arguing because the rape of a ten-year-old girl contained a distinct element, inability to give genuine consent, the act could be charged as rape and torture).

189. *Id.* (stating that the element of coercion or force would not apply since a minor is incapable of consent).

190. See *id.* (citing such example).

191. See *id.* (arguing that both crimes could be charged).

192. See *id.* (stating there was no sexual penetration of the brother).

193. See *id.* para. 28 (arguing that torture should apply when a family member is forced to watch rape).

rape charge should be separated from the humiliation, degradation and violation of dignity an individual experiences as their family members are being raped.¹⁹⁴

III. *CUMULATIVE CONVICTIONS ARE NECESSARY IN ORDER TO FULLY CAPTURE THE HARM CAUSED BY RAPE AND DETER THE USE OF RAPE AS A WEAPON OF WAR*

Part III asserts that the ICC should permit cumulative convictions for rape and torture. Part III.A discusses why cumulative convictions are necessary to end impunity for sexual violence in armed conflict. Part III.B argues that the ICC misapplied the test for cumulative convictions in *Bemba*. Part III.C proposes that cumulative convictions should be extended beyond convictions for rape and torture.

A. Cumulative Convictions are Necessary to End Sexual Violence in Armed Conflict

It is clear that sexual violence has moved beyond the acts of rogue soldiers motivated by sexual desire.¹⁹⁵ Emerging developments, such as the distribution of condoms and sexual enhancement drugs, provide concrete evidence that rape is being encouraged, and in some cases commanded, by the highest levels of armed forces.¹⁹⁶ According to the now-former ICC Prosecutor Luis Moreno-Ocampo, “the impotency drug Viagra was distributed to Libyan troops as part of an official policy of rape.”¹⁹⁷ The distribution of enhancement drugs demonstrates that perpetrators and commanders are encouraging systemic rape, are well aware of the harm caused by sexual violence, and have sought to maximize its harmful effects.¹⁹⁸

194. *See id.* para. 30 (stating that such humiliation should be separate from the act of rape).

195. *See supra* notes 92–100 and accompanying text (analyzing how perpetrators are using rape strategically for its destructive nature).

196. *See supra* note 50 and accompanying text (discussing the use of condoms to facilitate sexual violence in armed conflict).

197. Bowcott, *supra* note 22.

198. *Id.*

Today, sexual violence knows no boundaries.¹⁹⁹ It is commanded by women and men alike, and perpetrated against men, the elderly, young children, and among family members.²⁰⁰ Rape is no longer an afterthought—it is a strategy, a targeted weapon, and should be treated and punished as such.²⁰¹ Instead, sexual violence has largely been ignored, with its victims and survivors often silent and forgotten.²⁰²

As a permanent international fixture with jurisdiction to try the most serious crimes committed around the globe, the ICC is in a unique position to deter crime.²⁰³ It should use its authority to prevent the rampant use of rape as a weapon of war by properly prosecuting and punishing its use.²⁰⁴ To do so, courts must not only acknowledge the myriad of forms that sexual violence and mutilation can take, but also fully consider and punish the harm that they can cause.²⁰⁵ Permitting cumulative convictions is an important step in doing achieving that goal.²⁰⁶ It is also a crucial step in deterring the increasing use of extreme sexual violence in armed conflict.²⁰⁷

Sexual violence is a *sui generis* crime with effects unlike any other.²⁰⁸ It can simultaneously destroy individuals, families, and

199. See, e.g., *supra* note 47 and accompanying text (discussing the use of sexual violence against young girls); *supra* notes 95–98 and accompanying text (discussing the use of extreme sexual violence, mutilation, gang rape, public rape and forced incest).

200. See *supra* note 47 and accompanying text (noting rape of women between the ages of eight and eighty); *supra* notes 55–59 and accompanying text (discussing the sexual violence against men); *supra* note 60 and accompanying text (discussing rape commanded by a woman); *supra* note 99 and accompanying text (discussing forced incest).

201. See *supra* note 92 and accompanying text (discussing how perpetrators are using rape strategically for its destructive nature).

202. See *supra* note 154 and accompanying text (articulating the problem of impunity surrounding gender violence).

203. See *supra* note 137 and accompanying text (outlining that the ICC's stated goals are in line with this cause).

204. See *supra* notes 141–43 and accompanying text (arguing that more extensive charging would help alleviate continuing harm to victims, and deter future incidents).

205. See *supra* notes 95–98 and accompanying text (discussing various forms of sexual violence and the resulting trauma).

206. See *supra* notes 154–55 and accompanying text (discussing the importance of cumulative convictions for sexual violence).

207. See *supra* note 154 and accompanying text (finding that the failure to prosecute gender violence increases its prevalence).

208. See *supra* note 115 and accompanying text (arguing that rape is *sui generis*).

communities.²⁰⁹ Its physical, mental and emotional effects are long lasting.²¹⁰ It can destroy a culture and have enduring effects for generations after the violence has ended.²¹¹ Moreover, widespread social stigmas result in the dishonor, shame, and silencing of survivors.²¹² The media is generally unable to fully capture the emotional and internal physical injuries caused by rape.²¹³ It is a crime that is frequently ignored and under-prosecuted.²¹⁴ For these reasons, the current system of prosecution incentivizes the use of sexual violence in armed conflict, relative to other weapons of war.²¹⁵

It is therefore essential to fully acknowledge the pervasiveness of sexual and gender based crimes in armed conflict through comprehensive prosecution.²¹⁶ As a crime that primarily affects women and girls, the failure to sufficiently prosecute sexual violence has further diminished the already low status of women in many communities.²¹⁷ The advancements in defining, prosecuting, and reporting sexual violence combined with the presence of women in the judiciary make it possible to propel the prosecution of sexual violence to a level of full accountability.²¹⁸

209. *See supra* notes 95–100 (discussing the physical, mental and emotional effects of sexual violence).

210. *See supra* notes 11, 65–66, 74, 86, 89, 100 (discussing the permanent effects of sexual violence).

211. *See supra* notes 89–91 and accompanying text (discussing sexual violence as a weapon of genocide); *supra* notes 75–77 and accompanying text (discussing children born of rape).

212. *See supra* notes 105–07 and accompanying text (discussing stigmatization of survivors and a reluctance to report the crime).

213. *See supra* notes 65–66, 72–73 and accompanying text (discussing internal physical injuries and emotional trauma caused by sexual violence).

214. *See e.g. supra* note 27 and accompanying text (stating that the prosecutor did not include rape in Akayesu's original indictment); *supra* note 101 and accompanying text (stating that rape is rarely prosecuted); *supra* note 102 and accompanying text (stating that rape was deliberately excluded from the Nuremburg trials).

215. *See supra* note 101 and accompanying text (stating that rape is advantageous because perpetrators are rarely prosecuted).

216. *See supra* note 154 and accompanying text (arguing that the failure to prosecute gender violence increases its prevalence).

217. *See supra* note 155 and accompanying text (arguing that the failure to prosecute gender based violence exacerbates the low status of women).

218. *See supra* note 25 and accompanying text (stating that Akayesu provided the first definition of rape under international law); *supra* note 30 and accompanying text (discussing the role of a female judge prosecuting Akayesu for rape); *supra* note 155 and accompanying text (discussing how prosecution can help end impunity).

B. *The ICC Misapplied the Test for Cumulative Convictions and Undermined the Intent of the Rome Statute*

By failing to distinguish the harm caused by war rape from other crimes in *Bemba*, the ICC misapplied the test for cumulative convictions.²¹⁹ The Court determined that the relevant test to decide whether a defendant could be convicted for two crimes based on the same act is whether “each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.”²²⁰ Based on the ICC’s Elements of Crimes, rape and torture, as war crimes and as crimes against humanity, each contain at least one materially distinct element not contained within the other. In the case of torture, the prosecutor must prove that the perpetrator “inflicted severe physical or mental pain or suffering.”²²¹ For rape, the prosecutor must prove that the perpetrator “invaded the body of a person by conduct resulting in [sexual] penetration.”²²² While some level of pain may be present in an act of rape, pain and suffering is not a material element required to prove the crime.²²³ This distinction is more evident in cases where perpetrators intentionally inflict a higher level of pain through the use of sharp objects or mutilation.²²⁴

The *Bemba* court also ruled that the crime of outrages upon personal dignity was subsumed by the crime of rape.²²⁵ Here too, each crime contains at least one materially distinct element, and thus should have passed the court’s test for cumulative

219. See *supra* notes 183–86 and accompanying text (arguing that the correct application of the test for cumulative convictions would result in convictions for rape in addition to torture and crimes against human dignity).

220. See *supra* note 171 and accompanying text (establishing the test for cumulative convictions in *Bemba*).

221. See Elements of Crimes, *supra* note 40, at arts. 7(1)(f), 8(2)(a)(ii)-1, 8(2)(c)(i)-4 (identifying elements of torture).

222. See *supra* note 40 and accompanying text (laying out the elements of rape as defined by the Rome Statute).

223. See *supra* note 65 and accompanying text (discussing the physical pain often associated with rape; *supra* note 184 and accompanying text (arguing that pain is not an element of rape)).

224. See *supra* notes 95–98 and accompanying text (discussing methods of extreme sexual violence).

225. See *supra* note 179 and accompanying text (discussing the court’s holding).

convictions.²²⁶ Specifically, rape requires proof of sexual penetration, and outrages upon personal dignity requires proof that the “perpetrator humiliated, degraded, or otherwise violated the dignity” of the victim.²²⁷ While rape victims often describe feelings of humiliation or shame, these are not elements required to prove rape.²²⁸ This distinction is seen most clearly in situations where perpetrators intentionally inflict rape in a manner intended to humiliate victims, including incest and public display.²²⁹

The failure to apply cumulative convictions also undermines the intent of the Rome Statute.²³⁰ Under the court’s interpretation, certain crimes, such as outrages upon personal dignity, would almost always fail their evidentiary burden.²³¹ Thus, in practice, such crimes would seldom, if ever be prosecuted.²³² The fact that such crimes were enumerated in addition to, and separate from, rape demonstrates the intent for such crimes to be charged cumulatively.²³³ This interpretation is consistent with the introduction to the Elements of Crimes and the drafting history of the Rome Statute, which states “[a] particular conduct may constitute one or more crimes.”²³⁴

226. See *supra* notes 180, 185 and accompanying text (arguing that the crime of outrages upon personal dignity test contains at least one materially distinct element from the crime of rape).

227. See *supra* note 40 and accompanying text (enumerating the elements of rape); Elements of Crimes, *supra* note 40, art. 8(2)(c)(ii) (enumerating the elements of outrages upon personal dignity).

228. See *supra* notes 185–86 and accompanying text (arguing that humiliation or shame is not required to prove rape).

229. See *supra* notes 99–100 and accompanying text (discussing sexual violence intended to humiliate or shame victims).

230. See *supra* notes 144–49 and accompanying text (discussing the legislative history of the Rome Statute as related to cumulative convictions).

231. See *supra* notes 179–82 and accompanying text (discussing the high evidentiary burden to prove outrages upon personal dignity in practice).

232. See *supra* note 149 and accompanying text (arguing that crimes such as outrages upon personal dignity would almost never be prosecuted in practice).

233. See *supra* notes 147–49 and accompanying text (noting that such crimes were originally included within the crime of rape).

234. See *supra* notes 144–45 and accompanying text (discussing the introduction to the Elements of Crimes).

C. Cumulative Convictions Should Be Extended Beyond Rape and Torture

In order to fully capture the harm caused by sexual violence, it is essential to prosecute and acknowledge every tactic employed and every injury that results.²³⁵ As such, conviction schemes should reflect each individual crime that accompanies the crime of rape.²³⁶ For example, a perpetrator should be charged with murder in addition to rape if the victim is killed through, or as a result of, the act of sexual violence.²³⁷ Similarly, a charge of torture should be added if the crime is committed in a particularly painful or harmful way, such as gang rape or use of an object or weapon.²³⁸ If a victim is detained and/or raped multiple times, the defendant should be charged with sexual slavery.²³⁹

Similarly, convictions should reflect reproductive harm to victims that is specifically intended. For example, the perpetrator should be charged with use of a biological weapon if the act of sexual violence transmits an STD such as HIV/AIDS.²⁴⁰ In cases where victims lose their reproductive abilities, the perpetrator should be charged with forced sterilization.²⁴¹ A perpetrator who impregnates a woman and does not provide her with access to an abortion (if desired or

235. See *supra* notes 139–40 and accompanying text (discussing the importance of acknowledging the full extent of the criminal conduct of the accused); *supra* notes 148–49 and accompanying text (arguing that all sexual violence crimes available under the Rome Statute should be prosecuted).

236. See *supra* notes 139–40 and accompanying text (discussing the importance of acknowledging the full extent of the criminal conduct of the accused).

237. See *supra* notes 11, 65 and accompanying text (discussing death as a result of sexual violence).

238. See *supra* notes 184, 186 and accompanying text (arguing that courts should charge cumulatively for rape and torture since pain is not an element of rape).

239. See *supra* notes 10–12 and accompanying text (discussing sexual slavery of comfort women in Japan); Elements of Crimes, *supra* note 40, art. 7(1)(g)-2 (defining sexual slavery).

240. See *supra* notes 66–69 and accompanying text (discussing the transmission of STDs through sexual violence); see generally GLOBAL JUSTICE CENTER, HOW THE LAWS OF WAR FAIL WOMEN (2012), available at <http://www.globaljusticecenter.net/index.php/publications/advocacy-resources/21-q-a-how-the-laws-of-war-fail-women-march-2012>.

241. See *supra* notes 11, 57, 65, 91, 97 and accompanying text (discussing the loss of reproductive abilities due to sexual violence or mutilation); Elements of Crimes, *supra* note 40, art. 7(1)(g)-5 (defining enforced sterilization).

medically necessary) should be charged with forced pregnancy.²⁴² Perpetrators should also be charged with forced pregnancy in cases where women are intentionally held to prevent them from terminating the pregnancy.²⁴³

Convictions should also reflect the emotional or psychological damage that victims face. For example, outrages upon personal dignity should be charged if the crime is committed in a particularly humiliating or degrading manner, such as in public, in front of family members, or through forced incest.²⁴⁴ This charge may be applied to include public nudity, particularly in religious or conservative communities.²⁴⁵ A crime should also be added for perpetrators who rape children below a certain age.²⁴⁶ In addition to deterring future crimes through the acknowledgment and punishment of the different rape tactics employed, allowing cumulative convictions will also alleviate the discrimination caused by failing to fully prosecute gender crimes.²⁴⁷ Historically, the low status of women in society, combined with the lack of women in prosecutorial and judicial roles, pushed sexual violence, a crime that mostly affects women, to the sidelines. This led to impunity for some of the most damaging and horrific crimes of war. In order to overcome this discrimination, it is essential that crimes of sexual violence be fully prosecuted and acknowledged on a global scale.

242. See *supra* note 71 and accompanying text (discussing increased mortality rates due to lack of access to abortions); Elements of Crimes, *supra* note 40, art. 7(1)(g)-4 (defining forced pregnancy).

243. See *supra* note 90 and accompanying text (stating that pregnant women were held by Serbian forces until they could no longer terminate the pregnancy); Elements of Crimes, *supra* note 40, art. 7(1)(g)-4 (defining forced pregnancy).

244. See *supra* notes 49, 99–100 and accompanying text (discussing public rape, including videos, rape in front of family members, and forced incest); Elements of Crimes, *supra* note 40, art. 8(2)(b)(xxi) (defining forced pregnancy).

245. See *supra* note 87 and accompanying text (discussing additional stigma associated with conservative or religious communities).

246. See *supra* note 47 and accompanying text (noting soldiers were commanded to rape girls as young as eight).

247. See *supra* notes 154–55 and accompanying text (arguing that failure to fully prosecute such crimes leads to prevalence of gender based violence).

CONCLUSION

In *Bemba*, the Court acknowledged the ability to charge rape crimes cumulatively in the ICC.²⁴⁸ Unfortunately, the Court also prohibited the use of cumulative convictions on a practical level. Due to its unique position to try perpetrators who have typically enjoyed impunity for crimes, including sexual violence, the ICC must seize the opportunity to charge cumulatively in order to fully acknowledge, punish, and prosecute the wide array of harms caused by war rape. Only then will victims receive full recognition of the crimes they have suffered, and perpetrators face the consequences of their actions, leading to a major step in ending a crime that has reached truly inhumane levels.

²⁴⁸. See *supra* note 121 (noting the theoretical possibility of cumulative convictions).