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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
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TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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SEXUAL VIOLENCE AND THE ROLE OF THE INTERNATIONAL COURTS

Justice Teresa Doherty*

This article is based on a speech presented as the annual Shirley Smith Address in Wellington, New Zealand on 14 May 2013. It concerns the historical problem of sexual violence in armed conflict, and the important developments in this field spearheaded by the international criminal tribunals of Yugoslavia, Rwanda and Sierra Leone.

> It is all that woman's fault; she told me she was not married. I know she said no, but we highlands men are entitled to more than one wife so I took her anyway.

These were the words of a man appealing against his conviction and sentence for the abduction and rape of a young woman he met on a road, made to two fellow judges and myself in the Supreme Court of Papua New Guinea. He took a fancy to her, but she refused his overtures. In the course of her resistance he formed the view that she was not married. She was in fact married. He took her, kicking and screaming, home and held and raped her there. He already had a wife who was not impressed by this interloper.

What struck me, after I initially thought "this – after I have struggled for some recognition of the status of women for so long" was: what was his concern? It was not that she refused; he knew that ("I know she said no"). Nor that it was all her – "that woman's" – fault; that, after all, is the oldest legal defence on record. Adam used it on God in the Garden of Eden. It did not work then and it does not work now.

His concern was that "she told me she was not married". He was concerned about what would happen if he interfered with another man's wife – another man's property – and in doing so offended local norms – the repercussions could lead to fighting. What concerned him was not the woman's feelings, her rights, her refusal. His worry was the rights of another man, a husband.

And that has been, for centuries, the attitude to women whose clans, towns, countries were vanquished in war. Women were property under the ownership of men: a father, a husband, a slave

* Justice TA Doherty CBE is a judge of the Special Court for Sierra Leone. The views expressed in this article are personal to the author and may not reflect the views of the Special Court. This article has been edited by Elizabeth Chan, a judge's clerk of the Supreme Court of New Zealand.

owner. Rape was considered a property crime committed, not against the woman, but her owner, because it could reduce her work ability or value on the marriage market. Roy Porter states that:[1]

> … the crime [of rape] was principally that of stealing and abducting a woman from her rightful proprietors, normally her father or husband. Moreover, in the case of a maiden, rape destroyed her property value on the marriage market, and … heaped shame on her family. … Violated daughters might be given as offerings to nunneries, and in many societies they were married off to the abductor or rapists.

Hence women were property the conqueror could take: the conqueror could not only have anything he could carry or drive away – furniture, gold, livestock – but also women and children, as the spoils of war. It was a complete defeat, a vanquishing of the enemy. It also showed that they could not protect their own women and children.

This was an attitude that prevailed, not only in European wars, but also in parts of Asia. One example is the Chinese wars waged by Khubilai Khan against the Japanese in the eleventh and twelfth centuries where women were captured, held and even distributed among vanquishing troops.[2] A recent BBC documentary stated that there are 23 million descendants of his grandfather Genghis Khan,[3] however, how Andrew Marr made that assessment was not stated.

There were laws controlling violence against women, but as Kelly Askin (who has written widely on the history of gender-based violence in war) has shown in her research, while:[4]

> … sexual assault has been increasingly outlawed through the years, this prohibition has rarely been enforced. Consequently, rape and other forms of sexual assault have thrived in wartime, progressing from a perceived incidental act of the conqueror, to a reward of the victor, to a discernible mighty weapon of war.

Not many ancient wars were actually subject to written or universally accepted codes or laws; there were "traditions" but they did not necessarily deal with the status of civilians. A few, like the war code of the Saracens, made clear "[w]omen and minors of both sexes become the immediate

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1 Roy Porter "Rape – Does it have a Historical Meaning?" in Sylvana Tomaselli and Roy Porter (eds) *Rape: An Historical and Social Enquiry* (Basil Blackwell, London, 1986) 216 at 217 (footnote omitted) as cited in Kelly Dawn Askin *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Kluwer Law International, The Hague, 1997) at 21.

2 See James P Delgado *Khubilai Khan's Lost Fleet: in Search of a Legendary Armada* (University of California Press, Berkeley, 2008).

3 See BBC "Andrew Marr's History of the World" <www.bbc.co.uk>.

4 Askin, above n 1, at 19.

property of the captors".[5] Male prisoners of war could be ransomed, released or exchanged. Women could not.

Askin cites a change of practice emerging in Roman war ethics, suggesting that it came about partly as a result of changing attitudes towards civilians as non-combatants. This included prohibiting the sexual violation of women. For example, Nicetas records that the Turks prohibited violation of women; likewise Totila the Goth during the sacking of Rome, and Alexander the Great, although it has been opined that this was because of Alexander's sexual orientation rather than altruism.[6]

One example of a traditional law or rule of war, showing that such rules are not unique, came before me as a judge in Papua New Guinea following a tribal fight. Tribal fighting, although a criminal offence, did not often come to a court hearing because the participants would not give evidence against each other. Jailing of participants would upset the equilibrium. Despite the impression that tribal fighting was spontaneous and vicious, the warring parties maintained a balance of those injured or killed on each side. In that particular case the warring factions met at the time and place arranged, the men to fight while the women sat along the sides of the battle ground sharpening arrows, tending wounds and supplying food. The accepted procedure was when one side realised things were not going well the fighters would take off, running for the hills while their accompanying womenfolk would carefully, methodically and slowly collect their sharpening stones, food and other belongings, spread out in a line and slowly walk with careful deliberation up the hill after the retreating men. The winning side could not chase their retreating enemy until all the women were out of the way. This was one of the local rules of war. The winning side broke that rule by chasing and killing one of the women who formed the barrier between them and their enemy. This very serious breach of the traditional rules of war – which prohibited attacks on the retreating women – was enough to cause the losing side to treat the killing as murder and report it to the police, who in turn brought it to court in a criminal trial.

But attitudes to gender-based violence, including rape, in war varied. According to Susan Brownmiller, to the ancient Greeks, rape was "socially acceptable behavior well within the rules of warfare" and "women were legitimate booty, useful as wives, concubines, slave labor, battle-camp trophy".[7] That attitude, while not universal, was very common. Askin explains that "to the victor

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5 Percy Bordwell *The Law of War Between Belligerents* (Callaghan & Co, Chicago, 1908) at 13.

6 Thomas Cowan *Gay Men and Women who Enriched the World* (Mulvey, New Canaan (Conn), 1988) at 11–16 as cited in Askin, above n 1, at 23.

7 Susan Brownmiller *Against our Will: Men, Women and Rape* (Simon and Schuster, New York, 1975) at 33 as cited in Askin, above n 1, at 21.

goes the spoils" has been a war cry for centuries,[8] and Peter Karsten states that women and children were seen as "fair prey as spoils".[9]

During the Middle Ages there were debates on the ethics of war, mainly on the concept of the "just war", a lot of which evolved around an excuse to attack – and attacks on women and children sexually were seen as part of the war machine. Superior orders were an excuse or defence to what would otherwise be a crime. John of Salisbury wrote in *Pilicraticus* in 1159 that theft and rape, that is, property crimes, were wrong, but if the superior officer commanded the soldier to do that then failing to obey the order was an even greater, the greatest crime. Alberico Gentili advocated against rape of women in war, extending that to women combatants. However that was far from the accepted norm. Brownmiller writes that rape was considered a reward:[10]

> In medieval times, opportunities to rape and loot were among the few advantages open to … soldiers, who were paid with great irregularity by their leasers. … When the city of Constantinople was sacked in 1204, rape and plunder went hand in hand, as in the sack of almost every ancient city. … Down through the ages, triumph over women by rape became a way to measure victory, part of a soldier's proof of masculinity and success, a tangible reward for services rendered. … an actual reward of war.

In 1474, Sir Peter Hagenbach was accused of instituting a reign of terror in Briesach, Germany because he had not properly declared war which would have brought the rules of war into play.[11] Among the rules acknowledged was that the women occupants of a town which refused the demand to surrender could be raped.[12] M Cherif Bassiouni identifies Hagenbach's trial in Breisach before 27 judges of the allied states of the Holy Roman Empire as the first modern international prosecution for war crimes. Hagenbach was convicted, among other crimes, of rape.[13] But, as Bassiouni also notes, other than James II of England's punishment of Count Rosen for the "outrageous" way in which he conducted the siege of Derry, in Ireland, including by murdering innocent civilians, there were no other instances in this period of prosecutions for internationally accepted principles and norms regulating the conduct of armed conflict, and nor was there much progress in the historical

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8 Askin, above n 1, at 21.

9 Peter Karsten *Law, Soldiers and Combat* (Greenwood Press, Westport (Conn), 1978) at 5.

10 Brownmiller, above n 7, at 35.

11 Donald Arthur Wells *War Crimes and the Law of War* (2nd ed, University Press of America, 1991) at 93–94 as cited in Askin, above n 1, at 29.

12 Wells, above n 11, at 93–94.

13 M Cherif Bassiouni "The Time has Come for an International Criminal Court" (1991) 1 Ind Int'l & Comp L Rev 1 at 1. However, Askin notes that Nuremberg is frequently referred to as the first international war crimes tribunal because of its magnitude and dramatic impact on humanitarian law around the world: Askin, above n 1, at 5.

evolution of international humanitarian law and international regulation of armed conflicts.[14] Derry, my late father's home city, remembers that siege by marches each year. The fallout of war is long lived.

Civilian women were also killed because of their ability to produce children of the enemy. They had not fought or carried arms, but had potential – the potential to reproduce. In the words of General Westermann during the French Revolution, he massacred the women so that they could "breed no more brigands".[15] During the Balkan wars, stories circulated that women were raped with the intent that they would give birth to children of the enemy.[16] Forced pregnancy is now a crime against humanity in the Rome Statute of the International Criminal Court[17] and the Statute of the Special Court of Sierra Leone.[18] However, I am not aware of any prosecutions for that crime.

Did attitudes change and if so when? The answer is debatable. Hugo Grotius, considered by many lawyers as the father of international law, said:[19]

> You may read in many places that the raping of women in time of war is permissible, and in many others that it is not permissible. Those who sanction rape have taken into account only the injury done to the person of another, and have judged that it is not inconsistent with the law of war that everything which belongs to the enemy [including the women] should be at the disposition of the victor.

Kelly Askin identifies in the late eighteenth and nineteenth centuries, a smattering of treaties or war codes that began including vague provisions for protecting women:[20]

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14 See generally, Bassiouni, above n 13.

15 Hoffman Nickerson *The Armed Horde, 1793–1939* (GP Putnam, New York, 1940) as cited in Askin, above n 1, at 32.

16 See generally Joana Daniel-Wrabetz "Children Born of War Rape in Bosnia-Herzegovina and the Convention on the Rights of the Child" in R Charli Carpenter (ed) *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press Inc, Bloomfield (Conn), 2007) 21.

17 Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force on 1 July 2002), art 7(1)(g).

18 Statute of the Special Court for Sierra Leone (established under SC Res 1315 S/Res/1315 (2000)), art 2(g). Neither the Updated Statute for the International Criminal Tribunal for the Former Yugoslavia (as amended by SC Res 1431 S/Res/1431 (2002)) nor the Statute of the International Criminal Tribunal for Rwanda (established under SC Res 955, S/Res/955 (1994)) have criminalised forced pregnancy: see Alyson M Drake "Aimed at Protecting Ethnic Groups or Women? A Look at Forced Pregnancy Under the Rome Statute" (2012) 18 Wm & Mary J Women & L 595 at 602.

19 Hugo Grotius *The Law of War and Peace* (1646, reprinted in 1925) as cited in Askin, above n 1, at 30.

20 Askin, above n 1, at 34. See also M Cherif Bassiouni *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, Cambridge, 2011) at 427.

- Article 6 of the Treaty of Amity and Commerce 1785 (between the King of Prussia and the United States of America) specified that, in case of war, "women and children … shall not be molested in their persons".
- Order No 20 1847, a supplement to the Rules and Articles of War for the United States, listed rape as a severely punishable offence.
- The Declaration of Brussels 1874 stated that the "honour and rights of the family … should be respected." Note it is "should", not "shall": it is not mandatory.
- The Laws of War on Land (Oxford Manual) 1880 asserted that "human life, female honor … must be respected. Interference with family life is to be avoided."[21]

Although the language of most of these documents is imprecise, authorities such as Askin and Miller presume that the provisions were intended to protect women and children against sexual assault. But this is not always spelt out. The term used is "family honour", which does not acknowledge the woman's right not to be assaulted or to suffer.

But there was a much earlier written law in my homeland, Ireland: Cain Ardoman's The Law of Innocents, which protected the status of women, was made in 697. According to Irish tradition Ardoman, a senior cleric, and his mother saw a battle field where women were dead and dying, for in those days women had to fight whether they wanted to or not. They saw one woman's head was on one side of a stream, her body on the other and her baby was trying to feed from her dead body. Ardoman's mother told him to do something about it. He drafted a law which prohibited physical and sexual abuse of women, declared that women were not chattels and stipulated punishments. It had effect throughout Ireland and areas in Scotland and northern England under the influence of Irish clerical laws. If that could be done in Ireland 1,300 years ago, why not the rest of the world now?

Askin and Theodor Meron consider the Lieber Code passed in the United States in 1863, following the Civil War, which outlawed rape and assault on women, as the foundation for the modern laws of war which are codified in the Geneva Conventions.[22] But even these first conventions did not clearly spell out that there should be no rape and no sexual assault on women.

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21 Institute of International Law *The Laws of War on Land* (Oxford, 1880), art 49.

22 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick Armed Forces in the Field 75 UNTS 31 (signed 12 August 1949, entered into force 21 October 1950); Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick Armed Forces at Sea 75 UNTS 85 (signed 12 August 1949, entered into force 21 October 1950); Geneva Convention relative to the Treatment of Prisoners of War 75 UNTS 135 (signed 12 August 1949, entered into force 21 October 1950); Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (signed 12 August 1949, entered into force 21 October 1950); Theodor Meron "Shakespeare's Henry the Fifth and the Law of War" (1992) 86 Am J Int'l L 1 at 34 as cited in Askin, above n 1, at 323. Meron comments that despite the prohibition of "all rape" in the Lieber's Code, the protection of women's rights did not appear to have been a priority.

Article 46 of the 1907 Hague Convention stipulated that: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practices must be respected."[23] However, art 46 did not say that the integrity of individual women and girls was to be protected and respected, nor did it acknowledge their suffering. Here again it was "family honour and rights" that was to be respected; arguably the drafters had not moved away from the concept that women and children were the property of fathers or husbands.

The First World War involved gross atrocities and offences: twice as many people were killed than had been killed in all the wars between 1790 and 1913, and invading German soldiers raped women and massacred opponents by the thousands.[24] Sexual assaults were not only indiscriminate acts by soldiers but were used as a weapon of terror, rage and intimidation. In 1919, a War Crimes Commission of 15 persons established to report on crimes committed during the conflict reported that there had been "extensive violations of the laws of war".[25] Thirty-two offences were identified, including rape and forced prostitution,[26] but the only recommendation of the Commission that appeared in the draft of the Versailles Treaty was art 229, which provided for the trial of war criminals.[27] There were no post-war initiatives to prevent future abuses.

It was not until August 1949 that art (4)(2)(e) of the Protocol II to the Geneva Convention spelt out that the fundamental guarantee of humane treatment included the prohibition of rape, enforced prostitution and any form of indecent assault.[28] As well, under customary international law, detained women were to be separated from men and supervised by women.[29]

The first of the modern post-war criminal tribunals were those after the Second World War. They were heard in Nuremburg or Tokyo. But no sexual crimes were prosecuted at Nuremburg or Tokyo. Why? It was known that rape happened, sometimes on a massive scale. Rape or sexual violence were not explicitly criminalised in the Charter of the Nuremberg Tribunal nor expressly

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23 Convention IV respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (1907 Hague Convention IV) 187 CTS 227 (signed 18 October 1907, entered into force 26 January 2010).

24 Telford Taylor *The Anatomy of the Nuremberg Trials, A Personal Memoir* (Knopf Doubleday Publishing Group, New York, 1992) as cited in Askin, above n 1, at 41.

25 Askin, above n 1, at 42.

26 Askin, above n 1, at 47.

27 Askin, above n 1, at 44.

28 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1125 UNTS 609 (signed 8 June 1977, entered into force 7 December 1978).

29 Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2009) vol 1 at 431–433, r 119.

mentioned in the judgments as forms of either war crimes or crimes against humanity.[30] Jennifer M Green notes that although rape was recognised as a crime against humanity in Local Council Law No 10, which governed the subsequent trials held by the Allied military powers against lower-level Nazis, no one was ever charged with rape.[31] Similarly, although rape was stated as a crime in the Tokyo statutes, no-one was prosecuted. Yet thousands of Korean women and girls were held as sexual slaves, euphemistically called "comfort women".[32]

I have heard it said that the prosecuting powers did not want to offend "sensibilities", whatever those might be. But other researchers say that it was because the Allied troops had behaved as badly as other combatants. Thousands of women and girls were assaulted and raped as the Soviet army entered Berlin. Although the Soviet War Memorial erected by the Soviet Union at the Tiergarten in Berlin was supposed to be a tomb or monument to the Unknown Soldier, that monument has been referred to as the "Tomb of the Unknown Rapist".[33]

Other researchers who have looked into contemporary records say that Stalin was reluctant to do anything against his own Russian soldiers who committed rape and degradation upon women as they fought through the Soviet Union and Europe. Sexual assault was seen as a sort of entitlement. Hence there were no prosecutions. However, Bassiouni says that after the Second World War, the "victorious Allies simply imposed their will on the defeated, while totally absolving themselves [of liability]".[34]

I heard the attitude that rape was "an entitlement" in the course of evidence during the *Prosecutor v Taylor* trial.[35] A witness testified that when something was said to a leader of the rebels in the Revolutionary United Front about the treatment of captured women, he told his troops: "Enjoy yourselves boys. This is your time." Also a young girl, describing her violent gang rape and subsequent abduction and detention, averred that a sister told her: "If they capture [you], they have a right to rape you". A right!

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30 Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 82 UNTS 279 (signed 8 August 1945, entered into force 8 August 1945).

31 Jennifer M Green "Litigating International Human Rights Claims of Sexual Violence in the US Courts: A Brief Overview of Cases Brought Under the Alien Tort Statute and Torture Victim Protection Act in Sanja Bahun-Raunovíc and VG Julie Rajan (eds) *Violence and Gender in the Globalized World: The Intimate and the Extimate* (Ashgate Publishing, Aldershot, 2008) 125 at 129.

32 Green, above n 31, at 129.

33 See Frederick Taylor *The Berlin Wall: A World Divided, 1961–1989* (Harper Collins, New York, 2006) at 32.

34 M Cherif Bassiouni *Crimes Against Humanity in International Criminal Law* (2nd ed, Kluwer Law International, The Hague, 1999) at 554.

35 *Prosecutor v Taylor* SCSL Trial Chamber II SCSL-2003-01-PT, 3 April 2006.

I SO WHEN AND HOW DID IT CHANGE?

The Statute of the International Criminal Tribunal for the Former Yugoslavia (the ICTY), the first of the modern war crimes tribunals, declared rape a crime.[36] Rape had been widespread during the civil war in the Balkans; there were camps where women were detained and used by their captors for sex and where women of one ethnic group were deliberately impregnated by men of another to ensure that their children were of the other ethnicity.[37] The International Criminal Tribunal for Rwanda also provided for prosecutions of war crimes and crimes against humanity, with "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" being included within the definition of war crimes.[38]

But initially there were few prosecutions for sexual offences in the ICTY. Justice Richard Goldstone, an early prosecutor, conceded this.[39] The explanations given included that women did not want to give evidence or re-live the trauma or embarrassment. Likewise, initially in the International Tribunal for Rwanda no actual indictments for sexual offences were laid. It was not until a witness described the gang rape of her very young daughter during the evidence in a case against a town mayor called Jean Paul Akeyesu that Judge Navenethem Pillay, who is now the United Nations High Commissioner for Human Rights, intervened and asked why the rape was not being prosecuted.[40] Akayesu had not been prosecuted for rape or any other sexual crime. The Court directed the Prosecutor to investigate. A new indictment was laid and Akayesu was convicted; rape was declared "an act of genocide" and a definition was given.[41] The decision was a landmark one, both for its definition and for clearly showing that rape was just as much a crime in war as in peace.

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36 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art 5(g). The Statute does not refer to forced pregnancy or forced prostitution, however.

37 See Danise Aydelott "Mass Rape During War: Prosecuting Bosnian Rapists Under International Law" (1993) 7 Emory Int'l L Rev 587 at 598–599.

38 Statute of the International Criminal Tribunal for Rwanda, art 4(e).

39 See Courtney Ginn "Ensuring Effective Prosecution of Sexually Violent Crimes in the Bosnian War Crimes Chamber: Applying Lessons from the ICTY" (2013) 27 Emory Int'l L Rev 566. Goldstone J developed a comprehensive gender strategy that was integral in the recognition of rape as a crime against humanity. Ginn comments that perhaps his most important contribution was the creation of a Gender Advisor in the Office of the Prosecutor: at 578.

40 *Prosecutor v Akayesu (Judgment)* ICTR Trial Chamber ICTR-06-4, 2 Sept 1998.

41 At [731] (footnote omitted), the Chamber stated:

> With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act so long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways to inflict harm on the victim as he or she suffers both bodily and mental harm.

Other cases followed and with the appointment of both women investigators and prosecutors (for example, Brenda Hollis and Patricia Sellars), further charges for gender-based violence were laid by the joint ICTY and International Criminal Tribunal for Rwanda's Office of the Prosecutor. However, the fact that these crimes were committed against captured vulnerable women did not mean that the perpetrators admitted that it happened or that the old "it was all that woman's fault" defence was not tried – as a recent video issued by the ICTY which includes Kunarac giving evidence in his own defence shows.

The Special Court for Sierra Leone brought further developments. It is considered as "a critical landmark for international justice in prosecuting sexual and gender-based crimes committed during conflict" and its jurisprudence has "played an essential role in advancing the recognition in law for such crimes".[42] At present all of the Special Court's principals are women; it is the only international tribunal to have achieved this level of female representation in leadership roles.

The Special Court was set up following a request by the Government of Sierra Leone to the United Nations after a civil war that raged in that small West African country for 10 years.[43] The war was noted for the brutality of the atrocities visited upon civilians, which included: killing by beating and burning; the deliberate chopping off of arms, hands and legs; the abduction of people for forced labour, as sex slaves and as child soldiers; the cutting open of pregnant women to settle bets about the sex of their unborn babies; and the deliberate destruction of homes, villages and cities.[44] The modus operandi was to enter a village, burn homes, round up the people, publicly rape women – particularly young women – and take away able-bodied males, females and children. The children would then be used as child soldiers.

The Special Court is noted for several landmark decisions in international law, including the decisions on the immunity of a head of state,[45] the application of amnesties in peace treaties to crimes against humanity and war crimes,[46] as well as the recruitment and use of children in war

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42 UN Women "UN Women hails historic work done by Special Court for Sierra Leone strengthening women's access to justice" (press release, 9 October 2012).

43 The Special Court for Sierra Leone <www.sc-sl.org>. For more information about the Court, see Teresa Doherty "Jurisprudential Developments Relating to Sexual Violence: the Legacy of the Special Court for Sierra Leone" in Anne-Marie de Brouwer and others (eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Cambridge, 2013) 157.

44 *Prosecutor v Brima (Judgment)* SCSL Trial Chamber II SCSL-2004-16-PT, 20 June 2007 [*Brima* (Trial Chamber II)]; and *Prosecutor v Brima (Judgment)* SCSL Appeals Chamber SCSL-2004-16A, 22 February 2008 (Appeals Chamber) [*Brima* (Appeals Chamber)].

45 *Prosecutor v Taylor (Decision of Immunity from Jurisdiction)* SCSL Appeals Chamber SCSL-2003-01-I, 31 May 2004.

46 *Prosecutor v Kondewa (Decision on Lack of Jurisdiction/Abuse of Process)* SCSL Appeals Chamber SCSL-2004-14-AR72(E), 25 May 2004 (Amnesty Provided by the Lomé Accord).

(commonly referred to as child soldiers)[47] and forced marriage. The Special Court's mandate was limited to those "who [bore] the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996",[48] which led to "it was not me, the other bigger boy did it"-type arguments.

The original indictments against members of two warring factions, the Revolutionary United Front and Armed Forces Revolutionary Front charged rape, sexual slavery and outrages against personal dignity. In February 2004, the prosecution sought leave to amend its indictments to include a new count of forced marriage as a crime against humanity. The Trial Chamber agreed in those two cases and recognised "the necessity for international criminal justice to highlight the high profile nature of the emerging domain of gender offences with a view to bringing the alleged perpetrators to justice".[49] In justifying the decision, one judge, Justice Boutet, referred to the Special Court's own Rules, the reluctance of victims of sexual violence to come forward and report sexual offending, as well as a report of the International Committee of the Red Cross,[50] and a report of the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Periods of Armed Conflicts.[51] (It is a sad reflection on our world that we need a Special Rapporteur on systematic rape).

Trial Chamber II, of which I was a judge, heard and ruled on the evidence in *Prosecutor v Brima* (also called the Armed Forces Revolutionary Council or AFRC trial).[52] That decision considered, for the first time, the international criminal law relating to child soldiers, forced marriage and sexual slavery. In the course of the civil war, two rebel groups, the Revolutionary United Front and the Armed Forces Revolutionary Council, regularly abducted civilians and used them for forced labour such as mining, domestic work and carrying of loads, and in the case of women and girls, for sexual purposes.

Those women and girls, who were forcefully abducted from their homes, were taken back to the rebel camps and fighters could select those women and girls they wanted as wives. Commanders got the first choice. Very young girls were sometimes allocated to young SBU (small boy unit) fighters. A bureaucratic system of registering the names and allocation of these women to different men was

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47 *Prosecutor v Norman (Decision on Preliminary Motion Based on Lack of Jurisdiction)* SCSL Appeals Chamber SCSL-2004-14-AR72(E), 31 May 2004.

48 The Special Court for Sierra Leone, above n 43.

49 *Brima* (Trial Chamber II), above n 44, at [34].

50 Charlotte Lindsey *Women Facing War: ICRC Study of the Impact of Armed Conflict on Women* (International Committee of the Red Cross, Geneva, 2001).

51 Linda Chaves *Preliminary Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Periods of Armed Conflict* E/CN4/Sub2/1996/26 (1996).

52 *Brima* (Trial Chamber II), above n 44.

instituted in some camps. Fighters had to sign up for a woman or girl to be allocated to them as wives, as if they were giving receipts for bags of rice. The captors sometimes kept those women or girls that they had captured themselves. The woman was told if she would become the wife of the captor or fighter. She was given no choice in the matter and was punished if she refused. She was obliged to cook, carry his (often looted) property through the jungle, have sex and bear his children. Whatever status the "husband" had, she also had; she got food if he had food, if he was a commander, she had someone to work for her and, in one example, a woman had the power to distribute looted goods because of her husband's status. But if she transgressed, she was severely punished. For example, she might be lashed and held in a rice box, and if he tired of her, she was rejected and often sent to the front to fight. She could not leave. Other women who were not allocated as wives were available to all and any men in the camps and were raped by individual men and gang raped. They were held and forced to work. Unsuccessful escape was usually punished by death.

In the majority judgment, my two judicial colleagues held there was no separate crime of forced marriage.[53] They held in their decision that the indictment charging sexual slavery and other forms of sexual violence was bad for duplicity.[54] On the issue of forced marriage, I said:[55]

> The crucial element of "forced marriage" is the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrators over the victim.

I also held that the count alleging sexual slavery and other forms of sexual violence should be severed from the other counts.

The Appeals Chamber agreed with me,[56] and the Special Court was the first international tribunal to return convictions for sexual slavery and forced marriage as crimes. The Special Court also held in *Prosecutor v Sesay* that rape could be an act of terror.[57] There were also convictions for outrages against personal dignity and, in the recent *Taylor* trial, we referred to the public humiliation of raping women and girls in front of family and community as a degradation amounting to an act of terror.[58]

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53 *Brima* (Trial Chamber II), above n 44, per Judge Sebutinde and Judge Lussick.

54 At [95] per Judge Sebutinde and Judge Lussick.

55 At [53] per Judge Doherty.

56 *Brima* (Appeals Chamber), above n 44.

57 See *Prosecutor v Sesay (Judgment)* SCSL Trial Chamber I SCSL-04-15-T, 2 March 2009; and *Prosecutor v Sesay (Judgment)* SCSL Appeals Chamber SCSL-04-15-A, 26 October 2009.

58 *Prosecutor v Taylor*, above n 35.

II CONCLUSION

I am not qualified to say why there has been an increase in the prosecution of crimes of sexual and gender-based violence. I have heard it said that it is due to the increasing number of women on the bench of courts in domestic and international courts. Examples of such women include Justices Navenethem Pillay, Louise Arbour and Elizabeth Odio Benito in the ICTY and myself in the Special Court of Sierra Leone. I am not convinced that the presence of women on the bench is the sole reason for a more progressive view of sexual offending as a crime against humanity. I suggest that these developments also reflect the trend in domestic jurisdictions and the work of groups and civil society to raise awareness of sexual and gender-based violence and the need for action against such violence. We, as judges of international tribunals, were the ones who had the opportunity to actually say what many already believe.