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BEYOND RETRIBUTION AND IMPUNITY: RESPONDING TO WAR CRIMES OF SEXUAL VIOLENCE

Naomi Cahn

INTRODUCTION

Over the past five years, as many as 100,000 Congolese women, girls, and babies have been subjected to gender-based violence. Like other human rights crimes that occurred during the Congolese "civil" war, gender-based violence is both an individual and a community abuse. As the Congo begins

1. Professor of Law, George Washington University (on leave, 2002-2004). The author lived in Kinshasa, Democratic Republic of the Congo, from July 2002-June 2004. Many thanks to Colleen Duggan, Elza Elek, Mary-Louise Eagleton, Tony Gambone, C. Quince Hopkins, Sean Murphy, and Jo Wells for comments and support, and to Terra Nevet, Alyson Thomas, and Veronica Wayner for research assistance.


to emerge from this conflict, the questions here, as in other countries like Rwanda, Sudan, and the former Yugoslavia that have confronted these issues, concern on the tensions between impunity, prosecution, and reconciliation. The standard human rights non-governmental organization response has been to investigate and prosecute, in order to end the impunity that has protected human rights abusers in this country for so long. Other non-governmental organizations and some of the international organizations are more focused on issues of demobilization and reintegretion, even if the people being reintegrated are those whom the human rights non-governmental organizations would prefer to see prosecuted for their role in committing violence against women and other atrocities during the conflict.

Conflicts affect both men and women, but women face additional issues during and after wars that men do not, including, of course, sexual violence, forced impregnation, and forced abortion. The recent conflicts in Rwanda, the former Yugoslavia, and the Congo illustrate the impact of sexual violence on women. Women are also disparately affected by conflicts because of their role as the primary caretaker of the household and family, and because of their legally enforced second-class status in most conflict zones. Consequently, in any discussion of conflict and sexual violence, it is critical to focus on women’s political and economic status as well.

While this Article examines issues of sexual violence, it also discusses practices for dealing with such violence that implicate the other impacts of armed conflict on women. Now that sexual violence is considered a war crime

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they also raise critical issues concerning victimization. Women who have been subjected to sexual violence by armed groups are certainly victims, yet they are often scorned and treated by their families and communities as outsiders, while the soldiers who committed the crimes are welcomed home. This treatment of women stems from two different causes. The first reason is that women’s status in many developing countries is quite low, and these women do not receive the same rights and respect as their male counterparts. A second reason for the divergent treatment, intertwined with the first, is that while sexual violence is slowly being accepted by the international community as a crime, it still is not treated as seriously as other war crimes.

This Article articulates principles for a new approach to gender-based violence during conflict and post-conflict that operate within three different meanings of justice: criminal/civil justice, restorative justice, and social services justice. These principles are suggestions for guiding the involvement of international donors, multilateral institutions, recipient governments, international and local legal systems, and country-internal civil society actors, and are offered in an effort to improve the response to sexual violence victims in conflict and post-conflict situations. As a threshold principle, the project of improving existing responses requires simply listening to what individual victims want and need by recording their stories and identifying the various consequences of sexual violence in their lives. Because violence affects so many parts of the victims’ lives, the second principle requires seeking solutions from both within and outside of the law in the effort to develop appropriate responses. Victims may seek civil or criminal sanctions against their perpetrators, but they may also need seeds to grow food for their families, more efficient stoves so that they do not need to go into the forest to collect wood, or whirlies to call for help if they are attacked. Legal responses are often inadequate, undesirable, or untenable because they can only respond to linear aspects of the population’s post-conflict needs; they provide the opportunity for publicizing and testifying about the injustice and punishing the perpetrator or even reparations, but they do not provide for the practical realities of victims’ lives. Responses to sexual violence must integrate legal and nonlegal, national, international, and local approaches, and must respond to both short- and longer-term needs.

The third and final principle requires placing individual victims, who may have been raped, or penetrated with guns, sticks, knives, or machetes, into the larger contexts of their families, communities, and country. Each victim of gender-based violence deserves justice, but that justice must be defined by more than individual needs. Rape during armed conflict is a crime against not only the individual victim but also her community and gender. This final principle requires going beyond the victim and placing her within her differing communities; in turn, appropriate responses require balancing what the victim wants, what is in her best interest, and what is in the best interests of her larger communities.

A critical issue for non-traditional justice approaches that move beyond criminal prosecutions and civil lawsuits is ensuring responsibility and accountability of perpetrators while also serving the needs of victims. When justice includes what might be characterized as “development” services, such as different forms of direct aid to recipients, these services cannot be separated from perpetrator responsibility. The focus of the traditional criminal justice system is almost solely on the perpetrator; indeed, the victim is not a party to the proceedings but is called as a witness by the prosecution, who represents the public interest. Alternative forms of justice have broadened this focus.


9. “Social services justice” provides another dimension to concepts of justice by focusing on the social, economic, medical, and psychological components of providing justice to victims. While this may be a component of restorative justice, which seeks reintegration of the perpetrator and victim into their communities, social services justice is a broader concept. The standard dictionary definition of “justice” focuses on doing what is right and fair, and the administration of legal process is only one of multiple definitions. MICHAEL-WEINBERGER’S COLLEGIATE DICTIONARY (11th ed. 2003), see also RUBIN WERTHEIM, Caring for Justice 24 (1997) (suggesting that ethos of care must be part of ethos of justice).

10. For example, “[S]exual violence may be systemic, for the purposes of destabilizing populations and destroying bonds within communities and families, advancing ethnic cleansing... In Bosnia, for example, public raped of women and girls preceded the flight or expulsion of entire Muslim population from their towns or villages.” Jeanne Ward, If Not Now, When?: Addressing Gender-Based Violence in Refugees, Internally Displaced and Post-Conflict Settings, A Global Overview, The Reproductive Health for Refugees Consortium (Apr. 2002), available at http://www.who.int/whc/documents/6.pdf.

11. Of course, this shows the perpetrator that the crime was committed against society, and relieves pressure on the victim. See Hopkins et al., Applying Reproductive Justice, supra note 5, at 296 ("[A]lso witness rather than parties in criminal cases, victims’ control over prosecution is limited; in fact, the traditional criminal justice system, at the urging of battered women’s advocates, adversarially displays battered women as ‘victims’ and then asks the court to take on the primary responsibility of confronting batterers about their violence."); John Meter, The “Right” as a Determined Processor of Criminal Cases: Unpacking Public and Private Interests, 70 WASH. U. L.Q. 85 (1992); BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 68 (Nancy Rosenblum & Mattia Mislov eds., 2002) (legal proceedings in response to human rights violations have as their goal justice and not
recognizing that the legal system must respond to both victims and perpetrators. By listening to victims, responding to their needs in concrete ways, and placing the victim within her larger community, we can craft responses to crimes of mass violence that respect what the victim has undergone, punish the perpetrator, and provide lessons to the public on the utter relevance with which the underlying conduct must be treated. Individual justice is critical, but large-scale crimes are symptomatic of other serious problems in the surrounding culture. Transitional justice, which focuses on responding to past official violations of human rights, is critical to holding violators accountable for their acts.12

The relationship between sexual violence, retribution, and reconciliation is a new topic that is just beginning to be studied, and the Democratic Republic of the Congo provides a logical forum for discussing these issues. The Congo will provide a testing ground for the new International Criminal Court; with the placement of 10,000 United Nations troops and billions of dollars in aid, with international focus on its transition to democracy, the country must confront its past in determining how to move forward.

This Article proceeds by discussing the contemporary Congolese conflict, providing the context for the sexual violence that has occurred over the past eight years.13 Next, the Article provides a fuller development of the principles that should guide any response to the sexual violence, surveying the possible approaches. The continuum of current approaches ranges from attempted prosecution of all perpetrators to a focus on elections and reintegration of both victims and former soldiers, who may be perpetrators of sexual violence. The recommendations differ depending on the entity implementing the program; the international community is better equipped to provide training, while local civil


15. For a history of private sector irresponsibility, see Adam Hochschild, King Leopold's Ghost (1999), for a fictionalized account, see Joseph Conrad, Heart of Darkness (1902).

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Society organizations are more suitable for information collection and much of the actual service delivery.14 Finally, the Article provides specific recommendations for a victim-centered approach that respects and reflects community concerns and interests.

1. THE CONFLICT

This Part explores the background to the Congolese conflict, before discussing the impact of sexual violence against women. The impact ranges from the actual physical harms to economic harms to health harms; although the rate of HIV/AIDS is approximately 6-7% nationwide, it is estimated to be much higher in the conflict areas.15

A. The Background to the Congolese Conflict

The Congolese "civil war" has been labeled Africa's "first world war" and categorized as the worst world conflict since the Second World War.16 The Congo, as large as the portion of the United States east of the Mississippi River, is a country rich in natural resources.17 It exports diamonds, cobalt, copper, coffee, and oil, and has vast deposits of cobalt, a critical component of cell phones and other technological equipment.

But the country has a long history of corruption. When the Portuguese first found the Congo River in the late fifteenth century, they sent out teachers and masons—but these men abandoned their professions and entered the far more lucrative slave-trade.18 In 1885, at the Berlin Conference where Europeans met to carve out territories in Africa for themselves, King Leopold of Belgium
ized the Congo for his own self gain and glory.  Although Leopold claimed that he had established a free-trade zone in the country to export rubber and ivory, he was instead exploiting the country, treating it as a privately owned slave colony from which Leopold was underreporting profits and pocketing the difference.  When Belgium granted independence to the Congo in 1960, there were fewer than 30 Congolese who had graduated from university and, among the 5000 management-level positions in the government, only three were held by Congolese.  Shortly after gaining independence, Joseph Desire Mobutu, who had received payments from the CIA, mounted a coup to become the head of the country. It is an understatement to note that corruption and human rights abuses continued during the thirty-two years that he was dictator.

The country's history of corruption and the colonialist plundering have inhibited the development of democratic institutions and traditions. As a result, the country's instability has permitted other countries to become involved in Congolese conflicts. There is not one specific origin for the recent war, but the catalyst was the Rwandan genocide of 1994, in which the Hutu-led Rwandan government organized mass killings of hundreds of thousands of Rwandan Tutsis and moderate Hutus.  After its defeat, the government and military forces fled to neighboring Congo (called Zaire at that time).  In 1996, the now-Tutsi-led Rwandan government sent troops over the border into the Congo, claiming that it needed to protect Rwandan Tutsis against further slaughter.  Rwandans, together with a local coalition led by Laurent Kabila attacked the Rwandan refugee camps in eastern Congo, killing tens of thousands, primarily civilians.  Uganda then sent soldiers in support of the Kabila-led coalition.  With the Kabila coalition, the Rwandans and Ugandans overthrew Mobutu in May 1997.

During the summer of 1998, Kabila tried to free himself from the Rwandans and Ugandans, who formed a coalition with a Congolese-based
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sexual violence, a husband can "disown" his wife, and unmarried women may be deemed "spoiled," based on Tswana traditions.46 Similarly, in Rwanda, where sexual violence was used to shame Tutsi communities, women had to report their experiences of sexual violence because they fear that their husbands will scorn them, or, if they are not married, that no one will marry them.47 During Sierra Leone’s devastating civil war, some estimate that more than 200,000 women and girls were subjected to sexual violence.48 Sierra Leone’s Truth and Reconciliation Commission has devoted time to hearing these claims.

The Congo has ratified the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).49 Notwithstanding guarantees of equality for men and women in these documents, women’s inequality in the Congo is codified in various laws left over from Belgian colonial rule. The Congo has yet to develop a women’s rights movement on a large scale, although there are small groups of women’s organizations. Girls can get married at age fifteen without parental permission, although boys must wait until age eighteen.44 A man and his family are required to pay a dowry for his bride before a marriage can occur.45 The Family Code explicitly designates the husband as the head of the Congolese family, and requires the wife to defer to her husband’s decisions (unless she

40. Id. at 15.
43. See HUMAN RIGHTS WATCH, WAR WITHIN THE WAR 89-90 (2002) (Congo is a party to the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, the Convention on the Rights of the Child, the African Charter on Human and Peoples’ Rights, and CEDAW).
44. Code de la Famille art. 352. All translations are the author’s own.
45. Although there has been attempts to place Congolese laws on the internet, see http://www.jartcongo.net, they have not yet been entirely successful, and the laws are generally compiled in loose-leaf pamphlets, sometimes by non-governmental organizations.
49. Antennity International, Sudan: Darfur: Rape as a Weapon of War: Sexual Violence
Within some Congolese tribes, there are customs which minimize the impact of rape; for example, in one tribe, when a man's husband has died, his husband's male relatives rape her with impunity, while in another area, a girl can be sequestered and raped for several weeks and, upon her release, the boy who has proved his masculinity need only pay a goat or a small sum of money in compensation.

These legal inequalities, supported by pre-colonial traditions, help provide the context for community and family reactions to the sexual violence. They also establish a climate of impunity, if not tolerance, for gender-based violence.

C. Sexual Violence During the Conflict

[Bulengo] Nyanakon [is] waiting for her third procedure at the Panzi Hospital in Bukavu [a regional Congolese capital]. The story of how she arrived here began on May 12, 2002, when rebel fighters demanded that she disrobe in her home. It was 8 p.m. She was eight months pregnant and had finished a long day of cooking and washing. She was resting in the sitting room of her small hut. “Five of them came at me. I closed my eyes. They told my husband to get in another room and they held him down. They were shouting that they would kill him,” she said, looking down. “Then they each had sex with me, five of them. Afterwards, I was so bruised and my mind was shutting off.”

After the rebels left, [Nyanakon’s] husband carried her through the banana trees under the cover of darkness and onto a boat for the five-hour ride from her town of Nialombie to Kibare, a bigger town with a hospital.

In the middle of the night, doctors had to cut her abdomen open and remove the dead fetus.

The scale and scope of sexual violence against women in the Congo is almost incomprehensible. As a spokesperson for the UN World Food Programme observed, “[w]e have never come across as many victims of rape in a conflict situation as” in the Congo. The sexual violence against women and girls has affected them physically, economically, psychologically, and emotionally.

The Family Code requires that a woman obtain her husband’s permission before undertaking any legal act, and warns, in the same provision establishing the incapacity of minors and those who are mentally incompetent, that wives’ capacities may be limited in accordance with the law. Only in 2002 was the Labor Code changed to allow a wife to work without her husband’s permission. A woman must live with her husband and follow him where he thinks it appropriate to reside. If there is a disagreement between the mother and the father concerning childrearing, the father’s decision controls. Abortion is illegal, and the laws on contraception and women’s status have been interpreted to require that a woman get her husband’s permission before obtaining birth control.

The laws on rape, which are rarely enforced, date back to the early twentieth-century Belgian Colonial Penal Code, with minor modifications since then. Rape is addressed in a section titled “infringements against the proper family order,” and the law addresses two different kinds of sexual crimes: first, a violation of modesty committed with violence, cunning, or threat by one person to another of the opposite sex is punishable by imprisonment of between six months and five years, and second, a rape, with the aid of violence or serious threat or cunning is punishable by imprisonment of five to twenty years. Associated doctrine, embodied in the official comments to the penal code, precludes any act other than “cold” (coitus), regardless of its nature or morality, from being treated as rape. Rather than proceeding through the judicial system, rape cases are sometimes resolved when the perpetrator marries the victim, or pays reparations to her family, a type of informal resolution that occurs in other countries where women remain second-class citizens. For example, in Peru, until 1997, if a rapist married his victim, he was exempt from prosecution.
socially. The impact on their communities has been equally profound, illustrating the vacuum of local authority and the lack of protection available on an individual, communal, national, and international level. Many women have been displaced from their homes, unable to grow crops, and are scared to collect wood for their stoves.

During the war, tens of thousands, if not more, women and girls were subjected to various forms of sexual violence. Women were raped, often by multiple men, and often in front of their husbands, children, or other family members. Women were held captive for months or years at a time, subjected to repeated rapes and unable to return to their families, penetrated with sticks and guns, and shot in the genital area. Many women and girls were kidnapped from their communities, and forced to provide sexual services as well as domestic work to the soldiers. A female’s age was irrelevant; babies, toddlers, teen-agers, and elderly women were all subjected to various forms of sexual violence. Some pygmy women were raped, they explained, because soldiers believed that they would thereby become immune to various illnesses.

The actual number of women subjected to gender-based violence is not known because attacks often occur in remote areas, where it is difficult to contact victims. Observers believe that, once it is finally established, the number of women subjected to sexual violence in the Congo will be much higher than the numbers in either Rwanda (approximately 50,000) or Bosnia (about 20,000). Moreover, women are generally frightened to report their rapes, fearing ostracism from their homes and communities and reprisal for
daring to speak. Also, in addition to the psychological impact of the shame and humiliation they feel, there is a lack of awareness of the opportunities for help. Even if women do find the proper authorities, they may be unable to file a complaint because they lack the money or because the authorities are in collusion with the military.

Not only were civilians the victims of gender-based violence, so too were girl and female soldiers. Joining a militia did not provide immunity from violence. In its report on child soldiers in the Congo, Amnesty International found that virtually all girl soldiers had either been raped or otherwise sexually attacked by commanding officers or others in their units. Few places in the conflict region are safe; women and girls are raped in camps for the internally displaced and MONUC troops have also been accused of sexual violations. And, female refugees have agreed to exchange sex for food with the peacekeeping troops.

Each of the warring factions has also been implicated in the commission of sexual violence. It is difficult to define the “good guys” or the “bad guys” given the complexity of the conflict and the number of groups and other African countries involved. Rape is used by all sides both as a weapon of war, to terrorise and dehumanise the population, and as an extension of widespread pillaging. As in other African wars, it is typically unarmed civilians who are most likely to be victimised. Winning soldiers use rape to establish the power to take what they want, to punish anyone suspected of sympathising with another faction, and to humiliate individuals and their communities. Because rape is defined under Congolese law as a violation of a man’s honor, it

69. Goodwin, supra note 65.
70. Reuters, UN Calls Sex Abuse by Troops in Congo, WASH. POST, Jan 8, 2005, at A16 (the author initially learned of these allegations in numerous conversations between the author and various non-governmental organizations while she was in the Congo); see also Vans, supra note 8, at 13.
73. “War in this context is virtually unrecognizable… Parties to conflicts do not fight to win; direct armed clashes are avoided, minimized, or simulated; strategic towns are not taken; and armed violence is mainly directed at unarmed civilians, who constitute the vast majority of casualties. Looting of civilians is the primary form of payment for both soldiers and rebels.” Ken Merlikaat, “A Hidden Outbreak of Tranquility”: Assessing the New Peace in Africa, 28 FLETCHER F. ON WORLD AFF. 73 (2004).
74. In a survey of displaced households in Sierra Leone, ninety-four percent reported that members had experienced some form of gender-based violence. UNHCR, Guidelines, supra note 2, at 7.
75. Fritz & Westcliff, supra note 15, at 8. For the now-classic view of rape as a means of domination rather than sexual abuse, see Susan Brownmiller, Against Our Will: Men, Women, and Rape (1975).
is seen as a humiliation of men too. As Kelly Askin notes, gender-based violence demoralizes the raped individual and her community, and it also "entertain[s] or reward[s]" soldiers, encouraging them to continue the conflict. The scale of sexual violence differs from pre-war rape cases, which typically involved individuals, not armed groups. Gender violence has additional indirect effects on other women, making them fear for their own and their children’s safety as they conduct their daily activities, and helping to foster, post-conflict, a situation with ongoing sexual violence, including rape. Gender-based violence has far-reaching effects on its victims, including their mental and physical health and socioeconomic situation.

1. Health impact

The health impact of gender-based violence is, perhaps, the easiest to comprehend. The consequences for women’s health range from unwanted pregnancies, miscarriages caused by the abuse, and illness or death from illegal abortions, to damaged vaginas resulting from rape or penetration with knives or gunshot wounds, and sexually transmitted diseases, including HIV/AIDS. Although, in most regions, injured vaginas typically result from early childhoods, this is not true in the Congo, where doctors have seen so many injured vaginas that they record them as a "crime of conflict." The chief medical office at one provincial hospital estimated that eighty percent of the women treated there had sexually transmitted diseases. Because abortion is illegal, women may either try to arrange illegal abortions, or carry the baby to term in a country where the

75. See Rebecca Cook, Gender, Health and Human Rights, in HEALTH AND HUMAN RIGHTS: A Reader 235, 200 (Jonathan Moyo et al. eds., 1999) (discussing various harms caused by sexual violence during armed conflict).
76. Askin, The Quiet, supra note 6, at 233. Sherrie L. Russell-Brown explores why commanders allow their soldiers to commit sexual violence, discussing the reality that preventing it is not a high priority, that sexual violence may simply be viewed as another war tactic that demoralizes the population, and a lack of sense of accountability for such crimes. Sherrie L. Russell-Brown, The Last Line of Defense: The Doctrine of Command Responsibility and Gender Crimes in Armed Conflict, 22 Wis. Int’l L.J. 125, 133-34 (2004).
77. Pratt & Warshak, supra note 17, at 9.
79. See Ward, supra note 10, at 13 (the focus on sexual violence during conflict overlooks other forms of violence against women that occur before, during, and after the conflict, including domestic violence).
80. For a useful chart summarizing these effects, as well as the security and legal impact, see UNIFEM, Guidelines, supra note 2.
81. War, Bondage Legacy, supra note 57.

83. See Calin & Goldstein, supra note 51. By contrast, the maternal mortality rate in the U.S. is 12 per 100,000 births. Id.
88. Rabin & Silver, supra note 95, at 55. In conflict zones, peacekeepers are associated with increased prostitution and sexual exploitation, though not necessarily with the rapes committed by the militia. Id. at 61.
89. See Jefferson, supra note 35, at 9.
that less than 30% of the country’s health zones are “functional.”98 And years of war have left health centers essentially inoperative, with no medical supplies, and no money available for salaries for health workers.99 Women may not know how important it is for them to find medical care; and, even when they are aware of the importance of health care and it is available, it may be prohibitively expensive.97

2. Socioeconomic Impact

More than three-quarters of rural families in the eastern Congo have been displaced at least once during the conflict.100 Many women are unable to return to their families. In some cases, their husbands, mothers, fathers, and other family members have been killed, so they have no one to whom they can return. In other cases, their husbands and fathers have rejected them, sometimes claiming that the women have sexual diseases, sometimes explaining that the men’s honor has been damaged, generally blaming the woman herself rather than the militarists. One woman explained what happened when she returned home: “I tried to hide it from my husband but he found out. He said that I had accepted it voluntarily. He said this although I had bruises and marks where the soldiers had pressed their fingernails into my inner thigh.”101 Men may have taken another wife, and relegated the first, raped wife to secondary status.102 Many young men told one local human rights group that they would not marry a woman who had been subjected to sexual violence.103 Young, unmarried women who have been raped and had children may be scorned by their families, and subsequently flee their villages, because their honor has been damaged.104 Women who have been raped may be deemed culpable for their rapes because they did not resist enough.105 By contrast, many of the male soldiers who committed these violent acts have been accepted into their former communities, and allowed to resume their former activities.106 The women who have been rejected by their families and communities are further victimized because they have no economic support.107 Their families will not provide food, and they often fear leaving their houses to work in the fields or to sell goods at the local market. When rape results in pregnancies, then the children are also stigmatized. The mothers themselves may reject children resulting from rape because the children are a visible and constant reminder of their humiliation.108 In neighboring Rwanda, raped women sometimes label their children “little killers.”109

II. LEGAL RESPONSES TO SEXUAL VIOLENCE

Legal approaches to sexual violence have focused on ending impunity as well as healing the country. But justice and reconciliation are often framed as opposite ends of a continuum.110 Either the community treats criminals as such, and prosecutes them; or the community focuses on overcoming a violent past and reintegrating potentially indictable war criminals into their home communities, granting a fairly open-ended amnesty that excuses the crimes.111 Because of the relatively recent advent of international justice and culpability for crimes committed during conflict,112 this dichotomy makes sense. The availability of international tribunals to impose criminal liability for war crimes helps symbolically to show the horrendous nature of these crimes. Prosecution and consequent accountability—if they happen—indicate the level of gravity

98. Id. at 4.
99. Relo & Sinaiel, supra note 96, at 128; see Mass Rape, supra note 36, at 25 (“The DRC’s health-care infrastructure, always terribly under-resourced, has broken down completely in many areas with the advent of war, either having been destroyed or looted by combatants or become obsolete or neglected, with unsympathetic conditions and no water or electricity supply.”).
100. See Mass Rape, supra note 36, at 28 (most Congolese survive on 20 cents a day, and hospitals often charge $2.00 to admit a child, and slightly more for an adult).
101. War Victims—the War, supra note 43, at 11 (estimating that 80% have lost their homes).
102. Id. at 64. Rejecting and blaming the victim is a common attitude towards women raped during conflict. See Jefremopou, supra note 35, at 6.
103. Rubin & Sinaiel, supra note 96, at 10, 14. Polygamy is not uncommon in the Congo, but sexual violence provides another reason for a man to take additional wives.
105. Kenji Holt, reporting for DVB, told the story of a girl named Faika: “I came to this camp nearly six months ago when the fighting got bad in our village,” Faika expresses. “Every night the [Congolese rebels] soldiers would come to our home and make my sisters and I do it with them. We had no choice. If we said ‘No’ then they would hurt us. Sometimes they put their guns against my chest and sometimes between my legs. I was really scared... Scared, scared, scared.”
106. More Rape, supra note 36, at 32-33.
110. See Irene Alves, Crimes of State/Crimes of Hate: Lessons from Rwanda, 24 YALE J. INT’L L. 345, 403 (1999) (international lawyers contend that sometimes “legal lawlessness to victims, to perpetrators, and to relevant national communities, as well as to international society as a whole. This message is currently contested and the rule of law affirmed through international criminal accountability.”).
111. See Eric Daly, Transformative Justice: Charting a Path to Reconciliation, 12 JRT’S LEG. PERSP. 73, 168 (2002).
112. For a compelling history of the crime of genocide, see SAMANTHA POWER, A PROBLEM FROM HELL?: AMERICA AND THE AFRICAN CRISIS (2002). She argues that the United States has, for a variety of reasons, including a lack of will to do so, done little to prevent or respond to genocide.
with which the community of nations has begun to treat these inhumane acts.105

The additional recognition of gender-based violence by international tribunals is even more significant: taking these crimes seriously requires indictments, trials, and judgments so that the defendants understand how they have wronged their victims and society.106 The new International Criminal Court statute, which has specific provisions dealing with gender-based violence including the creation of a victim-witness unit, is an example of the development of a new approach to sexual violence.107 Kelly Askin, an extremely thoughtful scholar of rape as a war crime, observes that there is a "tendency to ignore gender- and sex-based crimes. The crimes are intensely personal, the injuries often less visible, and the details provoke discomfort and aversion. But the alternative is silence, impunity, and grave injustice."108

There have been repeated calls to use the formal justice system to end the impunity that has protected rapists in the Congo. Human Rights Watch

105. The effectiveness of these international tribunals remains questionable. As Jane Avodra suggests more generally with respect to international dispute settlement, this "requires a meaningful, long-term political commitment involving substantial resources and extensive efforts to provide transparency that at least is present to respect to international tribunals, is not now apparent." Jane Avodra, The New Disputes Settlers: Shifting Trust and Consequences, 58 Tex. Int'l L.J. 403, 412 (2003); see Distal N. Sharp, Prosecution, Development, and Justice: The Trial of Hussein Habre, 16 Harv. Hum. Rts. J. 147, 177 (2001) ("It seems unfair for human rights advocates, versed in a vocabulary of rights, to focus on the legal and on the political . . . [Rights advocates should consider] that a campaign against impunity might also require them to play the role of capacity-builder, teacher, and community development organizer.").

106. See, e.g., Kelly D. Askin, Sexual Violence in Elections and Inducements of the Fugitives and Fugitives: It's Time for the ICC and the UN to Get Serious about Crimes of War (2008) [hereinafter Askin, Sexual Violence in Elections and Inducements of the Fugitives and Fugitives]; see also Distal N. Sharp, Prosecution, Development, and Justice: The Trial of Hussein Habre, 16 Harv. Hum. Rts. J. 147, 177 (2001) ("It seems unfair for human rights advocates, versed in a vocabulary of rights, to focus on the legal and on the political . . . [Rights advocates should consider] that a campaign against impunity might also require them to play the role of capacity-builder, teacher, and community development organizer.").

107. Professor Grace Gwirali acknowledges the challenges facing international tribunals such as that failure to deter crimes, but also suggests that these criticisms can strengthen the courts. Diane Gwaigwali, Uniting Global Justice: Assessing the International Criminal Court, 21 Wis. Int'l L.J. 405, 500-03 (2003).

108. See supra for a discussion of the benefits and criticisms of truth and reconciliation commissions.

109. See infra for Human Rights Watch's candid acknowledgment of the difficulties of improving the Congo's existing justice system.

110. See Section 2.3, supra note 9, at 251.

111. See supra note 9, at 251.

112. See supra note 9, at 251.

113. See supra note 9, at 251.

114. See supra note 9, at 251.

115. See supra note 9, at 251.

116. See supra note 9, at 251.

117. See supra note 9, at 251.
process because of deficiencies in the internal justice system, such as inadequate—or no—legal representation for defendants. In the Congo, because of the widely acknowledged disarray of the justice system, there would be similar problems.

This Part discusses three possible responses to gender-based sexual violence, reviewing the recent development and growing recognition of rape as a war crime, and then exploring the concept of restorative justice, which together represent a move away from the more traditional criminal justice system. Finally, this Part suggests principles for developing an approach to sexual violence that combines both traditional and newer methods.

A: Sexual Violence as a Violation of International Law: Prosecutions To End Impunity

Accountability for state-sponsored abuses against individuals during war has a longer history than does accountability for individuals who commit crimes during war, with 1947 marking the date for “the most significant effort to create a comprehensive regime for individual criminality.” States can be held liable for sexual violence under the laws of war or pursuant to international human rights law, including genocide and torture, and individuals can be held liable for crimes of war and crimes against humanity. International humanitarian law, which applies once an armed conflict has begun, has traditionally accorded minimal attention to sexual violence. The Geneva Conventions of 1949 prohibit violence against civilians, including “ outrages upon personal dignity.” Until the past decade, sexual violence has been treated as a crime of honor. For example, the Fourth Geneva

17. See POWER, supra note 104; MENN, facing HISTORY, supra note 114, at 124.
19. Chinkin, supra note 78, at 6, see Ethiopia Crimes Commission, Partial Amndt 38 (Apr. 28, 2004) (on file with author) (finding of liability against Amnest for "failure to take effective measures to prevent rape of women").
20. See Selkin, Wrong Time, supra note 4, at 295-96.
24. “International humanitarian law is only invoked once an armed conflict exists, whereas crimes against humanity and genocide do not need a connection to war in order to be prosecuted . . . international human rights law and international humanitarian law prohibits torture and slavery, yet relatively few efforts depend upon which body of law is applied . . . within the context of war, international human rights law can still provide protections.” Akinn, War Time Rape, supra note 8, at 201.
27. Akinn, The Quest, supra note 8, at 520 (n.41); see generally Akinn, Wrong Time, supra note 4; Chinkin, supra note 78; Thedore Meren, Rape as a Crime Under International Humanitarian Law, 87 Am. J. Int’l L. 424 (1993). When it comes to genocide, there are complicated issues concerning its legal status in international law, and its scope. Rather and Abraham observe that there have been questions about whether rape committed in the Balkan War was genocidal, especially in light of the hope expressed by some Serb attackers that they would make their victims give birth to Serb babies . . . . When an attacker rape a victim solely as an act of vengeance or brutality toward the victim, the rape is not genocidal, even if the attacker has selected the victim on the basis of her religion or ethnicity . . . . evidence suggests that the attacker committed the rape as part of an effort to drive members of the victim’s group into conditions when the attackers hopes will be realized in terms of the final solution to the problem (e.g., mass extermination). Rafter & Abraham, supra note 118, at 42. It is also a fact that torture. See Cook, supra note 73, at 260.
slavery, forced prostitution, enforced pregnancy, and other comparable crimes.” The first judgment issued by an international tribunal that recognized rape as a war crime occurred in the case against Jean-Paul Akayesu, a former mayor in Rwanda, who was convicted of failure to stop rape and murder by his subordinates. The international tribunals have also issued several other judgments recognizing sexual violence as a violation of international law. The Rome Statute of the International Criminal Court defines rape and other serious forms of sexual slavery as “crimes against humanity” when it is committed as part of a broad attack against civilians, and as “war crimes,” when committed as part of a plan or when there are massive numbers of such crimes.

In a forceful critique, Hilary Charlesworth argues that pursuant to international humanitarian law, rape should be prosecuted not as a community- or group-based offense, but as a crime against women. She notes that the two ad hoc tribunals as well as the Rome Statute, which are concerned with wide-spread assaults, define rape as a war crime, as a crime of genocide, and as a crime against humanity. Nonetheless, because of the limitations in how these crimes are defined, rape can only be prosecuted when it can be connected with the intention of assaulting a community. Consequently, rape is defined as a private, individual violation unless it can be tied to the public harm of destroying a community. Such a definition, while an expansion of international law, still relies on traditional notions of women’s roles and bodies. Instead, rape could be redefined “as a crime of violence against women.”

On the other hand, the Akayesu judgment of the International Criminal Tribunal for Rwanda, which found him guilty of war crimes and crimes against humanity because he encouraged individual acts of sexual violence, can be seen as “monumental” in its recognition that rape can, indeed, constitute genocide and a crime against humanity. Trials can be dramatic illustrations that there is no impunity for sexual violence.

B. Additional Means of Justice

In the United States, advocates have succeeded in strengthening rape laws over the past twenty-five years by, for example, abolishing the exceptions for marital rape and increasing the sentences for rapists. Yet these reforms have had limited impact on the rates of rape reporting, prosecution, or conviction. Instead, as advocates recognize that it is community attitudes that aid in tolerating sexual violence even with the existence of strengthened laws, they have suggested that interventions should focus on holding perpetrators more accountable while also decreasing public tolerance of their behavior. Prosecutions alone, then, have not resulted in the desirable outcome of decreasing rape.

In the international arena, international criminal tribunals do not necessarily deter future crimes, but serve instead to hold perpetrators accountable and as vivid reminders of the conflict’s destruction. As Christine Chinkin pointed out more than a decade ago, the focus of international criminal tribunals “is on punishing the wrongdoers, not on providing compensation and support to those who have suffered.” Advocates have begun to develop restorative justice approaches that seek to repair harm, support a victim-centered legal process, and change the


130. For a thorough review of these judgments, see Akin, War Time Rape, supra note 4, at 318-46.


132. Id. at art. 8, Sec. (c)(x).

133. Chartersworth, supra note 4, at 394.

134. Id. at 387.

135. Id.

136. Id. She critiques another aspect of the public/private distinction in international criminal law, the distinction between crimes committed by state and autonomous actors. Id. at 387-89.

137. Akin, War Time Rape, supra note 4, at 318.

138. See Dronthi, Punishment, Prosecution, supra note 23, at 1777-78 ("[T]he law may have significant declaratory values. Trials may set standards, codify legal principles and create precedent ... a trial may be needed to obviate the zeroes of defensive tactics."); see generally, Isaac E. Akwuebu, Peach to Close: Lessons of the Abuja Witness, 96 MDL. R. Rev. 2003 (1998).


140. Id. Similar efforts in the domestic violence context have had relatively little impact on lowering its prevalence. See Hopkins et al., Applying Restorative Justice, supra note 7, at 299.


142. Marjory Minors, Identity and Hate: Are There Lessons from Around the World?, in BREAKING THE CYCLES OF HATE: MEMORY, LAW, AND REPAIR 14, 22 (Nancy Rosenblum & Martha Minow eds., 2003) ("the trial and their work offer rich lessons of accountability, defining impunity and public acknowledgment, defining forced forgetting") [Emphasis added]. Minors, Memory and Hate), see Nancy L. Rosenblum, Justice and the Experience of Injustice, in id. at 77, 79 ("[v]erbal justice, root and cognitive" does not "[o]utside the survivor’s desire for revenge ").

143. Chinkin, supra note 76, at 12.
community’s attitudes. Similarly, prosecuting all war criminals, while an enormously significant and critical endeavor, may not always serve the interests of justice, of the local community, nor of the world community. International law scholars have begun to discuss a “third course,” that is neither prosecution nor amnesty, and to suggest that justice solutions for each transitional society be context-specific. This Section explores restorative justice as well as “social services justice,” which I define as a concept that allows justice to move beyond reparations and retribution and punishment that focuses on both immediate and long-term solutions for the victim, potential victim, and community.

1. Restorative justice

Some of the newer approaches, based on principles of restorative justice, emphasize the importance of transforming the culture, not just holding perpetrators liable, or excusing them so that they can resume their pre-conflict lives; of reconciliation and prevention and repairing harmed lives, not retribution.\(^{44}\) Examples of the “third course” include truth and reconciliation commissions, reparations programs, or hearings.\(^{45}\) Restorative justice can take many other forms as well, including civil proceedings, mediation, and community conferencing, although not all of these are appropriate for sexual violence.\(^{46}\) While restorative justice focuses on the individual, the perpetrator, and the community, it also acknowledges that the crime is a wrong against the state as well. Truth and reconciliation commissions (TRCs), for example, generally take testimony from witnesses and then compile reports, providing the opportunity to gather information from many people and then synthesize it.\(^{47}\) TRCs do not conduct trials, and witnesses are typically not subjected to litigation techniques, such as cross-examination; witnesses are able to tell their stories outside of the formal legal framework. Because these commissions are structured in different ways, their relationships with the judiciary and other government agencies are variable; in South Africa, the TRC was able to grant individual amnesty, but these decisions were reviewable by outside courts.\(^{48}\) Because they collect multiple and full stories, TRCs can provide extensive factual records that document the violence.\(^{49}\) Nonetheless, even as many are “blindly hostile” with TRCs, the implementation of TRCs around the world remains problematic: they “must be independent, well resourced and endowed with subpoena power, must hold public hearings when necessary; and must be able to tame the accused publicly. Few commissions today meet these criteria.\(^{50}\)

Restorative justice is concerned not just with violations of the law but also with violations of relationships;\(^{51}\) thus, it brings victims and offenders together so that the victim receives reparations, the offender takes responsibility, and the community becomes involved in the healing process. Its many different forms, including victim-offender mediation, typically brings together the victim, offender, and a community mediator; family conferencing, which involves the families of both the victim and perpetrator; and healing circles, which involve the community as well as the victim and offender, have been adapted to a variety of crimes, including child abuse and neglect as well as sexual violence against women.\(^{52}\) The perpetrator must admit guilt before becoming involved in restorative justice,\(^{53}\) so this alternative does not imply impunity, and is not an alternative that precludes prosecution or other legal options. But it can result in providing victims with structure, support, and choices, while strengthening the community’s understanding of the victim’s situation, and increasing community deterrence of future attacks.\(^{54}\)

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144. Hopkins et al., Applying Restorative Justice, supra note 7, at 254.
145. See Deubelh, Toward a Criminology, supra note 23, at 274 (2003); Deubelh, Punishment, Postgenocide, supra note 23, at 1230-32.
146. See Daly, supra note 103.
147. Id., Deubelh, Punishment, Postgenocide, supra note 23.
148. See Daly, supra note 103; Koss et al., RESTORATIVE JUSTICE, supra note 119, at 5.
149. Deubelh, Punishment, Postgenocide, supra note 23; Daly, supra note 103.
150.同样，现行法律往往使官员在面临公共服务时，没有明确责任。参见 id at 12 & n.56.
151. Hopkins et al., Applying Restorative Justice, supra note 7, at 294-95.
Restorative justice can include reparations such as apologies, financial remuneration, personal service, and community service.\textsuperscript{159}

For sexual violence in the Congo, a restorative justice approach provides a useful, albeit unrealistic, perspective on how to heal the women and their communities. Where the perpetrator’s identity is known, and if any assets are available, then the perpetrator can make reparations. Otherwise, he can acknowledge his wrongdoing and provide non-monetary services to the victim. In many cases where the perpetrator’s identity is not known, the community can make reparations to the victim.

Nonetheless, the success of any restorative justice approach depends on the commitment of the individuals involved, but also requires community monitoring and enforcement of any outcome.\textsuperscript{160} Moreover, the community must be supportive of the process and outcome and willing to recognize the harms experienced by the victim.\textsuperscript{161} Restorative justice requires resources focused on creating the environment for discussion between the parties, facilitating the discussions, and then monitoring performance. For example, pursuant to a $1.5 million grant, the RESTORE (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience) program in Arizona, which focuses on date and acquaintance rape and non-consent offenses, first undertakes an extensive evaluation of the appropriateness of a case, including

Communication approaches differ to systematically and personal aspects of main violence by seeking the underlying reasons and transferring emotional resources so that future vulnerability will be insured.\textsuperscript{162} Communication methods counter the helplessness induced by victimization. A conference offers the victim a ritual face-to-face contact with her perpetrator under conditions aimed at protecting her safety, providing space for her story to be heard, and involving her as an active participant. No crime victim should be forced to confront her perpetrator, but rather should be allowed the opportunity if she desires it. The support provided the victims in a conference will be of a better quality than its criminal or civil justice contexts, because the process is therapeutic and ad hoc and have a more active role in speaking up on behalf of women’s rights to be free from violence and to counter myths and violence-supportive attitudes.

The conference creates a setting where poor and family of the perpetrator, who may share attitudes and model behavior that justify a violence-supportive environment, are exposed to an antiviolence message, thereby creating a new avenue for primary prevention targeted at high-risk groups, involving advocates or monitors in the process and expecting their role to include those who are explicitly trained to respond to the perpetrator ensures that accountability messages will be reinforced. There will never be enough police to guard every vulnerable woman. Confronting offers a methodology to multiply social control resources using the natural community, while also directly aiming to eliminate societal supports for gender-linked abuse.

\textsuperscript{163}

159. See Elizabeth et al., supra note 153, at 6. Reparations suggest the “paradisical search to repair the inequalities.” Nitro, Memory and News, supra note 142, at 23. As the note, money cannot compensate for the non-monetary harms, although it can help raise the victim’s dignity and, perhaps, where money actually can be exchanged, livelihood.

160. See Kios, Blame, Shame, and Community, supra note 157, at 8.

161. See Hopkins et al., Applying Restorative Justice, supra note 7, at 296 n.34 (incendiary criticism of restorative justice based on the relevant community’s failure to understand).


163. For example, mediation may have drawbacks in certain situations because of its assumptions of equality, and because it personalizes the violence between the perpetrator and victim, excluding consideration of community; see also Kios, Blame, Shame, and Community, supra note 157, at 8.

164. IT’S IN OUR HANDS, supra note 128, at 99.

165.
national and international attention and public accountability.\textsuperscript{164} rather than creating sexual violence as a more private matter to be resolved locally.\textsuperscript{162}

Traditional criminal justice prosecutions show the perpetrator, the victim, and their larger communities the seriousness of the crime that was committed. It may be that the very structure of courtroom proceedings provides solace to the victim.\textsuperscript{163} In addition, advocates must examine the context in which the violence occurred, as well as the context in which the "solutions" are being proposed.\textsuperscript{164}

Moreover, while repairing harmed lives is important, too is preventing future harms. Sexual violence in an unsettled country requires forward-looking, as well as backward-looking, forms of justice. In situations of sexual violence, both criminal justice and restorative justice approaches are appropriate to handle the complexity of issues. Responding to sexual violence may require trials to provide public accountability, but also reconstruction and reconciliation efforts that respond to the victims' needs.\textsuperscript{170} Legal proceedings are critical for deterrence and retribution, but cannot comprehend the magnitude of the injustice, nor respond to the victim's injuries.\textsuperscript{171} Moreover, these are longer-term approaches. Many countries, like the Congo, are not sufficiently stable to propose such solutions although, as discussed infra, the ongoing transition process provides opportunities to screen for perpetrators and begins to plan sanctions against the more egregious offenders.

\textsuperscript{164} Id.

\textsuperscript{163} Cf. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSEQUENCES AMONG WOMEN Clark Americans (1995) (noting that simply going to court can make plaintiffs in civil cases feel supported, even if the judgment goes against them).

\textsuperscript{165} Marsha Minow suggests six different context-related questions in deciding between promotion and truth commissions, although these questions are important in deciding how to proceed against war crimes perpetrators in other contexts as well. Minow, FACING HISTORY, supra note 114, at 133–35. These questions include the involvement of international organizations, the seriousness with which nation-building is occurring, the identity of the perpetrators, and the allegiance of the government. For example, one question particularly relevant to the Congolese situation is: "Were the atrocities part of war, with human rights violations committed by all sides? Then some process of even-handed response would be crucial to the movement for international respect for human rights." Id. at 134.

\textsuperscript{170} Drumbl, Toward a Criminology, supra note 23, at 277; Kraemer, Crimes of Hate, supra note 102.

\textsuperscript{171} See Rosenblum, supra note 142, at 9.

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2. Social services justice

Criminal and restorative justice solutions provide significant responses to gender-based violence, but they remain incomplete. A third kind of justice involves responding to the social, economic, and medical needs of the victims and potential victims in the post-conflict setting. Like the best-practices model for responding to victims of gender-based violence in the humanitarian community, this alternative vision of justice is multilateral.\textsuperscript{172} It is not simply focused on perpetrators, or on guilt or innocence, but on the actual situation in which victims are left, on helping them move on with their lives and on recognizing that "political violence itself and the transitional period can often open up" opportunities for women—the so-called "gender dividend."\textsuperscript{173} And it is concerned about potential victims, about prevention as well as both short-term and longer-term responses. One of its guiding principles is the importance of involving the victim and her community in developing programs to prevent and respond to the abuses.\textsuperscript{174}

Establishing the procedures for restorative justice or civil and criminal trials is time-consuming, before these forms of justice arrive, women's HIV may have become full-blown AIDS, their husbands may have married other women, they may be scared to sell goods at market or work in the fields. Social services justice focuses on the consequences and effects of the crime; because it is unrealistic for perpetrators to provide reparations directly to the victims, victims and communities need additional resources to heal the harm. The social services may be provided by the community, by the government, non-governmental organizations, multilateral institutions, or other donors. To achieve this, justice requires a multilingual approach that involves the community as well as health, legal, security, and the social services sector.\textsuperscript{175} Social services justice can take the form of supplying medical kits to test for AIDS, establishing security patrols so that women can sell goods and produce at markets, or developing rape clinics which provide denaturalization services.

\textsuperscript{172} See Tools Manual, supra note 2.

\textsuperscript{173} Collins Duggan & Ada Alabrand, Reparation of Sexual Violence and Democratic Transition: In Search of Gender Justice, in REPARATIONS AND TRANSITIONS TO DEMOCRACY (forthcoming 2005) (manuscript, at 5, on file with author).

\textsuperscript{174} UNHCR, Guidelines, supra note 2, at 27–28. Guiding principles for responding to gender-based violence are concerned both with the development of programs, such as reining in the full equality of men and women in program development, as well as with protection of victims and prevention of future violence. See id. at 27. Guiding principles are typically part of baseline agreements among a coordinated group of organizations responding to situations of gender-based violence. Id.

\textsuperscript{175} See Ward, supra note 10, at 11 ("best practices" for gender-based violence is now recognized as a "multilateral model" which includes a variety of individuals, including teachers, traditional birth attendants, nurses, microcredit banks, judges, police, and other military).
as well as legal counseling. For children whose education has been interrupted because their parents fear they will be attacked if they attend school,176 community watch committees can escort them to school. Some forms of social services justice are actually recognized in the Declaration on the Elimination of Violence Against Women, which urges states to provide services for women and their children, including "rehabilitation, assistance in child care and maintenance, treatment, counseling, and health and social services facilities and programs ... and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation."177

Social services justice differs from restorative justice and the models of community justice that are developing in the United States because it is not attached to a formal legal proceeding, although it shares their focus on responding to crimes through involvement beyond the perpetrator and victim.178 It is comparable to reparations, although reparations typically take the form of government-transferred aid179 and involve the provision of "material benefits for the devastation inflicted" based on a theory of compensation.180 For example, in their master discussion of reparation programs for victims of sexual violence, Colleen Duggan and Adila Abusharaf discuss "national reparations programs" which could provide remedies ranging from direct monetary transfers to social services, such as providing scholarships for children of sexual violence victims.181 Reparations are typically provided by the perpetrator, or a successor to the perpetrator, to the victim.182 They involve an acknowledgement of guilt together with an acceptance of responsibility. Social services justice may be administered and funded by entities with no connection to the crime. While social services justice necessarily includes possible reparations programs as longer-term remedies, or as possibilities when the perpetrators are known and accept responsibility, it is also concerned with the more immediate, and often desperate, status of the victims. As such, social services justice refers to the range of potential short- and longer-term services, social, economic, and medical, that can be provided to victims. These services may apply to situations broader than the individual perpetrator and victim, and beyond the specific losses caused by the violence. For example, social services justice could provide protection for women who may not have directly experienced sexual violence themselves, but who live in continuing fear of it.

There are potential criticisms of social services justice that may undermine its effectiveness. First, social services justice may seek to ameliorate too many wrongs, some of which were not directly caused by the sexual violence. Because of its breadth, like restorative justice, social services justice can be an expensive proposition in compensating the victim, her family, and her community. Second, because aspects of social services justice resemble development assistance, the social services may be emphasized at the expense of its justice and accountability aspects. Indeed, many post-conflict reconstruction programs are development programs.183 Third, as with the other types of justice discussed, its effectiveness depends on sensitive implementation.

These are legitimate criticisms that must be addressed as the concept is more fully developed in theory and in practice. Assuring that the framing principle is social services in the context of responsibility and accountability, and that implementation can be carefully supervised to assure that neither victims nor perpetrators believe that the services provide an alternative to other forms of justice or a form of impunity, then social services justice can aid transitional countries. Because it is based on the coordination and response of the different sectors concerned with prevention of, and response to, gender-based violence, social services justice provides a useful model that can provide both immediate and long-term assistance. Providing such assistance requires two different and interrelated strategies on the part of both external and internal actors. First, multilateral institutions, bilateral aid agencies, and international non-governmental organizations must become involved in providing these programs. Second, such external actors must be engaged with, and support, indigenous non-governmental organizations, individuals, and (if possible) responsible governmental officials; indeed, to the extent possible, it is the indigenous institutions which should be setting the agenda for aid.

176. See Pauta & Welchok, supra note 13, at 13.
179. Reparations may also make reparations for their offenses.
180. MINOR, FACSIMILE HISTORY, supra note 114, at 104-05 (providing examples of the types of reparations that witnesses before the South African TRC need, such as a death certificate, memorial parks named after an apostate victim or medical rate).
181. See Duggan & Abusharaf, supra note 173, at 28.
III. PRINCIPAL RESPONSES

Throughout this Article, I have been concerned with the practical realities of gender-based violence, with its causes and consequences, and with articulating different visions of justice to provide short- and long-term solutions to the complex situation of survivor, perpetrator, community, and country. Before returning to concrete recommendations, this Part provides theoretical bases for choosing to engage in justice activities in a transitional society.

A. Why Act?

External actors who are asked to become involved in post-conflict reconstruction may not have been integrally involved in the conflict or its aftermath, and bear no direct responsibility for the situation. Nonetheless, there are compelling reasons for these actors to become involved. Samantha Power has painstakingly documented the failure of the U.S. response to a series of worldwide genocides, beginning with the 1915 Armenian genocide, and ending with more recent events in Rwanda and Bosnia. She argues that American policymakers failed to act to stop genocide because they narrowly defined American interests, and tried to narrowly define the massacres so that the policymakers would not incur political costs through their failure to intervene. The reasons for acting to stop massive human rights abuses, she suggests, are two: first, there is a moral duty to stop genocide, and second, America should act out of a sense of expanded self-interest because genocide affects regional security, creates refugees, sends a signal of tolerance for cruelty, and ultimately expands. The reasons for acting in the aftermath of conflicts are virtually identical. The moral duty to stop genocide involves confronting its aftermath, and helping to ensure that conflict does not recur. Second, post-conflict reconstruction aims in promoting regional security, resettling refugees, and may also provide other concrete opportunities that are in the economic self-interest of the aiding country. There is a moral imperative to help; but countries should also act out of enlightened, and long-term, self-interest.

184. Power, A Problem from Hell, supra note 164.
185. Id. at 508.
186. Id. at 512-13.

B. How To Act?

The fundamental principle of responding to gender-based sexual violence is to listen to what individual victims want. This first step involves hearing and documenting stories and identifying the various consequences of the violence in their lives. It requires examining how women's basic fundamental capabilities have been impaired.

Because violence affects so many capabilities of the victims' lives, the second principle requires looking both within the law and outside the law in the effort to develop appropriate responses. In this connection, Martha Minow suggests three principles to guide the development of a victim-centered approach towards war crimes: first, restore community respect and integrity to the victim by, among other possibilities, taking some action to support her; second, listen to the victim's freely expressed preferences and support her by, for example, providing social and economic help so that she can articulate her preferences; and third, develop viable alternatives to prosecution, such as truth commissions, so that restorative justice is a meaningful option. Victims may

189. See Chinkin, supra note 78, at 12 ("Survivors of rape must be provided the space to specify their own needs within the community.").
190. As discussed supra, documentation is critical because it allows for the identification of victims and perpetrators, and provides a record of crimes that may be used in prosecution as in other proceedings related to the transition process.
192. The human capabilities approach, which is used by the United Nations Development Programme to measure people's abilities to perform certain basic functions in their countries, see Martha C. Nussbaum, Still Worthy of Praise, 111 HARV. L. REV. 1775, 1792 (1998), includes: "Bodily Health. Being able to have good health, including reproductive health, to be adequately nourished, to have adequate shelter, Bodily Integrity. Being able to move freely from place to place, to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction." Martha C. Nussbaum, Human Rights Theory: Capabilities and Human Rights, 66 FOREIGN L. REV. 273, 287 (1997).
193. Bodily health and bodily integrity are two aspects of adolescent lives that are endangered through ignorance of reproductive issues and lack of access to reproductive products. As Amartya Sen points out: "[The "solution" to the population problem that seems to emerge from increasing access to reproductive issues and lack of access to reproductive products. As Amartya Sen points out:

195. Minow, Between Tolerance and Forgiveness, supra note 7, at 590-81.
seek civil or criminal sanctions against their perpetrators, but they may also need seeds so that they can grow food for their families, more efficient stoves to reduce how often they need to go into the forest to collect wood, or whistles so that they can call for help.

The third and final principle requires a long-term perspective that places individual victims into the larger contexts of their families, communities, and country. Each victim of gender-based violence deserves justice, but that justice must be defined by more than individual needs. Rape during armed conflict is both an individual and a group harm, a crime against the person and against her community and her gender. This final principle involves placing the victim within her differing communities; in turn, appropriate responses require balancing what the victim wants, what is in her best interests, what is in the best interests of her larger communities, and what will prevent future recurrences of violence. While retaining a victim focus, we must also develop principles to guide approaches to the community and the perpetrator, such as ensuring that the community and the perpetrator understand their responsibility for the violence, and helping the community develop its own responses to the violence and prevent future violence. The ICTR’s landmark conviction of Akayesu, the first time that an international tribunal had found rape to be a form of genocide, and the ICTY’s conviction of three Bosnian Serbs for rape and similar crimes, the first time that an international tribunal had heard charges based solely on crimes of gender-based violence, are critical steps in letting past and potential perpetrators know that they can be held accountable for such crimes. Protecting women who testify from retaliation and helping them mediate reintegration into their families and communities are also critical steps in supporting victims and responding to their pain.

Taken together, all of these principles accomplish the following: help the victim to move on with her life, to reintegrate herself into her community and family, socially and economically, and develop measures that protect against recurrences of similar violence so that women feel secure.

While focusing on and listening to the victim helps protect against imposing a Western, essentialist conception of justice on these transitional societies, post-conflict countries provide an opportunity to transform the underlying culture. Individual justice preferences may be distorted by repression and domination, so it is critical to place those preferences within a broader approach to human functioning in the post-conflict country. The transition process is focused on creating a democratic government for the country, of fostering a culture of democracy. As part of this process, there

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193. See Nabiabu, NEW YORK JOURNAL OF LAW & BUSINESS, supra note 191, at 3, 5.
194. As Professor Jennifer Widner notes, establishing “democratic political structures is the main strategy for sharing power in post-conflict transitions.” Jennifer Widner, Courts and Democracy in Postconflict Transitions: A Social Science’s Perspective on the African

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WAR CRIMES OF SEXUAL VIOLENCE

are public education campaigns to promote voting and legal change. Part of the public education campaign concerns women’s status and capability to participate in a democratic society (e.g., by sending the message that women’s desires should be valued and women can make their own voting decisions). Yet if women are to be considered a group, women must help change the attitudes of both men and women, not just concerning participation in democracy, but also with respect to women’s rights to be free from violence in their homes. There must be “multiple remedies.”

All resolutions will have both short- and long-term components. Changing the internal justice system is a process that will require years; even developing an international court is a longer-term solution. Providing low-cost or free medical care and HIV testing is, on the other hand, a much more immediate solution.

IV. RECOMMENDATIONS

To respond to the situation of victims and of their communities requires a multifaceted approach that focuses not just on the daily needs of the women and their families, but even the long-term needs of their communities; the multifaceted approach must also include a recognition of the transition occurring throughout the country. In the Congo, as in other countries that have been subjected to internal wars, the international community and national government are involved in disarmament, demobilization, and rehabilitation (DDR) of former Congolese combatants and DDRRR (reinsertion and resettling the non-Congolese combatants). A recent British government report identified DDR as “[t]he first priority.” Virtually all members of civil society in the Congo, whether they are focused on democracy, sexual violence, or economic issues, agree that foreign troops (other than UN peacekeepers) must leave permanently, domestic troops must be retrained, and a democratic government must be elected. The same energy that is given to DDR for soldiers must also be given to victims capable members of society, education. Unfortunately, given women’s status in society, given the tolerance for sexual violence, and given the high visibility of guns, but not of torn fistulae, that same energy is not yet
As the magnitude of the Congolese sexual violence becomes increasingly public,198 multilateral institutions and individual donor countries are developing programs to aid victims of sexual violence and to screen armed forces for human rights violators. But, while some donors attempt to coordinate with each other and with local groups, there needs to be improved communication among all of the groups involved.199 International actors must work with each other, with local civil society and women’s organizations, with religious institutions, and with the national and local governments to prevent overlapping activities and to fund activities that are actually dealing directly with victims and their communities.

This Part discusses a series of different sectors in which international, national, and local actors can make a difference. While the Congo provides the case study, these recommendations are useful in any transitional country.

A. Reintegration

Although reintegration in a post-conflict situation generally refers to reinsertion of former combatants into their home communities, it has a completely different meaning for victims of these conflicts. For victims of gender-based sexual violence, reintegration has two aspects: first, victims must be accepted by their families, and second, victims must feel safe in their families and communities. The victims themselves want reintegration into their communities. They want their husbands, families, and neighbors to accept them, and for life to continue as though the sexual violence had never occurred. They are often less concerned with issues of justice, retributions, and impunity, and more concerned with food, shelter, and school fees for their children. Their husbands and fathers may want prosecution, but the women themselves may not want to undergo any additional trauma or reminders of their experiences—at least within the existing legal process. Women’s responses may reflect their dependencies on their families and communities and a fear not only of proceeding against community members but also of retribution, or these responses may reflect a more empathetic, prospective approach to the violence committed against them.200

One successful effort in eastern Congo to reintegrate women has been achieved through mediation by a respected community member, who may be a village elder, another woman, or a family member. By discussing the issues together, with a trusted third person, family members have been able to accept the victim. Community education designed to discourage victim-blaming that emphasizes the message that rape is not the victim’s fault would also improve the situation, and a few high-level prosecutions might indicate that rape is a serious crime committed by a perpetrator and not welcomed by the victim.

As women return to their communities, they must also face the loss of their livelihood and, in many cases, the loss of their husbands or other family members.201 Their means of support, which, in the Congo, were already minimal, have been destroyed. The few farming implements have been pillaged and destroyed, food and need pillaged, and farming work has been disrupted. Consequently, they need educational and work programs, together with items as concrete as seeds, to help them become economically stable. If they own land, notwithstanding gender-neutral inheritance laws, their husbands’ relatives or other community members may have already taken control of it. Overcoming customary inheritance practices and enforcing property laws will enable women to reclaim their farms and houses, although this cannot occur until their immediate environment is secured and there is a judiciary able to enforce existing inheritance laws.

Many women remain concerned about their future security. Not only are they survivors of past abuse, they are potential victims of future abuse.202 The instability that characterized the region for so many years has not dissipated, and large-scale conflict could easily recur. Women are still being raped, and are frightened that they will continue to be targets. They want better protection from future violence. Such protection involves strengthening local authorities, establishing safe havens, providing systems for emergency alerts. It also involves informing women about where they can go in case they are subject to an attack,203 and reassuring them that help will be available. The development

198. DRC focuses on combatants, who are typically male, while victims of sexual violence are overwhelmingly female. See Nutti Calin, Responding to Victims of Gender-based Violence (manuscript 2004) (discussing how financial allocations may reflect gender subordination). Not only are some combatants female, however, but they may also have female family members whose needs must be recognized by the DDR process. And, some sexual violence victims are male, as has been vividly illustrated by the revelations in 2004 of the American military’s treatment of Iraqi prisoners. These realities should also help structure any justice programs.
201. See Minow, Between Vengeance and Forgiveness, supra note 7, at 971. As discussed below, it is crucial in respect victims’ involvement in the prosecutions but there will be circumstances in which the victim’s control cannot be total. See Hansen, supra note 106.
202. After the Rwandan genocide, it was estimated that the Rwandan population was seventy percent female, and that fifty percent of families had female heads. Shattered Lives, supra note 5.
203. Interview with Jo Wills, staff member of the International Human Rights Law Group, in Kinshasa, Congo (Jan. 13, 2004).
204. Vauti, supra note 8, at 10.
of an independent media, an enterprise already occurring throughout most parts of the country with MONUC's Radio Okapi,209 and its mass dissemination of information and trainings about tolerance may promote more secure future environments 210.

Consider two examples of practical measures that would help women: giving women whistles, and providing more efficient stoves. International non-governmental organizations or local civil society groups, with international funding, could distribute these items through various means, such as at maternity clinics or through schools. Whistles, obviously, can provide protection by allowing women to alert anyone within hearing distance that they are in trouble and need help.211 Because most stoves in the Congo are wood- or charcoal-burning, more efficient stoves would mean that women would need to collect wood less frequently, thereby minimizing their exposure to potential victimization in the forest. Whistles and stoves, while potentially valuable, are less likely to be sold than other farm implements, for example, and thus be used against the women themselves. More ambitious programs could include literacy training, which could, itself, provide the basis for additional self-help projects.

Beyond reintegrating women into their communities, the processes of DDR and DDRRR must include sending foreign troops out of the country as well as providing adequate supplies for Congolese troops seeking demobilization. And, during the transition process, as domestic troops are resettled through DDR, and foreign troops are repatriated through DDRRR, these repatriation programs must integrate the concerns of gender-based victims. DDR and DDRRR typically provide a package of goods, services, and money to soldiers agreeing to surrender their arms. While the plan in effect in the Congo, like many other DDR campaigns, precludes soldiers who are guilty of human rights abuses from receiving the package, the screening process must also exclude soldiers guilty of gender-based violence. The planning in the government’s

209. See www. bribedville.org. Even this ubiquitous radio station, with the full backing of the UN force in the Congo, does not reach isolated areas or many rural sections of the country.

210. See Martha Minow, The Work of Re-Membering: After Genocide and Mass Atrocities, 23 EURAIJ INT’L. L.J. 429, 437 (1999) (“After critical periods of violence, non-governmental groups should muster not only humanitarian and peacekeeping aid, but also resources for media uncontrolled by factional forces. Attention to audiences...is especially crucial because they are likely targets of the late-mobilizing effects...efforts will also be needed to strengthen basic peacekeeping, law enforcement, political institutions, and infrastructure services.”).

211. In the U.S., there are various programs to give battered women used cell phones so that they can call for help if their abuser approaches them. E.g., The Wireless Foundation, Cell To Protect Campaign, at http://www.wirelessfoundation.org/CellToProtect/ (last visited Apr. 15, 2004); see also Leta Mabiyakha, Note, Reach Out and Touch Someone: Cellular Phones Health, Safety and Reasonable Regulation, 16 J.L. & HEALTH 373, 396 (2001-02).

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DDR program is general, and subject to broad interpretation.212 Screening for gender-based violence will only happen if gender concerns are explicitly incorporated into the demobilization process to that the general term “human rights abuses” includes gender-based violence and if there is adequate documentation and verification so that the names of perpetrators are known.213

Once perpetrators have been identified, there are important choices concerning whether to imprison, prosecute, or simply segregate them from the communities. Working solely with victims is insufficient, and it is critical to make decisions about how to treat identified perpetrators.214

Creating a meaningful transitional government that can bring peace to the area is the solution most likely to end the ongoing sexual violence and provide the stability necessary to treat victims of rape. Sexual violence decreased when there was hope that the transitional government would be effective, but increased as the population became disillusioned that authorities were not taking control of the region.215

Fears about further conflict are well-supported by research on the factors that are correlated with the outbreak of war. Empirical research on the outbreak of conflict indicates that the most significant risk factors are low per-

208. Gouvernement de la Republique Democratic du Congo, Programme National de Deseasment, Deseasalisation et Renovation PHDRD 24. The package of services provided includes transportation costs and a monthly net of money. Id. at 41.

209. This, in turn, requires delicate issues of confidentiality. Providing survivors with a list of perpetrators endangers the privacy of the victim. And, once someone has been screened out, he remains a problem, while some soldiers can be imprisoned for their crimes. The magnitude of these rates suggests that there will be too many potential prisoners. Currently, there are over 90,000 alleged aggressors incarcerated in Rwandan prisons. Article 20, Final Demography for Perpetrators of Rwandan Genocide, THE GUARDIAN, Feb. 18, 2004. In February 2004, the Rwandan government offered a flat clause for money, and release from prison, to all active perpetrators of genocidal crimes. See id. Idempotent only military commanders who confessed gender-based violence, while simply not supplying the package of goods and services to others, might be appropriate.

210. See UNHCR, Guidelines, supra note 2, at 67. In Liberia, women who are victims of "sexual and gender-based violence" are provided with counseling services as part of the DDR program. See http://www.humanitarianinfo.org/liberia/coordination/sectors/DDR/index.asp. However, other experts suggest that many DDR schemes do not meet the needs of female combatants, and thus do not adequately prepare communities for reintegration of ex-combatants. For example, many female combatants do not have a weapon to turn in, even though they were a part of the war effort. Under many DDR schemes, such women are excluded from the demobilization process, and all its services, because providers erroneously believe that they have nothing to "demobilize." Caroline Preston, Rehabilitation Programs Reportedly Failing to Aid Liberian Female Former Combatants, U.N. NEWS (Apr. 8, 2004), available at http://www.un.org/News/Press/docs/2004/04-0405/04-0405.hsp. Actually, there is some controversy on whether human rights abuses serve as a screen.

211. Pratt & Wrenchick, supra note 15, at 7 (reporting that rapes appeared to decrease during the early months of the transition government, only to increase when the armed groups were not subject to local control).
capita income, low rates of economic growth, and dependence on commodity exports, and about one-half of all countries that have experienced a civil war are likely to experience another one within ten years.212 The Congo exhibits all of these factors. Although this does not mean that further conflict is inevitable, it serves as an impetus to develop safety plans for women who have already been sexually abused.

B. Health Issues

Sexual violence in the Congo is a critical public health issue. All three aspects of what is traditionally defined as public health—"assessing health needs and problems, developing policies designed to address priority health issues, and assuring programs to implement strategic health goals"213—are applied to constructing responses to gender-based sexual violence.

The first step is multi-faceted: collecting information on the magnitude of the problem, the needs of victims, and the existing capacity of current health resources214 while simultaneously establishing special clinics and de-radicalization that can aid in the documentation process as they aid victims. These centers could respond to victims of gender-based violence with a variety of services as soon as a woman arrives, by providing clothing and food, in addition to medical aid, such as pain relief and emergency contraception. Even without complete statistics or surveys on the situation, it is clear that women subjected to sexual violence have a series of health needs, ranging from HIV tests and drugs to treatment for vaginal fistula to counseling.215 Most clinics are understaffed and inadequately supplied; staff members lack training, including on how to protect the confidentiality of information about the victims, and other special resources for caring for sexual violence victims.

While there are two hospitals in eastern Congo that are capable of treating severe cases of rape and injury, access is limited because of the number of beds, and because of the lack of information in rural areas about the services available.216 Although there are HIV-prevention medications that can be administered within seventy-two hours of a rape and that are eighty-percent effective, the supply is inadequate, women rarely reach clinics capable of administering the drugs within the requisite time period, and the course of treatment is long and onerous.217

Services for rape victims could be expanded through training additional physicians capable of handling these cases.218 To reduce other barriers to health care, such as lack of information and the difficulties of reaching medical care, larger clinics or non-governmental organizations could develop mobile teams of health professionals specializing in rape-related services who could provide, among other things, training on physical and mental health issues as well as treatment of rape survivors in remote areas.219 These mobile teams could also support existing smaller medical clinics and birthing centers by providing training and supplies. In addition, local groups could publicize the visits of the teams and the services provided.

Preventing pregnancy through an adequate supply of emergency contraceptives would help amass some of the trauma for the women who arrived at clinics in time.220 Doctors Without Borders has made post-exposure HIV prophylaxis (PEP) available in its treatment of sexual violence victims in eastern Congo, although there are not a panacea for AIDS prevention.221

Some women are reluctant to be tested for HIV/AIDS, fearing that a positive outcome—or even the test itself—will result in further isolation and rejection. Others, however, seek a "clean bill of health" that a negative test can provide so that they can return to their husbands and families. As illustrated by the Ugandan experience, where HIV/AIDS rates have been dramatically reduced, overcoming resistance to HIV testing and to positive results requires work on a number of different levels.

Studies of Uganda have identified several different elements as contributing to the overall success. First, the President of Uganda personally led strong efforts to reduce the HIV infection rate, providing high levels of political support throughout the government. Second, Uganda used grass-roots communication activities to promote AIDS awareness, including training teachers on how to teach about HIV in their curricula, and organizing religious activities.

212. Ian Buxton & Paul Collier, Natural Resources and Conflict: What We Can Do, in NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ANSWERS 1, 3 (2001).

213. Jonathan Mann et al., Health and Human Rights, in HEALTH AND HUMAN RIGHTS, supra note 75, at 7, 12.

214. See UNDP, Violences Sexuelles faits aux Femmes et aux Enfants en RDC: Une Initiative Contreui de Prevention et de Responsabilite des victimes 22 (Kisangani Nov. 2001) (file with author). Collecting this information is useful for both public health and legal accountability reasons. On the other hand, information collection should not hinder other service-oriented efforts, and the two should be conducted together.


216. See Hsu, Brutal Legacy, supra note 57, at A1; Goodwin, supra note 65.

217. See Goodwin, supra note 65.

218. See Pret & Wenscock, supra note 15, at 22.

219. Id. at 10.


221. Jefferson, supra note 33, at 9. Nonetheless the medication, while affordable, must be taken over a four-week period immediately after the violence, and to ensure help many women for whom clinics are inaccessible.
leaders on how to handle HIV-related issues in education and counselling. The activities also emphasized the inclusion of women and youths in anti-AIDS efforts. For example, a statute requires that women constitute one-third of the Parliament, and youths are also able to elect representatives. In addition, Uganda developed the first confidential voluntary counseling and testing program in Africa.

Third, Uganda has used health programs, including condom promotion and projects focused on preventing sexually transmitted diseases, to further reduce exposure and increase awareness. Condom use for men who reported 3 non-regular sexual partners was 15%, and for women, it was 38% in 2000.

Overall, Uganda’s success appears to rest on the personalization of the risk of HIV. Using small, personal networks to provide education as to the implications of HIV-AIDS, and as to the importance of accepting community members who may be HIV positive, could help women obtain testing and treatment, and aid in reintegrating them into their communities.

In addition to physical health, women’s mental health has also been assaulted by the widespread sexual violence. There are few rape-trauma centers, and one of the goals of a $30 million proposal from the UN is to establish centers for listening to victims and warning them. Health clinics could coordinate support groups so that women could discuss and develop best practices that help them handle the multiple effects of the violence. The groups could be self-perpetuating, so that they require minimal resources. As women in the groups became more secure, the groups could be expanded to address post-war trauma more generally among women, thereby decreasing the stigmatization of victims. Innovative drop-in centers, which have integrated psychosocial and health support with survivor services or maternal care, could also expand to offer other services, such as microcredit and small enterprise-building, as participants’ needs changed during the post-conflict period.

C. Community Supports

When civil authorities failed to respond to the crisis, it was local communities via churches, human rights and women’s groups, and other, often indigenous, organizations that provided medical care and counseling to the abused victims. These groups are continuing to offer as much care as they can, given financial constraints and ongoing fears of retaliation. The strength of the civil society response provides some recourse, and resources, within the victims’ communities. Indigenous groups of women survivors of sexual violence have developed and, in the safer areas, have publicized their efforts via radio.

Within some communities, there are individuals who are highly respected and are able to mediate between victims and their families. The benefits of this form of conferencing include counteracting “the helplessness induced by victimization . . . [providing the victim with] ritual face-to-face contact . . . under conditions attuned to protecting her safety, providing space for her story to be heard, and involving her as an active participant.” But there is a general lack of knowledge about sexual violence, and a mentality that blames the victim for what happened to her. The failure to prosecute, and the low status of women reinforce this mentality. Within some communities, restorative justice systems are developing indigenously and, in addition to providing mediation between victims and their families, are also mediating between victims and perpetrators. In one case, a perpetrator agreed to cover the victims’ medical expenses as a result of mediation.

But, as discussed above, reintegration for many women and their children is difficult, and will not occur without widespread education and other efforts designed to increase understanding of their situation. Public announcements, posters, radio, and television advertising, distributed, for example, through the wide network of the UN’s communications department, should be targeted towards acceptance of sexually victimized women. Given that the community often shares the same belief systems concerning the role of women and the nature of sexual violence, education is critical to ensuring that restorative justice will be effective, rather than more traumatizing to the victim as she continues to experience the same rejections. Education must be directed at men, not just because they are the primary perpetrators of the violence, but also to help them respond to situations of violence. Thus, community education is a critical component, not just long-term, but for an individual victim in an individual case.

A second aspect of community support centers on issues of how to prevent future violence. Some women have developed their own strategies for safety, such as traveling in groups with other women, or asking men to accompany all-female groups. Yet even these methods are inadequate; one man who was
traveling with a group of women was himself shot when he tried to protect one of the women from rape. An alternative strategy could involve community patrols, with the help of MONUC or another authority, so that women can sell their products at the market, chop wood for fire, and bring water to their homes, in order to make women feel safe in their daily activities. Women and women’s groups should be involved in designing procedures for greater security and in implementing the programs, such as by becoming members of community patrols, or teaching others how to protect themselves. These are short-term measures, however, and cannot substitute for the creation of legitimate local authorities, a respected, neutral judiciary, universal education, and enactment and enforcement of laws penalizing violence against women.

D. The Role of the Law

Law is critical to defining the illegality of the conduct, to improving women’s status, and to establishing democracy and accountability. Yet the “rule of law” is highly questionable in transitional countries, which have none of the basic institutions that can help to establish and enforce the law. The law as written, and the law as it appears in the courts or on the streets, can differ dramatically.239 Throughout the reports of sexual violence is an acknowledgement of the lack of local authority to prevent the violence, and, as discussed earlier, the inability of the existing judicial system to process adequately the cases or to prevent retribution against the complainant and anyone who helps her.240 For example, in order to file a complaint, the victim must pay $20, an exorbitant amount in a country where the GNP is about $100. One of the vice-presidents of the transitional government stated that rape was a crime against humanity, and that rapists would be held responsible for their acts. But there is no internal plan. In its recent report on the justice situation in the Congo, the UN mission force observed that there was a need to “revitalize” the rule of law and to “[c]onstitute appropriate institutions.”

As in other areas, the first step in an assessment of the existing situation, examining how sexual violence cases can be brought. Questions concerning how suspects are detained, where they are placed pending trial, how charges are made, the typical time-frame from arrest through outcome, reasons for the lack of prosecution, witness-protection programs, and training received by judges show the possibilities and problems of bringing perpetrators to justice.

For a thorough analysis and reform is exemplified by these women who have sought to bring the rapists to trial, only to have themselves further victimized by the legal system, which is in a state of disarray. There has been little investment in the national judicial system, and court personnel have not been paid by the government for many years. Judges and prosecutors are appointed immediately upon graduation from law school, but receive no effective training for their positions; they are promoted based on their superiors’ evaluation of their work. As one Congolese lawyer explained, “Magistrates are not paid. They can’t refuse gifts . . . women don’t see the point in complaining. Even if they say something, what will change?”

Domestic rape law is inadequate, because it criminalizes only penetration of the vagina or anus with a penis. It does not cover penetration with an object. The ICTR defined rape much more broadly in the Akayes case, noting that it included “acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.” Such a

human rights organizations have helped in the filing of many cases, but local authorities claim that they cannot process the cases. The organization knows of only one complaint that has actually resulted in incarceration for a soldier. The soldier had raped a seven-year-old girl and was sentenced to ten years.

UN Integrated Regional Information Networks, Congo-Kinshasa: Focus on Rape case, Despite End of War, AFRICA NEWS, Mar. 8, 2004.


Rape: Tools Manual, supra note 2, at 33-35.

Human Rights Watch, Confronting Impunity, supra note 109, at 16.

Rape & Relief, supra note 86, at 87.


The U.S. Model Penal Code definition of rape does not include penetration with a foreign object, and is only limited to “(a) State who has sexual intercourse with a female not his wife” if the female is compelled in some way, is insured, or unconscious. MODEL
definition would have helped in a recent Congolese rape case involving an eight-year-old girl, in which the defendant claimed that he had used an object rather than his penis so that he would be acquitted of rape. 250

Because the Congo is attempting the transition to a democracy, there are multiple opportunities for changing the legal system. Various non-governmental organizations have organized workshops to discuss legal reform, involving people around the country from the community, human rights organizations, and local and national government. 251 As a result, the country’s legislators have before it various laws that would conform the Congolese penal code to international law on war crimes and rape. 252 While much of the legal reform is focused on ending impunity for perpetrators, reforms that would help victims include improving their status as full citizens, legalizing abortions (at a minimum for cases of rape), and protecting the confidentiality of information that survivors provide to medical and psychological care providers.

Once the law is changed, community education and “know your rights” campaigns become critical to informing victims about their rights and remedies. Encouraging victims to explore formal justice proceedings requires ensuring that they have sufficient information about the adjudicatory process, their role, and the consequences, and ensuring that the law criminalizes the implicated behavior. Because the adult illiteracy rate is approximately 44% for women, and 19% for men, 253—indeed, less than two-thirds of all children are

251. \[\text{Penal Code \S 213.1 (1992). States have developed a variety of laws defining what will be penalized as rape. In New York, rape is defined as non-consenting sexual intercourse, and does not include sex of foreign objects. N.Y. Penal Code \S 130.55 (2003). If a foreign object (i.e., flag) is used in a sexual manner, causing physical injury to the non-consenting party, the perpetrator can be charged only with aggravated sexual abuse. Id \S 130.70. Similarly, in California, rape and penetration by a foreign object are distinct crimes. See CAL. PENAL CODE ANN. \S 289 (West 2004). But see People v. Quimene, 106 Cal. Rptr. 2d 719 (Ct. App. 2001) (stating “ejaculation 289 object penetration, in turns, is a form of rape” and emphasizing the intent of the sexual penetration statute was to put object penetration “on par” with rape (emphasis is original)). Additionally, the penalty for object penetration in California is the same as that of rape (i.e., 6, or 8 years, depending on other circumstances). Arizona statutes, however, do define rape to include forcible penetration by a foreign instrument. Penetration by a foreign instrument “however slight” is considered “deviate sexual activity.” ARK. CODE ANN. \S 5-14-101 (West 2001) (current through end of the 2003 Reg. Sess.). “A person commits rape if he or she engages in sexual intercourse or deviates sexual activity with another person by forcible compulsion.” Id \S 5-14-103 (Ala.)].

252. Private communications to the author.

253. There are organizations such as Synergie des Femmes Pour Les Victimes des Violences Sexuelles and Coalition Centre Les Violences Sexuelles en Republique Democratique du Congo, as well as Global Rights (formerly the International Human Rights Law Group) which are involved in this issue.

254. Given that the Congo is already a party to the relevant international conventions, these laws would simply confirm that the law to those documents.


256. War Crimes of Sexual Violence, supra note 214, at 1.

257. This type of counseling will vary, some women will not want any, others may be uncomfortable with traditional practice. As Beth Van Kruys, “Western self-help modes of counseling may be unfamiliar.” Yvonne, supra note 8, at 72. I have visited centers for street children in Kinshasa, Congo, which have little art work except for a poster on avoiding pregnancy, so similar posters could be developed on sexual violence. See also Policy Paralysis, supra note 64.

258. SOURCES, supra note 139, at 5.

259. E-mail from Jo Wells, Program Officer for the Law Group’s Field Project in the Democratic Republic of Congo, to author (Mar. 17, 2004) (on file with author).


261. Forum on Rape in Rwanda, supra note 67.

262. See Tools Manual, supra note 2, at 49. These safe houses would be comparable to battered women’s shelters, providing housing, food, and support in a confidential location.
from specially trained counselors. After some rape survivors testified in front of the ICTR, they received anonymous threats and other forms of harassment when they returned home, and they discovered that community members had detailed reports of their testimony. Congolese law has no special provisions that protect witnesses or that safeguard confidentiality. Courts could also provide health care services to ensure that victims remain sufficiently healthy to testify.

Third, judicial systems should recruit more women as investigators, prosecutors, and judges. Women will not necessarily be better at or different from men in hearing and investigating these cases, but gender balance may make victims feel more comfortable and may provide alternative perspectives. Gender balance also sends a signal that women's voices count.

Fourth, mobile investigative units could collect evidence without forcing the victims to travel, and could begin operating more quickly than formally established prosecutors' offices. In addition to cultural barriers, there is a series of other barriers to women reporting their rapes, including their responsibility for child care and their inability to use family resources to travel. So long as it did not violate the victims' confidentiality, and did not lead perpetrators to believe that the departure of the team implied the departure of accountability, the use of mobile teams could help establish the basis for prosecutions and provide visible evidence of crimes in prosecuting procedures.

Further, the prosecutions must be weighed against an extremely fragile transition process as the country tries to establish a democracy. The justice system must proceed delicately and carefully in choosing which perpetrators to punish. In the Congo, some of the potential defendants occupy positions of authority within the current, somewhat fragile, transitional government, and are likely to be on the ballot in the upcoming national elections. While they should not necessarily escape punishment, prosecutors need to exercise discretion. Indeed, bringing several well-publicized cases will help show the end of impunity.

Rather than criminal lawsuits, victims could bring civil lawsuits seeking to hold perpetrators or the government accountable for the sexual violence, and seeking various forms of civil reparations. Catherine MacKinnon has brought a similar lawsuit in the former Yugoslavia. However, these lawsuits require that the defendant have sufficient financial assets to satisfy a judgment against him, and also may recreate the same trauma for the victim as would a criminal suit.

Notwithstanding the inadequacies of country-international processes, international tribunals do not provide a complete answer either. The ICTR and ICTY, which have spent enormous amounts of money (the annual budgets for the two tribunals are in the $500 million range), have issued comparatively few convictions, symbolically, the existence of these tribunals is critical in showing that the international community is committed to prosecuting war crimes. Convictions in the international tribunals, and the recognition of rape in the statute establishing the International Criminal Court, similarly represent that rape is no longer a crime that will go unreported and unpunished. Yet such proceedings may not provide the most context-sensitive solutions to sexual violence against women because they represent a particular model of justice that is focused on retribution and deterrence. Moreover, the many difficulties faced by the international tribunals for the former Yugoslavia and Rwanda, ranging from procedural problems to issues of legitimacy with local...
committees, as also weigh against using international tribunals as the sole means of pursuing justice.

Outside of the formal justice system there are a series of quasi-legal proceedings that can be encouraged that will provide help in a variety of ways. First, as discussed above, the community mediations can be expanded to adjudicate between victims and perpetrators, and victims and their families. Second, even if prosecution does not happen tomorrow, it is important to document the sexual violence that has occurred not just (as discussed earlier) for public health reasons, but also for reasons of memory and potential future legal proceedings. Some local groups within the Congo have already started to document the sexual violence. Further documentation requires confidential systems of record-keeping. Records can be stored at hospitals or with community leaders to safeguard their confidentiality. Telling the victims' stories may provide therapeutic benefits and create public recognition of their injuries, regardless of whether the perpetrators are ever publicly identified and tried. Simply telling their story to a sympathetic counselor, organizer, or court-appointed officer can aid victims in finding justice and feeling vindicated. While female interviewers may help victims feel more comfortable in confiding the details of their experiences, counselors may need to develop strategies to elicit stories from women who are unable to relate their stories at all, even to a female interviewer. The confidentiality of the process may provide both protection and reassurance to women. One woman, who had denounced her rapists, subsequently had her lips cut off to prevent any further talking; although initially reluctant, she indicated that she might consider going forward again with the right protections.

Third, a truth and reconciliation commission provides opportunities to validate victims' stories, collect information about atrocities, and document the crimes that have occurred. Such a commission is already mandated by the 2002 Congolese peace accord, and it is supposed to consider various crimes committed between independence in 1960 and the establishment of the transitional government in 2003. Although the commission has been created formally, there are competing proposals under consideration by the Congolese legislature to govern its operations, and human rights observers are concerned that some of the members already appointed to the commission may have themselves committed human rights violations. Moreover, one of the draft laws, which was developed by existing members of the commission, does not, include gender-based sexual violence as one of the crimes on which testimony should be collected. For the truth and reconciliation commission to be effective, it must be inclusive of gender-based violence. The commission members must be respected and capable of leading a process that is also fair and transparent. To inspire faith in its constituency, such a commission should be headed by a consensus political figure. Such requirements, while promoting the success of TRCs, are extremely difficult to implement and maintain in many post-conflict transition countries.

Fourth, a program of national reparations, such as financial compensation, restoring property, or creating memorials, provides another mechanism for responding to the harms inflicted. Some risks of a reparations program are repaying material goods with inmaterial harms and creating false victims who invent claims. On the other hand, the tangible nature of reparations make them symbolically and practically important to the recipients. Reparations should be used if the program can be sufficiently funded and the appropriate recipients can be identified. These are, however, potentially insurmountable limitations on these programs.

CONCLUSION

Concepts of justice must be redefined to include nonlegal remedies that “feel like” justice to victims. Sexual violence, like other crimes committed during armed conflict, affects individuals and communities in complex ways that require multifaceted responses. Focusing simply on prosecutions by designating sexual violence as a violation of international law is critically important in gaining recognition of the significance of gender-based crimes; but it does not necessarily respond to the actual needs of the victims. The response of local, national, and international actors must include both legal and nonlegal approaches that recognize the varying impacts of gender-based sexual violence during armed conflict. Restorative justice, which seeks to bring communities together after the perpetrator acknowledges guilt, provides

278. See id.
279. Pratt & Weerakoon, supra note 15, at 10; see Minow, Memory and Hope, supra note 142, at 28-30.
281. An additional benefit is that it helps build civil society. If the records are collected by non-governmental organizations, it helps those organizations to build their membership and credibility.
282. See MINOW, FACE THE HISTORY, supra note 114, at 120, 126.
283. On the therapeutic benefits of narrative, see, for example, Leila E. Esmail, Legal Narratives, Therapeutic Narratives: The Invisibility and Overtagging of Race and Gender, 47 MICH. L. REV. 901, 912-17 (1999); Susan Bandes, Empathy, Narrative, and Victim Impact Statements, 62 U. Chic. L. Rev. 363 (1995); Barrett, supra note 156.
284. See Eschle & Abusharif, supra note 173, at n.68. They note that women must balance the possible gains from telling their stories against the drawbacks of coming forward and possibly harming their reputations. Id., at 70.
285. See Pratt & Weerakoon, supra note 15.
an alternative model, albeit one that is within the legal system. Social services justice involves recognizing the concrete needs of victims. Social services justice means putting wells closer to the victims’ houses, providing seeds, training police, establishing rape-trauma centers, supplying medicine, and is an alternative that provides justice outside of the formal legal system. The two different forms of justice involve various responses that acknowledge the many levels on which sexual violence harms.

Yet providing justice to sexual violence victims also provides a method to transform the surrounding culture. Explicitly acknowledging the gendered nature of conflict can, somewhat paradoxically, help mainstream gender issues during the transitional process.291 As women understood that their harms matter, and as they take the risks to make their claims known, they may be strengthened politically, economically, legally, and culturally.

Developing changes in laws and practices requires responding to opportunities. Countries in the post-conflict transition process provide multiple opportunities for transformation on many different levels, including local and national law, reintegration of soldiers and victims, changing attitudes towards basic health care, and improving women’s status.

BOOK REVIEW

WHAT IF BROWN V. BOARD OF EDUCATION WAS A HATE-SPEECH CASE?

Richard Delgado


INTRODUCTION

In 1882, Harvard Civil Rights-Civil Liberties Law Review published the first article specifically on hate speech, Entitled Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling.1 The article identified a number of harms associated with racial vituperation.2 showed that courts were already beginning to afford relief under such theories as intentional infliction of emotional distress, assault, and defamation.3 and proposed a new, freestanding tort.4 A number of U.S. courts and the Canadian Supreme Court in a landmark decision followed suit.5

A few years later, Mari Matsuda, in a much-heralded article, argued that public law remedies, such as criminal prosecutions, also ought to be available to victims of hate speech.6 And, a short time later, a third critical race theorist,

291. See Duggan & Abusharaf, supra note 135, at n.9 (discussing gender dividend).