# Intersectionality and International Law: Recognizing Complex Identities on the Global Stage

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*As a legal theory, intersectionality seeks to create frameworks that consider the multiple identities that individuals possess, including race, gender, sexuality, age, and ability. When applied, intersectionality recognizes complexities in an individual's identity to an extent not possible using mechanisms that focus solely on one minority marker. This Note proposes incorporating intersectional consideration in the realm of international human rights law and international humanitarian law to better address the human rights violations that affect women whose identities fall within more than one minority group because of their ethnicity or race. The Note begins with an explanation of intersectionality, and then applies intersectionality to human rights mechanisms within the United Nations and to cases in international criminal tribunals and the International Criminal Court. As it stands, international human rights law, international criminal law, and international humanitarian law view women who are members of a racial or ethnic minority as variants on a given category. This Note contends that by applying a framework that further incorporates intersectionality—that is, both in discourse and action—in international human rights law, international humanitarian law, and international criminal law, these women's identities will be more fully recognized, opening up the possibility for more representative women's rights discourse, and remedies for human rights abuses that better address the scope and nature of the violations.*

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## Introduction

The field of international human rights[1] has expanded significantly since the United Nations' Universal Declaration of Human Rights ("UDHR").[2] These developments include the creation of the International Criminal Court ("ICC"), which has the power to oversee cases of international human rights law ("IHRL") and international humanitarian law ("IHL") violations—including genocide,[3] crimes against humanity,[4] war crimes,[5] and, in the future, the crime of aggression.[6] Yet, in spite of these developments, there is much work to be done to recognize and remedy human rights violations. This is especially true for violations against people whose identities are classified under more than one of the core international human rights instruments, such as women who belong to a minority racial or ethnic group. For these doubly marginalized persons, human rights mechanisms do not provide the same level of protection afforded to people whose identities represent one minority.

Remedies for crimes against these persons should take into consideration all aspects of their identities that made them a target. To this aim, intersectionality should be applied on an international level through the core international human rights instruments and international criminal tribunals ("ICTs"). IHRL must recognize intersectionality in both the discourse and adjudication of international crimes that involve women within ethnic minority groups. This Note examines the effectiveness of intersectionality in this discourse and adjudication, with a focus on the rhetoric of the women's rights movement and the prosecution of rape in international tribunals and courts. These two areas were chosen to illustrate both the methodological and practical application of the theory of intersectionality in the international human rights community.

Over the course of three sections, this Note will illustrate the ways in which intersectionality can be applied internationally to better recognize women who do not fall within the normalized boundaries of "women" in international human rights rhetoric. Part I will discuss the theory and

1. Throughout this Note, "field of international human rights" and "international human rights community" are used to refer to legal, social, and political tools, as well as the group made up of NGOs, scholars, advocates, and international organizations like the United Nations that discuss, study, and work in relation to international human rights issues.

2. The United Nations has listed ten other core international human rights instruments. *The Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. Office of the High Comm'r for Human Rights, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx, *archived at* http://perma.law.harvard.edu/0ELfdWrGa7W.

3. Rome Statute of the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 90, *available at* http://www.unhcr.org/refworld/docid/3ae6b3a84.html, *archived at* http://perma.cc/5RTY-U3GG [hereinafter Rome Statute].

4. Rome Statute, *supra* note 3, art. 7.

5. *Id.* art. 8.

6. *Id.* art. 5; *The Crime of Aggression*, Coalition for the Int'l Criminal Court, http://www.iccnow.org/?mod=aggression, *archived at* http://perma.cc/46T7-7RFE.

methodology of intersectionality, explaining how the theory developed and how it has been used over the past two decades. Part II focuses on how intersectionality may be adapted to apply to the international women's rights movement through the core international human rights mechanisms. This section expounds on the first part of the two-part argument for international intersectionality, proposing that intersectionality can be used to deconstruct the prevalent rhetoric and representation of women as a monolithic group needing special consideration because of an inherent vulnerability.[7] In its place, intersectionality would better recognize marginalized groups of women that have so far been viewed primarily in the context of the normalized concept of women under IHRL.[8]

Part III focuses on the second part of the Note's two-part argument: the need for intersectionality in the adjudication of situations in which both gender and ethnicity have caused a group to be targeted with violence. Part III examines how the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") changed how rape was adjudicated internationally, especially in relation to conflicts that were ethnic in origin. Finally, Part III examines the conflict in Darfur as a case study for the potential application of intersectionality in the adjudication of human rights violations. This section acknowledges the shortcomings of the application, or lack thereof, of intersectionality in the ICTs and explains how best to incorporate intersectionality moving forward such that remedies for victims can better respond to the complex realities of their experiences.

## I. Intersectionality: Theory, Methodology, and Application

Intersectionality considers the connectedness of different components of identity that are often viewed separately.[9] As a theory, intersectionality challenges typical analytical frameworks and highlights the inseparability

7. For an analysis of the presentation of women's rights, see generally Catharine A. MacKinnon, Sex Equality 20–24 (2d ed. 2001); Sally Engle Merry, Human Rights & Gender Violence: Translating International Law into Local Justice 91 (2005); R. Charli Carpenter, *"Women, Children and Other Vulnerable Groups": Gender, Strategic Frames and the Protection of Civilians as a Transnational Issue*, 49 Int'l Stud. Q. 295, 303 (2005); Bonita Meyersfeld, *Domestic Violence, Health, and International Law*, 22 Emory Int'l L. Rev. 61, 73–74 (2008); Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade*, 10 Melbourne J. Int'l L. 11, 17 (2009).

8. For discussion on the normalized concept of women in international human rights, see Hilary Charlesworth, *What Are "Women's International Human Rights"?*, *in* Human Rights of Women: National and International Perspectives 58, 62 (Rebecca J. Cook ed., 1994) [hereinafter Charlesworth, *What are?*]; Jennifer Chan-Tiberghien, *Gender-Skepticism or Gender-Boom?: Poststructural Feminisms, Transnational Feminisms and the World Conference Against Racism*, 6 Int'l Feminist J. Pol. 454, 455 (2004); Hilary Charlesworth, *Feminist Methods in International Law*, 93 Am. J. Int'l L. 379, 384 (1999) [hereinafter Charlesworth, *Feminist Methods*].

9. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1244–45 n.9 (1991) [hereinafter Crenshaw, *Mapping*].

of identities.[10] This concept goes beyond merely merging separate identities but considers the unique identity developed from an individual belonging to multiple categories simultaneously. The purpose behind the development of intersectionality was to create a feminist discourse that moves away from essentialism and combines critique with "a strategy of insubordination."[11] This discourse aims to correct the gaps created by thinking of categories, such as race and gender, as mutually exclusive.[12] The international human rights community can use intersectionality to recognize the diverse needs and difficulties facing women around the world, in times of both peace and conflict.

### *A. The Birth of a Concept*

In the United States, where the concept of intersectionality was coined, "white, straight, and socioeconomically privileged" women have long provided the voice of feminist legal theory.[13] Early feminist theory categorized the experiences of the dominant group as universal.[14] Angela Harris highlighted a similar phenomenon in feminist legal theory, which she described as "gender essentialism": "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[15]

Both antiracism and feminism rely on specific lenses that normalize the experiences of Black men and white women, respectively,[16] to the detriment of Black women.[17] The experiences of Black women are seen as derivative of the experiences of Black men or white women, instead of as their own,[18] as a result of the "unidirectional" discrimination on which antiracism and femi-

10. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 150–52 (1989) [hereinafter Crenshaw, *Demarginalizing*].

11. Rebecca Johnson, *Gender, Race, Class and Sexual Orientation: Theorizing the Intersections*, *in* Feminism, Law, Inclusion: Intersectionality in Action 21, 29 (Gayle MacDonald, Rachel L. Osborne & Charles C. Smith eds., 2005).

12. Crenshaw, *Demarginalizing*, *supra* note 10, at 139.

13. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 588 (1990).

14. Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought 4 (1988).

15. Harris, *supra* note 13, at 585.

16. Joanne Conaghan, *Intersectionality and the Feminist Project in Law*, *in* Intersectionality and Beyond: Law, Power and the Politics of Location 21, 22–23 (Emily Grabham et al. eds., 2008) [hereinafter Intersectionality and Beyond] ("Much of the [anti-essentialism] critique was driven by the concerns of women of colour who argued that mainstream feminist discourse was predicated upon and thereby privileged the experiences of white women. Just as women's experiences were overlooked through the 'universalization' of men's, so also were the experiences of women of colour eclipsed by feminist attendance to white women's interests and concerns: the 'woman' of feminism was, for most purposes, white; whiteness was part of the 'essence' of womanhood which feminism represented.").

17. Crenshaw, *Demarginalizing*, *supra* note 10, at 1252.

18. Lisa A. Crooms, *Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do with the Race Convention?,"* 40 How. L.J. 619, 623–24 (1996).

nism rely.[19] Although Black women experience discrimination as a sum of race and gender discrimination, they also experience discrimination merely because they are Black women.[20]

In her 1989 article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, Kimberlé Crenshaw coined the term intersectionality and laid the groundwork for the concept. Crenshaw focused on the experiences of Black women in the United States, seeking to "reveal how Black women are theoretically erased."[21] Intersectionality recognizes that a group that inhabits multiple categories simultaneously has experiences that can be seen both as unique to that group and as a result of the overlap of individual categories.

An intersectionality analysis requires special attention to the experiences of individuals that exist at the "intersection" of more than one identity marker. This can include the two chosen by Crenshaw—race and sex—as well as sexual orientation,[22] socioeconomic status,[23] and whether a person is able-bodied.[24] Methodologically, intersectionality examines lapses in legal recognition of those existing in the overlap of multiple identity markers. Crenshaw's theory reflects the precarious and limited area of representation for people who exist where two identities, which can be imagined as lines or circles, intersect.[25] According to the theory, persons existing where one identity marker interacts with another face a form of discrimination that those falling within individual markers do not. Thus, intersectionality uncovers where the overlap of individual categories creates a negative space as opposed to an enhanced protection. Within that negative space, the experiences of double (or more) minorities fall outside of legal precedents and are thus left without recognition and remedy under the law.[26] Once this negative space has been noted, the intersectionality analysis compares protec-

19. Crenshaw, *Demarginalizing*, *supra* note 10, at 149.

20. *Id.*

21. *Id.* at 139.

22. *See generally* Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 L. & Sexuality: Rev. Lesbian & Gay L. Issues 83 (1994); Lisa Bowleg, *When Black + Lesbian + Woman ≠ Black Lesbian Woman: The Methodological Challenges of Qualitative and Quantitative Intersectionality Research*, 59 Sex Roles 312 (2008); Doug Meyer, *Evaluating the Severity of Hate-Motivated Violence: Intersectional Differences among LGBT Hate Crime Victims*, 44 Soc. 980 (2010).

23. *See* Avtar Brah & Ann Phoenix, *Ain't I a Woman? Revisiting Intersectionality*, 5 J. Int'l Women's Stud. 75, 82 (2004). *See generally* John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 Fordham L. Rev. 1927 (1999).

24. *See generally* David F. Warner & Tyson H. Brown, *Understanding How Race/Ethnicity and Gender Define Age-Trajectories of Disability: An Intersectionality Approach*, 72 Soc. Sci. & Med. 1236 (2011); Linda R. Shaw, Fong Chan & Brian T. McMahon, *Intersectionality and Disability Harassment: The Interactive Effects of Disability, Race, Age, and Gender*, 55 Rehabilitation Counseling Bull. 82 (2012).

25. Crenshaw, *Demarginalizing*, *supra* note 10, at 140. ("I argue that Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender.").

26. *See* Crenshaw, *Demarginalizing*, *supra* note 10, at 150.

tions available to those with individual markers with the dearth of protections available to those with two or more.

In order to examine how law has failed to recognize Black women's intersectional experiences, Crenshaw looked to three cases brought under Title VII of the Civil Rights Act of 1964—*DeGraffenreid v. General Motors*,[27] *Moore v. Hughes Helicopter, Inc.*,[28] and *Payne v. Travenol Laboratories, Inc*.[29] Unlike prior cases, this trio illustrated the ways that discrimination against Black women was difficult to prove specifically because the plaintiffs were Black women.

*DeGraffenreid* was brought by five Black women against their former employer, General Motors, asserting that General Motors's "last hired-first fired" policy perpetuated race and sex discrimination against them as Black women.[30] The court looked to the hiring of women superficially, and "[b]ecause General Motors did hire women—albeit *white women*—during the period that no Black women were hired, there was, in the court's view, no sex discrimination that the seniority system could conceivably have perpetuated."[31] The court dismissed the case without duly considering that race *and* sex needed to be considered to recognize the discrimination alleged by the plaintiffs.[32] For the *DeGraffenreid* court, discrimination against Black women was not enough to survive summary judgment because the discrimination suffered did not coincide with race or sex discrimination as they were primarily conceptualized: as discrimination against Black men or white women, respectively.[33] This decision, according to Crenshaw, signifies that "race and sex discrimination doctrine are defined respectively by white women's and Black men's experiences."[34]

In *Moore*, a Black female plaintiff alleged race and sex discrimination by Hughes Helicopters in selecting employees for upper-level and supervisory positions.[35] Moore's request to certify her suit as a class action on behalf of all female employees of Hughes Helicopter was denied because she referred to herself as a Black woman in her complaint.[36] This caused the Ninth Circuit to doubt that Moore was representative of women employees in general,[37] when even a white female class representative would not be representative of women generally. A lack of racial categorization would inevita-

27. 413 F. Supp. 142 (E.D. Mo. 1976).
28. 708 F.2d 475 (9th Cir. 1983).
29. 673 F.2d 798 (5th Cir. 1982).
30. *DeGraffenreid*, 413 F. Supp. at 143.
31. Crenshaw, *Demarginalizing*, *supra* note 10, at 142.
32. *Id.* at 142–43.
33. *Id.*
34. *Id.* at 143.
35. Moore v. Hughes Helicopter, Inc., 708 F.2d 475, 478 (9th Cir. 1983).
36. *See id.* at 480.
37. Crenshaw, *Demarginalizing*, *supra* note 10, at 144 ("Moore had never claimed before the [U.S. Equal Employment Opportunity Commission] that she was discriminated against as a female, *but only* as a Black female . . . . [T]his raised serious doubts [in the district court] as to Moore's ability to adequately represent white female employees." (emphasis added) (quoting *Moore*, 708 F.2d at 480)).

bly produce a biased experience.[38] According to Crenshaw, the court's approach revealed "the centrality of white female experiences in the conceptualization of gender discrimination."[39] Crenshaw took this argument a step further, explaining that when making a sex discrimination claim, white women do not designate their race because only their gender would have caused any discrimination against them.[40] The same may be said about Black men, who would need only reference their race as a cause for discrimination. In *Moore*, like *DeGraffenreid*, Black women's gender was insufficient to satisfy a claim of sex-based discrimination.

*Payne* was brought by Black female workers against Travenol Laboratories for discriminatory practice of hiring Black women for lower-paying positions.[41] The Fifth Circuit acknowledged race discrimination but limited the award of back pay and seniority to Black women while "refus[ing] to extend the remedy to Black men for fear that their conflicting interests would not be adequately addressed."[42] This limited victory for Black women revealed how even when Black women's unique experiences are recognized, this recognition can negatively affect those who experience "pure" discrimination—that is, discrimination based on one characteristic.[43] As a result, the *Payne* decision further solidified the marginalizing precedents of *DeGraffenreid* and *Moore*: harm experienced by self-identified *Black women* could not represent the experiences of *Black* men or white *women*—even where the harm also affected Black men or white women.

The plaintiffs in *Payne* were both similarly and differently situated than those in *DeGraffenreid* and *Moore*. Where the Black women in *DeGraffenreid* and *Moore* were unsuccessful because they possessed multiple minority identities, the success of the plaintiffs in *Payne* was limited to Black women for the same reason.[44] These opposing results do not negate intersectionality; rather, Crenshaw contends that "[t]his apparent contradiction is but another manifestation of the conceptual limitations of the single-issue analyses that intersectionality challenges."[45] The courts' refusal to recognize race and sex discrimination through the experiences of Black women illustrates a lack of intersectional consideration. Because the courts interpreted laws banning sex and race discrimination as mutually exclusive, the interaction of both forms of discrimination in the lives of Black women fell into the negative space.

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Class certification was further denied for all Black employees because Moore did not assert that Black men suffered any discrimination. *Moore*, 708 F.2d at 480.

38. Crenshaw, *Demarginalizing*, *supra* note 10, at 144.
39. *Id.*
40. *Id.* at 144–45.
41. Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 809–10 (5th Cir. 1982).
42. Crenshaw, *Demarginalizing*, *supra* note 10, at 147.
43. *Id.* at 148.
44. *See id.*
45. *Id.* at 149.

Though Crenshaw coined the term in this legal context, intersectionality has been developed largely as a sociological feminist theory,[46] and has been adopted in a wide range of contexts, including behavioral science,[47] labor and employment,[48] and Marxist-feminist critical theory.[49] Scholars note that feminist discourse has changed significantly since the introduction of intersectionality,[50] but the implementation of intersectionality in the legal field has been slower than in other areas.[51]

Intersectionality has been influenced by the narratives of those who have existed between the "gaps" of categories.[52] This preestablished foundation of narratives makes intersectionality more accessible to women who are minorities twice (or more) over and presents a springboard for analyzing discrimination or injustices they face from a more nuanced point of view. More specifically, women who have been targeted for sexual assault during ethnic conflicts would be better served if their claims were viewed through an intersectional lens such that they would not fall in the gaps between gender and ethnicity. Given its relevance to a number of different fields, intersectionality should be applied to the international human rights sphere. However, a number of challenges and critiques of intersectionality must first be considered.

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46. *See* Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS 1771, 1771–75 (2005).

47. *See* Bowleg, *supra* note 22; Elizabeth R. Cole, *Coalitions as a Model for Intersectionality: From Practice to Theory*, 59 SEX ROLES 443 (2008); Elizabeth R. Cole, *Intersectionality and Research in Psychology*, 64 AM. PSYCHOLOGIST 170 (2009); Stephanie A. Shields, *Gender: An Intersectionality Perspective*, 59 SEX ROLES 301 (2008).

48. *See* Irene Browne & Joya Misra, *The Intersection of Gender and Race in the Labor Market*, 29 ANN. REV. SOC. 487 (2003); Helen A. Moore et al., *Splitting the Academy: The Emotions of Intersectionality at Work*, 51 SOC. Q. 179 (2010); Mustafa F. Özbilgin et al., *Work-Life, Diversity and Intersectionality: A Critical Review and Research Agenda*, 13 INT'L J. MGMT. REV. 177 (2011).

49. *See* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT vii (2d ed. 2000); *see also* Emily Grabham et al., *Introduction*, *in* INTERSECTIONALITY AND BEYOND, *supra* note 16, at 1 (noting other areas in which research involving intersectionality has been applied).

50. *See, e.g.*, Brah & Phoenix, *supra* note 23 ("Recognition of the importance of intersectionality has impelled new ways of thinking about complexity and multiplicity in power relations as well as emotional investments."); Rachel E. Luft & Jane Ward, *Toward an Intersectionality Just Out of Reach: Confronting Challenges to Intersectional Practice*, *in* 13 PERCEIVING GENDER LOCALLY, GLOBALLY, AND INTERSECTIONALLY 9, 10 (Vasilikie Demos & Marcia Texler Segal eds., 2009) ("Given the concept's origins in Black women's social theory and activism, intersectionality has taken form not only as an analysis of the multiplicative nature of oppression, but also as a political intervention that deconstructs social relations and promotes more just alternatives.").

51. Harris, *supra* note 13, at 587–88.

52. *See* Sarah C. White, *The 'Gender Lens': A Racial Blinder?*, 6 PROGRESS DEV. STUD. 55, 57 (2006). *See generally* Barbara Ann Cole, *Gender, Narratives and Intersectionality: Can Personal Experience Approaches to Research Contribute to 'Undoing Gender'?*, 55 INT'L REV. ED. 561, 565 (2009) ("I shall—in view of the concept's perceived importance to feminist research and its very openness and ambiguity—seek to open up discussion around the possible use of intersectionality as a theoretical base in conjunction with narrative as a methodological approach, to explore 'undoing gender.'").

### B. Implementation, Absences, and Shortcomings

Joanne Conaghan has posited that intersectionality has "reached the limits of its potential."[53] While recognizing its importance in feminist theory and strategy, Conaghan argues that the theory of intersectionality is limited by its very creation; its basis in the law has created a frame of reference too uncompromising to fix the problems it highlights.[54] Conaghan's critique is understandable when examining Crenshaw's titular language and imagery, which looks to lines, margins and intersections.[55] However, in addition to critiquing intersectionality's "grid-like aesthetic," Conaghan's critique questions the use of law as a basis for intersectionality because the law itself seeks to compartmentalize and categorize, whereas intersectionality pushes against group generalizations to highlight the more complex experiences of some within a given group.[56] In her view, intersectionality has been built up with language that suggests rigidity—lines, maps, coordinates—that are not flexible enough to properly convey the intricacies of the complex identities intersectionality was created to represent.[57]

Conaghan assumes that intersectionality's basis in the law, which only recognizes certain classes of discrimination, acts as a constraint, prohibiting the theory from encompassing the complexities of discrimination—and that therefore the lines, maps, and coordinates must fit within the borders established by laws. However, this critique fails to consider the broadening and restructuring of laws as society ages. Though other scholars have also critiqued intersectionality as inapplicable to politics and law,[58] the theory has been enshrined in the national law of at least one country and has been adopted into the policy of another. In the United Kingdom, for example, the Equality Act of 2010 includes an employment provision on "combined discrimination."[59] In Canada, the Ontario Human Rights Commission,

53. Conaghan, *supra* note 16, at 21.

54. *Id.* at 21–22.

55. *Contra* Crenshaw, *Mapping*, *supra* note 9; Crenshaw, *Demarginalizing*, *supra* note 10.

56. Conaghan, *supra* note 16, at 41 ("If we are truly to get to grips with the issues intersectionality raises, we need a theoretical framework which is genuinely *multidimensional*, possessing breadth, depth and, most importantly, mobility. We must not allow our conception of the problems—and solutions—to become caught within a narrow legal aesthetic.").

57. *Id.* at 24.

58. *See, e.g.*, Richard Delgado, *Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 Iowa L. Rev. 1247, 1264 (2011).

59. Equality Act, 2010, c. 15, pt. 2, ch. 2, § 14(1)–(2). These two subsections read:

(1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.

(2) The relevant protected characteristics are—

a. age;
b. disability;
c. gender reassignment;
d. race;
e. religion or belief;
f. sex;

which administers Ontario's Human Rights Code,[60] has published a discussion paper that introduces and discusses the application of an "intersectional approach to discrimination."[61]

Critics have also attacked the practical application of intersectionality. For example, Toni Williams' study on the effect of intersectionality analysis in sentencing practices in Canada found that despite the enactment of "remedial" elements of Canadian sentencing law "intended to address overrepresentation of Aboriginal people in Canadian systems," oversentencing of Aboriginal women worsened over a ten-year period after the reforms.[62] Given that the sentencing of Aboriginal women increased following the incorporation of intersectionality analysis into judicial reasoning, Williams suggests that, in order to address the harms Aboriginal women face, changes are needed in the prevention of incarceration and in laws that disproportionately affect Aboriginal women.[63]

Critical race theory proponent Richard Delgado has argued that intersectionality, if applied without constraint, can result in the creation of subcategories ad infinitum.[64] Delgado proposes that to promote intersectionality, one must subscribe to a certain level of essentialism by assuming that one group is inherently worse off than another.[65] This essentialist assumption presumes that a Black woman in the United States has faced more discrimination than a white woman in the United States simply because she is Black. However, with this line of reasoning, Delgado assumes that intersectionality would be applied without consideration to the particular facts of a given case. Instead of assuming that the intersection of race and gender necessitates one lived narrative, the theory of intersectionality holds that the experiences of those living at that intersection are *influenced by* race and gender.[66] Thus, a Black woman's experiences are not weighed as decidedly

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g. sexual orientation.

*Id.*

60. *About the Commission*, Ontario Human Rights Comm'n, http://www.ohrc.on.ca/en/about-commission, *archived at* http://www.perma.cc/0yaXHG5jTjL; Human Rights Code, R.S.O. 1990, ch. H.19.

61. Policy & Educ. Branch, Ontario Human Rights Comm'n, An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims (2001), *available at* http://www.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf, *archived at* http://www.perma.cc/02ZEb2KtPi6.

62. Toni Williams, *Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does it Make?*, *in* Intersectionality and Beyond, *supra* note 16, at 79, 80, 87–95.

63. *Id.* at 96 ("Specifically with regard to the imprisonment of Aboriginal women, the findings reported in this chapter suggest a need to shift away from strategies that purport to adjust how judges exercise discretion and towards more direct means of preventing incarceration of Aboriginal women. This shift may require revisiting debates about how to penalise those offences that expose Aboriginal women to the greatest risk of prison terms . . . .").

64. Delgado, *supra* note 58, at 1263–66 (citing Harris, *supra* note 13, at 581).

65. *Id.* at 1268–69.

66. Crenshaw, *Demarginalizing*, *supra* note 10.

worse in comparison to those of a white woman or a Black man, but are inherently different.

### C. Broadening Margins and New Maps

As discussed above, intersectionality was initially applied to the experiences of Black women that were not given due attention in antidiscrimination and gender equality discourses that focused primarily on Black men and white women, respectively.[67] Intersectionality is about recognizing differences, not placing value judgments on the experiences of individuals in each category. Up to this point, the discussion of intersectionality has been based on the categories of gender and race or ethnicity; however, intersectional theory may incorporate a number of other identities as well, including sexuality,[68] socioeconomic status,[69] and ability.[70] As a result of the ever-evolving nature of the law, both domestically and internationally, protections for different groups of people are not stagnant. These additional categories illustrate the fluid applicability of intersectional theory to new categories that gain legal recognition or protection. Additionally, intersectionality provides a lens through which historical dynamics can be analyzed. Because intersectionality is so adaptable—even regarding the original factors of race and sex—it deserves a place in the international legal discourse. Applied in a global context, intersectionality would, among other things, help to prevent the exclusion of nonwestern women from women's rights discourse.

## II. International Human Rights Mechanisms and Intersectionality: Adjusting the Use of Categories in Global Discourse

Intersectionality can be applied to the existing international human rights framework both theoretically, in the discussion of human rights vio-

67. *See* Crenshaw, *Mapping*, *supra* note 9, at 1269 ("Although the rhetoric of both agendas formally includes Black women, racism is generally not problematized in feminism, and sexism, not problematized in antiracist discourses. Consequently, the plight of Black women is relegated to a secondary importance . . . .").

68. *See generally* Theorizing Intersectionality and Sexuality: Genders and Sexualities in the Social Sciences (Yvette Taylor et al. eds., 2011); Gerry Veenstra, *Race, Gender, Class and Sexual Orientation: Intersecting Axes of Inequality and Self-Rated Health in Canada*, 10 Int'l J. for Equity Health 3 (2011).

69. *See generally* Gloria Holguin Cuadraz & Lynet Uttal, *Intersectionality and In-Depth Interviews: Methodological Strategies for Analyzing Race, Class, and Gender*, 6 Race, Gender & Class 156 (1999); Angéla Kóczé & Raluca Maria Popa, Missing Intersectionality: Race/Ethnicity, Gender, and Class in Current Research and Policies on Romani Women in Europe (2009).

70. *See generally* Elizabeth P. Cramer & Sara-Beth Plummer, *People of Color with Disabilities: Intersectionality as a Framework for Analyzing Intimate Partner Violence in Social, Historical, and Political Contexts*, 18 J. Aggression, Maltreatment & Trauma 162 (2009); Nirmala Erevelles & Andrea Minear, *Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality*, 4 J. Literary & Cultural Disability Stud. 127 (2010).

lations, and practically, in the prosecution of people who have violated international human rights norms. Doing so would address the lack of representation in the existing human rights safeguards of people who fall within multiple protected categories simultaneously. This is not to say that human rights mechanisms should be eliminated, but they must be modified if they are to properly serve their target communities.

The women's rights movement in the international human rights community has been critiqued over the years, with many women arguing that the movement is not representative of all women.[71] In trying to universalize women's rights, cultural and ethnic differences have been overlooked.[72] Unsurprisingly, many of the critiques and arguments against universality come from women in the Global South, who historically have been seen as the "other" women of the world.[73] Simultaneously, antiracist rhetoric in the international human rights community has failed to consider the problems facing women in racial or ethnic minorities as unique to their gender.[74] Inserting intersectionality into international human rights rhetoric would help remedy these detrimental oversights.

This section focuses on the development of women's rights as a category of human rights and how that development has affected women outside of the western monolith. The initial, exclusively western voice of the women's rights movement under international human rights has transformed to include a moderate amount of diversity. More recently, the development of a less "universal," more inclusive, women's rights movement ushered in the first use of intersectional theory, though diluted, by the Committee on the Elimination of Racial Discrimination ("CERD") General Recommendation 25 and the Committee on the Elimination of Discrimination Against Women ("CEDAW") General Recommendation 25.

### *A. The Emergence of a Singular Female Voice*

The international human rights community has often been scrutinized for being western-dominated[75] and for promoting the ideals of the First

71. *See generally* Women's Rights, Human Rights: International Feminist Perspectives (Julie Peters & Andrea Wolper eds., 1995) (providing perspectives from feminists around the world who discuss the ways that the women's rights movement fails to acknowledge the importance of race and class to the experiences of women around the world).

72. Johanna Brenner, *Transnational Feminism and the Struggle for Global Justice*, *in* World Social Forum: Challenging Empires 25, 27 (Jai Sen & Peter Waterman eds., 2d ed. 2007).

73. *Id.*

74. *See* Randolph B. Persaud, *Situating Race in International Relations: The Dialectics of Civilizational Security in American Immigration*, *in* Power, Postcolonialism and International Relations: Reading Race, Gender and Class 56, 57 (Geeta Chowdhry & Sheila Nair eds., 2002) (discussing the incorporation of gender, identity, culture, ethnicity, class, and nationalism in the analysis of race and the use of race as a way to talk about the western domination of feminist rhetoric).

75. *See* Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 Buff. Hum. Rts. L. Rev. 211 (1999); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 Hum. Rts. Q. 400 (1984); Jack Donnelly, *The Relative Universality of Human Rights*, 29 Hum. Rts. Q. 281 (2007); Melville Herskovits et al., *Statement on Human Rights*, 49 Am. Anthropologist 539 (1947);

World.[76] The principle of universality, which seeks to apply the rights formulated by some to all, exemplifies this western dominance.[77] This supremacy has carried over into the discourse about women's rights.[78]

The representation of women in human rights discourse began as a struggle to combat male dominance in the field.[79] The Commission on the Status of Women ("CSW"), a subcommission of the United Nations Economic and Social Council ("ECOSOC"), was formed initially to provide recommendations and reports to ECOSOC "on promoting women's rights in political, economic, social, and educational fields."[80] Then, in 1987, eight years after the signing of the Convention on the Elimination of All Forms of Discrimination against Women ("Women's Convention")[81]—which solidified women's rights as its own category—CSW's mandate expanded to include functions beyond recommendations and reporting.[82] ECOSOC again updated the CSW mandate in 1996 to give CSW greater input.[83]

While there has been success in carving out a niche for women's rights in the United Nations' international human rights mechanisms, the way in which women have been, and continue to be, classified is concerning.[84] The same universality underlying most human rights law and rhetoric is present in the women's rights movement, which also developed with a "Bourgeois/white" voice.[85] In 1999, Hilary Charlesworth stated that in international law, women are represented predominantly in the role of victims "in need

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Ann-Belinda S. Preis, *Human Rights as Cultural Practice: An Anthropological Critique*, 18 Hum. Rts. Q. 286 (1996); Alison Dundes Renteln, *The Unanswered Challenge of Relativism and the Consequences for Human Rights*, 7 Hum. Rts. Q. 514 (1985).

76. In this Note, the term "First World" refers to the original demarcation created by the United Nations after World War II, which meant large, industrialized, democratic countries. Theodore Harney MacDonald, Third World Health: Hostage to First World Health 4 (2005).

77. *See* Eva Brems, Human Rights: Universality and Diversity 4 (2001). For further discussion about the problems associated with the universalist approach to human rights, see Surya Prakash Sinha, *The Axiology of the International Bill of Human Rights*, 1 Pace Y.B. Int'l L. 21, 54–55 (1989).

78. Catherine Harries, *Daughters of Our Peoples: International Feminism Meets Ugandan Law and Custom*, 25 Colum. Hum. Rts. L. Rev. 493, 493–94 (1994).

79. Charlesworth, *What are?*, *supra* note 8, at 68–70.

80. E.S.C. Res. 11 (II), U.N. ESCOR, 2d Sess., Supp. No. 1, U.N. Docs. E/90, E/84 ¶ 6 (June 21, 1946).

81. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

82. *Overview*, U.N. Comm'n on the Status of Women, http://www.un.org/womenwatch/daw/csw/index.html#about, *archived at* http://perma.law.harvard.edu/0gESJLy1DQW/.

83. *Id.* (citing E.S.C. Res. 1996/6, U.N. Doc. E/Res/1996/6 (July 22, 1996)).

84. In their article following the Fourth World Conference on Women in Beijing, Charlotte Bunch and Susana Fried discussed a number of problems facing the international women's rights movement, including its approach to sexual rights and designations of gender, as well as potential problems of universality in the movement. Charlotte Bunch & Susana Fried, *Beijing '95: Moving Women's Human Rights from Margin to Center*, 22 Signs 200, 203 (1996) ("Women must create a more nuanced conversation that can address the tension between calls for recognizing the universality of women's human rights and the respect for and nurturance of local cultures and oppositional strategies.").

85. *See* J. Oloka-Onjango & Silvia Tamale, "*The Personal is Political,*" *or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 Hum. Rts. Q. 691, 698 (1995).

of protection."[86] More recently, Charlesworth described women's rights in international law as skewed to illustrate "women's inherent vulnerability."[87] Compounding these generalities is the characterization of women as merely a tangent in international human rights conversations.[88] The dominance of western ideas about justice and equality eclipsed the voices of those in the Global South,[89] leaving them without representation that reflected their norms and mores.

Although the CSW and Women's Convention have been in place for decades, they have not been able to debunk the prevailing idea that gender is the only relevant characteristic for discrimination against women. Having been established only after breaking away from the universalism that led to a male-dominated human rights discourse, the CSW and the Women's Convention were not established with sufficient diversity in mind. Instead, the establishment of the international women's rights movement created a system similar to antidiscrimination laws in the United States—one that recognizes individual subsections of identity but does not acknowledge overlap or intersectionality.

### *B. Moving Beyond the Universal*

As illustrated above, using universality as an approach to women's rights led to broad oversights in the human rights discourse. Universality erases variation, reducing diverse groups to the lowest common denominator. Applying intersectionality debunks the assumption that women are all faced with the same problems. This process has begun through the emergence of "alternate" women in the international women's rights movement and has been promoted through the United Nations' recognition of intersectionality in CEDAW and CERD. However, in addressing human rights violations, on-paper commitments must be not only acknowledged but also implemented to allow for recognition that multiple sources of diversity interact to produce unique forms of adversity for many groups.

#### 1. *Deconstructing the Monolith: The Discourse Change*

More recently, the idea of a "Third World woman," who supposedly represents the human rights needs of women in the Global South, has entered the human rights discourse.[90] Although female human rights scholars have tried to show the differences in need for women living in different

86. Charlesworth, *Feminist Methods*, *supra* note 8, at 381.

87. Hilary Charlesworth, *Inside/Outside: Women & International Law*, IntLawGrrls (Aug. 20, 2009), http://www.intlawgrrls.com/2009/08/insideoutside-women-international-law.html, *archived at* http://www.perma.cc/0uwKLReonNo.

88. Charlesworth, *What are?*, *supra* note 8, at 68–70.

89. Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 30 Feminist Rev. 61, 64–65 (1988).

90. *See* Chandra Talpade Mohanty, "*Under Western Eyes*" *Revisited: Feminist Solidarity Through Anticapitalist Struggles*, 28 Signs 499, 519 (2003).

circumstances,[91] some of these attempts at diversity have resulted in the construction of yet another monolith, only this time otherized.[92] In her oft-cited 1990 work, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, Charlotte Bunch writes, "The concept of human rights, like all vibrant visions, is not static or the property of any one group; rather, its meaning expands as people reconceive of their needs and hopes in relation to it."[93] Likewise for the concept of women's rights, the meaning of "woman" must continue to be expanded and analyzed from multiple angles. In recent years, the idea of women under international human rights has changed, producing a more varied voice in discourse and also utilizing intersectionality beyond the use of terminology.[94] The international discourse about women has evolved in two notable ways: an emergence of critiques of the perceptions of Third World women and voices from the Third World that critique international feminism.

In 1988, before the term "intersectionality" had been published, Chandra Mohanty discussed the creation of another monolith in feminist discourse—that of the Third World woman.[95] According to Mohanty, the average Third World woman as portrayed by western feminist discourse was one who "leads an essentially truncated life based on her feminine gender (read: sexually constrained) and being 'third world' (read: ignorant, poor, uneducated, tradition-bound, religious, domesticated, family-oriented, victimized, etc.)."[96] Within this concept, western feminism's five stereotypes of Third World women are: as (1) victims of male violence; (2) universal dependents; (3) victims of the colonial process; (4) victims beholden to familial systems; and (5) victims of religious ideologies.[97] Mohanty concluded that the stereotypes of women in the Third World merely reversed a stereotype of western women, neither of which accurately represented the intended group.[98] The common conception of the "secular, liberated" western woman is just as problematic as the notion of the "veiled woman" or "chaste virgin" in the Third World.[99] In the international women's rights discourse, attempting to define women, whether as a gender or within certain regions, will necessarily fail. This is not to say that attempts to correct issues that affect large numbers of people should be overlooked but that the

91. *See, e.g.*, *id.*

92. *See* Mohanty, *supra* note 89, at 81.

93. Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 Hum. Rts. Q. 486, 487 (1990).

94. *See* Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 Emory L.J. 71 (2003); Llezlie L. Green, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 Colum. Hum. Rts. L. Rev. 733 (2002).

95. Mohanty, *supra* note 89, at 61.

96. *Id.* at 65.

97. *Id.* at 66–71.

98. *Id.* at 81–82.

99. *Id.* at 81.

problems facing a group should be defined as they affect them without being overly universalized or oversimplified.

In their critique of western feminism, Oloka-Onjango and Tamale encourage Third World women to participate in international human rights discourse because the women's rights agenda will continue to be defined, with or without their input.[100] To illustrate this critique, they note that scholars such as Charlesworth use Third World feminism as mere comparative pieces for First World feminism.[101] Though their critique is framed from an African perspective, Oloka-Onjango and Tamale recognize that that perspective in itself is varied and diverse.[102] Most notably, they present and dismantle the idea that nonwestern regions are predisposed to human rights violations because they lack an understanding of human rights,[103] hearkening back to Mohanty's critique of the generalization of Third World women. To remedy the problem of overreliance on western ideals, Oloka-Onjango and Tamale propose creating "space for a diversity of perspectives" that would create a cross-cultural approach and eliminate the supra-cultural approach that relied on monolithic parameters.[104] This cross-cultural analysis would complement an intersectional approach.

Considering different cultures' human rights standards would dovetail with incorporating diverse groups within the category of "female." The incorporation of varying norms and mores into the framework of gender and women's rights would facilitate a flexible discourse that respects differences. To be sure, this diversity would allow those falling within even the least-represented intersections to have a voice and a place in the broader conversation about human rights.

### 2. *Intersectionality in the United Nations: CEDAW & CERD*

CERD General Recommendation 25 addresses gender-related dimensions of racial discrimination.[105] The recommendation begins with the Committee noting that "racial discrimination does not always affect women and men equally or in the same way."[106] Similarly, CEDAW General Recommendation 25 discusses how the discrimination women experience varies based on a number of factors:

> Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from

100. Oloka-Onjango & Tamale, *supra* note 85, at 698–700.
101. *Id.* at 703.
102. *Id.* at 705.
103. *Id.* at 706–08.
104. *Id.* at 713.
105. Comm. on the Elimination of Racial Discrimination, General Recommendation 25 on Gender-Related Dimensions of Racial Discrimination (2000), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7, 217 (May 12, 2004).
106. *Id.* ¶ 1.

> multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.[107]

Nevertheless, CEDAW has not formally recognized that multiply categorized women face discrimination that should not be categorized as a fraction of women as a whole and that these women are not mere derivatives of other women whose ethnicity, race, or other orientation is considered the norm. Such recognition could begin with the establishment of committees for groups of ethnic women who have been the targets of human rights violations or the issuance of a recommendation that directly confronts intersectional identities, as opposed to treating women within minority groups as a subcategory.

In her discussion on intersectionality and IHRL, Johanna Bond critiques the developments in the United Nations for being overly focused on gender mainstreaming, which "requires that both men *and* women be included as analytical subjects in any given substantive area."[108] This approach, according to Bond, creates two problems. First, it "tends to be essentialist in that it treats women as a monolithic group, rather than encouraging examination of how different systems of oppression intersect and affect groups of women in different ways."[109] In doing this, committees like CERD may add women as an analytical category but not acknowledge that these women have been discriminated against based on intersections within their identities.[110] Second, gender mainstreaming requires "all entities—not only those that are specifically focused on gender—to examine sex discrimination" but "does not encourage gendered institutions . . . to examine how

107. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7, 282, 284 (May 12, 2004).

108. Bond, *supra* note 94, at 141. For more on gender mainstreaming, see Sylvia Walby, *Gender Mainstreaming: Productive Tensions in Theory and Practice*, 12 Soc. Pol'y 321, 321 (2005) ("As a practice, gender mainstreaming is a process to promote gender equality. It is also intended to improve the effectivity of mainline policies by making visible the gendered nature of assumptions, processes, and outcomes. However, there are many different definitions of gender mainstreaming as well as considerable variations in practice. As a form of theory, gender mainstreaming is a process of revision of key concepts to grasp more adequately a world that is gendered, rather than the establishment of a separatist gender theory.").

109. *Id.* ("[I]ntersectionality requires more than the proverbial 'adding women to the mix.'").

110. *Id.*

other systems of oppression such as racism and heterosexism affect women in qualitatively different ways."[111]

This oversight illustrates a deficiency in the United Nations' approach to intersectionality. These committees' recommendations effectively denote a subcategory within the committees' general mandates, which perpetuates the problems endemic to the antidiscrimination and feminist approaches that Crenshaw critiqued.[112] Thus, women who experience human rights violations based on the intersection of ethnicity or race and gender will have their cases examined from a framework that views their claim as less than "pure." For cases involving racial or ethnic discrimination, the inquiry is built on a framework created for purely racial analysis. Therefore, the analysis of how gender operates within these ethnic or racial categories is a secondary concern.

## III. Rape and International Criminal Law: The ICTY, ICTR, and ICC

As shown above, the need for intersectionality in women's rights discourse arises from the compound marginalization of certain groups of women. This need for intersectional consideration within the women's rights movement by international human rights bodies goes beyond theory. Intersectional application of IHRL and IHL through international judicial bodies would offer more thorough prosecution and remedies for crimes that target women from marginalized groups. While genocide relates to ethnicity whereas systematic rape typically relates to gender, the targeted rape and sexual assault during the conflicts in the former Yugoslavia and Rwanda implicated both gender and ethnicity. Therefore, when rape is used as a tool of genocide, a war crime, or a crime against humanity, the gender and ethnicity of female victims must be seen through a lens that focuses on both of those aspects of their identities.

Discussion of rape during armed conflicts must include some discussion of IHL and IHRL. IHL applies to armed conflicts,[113] while IHRL is perpetual and in effect both during and outside of armed conflicts.[114] Because the ICTY was created with the authority to try crimes "committed in armed

111. *Id.*

112. Crenshaw, *Demarginalizing*, *supra* note 10, at 140 ("These problems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated. Thus, for feminist theory and antiracist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating 'women's experience' or 'the Black experience' into concrete policy demands must be rethought and recast.").

113. Int'l Comm. of the Red Cross, International Humanitarian Law: Answers to Your Questions 16 (2004).

114. *Id.* at 36.

conflict"[115] and the ICTR was similarly authorized to try "serious violations of international humanitarian law,"[116] both IHL and IHRL are relevant for the ICTY and ICTR. Rape is considered a crime under both IHRL and IHL,[117] and has been addressed and significantly developed through international jurisprudence in the ICTY and the ICTR.[118] The ICC's attempted prosecution of players involved in the situation in Darfur[119] offers a case study of the potential opportunities for the use of intersectionality in international adjudication. Unlike the decisions handed down from earlier ethnic conflicts, the ICC cases from the situation in Darfur have the potential to recognize the intersectional identities of rape victims—women who, because of the conflict, were targeted based on their sex and ethnicity. Although the ICTs differ from the ICC in structure and creation, these tribunals may be used as a reference point from which to compare ICC jurisprudence. This comparison is followed by a brief mention of possible remedies through the ICC and an analysis of the role intersectionality can play in awarding these remedies.

### *A. The Creation of the ICTY and ICTR*

The ICTY and ICTR were created following significant conflicts in the former Yugoslavia[120] and Rwanda,[121] respectively. By the end of the conflict

115. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Annex, art. 5, U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute]; *see also* Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-international Armed Conflicts*, 91 Int'l Rev. Red Cross 35, 38 (2009); Jan Willms, *Without Order, Anything Goes? The Prohibition of Forced Displacement in Non-International Armed Conflict*, 91 Int'l Rev. Red Cross 547, 556 (2009).

116. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

117. REDRESS, Time for Change: Reforming Sudan's Legislation on Rape and Sexual Violence 14–20 (2008).

118. *See generally* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 596–98 (Sept. 2, 1998); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 165–71 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998). Feminist organizational style and capacity was instrumental in the evolution of the ICTs. *See* Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 Mich. J. Int'l L. 1, 6 (2008) ("Though feminism is uniformly experienced by feminists as a highly contentious field, perhaps even defined by its inability to reach consensus, [Governance Feminism] working on sexual violence in IHL and [international criminal law] in the 1990s, especially the part of it that worked on the big tribunal-establishing statutes, was nearly consolidated in its feminist ideology and in its goals.").

119. *See* Prosecutor v. Harun, Case No. ICC-02/05-01/07; Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09; Prosecutor v. Hussein, Case No. ICC-02/05-01/12. Ahmad Harun, Ali Kushayb, Omar Al-Bashir, and Abdel Hussein are still at large. *Situation in Darfur, Sudan*, Int'l Criminal Court, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx, *archived at* http://perma.law.harvard.edu/0U99mMsoF9U/.

120. *The Conflicts*, Int'l Crim. Tribunal for the Former Yugoslavia, http://www.icty.org/sid/322 (Mar. 2, 2014), *archived at* http://perma.law.harvard.edu/0keh3A6T2LP [hereinafter *The Conflicts*] (explaining that before its internal conflicts, the Socialist Federal Republic of Yugoslavia was composed of six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia). The conflicts across the former Yugoslavia were not uniform, with significant violence taking place in Bosnia and Herzegovina. Bosnia and Herzegovina was composed of approximately forty-three percent Bos-

in the former Yugoslavia, over one hundred thousand people had been killed and two million more were displaced.[122] In February 1993, the UN Security Council ("UNSC") Resolution 808 created the ICTY and classified the events in the former Yugoslavia as ethnic cleansing,[123] defined as "rendering an area ethnically homogenous by using force or intimidation to remove from a given area persons of another ethnic or religious group."[124] These ethnic conflicts not only resulted in murder and displacement but also in targeted rapes.[125] A report published soon after the creation of the ICTY estimated that one hundred nineteen thousand women were raped.[126] In their 2007 publication on sexual violence during times of conflict, Bastick, Grimm, and Kunz describe the sexual violence during the conflict in the former Yugoslavia:

> During the conflicts in the former Yugoslavia, sexual violence was used to terrorise and displace populations as part of a campaign of "ethnic cleansing". It took seemingly new forms, with women and girls abducted into "rape camps", where they were raped repeatedly until they became pregnant, and held to ensure they delivered a child born of rape; or held in domestic and sexual slavery for extended periods. . . . In some instances, men were victimised, even murdered, when they refused to commit sexual violence.[127]

The sexual violence in the former Yugoslavia was unprecedented in its cruelty and fueled the ethnic cleansing taking place in the region.[128]

The ICTR was created less than two years after the ICTY, in November 1994.[129] Unlike the ICTY, the ICTR was developed at the request of the

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nian Muslims, thirty-three percent Bosnian Serbs, and seventeen percent Bosnian Croats—diversity created through several foreign occupations and shifts in power. *Bosnia and Herzegovina: Torture & Ethnic Cleansing in the Bosnian War*, The Center for Justice & Accountability, http://www.cja.org/article.php?id=247 (Mar. 2, 2014), *archived at* http://perma.law.harvard.edu/0VfDrdE4W6u.

121. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

122. *The Conflicts*, *supra* note 20.

123. S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

124. U.N. Comm'n of Experts Established Pursuant to Sec. Council Resolution 780, Final Rep. of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, 33 (May 27, 1994).

125. *See* Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 Am. J. Int'l L. 778, 781 (2005) ("This apparent commitment to prosecuting rape under the Tribunal has been realized in practice. Twenty percent of all charges brought before the ICTY have involved allegations of sexual assault, and three cases have focused specifically on rape."); Andrew Osborn, *Mass Rape Ruled a War Crime*, The Guardian (Feb. 22, 2001, 9:01 PM), http://www.theguardian.com/world/2001/feb/23/warcrimes, *archived at* http://perma.law.harvard.edu/03bwKY7sp3S.

126. Shana Swiss & Joan E. Giller, *Rape as a Crime of War*, 270 J. Am. Med. Ass'n 612, 613 (1993).

127. Megan Bastick et al., Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector 113 (2007).

128. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l L. 288, 305 (2003).

129. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994). Unlike the conflict in the former Yugoslavia, the tensions leading up to the outbreak of violence in Rwanda were fueled by a legacy of

government of Rwanda.[130] As in the former Yugoslavia, the conflict in Rwanda involved ethnic conflict—in this case, between two major ethnic groups, the Hutus and the Tutsis.[131] As the mass murder took place, the military, police, *Interahamwe* militia, and ordinary civilians also committed sexual violence:

> Rape was widespread, and was seemingly an integral part of the genocide strategy, supervised by military and political authorities. Forms of sexual violence included rape, gang-rape, the introduction of objects into women's vaginas and pelvic area, sexual slavery, forced incest, deliberate HIV transmission, forced impregnation and genital mutilation.[132]

As with the ICTY before it, the ICTR was not only faced with genocide but also with an unprecedented occurrence of rape. In these conflicts, most of the raped women were targeted based on their ethnicity,[133] and thus the victims were chosen both because of their gender as well as their ethnicity. For these women, rape was not a random occurrence but part of the systematic destruction of their ethnic group.[134] Rwanda and the former Yugoslavia are not unique; in many recent armed conflicts, civilians have become victims during the course of sexual violence by opposing sides.[135]

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colonialism. Peter Uvin, *Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence*, 31 Comp. Pol. 253, 255–56 (1999). Before the 1994 genocide, there were a number of internal conflicts between the Hutus and Tutsis, most of which revolved around the animosity generated throughout German and Belgian colonial rule. Rwanda: A Brief History of the Country, U.N. Outreach Programme on the Rwanda Genocide and the United Nations, http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml, *archived at* http://perma.law.harvard.edu/0oFmxsc6yZ1. For more information about the history of colonialism and ethnic conflict in Rwanda, see generally Mahmood Mamdani, When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda (2002).

130. Permanent Rep. of Rwanda to the U.N., *Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/1994/1115, at 4 (Sept. 29, 1994).

131. Bastick et al., *supra* note 127, at 55.

132. *Id.* at 55.

133. Anne-Marie L.M. de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR 76, 167 (2005).

134. Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 Eur. J. Int'l L. 326, 328 (1994) ("Radhika Coomaraswamy has identified a number of reasons for sexual violence against women, two of which are especially applicable to rape in armed conflict: violence against women may be directed toward the social group of which she is a member because 'to rape a woman is to humiliate her community'." (citing Radhika Coomaraswamy, *Of Kali Born: Violence and the Law in Sri Lanka*, *in* Freedom from Violence: Women's Strategies from Around the World 47, 49 (M. Schuler ed., 1992))).

135. For more information about sexual violence during armed conflicts, see Victims, Perpetrators or Actors?: Gender, Armed Conflict and Political Violence (Caroline O.N. Moser & Fiona Clark eds., 2001); Bastick et al., *supra* note 127.

### *B. The Impact of the ICTs on the Prosecution of Rape as an International Crime*

Judgments by both the ICTR and ICTY provide us with context for how rape perpetrated against female ethnic minorities has been treated internationally. Statutorily, the ICTR, ICTY, and ICC treat rape similarly—rape is criminalized as a crime against humanity under Article 5(g) of the ICTY Statute,[136] Article 3(g) of the ICTR Statute,[137] and Article 7 of the Rome Statute,[138] and as a war crime under Article 8 of the Rome Statute.[139] For a long time, rape had been considered a mere violation of honor against the victim and her family.[140] During World War I and World War II, rape was considered a minimal crime.[141] Even without the judgments of the ICTY and the ICTR, the statutes of both tribunals would already improve the traditional approach to rape. But the process of adjudication has gone further, providing a forum for the victims of these atrocities to voice their individual experiences. This has allowed for women's individual personhood to be better reflected, instead of the objectification that comes from viewing women solely in terms of their family's honor. Through trial and conviction, the wrongs they faced have been treated as harms unique to them rather than as expected side effects of conflict.

In the ICTR, the most prominent judgment on rape is *Prosecutor v. Akayesu*.[142] Although there are numerous cases that involve charges of rape and sexually violent crimes,[143] the most notable is *Akayesu*. *Akayesu* provides the broadest definition of rape and sexual violence,[144] and is the first

136. ICTY Statute, *supra* note 115, art. 5(g).

137. ICTR Statute, Annex, art. 3(g).

138. Rome Statute, *supra* note 3, art. 7.

139. *Id.* art. 8(2)(b)(xxii).

140. Askin, *supra* note 128, at 300–04.

141. Doris Buss, *Sexual Violence, Ethnicity, and Intersectionality in International Criminal Law*, *in* INTERSECTIONALITY AND BEYOND, *supra* note 16, at 105–6, 108 ("The subsequent decisions from the Rwanda and Yugoslav tribunals have gone a long way in establishing rape as a serious crime, condemned by the international community and attracting heavy penalties for the perpetrators.").

142. Case No. ICTR-96-4-A, Judgment (June 1, 2001).

143. *E.g.* Prosecutor v. Semanza, Case No. ICTR-97-20, Judgment (May 15, 2003); Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-01-64, Appeals Chamber Judgment (July 7, 2006); Prosecutor v. Musema, Case No. ICTR-96-13, Judgment (Jan 27, 2000); Prosecutor v. Bagosora, Case No. ICTR 96-7, ICTR-98-41, Judgment and Sentence (Dec. 18, 2008); Prosecutor v. Nyiramasuhuko, Case No. ICTR 97-21; Prosecutor v. Ndindiliyimana, Case No. ICTR-00-56, Judgment and Sentence (June 24, 2011); Prosecutor v. Bizimungu, Case No. ICTR-99-45, Judgment and Sentence (Sept. 30, 2011); Prosecutor v. Simba, Case No. ICTR-01-76, Judgment and Sentence (Dec. 13, 2006); Prosecutor v. Gatete, Case No. ICTR-00-61, Judgment and Sentence (Mar. 31, 2011); Prosecutor v. Muvunyi, Case No. ICTR-00-55, Judgment (Feb. 11, 2010).

144. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Amended Indictment, ¶ 10A (June 17, 1997) ("In this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity."); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Sept. 2, 1998) ("The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual

international law case to hold that rape constitutes a violation of the Geneva Conventions as a crime against humanity.[145] The rape and sexual violence cases that followed *Akayesu* adopted its analysis and its application of rape as a crime against humanity.[146]

Jean-Paul Akayesu was the *bourgmestre* of Taba Commune—that is, he was "charged with the performance of executive functions and the maintenance of public order" within Taba Commune, which included having "exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune."[147]

On February 13, 1996, Akayesu was indicted by the ICTR Prosecutor on twelve counts, including genocide, incitement to commit genocide, crimes against humanity, and violations of Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II.[148] In June 1997, the Prosecutor submitted an amended indictment that included three new counts of rape and other forms of sexual violence as crimes against humanity.[149] The indictment charged Akayesu with encouraging and facilitating acts of sexual violence by virtue of his presence during instances of sexual violence and by knowing of, yet failing to prevent, other instances from taking place.[150]

In *Akayesu*, the ICTR became the first international tribunal to find that acts of rape and sexual violence could amount to genocide—namely, that they "constitute genocide in the same way as any other act as long as they were committed with specific intent to destroy, in whole or in part, a particular group, targeted as such."[151] The Chamber determined that the sexual violence in Taba was "an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole,"[152] and

violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.").

145. *See Landmark Cases*, Int'l Criminal Tribunal for the Former Yugoslavia, http://www.icty.org/sid/10314, *archived at* http://perma.law.harvard.edu/0w3UVTBmyri (explaining how cases in the ICTY followed precedent set in *Akayesu*); *When Rape Becomes Genocide*, N.Y. Times (Sept. 5, 1998), *available at* http://www.nytimes.com/1998/09/05/opinion/when-rape-becomes-genocide.html ("The guilty verdict the war crimes tribunal for Rwanda pronounced on Jean-Paul Akayesu this week marked the first judgment for the crime of genocide under international law. In making rape part of Mr. Akayesu's genocide conviction, the decision also advances the world's legal treatment of rape and sexual violence.").

146. *See infra* notes 162–73 and accompanying text.

147. *Akayesu*, Case No. ICTR-96-4-T, ¶ 56.

148. *Id.* ¶ 10.

149. *Akayesu*, Case No. ICTR-96-4-I, Amended Indictment.

150. *Id.* ¶ 12B. These instances of sexual violence took place between April 7 and the end of June 1994 when hundreds of primarily Tutsi civilians fled to Akayesu's commune for refuge. *Id.* ¶ 12A. While seeking refuge, many of the displaced were murdered either in the *bureau communal* or near the premises. *Id.* Along with these murders, many of the women were "forced to endure multiple acts of sexual violence which were at times committed by more than one assailant." *Id.* The women seeking refuge "live[d] in constant fear and their physical and psychological health deteriorated as a result of the sexual violence, beatings and killings." *Id.*

151. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998).

152. *Id.*

that it constituted "destruction of the spirit, of the will to live, and of life itself."[153] With this, the Chamber recognized that the Tutsi women faced a unique kind of violation during the genocide due to the intersection of their sex and ethnicity. The Chamber found that Akayesu was sufficiently connected to the acts of sexual violence to meet the intent requirement because "the crime of direct and public incitement to commit genocide"[154]—for which it had already found Akayesu liable[155]—"lies in the intent to directly lead or provoke another to commit genocide, which implies that he who incites to commit genocide also has the specific intent to commit genocide."[156] The Chamber thus held that these acts constituted genocide and found Akayesu to be individually responsible based on an inference of genocidal intention from his incitement to commit genocide.[157] Because *Akayesu* was the first international law case in which a person was convicted of rape and sexual violence that amounted to genocide,[158] it laid the groundwork for the criminalization of sexual violence as a means of committing other crimes, as seen in the ICTY.

Although a number of prominent ICTY cases discuss rape as a crime against humanity,[159] this Note will focus on *Prosecutor v. Furundžija*[160] and *Prosecutor v. Kunarac*,[161] as both adopt an interpretation of rape from both the *Akayesu* decision and other sources of international law, solidifying the standard of rape as genocide and a crime against humanity.

In *Furundžija*, Anto Furundžija was ultimately charged with two counts of violations of the laws or customs of war: torture and outrages upon personal dignity, including rape.[162] In the Trial Chamber, the Tribunal began by considering the definition of rape in *Akayesu*.[163] However, instead of using the definition from the ICTR wholesale, the Trial Chamber looked to other jurisdictions and established their own "objective elements of rape":

i. The sexual penetration, however slight:

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153. *Id.* ¶ 732.

154. *Id.* ¶ 729.

155. *Id.* ¶ 672.

156. *Id.* ¶ 729.

157. *Id.* ¶¶ 728–29, 734. The Chamber also found that "in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women." *Id.* ¶ 733.

158. Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 New Eng. J. Int'l & Comp. L. 135, 137 (2005).

159. *E.g.* Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgment in Sentencing Appeals (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000); Prosecutor v. Mucić, Case No. IT-96-21-A*bis*, Judgment on Sentence Appeal (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2003); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

160. Case No. IT-95-17/1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

161. Case Nos. IT-96-23 & IT-96-23/1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

162. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 38 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

163. *Id.* ¶ 176.

a. Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
b. Of the mouth of the victim by the penis of the perpetrator;

ii. By coercion or force or threat of force against the victim or a third person.[164]

Importantly, the Trial Chamber also stated, "rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war or an act of genocide, if the requisite elements are met, and may be prosecuted accordingly."[165] Taken in conjunction with the *Akayesu* decision, the *Furundžija* decision solidified the grave nature of rape during armed conflict. This standard was again broadened in *Kunarac*.

In *Kunarac*, Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic were accused of 25 counts of rape, torture, plunder, enslavement, and outrages upon personal dignity.[166] During the siege of the city of Foča, Bosnia and Herzegovina, between April and July 1992, Muslim and Croat inhabitants of Foča and surrounding villages were arrested. In the process, "many civilians were killed, beaten or subjected to sexual assault."[167] In the Foča Kazneno-popravni Dom, a large prison facility, and in the Partizan Sports Hall, Muslim women were detained and subject to beatings and sexual assaults.[168]

In the Trial Chamber, the defendants were charged with rape as both a crime against humanity and a violation of the laws or customs of war, in violation of Articles 5(g) and 3 of the Geneva Conventions, respectively.[169] The Trial Chamber looked to statutes and precedents from the ICTR and ICTY for "the specific elements of the crime of rape."[170] Finding that the definition utilized in *Furundžija* was too narrow,[171] the Trial Chamber defined rape as a situation where:

i. The sexual activity is accompanied by force or threat of force to the victim or a third party;
ii. The sexual activity is accompanied by force *or* a variety of other specific circumstances which made the victim particu-

164. *Id.* ¶ 185.
165. *Id.* ¶ 172.
166. Prosecutor v. Kunarac, IT-96-23, Amended Indictment (Aug. 27, 1999), *available at* http://www.icty.org/x/cases/kunarac/ind/en/kun-2ai990906e.pdf, *archived at* http://perma.cc/5F3J-YANM.
167. *Id.* ¶¶ 1.1–1.2.
168. *Id.* ¶ 1.3.
169. Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 4, 9, 10 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).
170. *Id.* ¶ 437.
171. *Id.* ¶ 438 ("In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundžija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim which . . . is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.").

larly vulnerable or negated her ability to make an informed refusal; or

iii. The sexual activity occurs without the consent of the victim.[172]

By broadening the definition of rape in *Kunarac*, the ICTY Trial Chamber reinforced the categorization of rape as a crime against humanity. This enhanced definition not only criminalized non-consensual sexual activity, it also recognized the importance of outside circumstances that could negate a person's ability to consent. Recognizing situational violence and vulnerability is especially important in armed conflicts where specific groups are targeted based on race, ethnicity, or religion.

Along with the expanded definition of rape, the Trial Chamber recognized the importance of the religious and ethnic differences between Kunarac and his victims. The Trial Chamber stated, "[Kunarac] acted intentionally and with the aim of discriminating between the members of his ethnic group and the Muslims, in particular its women and girls."[173] Additionally, discrimination did not have to be the end goal of Kunarac's actions: the Trial Chamber acknowledged, "it is enough that it forms a substantial part of his *mens rea*."[174] Importantly, this distinction was upheld by the Appeals Chamber: "The Appeals Chamber concurs with the findings of the Trial Chamber that the Appellants did intend to act in such a way as to cause severe pain or suffering, whether physical or mental, to their victims, in pursuance of one of the purposes prohibited by the definition of the crime of torture, in particular the purpose of discrimination."[175]

In addition to expanding the definition of rape, the *Kunarac* Trial Chamber included the act of sexual enslavement as a crime against humanity. The Trial Chamber recognized that enslavement included "the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent."[176] The Trial Chamber went on to state that "further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service . . . involving physical hardship; sex; prostitution; and human trafficking."[177] The inclusion of sexual enslavement in the judgment indicates a shift in the seriousness of sexual violence as an international crime. Additionally, by stating that sexually enslaved persons lack free will or consent, the women targeted throughout the conflict in the former Yugoslavia were given another route to the Tribu-

172. *Id.* ¶ 442.
173. *Id.* ¶ 654.
174. *Id.*
175. Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 153 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).
176. *Id.* ¶ 542.
177. *Id.*

nal. The Trial Chamber of the ICTY set and bridged two significant standards by recognizing the absence of consent inherent in enslavement in addition to stating that sexual activity without consent qualifies as rape. These standards remain relevant for international tribunals hearing cases dealing with rape as a tool of genocide, war crimes, and crimes against humanity.

Other landmark cases in the ICTY broadened the laws on rape in the context of conflict, beyond the connection between rape and ethnic cleansing and genocide.[178] More recently, the UNSC passed a resolution relating to the use of rape during armed conflict.[179] In this Resolution, the UNSC

> *Notes* that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, *stresses the need for* the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and *calls upon* Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and *stresses* the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation . . . .[180]

This resolution acknowledges the need to recognize rape as a serious offense during times of conflict, reflecting the developments of international case law highlighted above.

The developments within the ICTs around the prosecution of rape as a form of genocide and as a crime against humanity demonstrate significant progress in prosecuting human rights and humanitarian law violations. These developments are especially important for women within minority groups that are targeted during armed conflicts. The firm recognition of rape as a form of genocide and the link between sexual violence and ethnicity within the ICTs provides a new avenue to justice for women who are ethnic minorities. This avenue is especially needed given the situation in Darfur before the ICC.

178. *Landmark Cases*, *supra* note 145. *See generally* Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgment in Sentencing Appeals (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000) (first ICT case to try the crime of rape); Prosecutor v. Mucić, Case No. IT-96-21-A*bis*, Judgment on Sentence Appeal (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2003) (first ICT case to recognize rape as a form of torture).

179. S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008).

180. *Id.* ¶ 4.

### *C. Case Study: Rape During the Conflict in Darfur*

Currently, twenty-one cases in nine situations have been brought before the ICC.[181] Of those situations, proceedings have begun in seven: Uganda; the Democratic Republic of the Congo ("DRC"); Darfur, Sudan; the Central African Republic; the Republic of Kenya; Libya; and Côte d'Ivoire.[182] To date, there are two situations where women within specific ethnicities were targeted for rape: Darfur, Sudan[183] and the Democratic Republic of the Congo.[184]

Like the conflicts in the former Yugoslavia and Rwanda, the situations in the DRC and Darfur arise from armed conflicts involving acts of targeted sexual violence.[185] Unlike the earlier conflicts, the situations in Darfur and the DRC are being adjudicated in the ICC. While the ICC is not bound by the precedent of other ICTs, there is a "growing expectation, in the field of international criminal adjudication, that such courts and tribunals ought to take express account of relevant external judicial decisions."[186] The ICC should follow the judgments in the ICTY and ICTR and, in addition to recognizing rape as a crime against humanity[187] and war crime,[188] recognize sexual violence as a tool of genocide when women of particular ethnicities, religious groups, or other minority designation are targeted during the commission of armed conflicts—such as the situations in the DRC and

181. *Situations and Cases*, Int'l Criminal Court, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx, *archived at* https://perma.cc/EM5L-FXRR.

182. *Id.*

183. *See, e.g.*, Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 7–8 (Mar. 4, 2009) [hereinafter Al-Bashir Warrant]; Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 6, 8 (July 12, 2010) [hereinafter Second Al-Bashir Warrant].

184. *See, e.g.*, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application under Article 58, ¶ 17 (July 13, 2012) [hereinafter Amended Ntaganda Warrant]. Because no other situation exhibits the level of ethnic targeting present in the situation in Darfur, it will serve as the comparative case in this Note. However, at the time of this writing, there are ongoing investigations in situations in Mali and the Central African Republic, as well as preliminary examinations in Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea, and Nigeria. *See Preliminary Examinations*, Int'l Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx, *archived at* https://perma.cc/K57F-MBMQ. Intersectional identities may factor in these situations.

185. *See* sources *supra* note 183; Amended Ntaganda Warrant, *supra* note 183.

186. Aldo Zammit Borda, *Precedent in International Criminal Courts and Tribunals*, 2 Cambridge J. Int'l & Comp. L. 287, 290 (2013) (testing the theory of precedent by examining judgments of the ICTY, ICTR, Special Court for Sierra Leone, Extraordinary Chambers in the Courts of Cambodia, and ICC).

187. Rome Statute, *supra* note 3, art. 7(1)(g) (recognizing as crimes against humanity "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other forms of sexual violence of comparable gravity").

188. *Id.* art. 8(2)(b)(xxii) (recognizing as war crimes "rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other forms of sexual violence also constituting a grave breach of the Geneva Conventions").

Darfur.[189] By utilizing this established framework, the ICC has the opportunity to make greater headway in the recognition of intersectional identities. Furthermore, using intersectionality when awarding reparations to survivors targeted based on multiple identity categories could enable optimally customized remedies.

### 1. *The ICTY, ICTR, and ICC's Situations in the DRC and Darfur*

Between February 2003[190] and August 2009,[191] a conflict in Darfur raged. This conflict was primarily between the government of Sudan and two rebel groups, the Sudanese Liberation Army and the Justice and Equality Movement.[192] The rebel groups protested the favoritism shown to Arab people and discrimination against Black Africans within the region.[193] During the course of this conflict, the Sudanese government backed the Janjaweed militias,[194] which enacted a "scorched earth" campaign involving looting, raping, and burning villages and farmland.[195] The United Nations reported that more than three hundred thousand people died as a result of the conflict,[196] whereas the Sudanese government estimated this number to be ten thousand.[197] The crimes committed in Darfur have sparked international outrage and intervention, with the African Union sending peacekeepers to the region[198] and the UNSC voting to refer the situation to the ICC Prosecutor.[199]

From August 1998 through July 2003, the DRC was embroiled in a devastating war that involved Angola, Namibia, Zimbabwe, Uganda, and Rwanda.[200] Following the war, there have been significant conflicts throughout the DRC between different ethnic groups, which have led to

189. The Rome Statute states that "'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: . . . causing serious bodily or mental harm to members of the group." Rome Statute, *supra* note 3, art. 6(b). As discussed below, the violence committed against women within specific ethnic groups in the DRC and Darfur very clearly fall within this description.

190. *Sudan Human Rights*, Amnesty Int'l, http://www.amnestyusa.org/our-work/countries/africa/sudan, *archived at* http://www.perma.cc/0GN7yJgtn7k.

191. *War in Sudan's Darfur 'Is Over'*, BBC News (Aug. 27, 2009), http://news.bbc.co.uk/2/hi/africa/8224424.stm, *archived at* http://www.perma.cc/02jK8aqN3Pf.

192. *Id.*; *Heart of Darfur: Guide to Factions and Forces*, PBS (July 1, 2008), http://www.pbs.org/wnet/wideangle/episodes/heart-of-darfur/guide-to-factions-and-forces/299/#rebels, *archived at* http://www.perma.cc/08ZD8upUpKh.

193. *War in Sudan's Darfur 'Is Over'*, *supra* note 191.

194. *Sudan Human Rights*, *supra* note 190.

195. *Heart of Darfur: History of Sudan*, PBS (July 1, 2008), http://www.pbs.org/wnet/wideangle/episodes/heart-of-darfur/history-of-sudan/582/, *archived at* http://www.perma.cc/0LJiZDVEjgY.

196. *War in Sudan's Darfur 'Is Over'*, *supra* note 191.

197. *Id.*

198. *Id.*

199. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (specifying that the ICC was to prosecute humanitarian and human rights violations in Darfur for crimes beginning in July 2002).

200. *See Congo: The First and Second Wars, 1996-2003*, Enough Project (Nov. 29, 2001), http://www.enoughproject.org/blogs/congo-first-and-second-wars-1996-2003, *archived at* http://perma.cc/U6YM-GGX4.

widespread murder, rape, and displacement at the hands of both the army and militias.[201] There were an estimated 3.8 million deaths between August 1998 and April 2004[202] and 450,000 people remain refugees as of 2014.[203] In 2002, the DRC ratified the Rome Statute, accepting the jurisdiction of the ICC.[204] The government of the DRC formally referred the situation to the ICC on April 19, 2004.[205]

Like *Akayesu*, *Kunarac*, and *Furundžija*, the cases discussed in this section involve men who have been accused of using rape as a means of perpetrating crimes against humanity, war crimes, and genocide—crimes in which both gender and ethnicity were used as factors to target victims and that therefore demand intersectional consideration. Between August 2002 and May 2003, the Union of Patriotic Forces for the Liberation of the Congo (*Union des Forces Patriotiques pour la Liberation du Congo*) under Bosco Ntaganda perpetrated a widespread and systematic attack on non-Hema civilians in the Ituri Province.[206] In *Prosecutor v. Bosco Ntaganda*, the ICC Prosecutor ultimately brought four counts of war crimes[207] and three counts of crimes against humanity,[208] including charges of rape and sexual slavery, under both categories. In addition, Ntaganda faced charges of persecution on ethnic grounds as a crime against humanity.[209] In June 2014, Ntaganda was indicted for the aforementioned crimes.[210]

The charges brought under the Situation in Darfur include similar sexual violence as well as charges of genocide. In *Prosecutor v. Harun*, the ICC Prosecutor issued a warrant in April 2007 for the arrest of Ahmad Harun and Ali Kushayb, charging them with, *inter alia*, six counts of crimes against

201. *Democratic Republic of Congo Profile*, BBC (Sept. 16, 2004), http://www.bbc.com/news/world-africa-13283212, *archived at* http://perma.cc/BVZ9-W7RR.

202. Int'l Rescue Comm. & Burnet Inst., Mortality in the Democratic Republic of the Congo: Results from a Nationwide Survey iii (2004).

203. 2014 UNHCR Country Operations Profile—Democratic Republic of the Congo: Overview, U.N. High Comm'r for Refugees, *available at* http://www.unhcr.org/pages/49e45c366.html, *archived at* http://perma.cc/DG95-K4CP.

204. *Cases & Situations: Democratic Republic of Congo*, Coalition for the Int'l Criminal Court, http://www.iccnow.org/?mod=drc.

205. *Id.*

206. *Id.* ¶ 12.

207. Amended Ntaganda Warrant, *supra* note 185, ¶ 44.

208. *Id.* ¶ 17. In *Prosecutor v. Mathieu Ngudjolo Chui*, the ICC Prosecutor brought three charges of crimes against humanity and seven charges of war crimes, both including charges of rape. Chui is also accused of sexual slavery as a war crime. Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12, Warrant of Arrest for Mathieu Ngudjolo Chui, 6 (July 6, 2007). Through the commission of these crimes, the Prosecutor alleged that Chui targeted Hema people in Ituri. *Id.* at 4. Chui was acquitted, Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, 197 (Dec. 18, 2012), and the Office of the Prosecutor has appealed the verdict, *The Prosecutor v. Mathieu Ngudjolo Chui*, Int'l Criminal Court, *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/ICC-01-04-02-12/Pages/default.aspx, *archived at* http://perma.cc/2LGH-GY3N.

209. Amended Ntaganda Warrant, *supra* note 185, ¶ 17.

210. Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, ¶ 97 (Jun. 9, 2014) [hereinafter Decision on the Charges].

humanity and war crimes involving rape against primarily Fur women and girls, occurring in the towns of Bindisi and Arawala.[211] In *Prosecutor v. Al Bashir*, the Prosecutor charged President Omar Al-Bashir with criminal responsibility as an indirect perpetrator or indirect co-perpetrator in the rape of Fur, Masalit, and Zaghawa women as a crime against humanity[212] and genocide.[213] In *Prosecutor v. Hussein*, the Prosecutor sought the arrest of Abdel Hussein, the current Minister of Defense of Sudan, for indirectly co-perpetrating war crimes and crimes against humanity.[214] In both *Hussein* and *Al Bashir*, the charges reflect the defendants' prominent positions within the Sudanese government, positions that made them complicit even without having directly participated in the charged rapes,[215] similar to how there was no evidence of direct involvement in rape cases before the ICTY and ICTR.

As a preliminary matter, the ICTR and ICTY identified the protected groups—Bosnian Muslims in *Furundžija*,[216] and *Kunarac*[217] and Tutsis in *Akayesu*[218]—since the crimes at issue were ones targeting victims on the basis of group identity. In the warrants for Harun,[219] Kushayb,[220] Hussein,[221] and Al-Bashir,[222] the ICC mentions the Fur, Masalit, and Zaghawa as the targeted victims. Although the Fur have the greatest population within Darfur of the three targeted ethnic groups,[223] and thus are not a minority group, Fur women and girls were targeted based on their ethnicity, making them a protected group.

Following identification of the protected group, the ICTR and ICTY looked to the evidence presented in each case to satisfy the elements of the

211. Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, 8–9, 13–14 (Apr. 27, 2007) [hereinafter Harun Warrant]; Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, 8–9, 14–15 (Apr. 27, 2007) [hereinafter Kushayb Warrant].

212. Al-Bashir Warrant, *supra* note 183.

213. Second Al-Bashir Warrant, *supra* note 183.

214. Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Warrant of Arrest for Abdel Raheem Muhammad Hussein, 9 (Mar. 1, 2012) [hereinafter Hussein Warrant].

215. *See also* Rome Statute, *supra* note 3, art. 28 (addressing command responsibility for crimes committed by forces under "effective command and control"). For cases setting precedents for effective control, see generally Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgment in Sentencing Appeals (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000).

216. Prosecutor v. Furundžija, Case No. IT-95-17/1-T Judgment, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

217. Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-T, Judgment, ¶ 654 (Int'l Crim. Trib. for the Former Yugoslavia February 22, 2001).

218. Prosecutor v. Akayesu, Amended Indictment, Case No. ICTR-96-4-I, ¶¶ 12, 12A (June 17, 1997).

219. Harun Warrant, *supra* note 211, at 3–4.

220. Kushayb Warrant, *supra* note 211, at 3–4.

221. Hussein Warrant, *supra* note 214, at 5.

222. Al-Bashir Warrant, *supra* note 183, at 4–5; Second Al-Bashir Warrant, *supra* note 183, at 5–8.

223. "Darfur" translates to "homeland of the Fur." *Cultural Survival, A Closer Look: Sudan*, Cultural Survival, http://www.culturalsurvival.org/publications/cultural-survival-quarterly/sudan/closer-look-sudanbrthe-peoples-darfur, *archived at* http://perma.law.harvard.edu/0RxezD97qye.

crimes charged.[224] In *Furundžija*, *Kunarac*, and *Akayesu*, the evidence presented and testimony of survivors convinced the Trial Chamber of the guilt of the accused.[225] Given the documentation of the violations across Darfur during the six-year conflict, the Trial Chamber may also have sufficient evidence at its review to follow the ICTR and ICTY and find Harun, Kushayb, Al-Bashir, and Hussein guilty of rape as a crime against humanity, war crime, or form of genocide. In doing so, the Chamber could directly address intersectionality by considering rape as a unique crime that encompasses more than just the manifestation of rape as part of ethnic discrimination. However, given the pretrial status of these three cases at the time of this writing, there is no guarantee of the Trial Chamber's decision.

Following the ICTY and ICTR cases involving targeted rapes of women within certain ethnicities, a number of scholars have discussed how rape has been conceptualized in international criminal law. Doris Buss notes how "rape as a weapon of war" is conceptualized as an act "instrumental to, rather than a mere byproduct of, armed conflict."[226] However, according to Buss, this view of rape could make it more difficult to inquire "*why* the rapes happened" and "*how* the rapes may have been connected to various social relations and structures that pre-dated the genocide."[227] Buss proposes that presenting rape as a dichotomy of ethnicized, gendered violence reduces the identities of victims and treats the act of rape as uniform throughout the conflict when the reality is much more complex.[228] For example, rape as an act of genocide does not consider rape of those who fall outside of the protected group.[229] Given this interpretation of rape as an act of genocide, applying the previous analyses from the ICTR and ICTY could lead the ICC to recognize violations against Fur women because the Fur were largely experiencing targeted rape, but exclude women who are not Fur who were raped as a result of the conflict.

Alternatively, the ICC Trial Chamber could consider acts of sexual violence during the course of genocide as a tool of genocide, a war crime, or a

224. *See generally* Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. IT/32/Rev. 49 (Feb. 11, 1994), *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf, *archived at* http://perma.cc/PPZ6-JKMR [hereinafter ICTY Rules of Procedure and Evidence]; Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, U.N. Doc. ITR/3/Rev.1 (June 29, 1995), *available at* http://www.unictr.org/Portals/0/English/Legal/Evidance/English/130410amended%206_26.pdf, *archived at* http://perma.cc/RUN2-FSNR [hereinafter ICTR Rules of Procedure and Evidence].

225. *See generally* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

226. Doris E. Buss, *Rethinking "Rape as a Weapon of War"*, 17 Feminist Legal Stud. 145, 148 (2009).

227. *Id.*

228. *Id.* at 155–59 (providing two examples of rape impacting women outside of this dichotomy, stressing that these women experienced sexual violence not because of their ethnicities, but because of the ethnic conflict taking place around them).

229. *Id.* at 159.

crime against humanity. This expanded view would include acts of sexual violence that are reasonably linked to the act of genocide taking place within the conflict. Instead of only focusing on the gender and ethnicity of the rape victim, under this approach, the Chamber would also consider whether the sexual violence was committed in the course of perpetrating, inciting, or following genocide in the region.

By considering sexual violence to be a crime against humanity or war crime in addition to genocide, the ICC Trial Chamber can avoid the limitations Buss described. In this way, one may consider sexual violence a war crime or crime against humanity where it is committed at least in part on the basis of ethnicity, as opposed to only recognizing rape and sexual assault perpetrated as part of a genocide campaign against women within a certain ethnicity. This broader definition could ensure that more women are represented and protected against acts of sexual violence that take place during the course of genocide, but should not be used to the exclusion of a definition that does consider both gender and ethnicity. The ICC Prosecutor can easily prosecute Ntaganda, Harun, Kushayb, Al-Bashir, and Hussein for rape as a crime against humanity[230] and a war crime,[231] but should ensure that the discriminatory aim of these actions is recognized. In this way, the ICC can follow the example of *Kunarac*, which recognized that rape committed on the basis of ethnicity may be a crime against humanity.[232] Without both definitions, the limits of class definition seen in *DeGraffenreid*, *Moore*, and *Payne* may develop.

### 2. *Remedies in the ICC: One Forum for Trial and Reparations*

Although the advances in the ICTY and ICTR set a precedent for intersectionality in international courts, there is a greater opportunity for remedies in the ICC than in the other ICTs. In the ICTY and ICTR, there are no options for reparations to the victims of the crimes.[233] Instead, the victim,

230. Rome Statute, *supra* note 3, art. 7(1)(g).

231. *Id.* art. 8(2)(b)(xxii).

232. Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 153 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

233. Christine Evans, The Right to Reparation in International Law for Victims of Armed Conflict 91 (2012) ("There is no direct reference to reparations in the Statutes other than restitution. The Tribunals have no faculty to award compensation, but may decide on cases relating to restitution. Article 24(3) of the Statute of the ICTY (mirrored by Article 23(3) of the Statute of the ICTR) reads: 'in addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner.'"); Conor McCarthy, Reparations and Victim Support in the International Criminal Court 46–47 (2012) ("For their part, no regime for victim redress was created within the statutory framework of either the ICTY or the International Criminal Tribunal for Rwanda (ICTR), although both have the power to order the restitution of property. In light of the limited powers of victim redress available to these tribunals, detailed formal communications took place in the late 1990s between the judges of the ICTY and the ICTR, on the one hand, and the United Nations Security Council, on the other, as to whether the statutes of the tribunals should be amended to empower the tribunals to award compensation to victims of crimes within their respective jurisdictions. The discussions were triggered by a proposal put by the ICTY Prosecutor to the Security Council to use funds seized from accused persons

or anyone claiming compensation through the victim, must bring a claim seeking compensation to "a national court or other competent body,"[234] which is a significant additional procedural burden to navigate that would deter many from initiating such claims. By contrast, in the ICC, Article 75 of the Rome Statute specifically provides for restitution, compensation, and rehabilitation as options for reparations for victims.[235] Additionally, Article 79 authorized the creation of the Trust Fund for Victims,[236] which is mandated to implement court-ordered reparations and "us[e] voluntary contributions from donors to provide victims and their families in situations where the Court is active with physical rehabilitation, material support, and/or psychological rehabilitation."[237] These provisions make the ICC a better forum for providing remedies to witnesses and survivors of international humanitarian crises who choose to testify, as they provide victims with an alternate role in the ICC beyond serving as "essentially a tool of the Prosecutor in the case against the accused."[238]

In its first verdict, *Prosecutor v. Lubanga*,[239] the ICC convicted Thomas Lubanga Dyilo for the "conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities" in the DRC.[240] This decision also marked the first time reparations were awarded to victims of human rights abuses. Before the decision, Congolese activists called for reparations and asserted that the ICC must "tak[e] measures that will restore a society that has been torn apart by interethnic conflict."[241] The Trust Fund is working toward that goal by consulting with the victims, going to the villages affected by Lubanga's crimes, and planning repa-

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to compensate victims. However, after considering the issue, the judges of both tribunals decided not to pursue the matter . . . .").

234. ICTY Rules of Procedure and Evidence, *supra* note 224, r. 106(B); ICTR Rules of Procedure and Evidence, *supra* note 224, r. 106(B).

235. Rome Statute, *supra* note 3, art. 75.

236. *Id.* art. 79(1).

237. *The Two Roles of the TFV*, Trust Fund for Victims, http://trustfundforvictims.org/two-roles-tfv, *archived at* http://perma.cc/M2VW-QYP8.

238. Kevin F. Mitchell, Memorandum for the Office of the Prosecutor of the ICTR, *Issue: A Comparison Between the ICTR and the ICC on the Rights of Victims who Testify*, Case Western Reserve Int'l War Crimes Res. Lab 29 (2003), *available at* http://law.case.edu/war-crimes-research-portal/show_document.asp?id=2, *archived at* http://perma.cc/9Y8J-NFQ5.

239. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012).

240. *Id.* ¶ 1351.

241. Olivia Bueno, *Issues of Reparations in the Lubanga Case: An Interview with a Local Activist*, Open Soc'y Founds. (July 24, 2012), http://www.lubangatrial.org/2012/07/24/issues-of-reparations-in-the-lubanga-case-an-interview-with-a-local-activist/, *archived at* http://perma.law.harvard.edu/0WK5ksGiiAB/ ("Most observers think . . . that justice should contribute to the consolidation of peace and not be a factor of frustration that would risk undermining efforts at pacification undertaken so far. A central question here is whether reparations will involve only those victims who participated formally in the procedure, or if reparations will cover all those who suffered at the hands of Lubanga or his militia. Hopes are high among both groups that the court will bring justice. If individual reparations are only given to some people this might cause further frustration and anger.").

rations measures.[242] By seeking to adapt the remedy to communities' needs, the Trust Fund has included communities in the search for determining what types of reparations should be available to victims of IHRL and IHL abuses to restore Congolese society.[243]

For the survivors of targeted sexual violence, rehabilitation should be considered, adapted, and implemented—especially given the effect of rape on victims. As Amanda Beltz has said, "Rape is a unique crime in that the impact of rape extends beyond the physical trauma associated with the initial assault. The psychological effects of rape have been widely documented and characterized as Rape Trauma Syndrome . . . ."[244] If Harun, Kushayb, Al-Bashir, and Hussein are convicted, the remedies that their victims receive should necessarily include treatment for Rape Trauma Syndrome. This remedy is compatible with existing projects under the Trust Fund for Victims ("TFV"), which has crafted a number of projects offering assistance to victims of sexual violence, torture, and mutilation in the DRC and Uganda.[245] Many of these projects incorporated counseling for survivors,[246] though details about the structure of the counseling are unclear. Projects also: incorporated "both gender-specific and child-specific interventions to support the special vulnerability of women, girls, and boys"; provided assistance to help communities rebuild livelihoods that had been disrupted by conflict; and helped those who have survived torture and mutilation.[247]

In the most recent report, the International Center for Research on Women ("ICRW") worked with the TFV to document and evaluate the programs in Uganda and the DRC.[248] Their report discusses the physical rehabilitation, psychological rehabilitation, and material support provided by the TFV.[249] It also looks at the cross-cutting themes of: promoting community reconciliation; acceptance and rebuilding community safety nets; mainstreaming gender to include addressing impact of gender-based violence and other sexual violence; sexual and gender-based violence; and envi-

242. ReliefWeb, Trust Fund for Victims Welcomes First ICC Reparations Decision, Ready to Engage (Aug. 8, 2012), *available at* http://reliefweb.int/report/democratic-republic-congo/trust-fund-victims-Welcomes-First-icc-reparations-decision-ready, *archived at* http://perma.cc/KA7L-KGLH.

243. *Id.*

244. Amanda Beltz, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused*, 23 St. John's J. Legal Comment. 167, 188 (2008) (citation omitted); *see also* Kathryn Davis, *Rape, Resurrection, and the Quest for Truth: The Law and Science of Rape Trauma Syndrome in Constitutional Balance with the Rights of the Accused*, 49 Hastings L.J. 1511 (1998) (providing an overview of Rape Trauma Syndrome).

245. *Projects*, Trust Fund for Victims, http://www.trustfundforvictims.org/, *archived at* http://perma.law.harvard.edu/0LLL2onQpGV.

246. *Id.*

247. *Id.*

248. Jennifer McCleary Sills & Stella Mukasa, External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo (2013), *available at* http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/ICRWTFVExternalProgEvaluation2013Final.pdf, *archived at* http://perma.cc/JL2P-2W8X.

249. *Id.*

ronmental impact.[250] Given the flexibility of the reparations system, incorporating intersectionality in awarding reparations may provide an appropriate remedy to those affected by targeted sexual violence during armed conflicts.

The main benefit of using intersectionality when considering targeted, ethnicity-based rape and sexual assault is that the experience would not be viewed as a subcategory of sexual assault but as an experience that requires a new perspective. Using an intersectional approach, remedies will be better tailored for the affected group because their needs will not be seen as derivative of another person's experience. To provide this recognition, the intersectional consideration must consider the status of women in ethnic minorities before, during, and after the conflict. Remedies must also consider norms and mores that may not be prevalent within a dominant group but exist within ethnic minority groups. These remedies may include the types of projects underway in the DRC and Uganda, applied in a way that recognizes the unique aspects of the situation in Darfur. Additionally, utilizing an intersectional lens would ensure that the sexual assault that took place during the conflict is not conflated with sexual assault experienced by women in general.

### 3. *Intersectionality and the Situation in Darfur: Now What?*

The situation in Darfur was a conflict that included several ethnic groups, making it difficult to parse out how intersectionality should be applied. One major difficulty in applying intersectionality internationally, especially in the ICC, is *how* to supplant the theory from the largely U.S.-centric feminist debates and incorporate it into a global arena. Bond notes that there has been a general lack of analysis of the application of intersectionality and suggests a method of reaching the international human rights community—by reconstructing existing human rights institutions.[251] Bond proposes "qualified universalism," which accepts that human rights apply equally to all but also recognizes that human rights violations are experienced differently.[252] This framework relies on anti-subordination and anti-essentialist theory, allowing for an analysis of individuals that recognizes "racism, classism, sexism, and heterosexism."[253] Bond pays attention to the ways that intersectionality may be beneficial in the consideration of violence against women and armed conflicts and notes:

> Racially or ethnically motivated rape in situations of armed conflict strikes at the core of notions of identity. Communities, particularly in times of intense nationalism, place great emphasis on

250. *Id.*
251. Bond, *supra* note 94, at 76.
252. *Id.*
253. *Id.*

> women's "honor" as the site of ethnic purity and identity. This makes them "prime targets for rape, systematic rape and sexual torture for the purposes of shaming their men." Sexual violence against women in certain ethnic communities is thus fueled simultaneously and inextricably by both gender-based oppression and oppression based on racial or ethnic identity.[254]

It is unlikely that the ICC's approach to decisionmaking will be so significantly altered in the near future that it would be able to accommodate the intersectional approach encouraged here. Yet victims of rape during ethnic conflicts would benefit from having their experiences viewed intersectionally through recognition during indictment, acknowledgement during trial and sentencing, and individualization when awarding reparations. The first element has, by and large, been fulfilled in regard to the situation in Darfur. In the three aforementioned warrants, the Prosecutor has noted that the charged men are thought to be criminally responsible for the rape of women within particular ethnic groups for the purpose of furthering genocide.[255] This recognition respects the precedents set during the proceedings of the ICTY and ICTR. If the ICC continues to follow the precedent of the ICTY and ICTR, the second element will be mostly completed. To apply intersectionality to the situation in Darfur, the Trial Chamber should regard the rape of the women in the targeted ethnic groups as an act of genocide in its own right, not just as an act that constitutes genocide. The difference lies in the level of seriousness and recognition the Chamber grants the atrocities that were committed. Instead of being regarded as just a derivative of a greater atrocity, widespread rape should be recognized as an atrocity in its own right.

What could make this recognition problematic, however, is the same issue that arose in *Payne*: if the Fur, Masalit, and Zaghawa women's rapes are seen as a crime to themselves, will it come as a detriment to the crimes that befell the men, some of whom may have experienced sexual violence as well? Arguably, no. This recognition would not negatively affect male victims because genocide, war crimes, and crimes against humanity would still be prosecuted, all of which would include male victims. Additionally, separating the crime of rape for the Fur, Masalit, and Zaghawa women could provide benefits that would not come from the other convictions. The Trust Fund could focus on providing remedies to these women as survivors of rape *and* genocide and not survivors of rape *as* genocide. This would broaden the scope to include female members of the ethnic majority who were raped, and increases the possible reparations for women found to have been victims of a separate crime of rape during a time of genocide. As mentioned above,

254. *Id.* at 115 (citations omitted).

255. *See* Harun Warrant, *supra* note 211; Kushayb Warrant, *supra* note 211; Second Al-Bashir Warrant, *supra* note 183.

using intersectionality when crafting remedies for survivors of crimes would result in remedies that focus on the unique experiences of a given group. In doing so, the Fur, Masalit, and Zaghawa women would not be seen as minorities within a minority—or a gap between labels—but as separate groups for whom a tailored remedy could be produced.

## Conclusion

As it stands, the United Nations and the ICC have taken steps to recognize certain differences between populations, but this recognition must be taken further. Within the United Nations, this means pushing to advance the women's rights discourse. Noting that the combination of race and gender may create instances of discrimination that differ from racial or gender discrimination is a start, but creating subcategories within the existing mechanisms marginalizes the experiences of nonwhite, nonwestern women. Likewise, although ICTs have recognized that women of certain ethnicities are targeted during armed conflict, this recognition must not remain confined to the decisions of ICTs. Rather, it should lead to creative solutions and reparations for those whose identities have made them a target. Only then can human rights safeguards be both representative and truly effective.

The advancement of human rights protection is a continuing struggle. In this endeavor, the mechanisms and bodies designed to address and remedy the harms that befall people around the world cannot rely on foundations not built to house diverse populations. To properly address the plight of women around the world, human rights discourse must turn away from reliance on paradigmatic notions and look to the realities that different populations face. To accomplish this goal, international human rights mechanisms and international courts with jurisdiction over IHRL and IHL violations must employ intersectionality. Applied to any degree, intersectionality provides a conceptual framework for acknowledging the complexities of identity, as well as how the interplay of identities affects one's life. Through an intersectional analysis, violations against women will be better understood and their needs better served.