Chapter 8
Prosecution of Sexual Violence against Women in Post-Conflict Societies

Introductory: A Question of Choices?

Two of the main challenges facing conflict-inspired prosecution programmes in (or for) post-conflict societies are invariably these: (a) large numbers of crimes and suspects deserving of prosecution, in the face of limited resources and time to try them all in a regular court of law; and (b) other social reconstruction, rehabilitation and reconciliation needs and projects of ostensibly equally high priority, which necessarily compete with the justice priority for the limited resources and time.¹

One consequence of all of this has been the need to have a particularly focused approach to conflict-inspired prosecution programmes in post-conflict societies. This immediately boils down to the question: How is the choice to be made as to who to prosecute?

The evolution of the concern underlying this question now appears to suggest, as an emergent consensus, that the focus of prosecution should rest on ‘persons who bear the greatest responsibility’ for the crimes committed. It was through the Statute of the Special Court for Sierra Leone (SCSL),² and the Security Council resolution fostering it,³ that this notion was first introduced into the lexicon of international criminal law. The next appearance of the concept—or a variant of it—was in the context of the establishment of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Kampuchea. In the law establishing it, the ECCC was empowered to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recog-

¹ See, for instance, an address by Ms Navanethem Pillay, United Nations High Commissioner for Human Rights at the UN Approach to Transitional Justice: Dialogue with Member States on rule of law at the international level organized by the Rule of Law Unit on 2 December 2009.
² See article 1 of the Statute of the Special Court for Sierra Leone.
³ See UN Security Council Resolution 1315 (2000) of 14 August 2000, Doc No S/RES/1315 (2000).
nized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.4

Although not originally part of the language of the constitutive instruments either of the International Criminal Tribunal for the former Yugoslavia in 1993 or of the International Criminal Tribunal for Rwanda in 1994, by the year 2003, however, the idea had crystallised that, for those Tribunals, prosecution strategy was required or encouraged to concentrate only on persons ‘who bear the greatest responsibility’, or those ‘most responsible’, for widespread or systematic crimes committed during the relevant periods of armed conflict. In subsequent UN Security Council resolutions relating to the prosecution strategy of the ICTR or ICTY or both, there is a consistent reference to that theme. For instance, in resolution 1503 (2003) initiating the completion strategies of both ICTY and ICTR, the Security Council called upon both Tribunals thenceforth to concentrate ‘on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes’ within the respective jurisdictions of the two Tribunals.5 A similar call, also in respect of ICTR and ICTY, is contained in Security Council resolution 1534 (2004).6

Notable in the language of Security Council resolutions 1503 (2003) and 1534 (2004) is the shift to the even narrower focus of ‘most senior leaders suspected of being most responsible for crimes’. This greatly narrowed focussing is arguably excusable at that point in the lives of ICTY and ICTR, as both Tribunals had been in existence since 1993 and 1994, respectively; hence justifying a 2003 completion strategy that emphasised such a narrow focus. On the other hand, it is notable that in his report on the establishment of the SCSL, the UN Secretary-General correctly suggested that these formulations indicate an orientation (of the choice of accused) towards those in a ‘political or military leadership’ or ‘others in command authority’ down a chain of command.7 That this understanding is suggested in relation to the prosecutorial strategy of the SCSL, may indeed suggest, in turn, that the completion strategy modes of the ICTY and ICTR may be irrelevant to the clear expression of that understanding in the Security Council resolutions 1503 (2003) and 1534 (2004). In other words, the Security Council was, as a matter of first principles, retrofitting an emergent appreciation into the work of the ICTR and ICTY at every opportunity.

In any event, coming in the wake of the requirement upon the SCSL and ECCC to concentrate, from their inception, upon ‘persons who bear the great-

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4 See article 2 of Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).
5 UN Security Council Resolution 1503 (2003) of 28 August 2003, Doc No S/RES/1503 (2003).
6 UN Security Council Resolution 1534 (2004) of 26 March 2004, Doc No S/RES/1534 (2004).
7 UN Security Council, Report of the Secretary General on the Establishment of the Special Court for Sierra Leone, 4 October 2000, Doc No S/2000/915, paras 29–31, especially at para 30.
est responsibility’ or those ‘most responsible’ for crimes committed in the context of armed conflicts, the conclusion appears inescapable that evolving thoughts on conflict-inspired prosecution programmes need to concentrate on persons ‘bearing the greatest responsibility’ or ‘most responsible’ for the crimes under consideration.

As indicated earlier, such a narrowing of focus is entirely understandable, in view of the challenges of scope of criminality (demanding prosecutorial attention) amidst the competition for resources and time, engaged by other needs of a society recently emerged from an armed conflict.

When focus is placed on persons ‘who bear the greatest responsibility’ or those ‘most responsible’ for conflict-inspired crimes, particularly when such a focus suggests an orientation towards persons in leadership or command positions, the logic of that inquiry tends, in turn, to produce a related focus on certain types of crimes, as commanding greater priority in the prosecution strategy. Here the focus tends to rest on system crimes intrinsically connected to the armed conflicts. Generally, those system crimes are genocide, crimes against humanity and war crimes. Hence, the prosecution strategy tends to rest on prosecuting persons in leadership or chain of command in criminal enterprises involving the commission of genocide, crimes against humanity and war crimes. This may be consciously or subconsciously justified by the fact that the intervention of the United Nations Security Council usually under Chapter VII of the UN Charter, and notably in the case of the creation of ICTR and ICTY, proceeded out of the need to maintain or restore international peace and security. And the system crimes of genocide, crimes against humanity and war crimes, are more readily seen as threats to international peace and security, given expression either in international or internal armed conflicts.

These are system crimes in the sense of certain prerequisite elements that must link them to an armed conflict—involving violent attacks against an aggregation of people. For genocide, the crime in question must have proceeded from the intent to destroy a racial, ethnic, religious or national group in whole or in part (the focus thus is upon the destruction of a group); for crimes against humanity, the specific criminal conduct must be seen as part of a widespread or systematic attack against a civilian population (the focus is on attack against a group); and for

8 See article 2(2) of the Statute of the International Criminal Tribunal for Rwanda; article 4(2) of the Statute of the International Criminal Tribunal for the former Yugoslavia; article 6 of the Statute of the International Criminal Court. See also article 17 of the 1996 International Law Commission’s Draft Code of Crimes against Peace and Security of Mankind. In the Akayesu case, the ICTR held that sexual violence can be an act of genocide, as it fits into the act of ‘causing serious bodily or mental harm’ to members of a group protected by the Genocide Convention of 1948: Prosecutor v Akayesu (Judgment) dated 2 September 1998 [ICTR Trial Chamber] paras, 731–734.

9 See article 3 of the ICTR Statute; article 5 of the ICTY Statute; article 7 of the ICC Statute; article 2 of the Statute of the Special Court for Sierra Leone and article 18 of the International Law Commission’s Draft Code of Crimes against the Peace and...
war crimes, the specific crime must be seen as bearing a close connection to the 
armed conflict, in the sense of the ‘perpetrator’s ability to commit it, his decision to 
commit it, the manner in which it was committed or the purpose for which it was 
committed’ (as well the focus is on attack against a group).10

Thus understood, any committed crime that fits such a focus would ordinar-
ily be captured within the purview of the post-conflict prosecution programme in 
question.

The Importance of Sexual Violence Prosecution

The foregoing considerations notwithstanding, one crime that must command 
especial attention when committed in the context of an armed conflict is the crime 
of sexual violence against women. That is to say, sexual violence against women (in 
peace-time or war) is a truly exceptional evil, by reason of its social, historical and 
even cultural tenacity and dimensions: as such, efforts aimed at its eradication as 
an evil must not be constrained by the logic of nexus to armed conflicts. The rea-
sons for this proposition will become readily apparent in the following analysis.

Sexual violence against women is a particular scourge on humanity and is 
recognised as such by numerous contemporary international documents, includ-
ing numerous UN resolutions, declarations and reports.11 25 November is dedi-
cated by the UN as International Day for the Elimination of Violence against 
Women. In February 2008, the UN Secretary-General launched the campaign ‘UNiTE to End Violence against Women’.12 The campaign to end violence 
against women has been a foremost thematic issue on the list of priorities of suc-
cessive UN High Commissioners for Human Rights. This is especially the case 
with High Commissioner Navi Pillay, who as a judge at the ICTR was widely 
credited with the Akayesu locus classicus of rape as an act of genocide. There is 
rarely a public address in which she does not stress the theme of halting violence 
against women.13

Security of Mankind.

10 Prosecutor v Kunarac & ors (Judgment) dated 12 June 2002 [ICTY Appeals Chamber] 
para 58. See also Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory 
Appeal on Jurisdiction) dated 2 October 1995 [ICTY Appeals Chamber] para 70.

11 See generally the discussion in Chapter 1 under the subheading ‘A Legislative Fact 
Amply Proved.’

12 See <http://www.un.org/en/women/endviolence/>.

13 See for instance, UNHCHR Press Statement (18 December 2009): ‘Stop treating 
Migrants as Second-class Human Beings—Statement by the UN High 
Commissioner for Human Rights, Navi Pillay, on International Migrants’ Day 
<http://www.huffingtonpost.com/navi-pillay/stop-treating-migrants-as_b_400825. 
html>; Keynote address by the High Commissioner for Human Rights, 
Navi Pillay, Human Rights Day, 10 December 2009 <http://www.unhchr.ch/hurri-
cane/hurricane.nsf/view?6E4844D43B709B5BC1257688005FB92B?opendocument>; UNHCHR Press Release (8 March 2008): ‘Women still face discrimination
Indeed, often enough misogynistic sexual crimes committed in the context of
an armed conflict would satisfy the linkage elements—or fit within the juridical
focal range—of the system crimes of genocide, crimes against humanity or war
crimes. In many cases, therefore, the prosecution of sexual crimes against women
will fit naturally within the general conceptual scheme of a post-conflict pros-
ecution project that is aimed at addressing crimes committed during an armed
conflict. There is, however, a chance that a sexual crime may have been commit-
ted during an armed conflict, without it fitting neatly within the system crimes
indicated above.

This possibility is apparent from the explanation of nexus requirement for
war crimes, offered by the Appeals Chamber of the ICTR (populated by the same
judges that sit on the Appeals Chamber of ICTY). In view of a point of juris-
prudence that any crime committed ‘under the guise’ of the armed conflict would
normally be seen as closely connected to the armed conflict,14 the ICTR Appeals
Chamber sought in Rutaganda to explain the point. And their explanation is
“under the guise of the armed conflict” does not mean simply “at the same time as
an armed conflict” and/or “in any circumstances created in part by the armed con-

...".15 By contrast, the crime is a war crime where combatants took advan-
tage of their military positions of authority to rape individuals whose displace-
ment was an express goal of a military campaign in which they participated.16 But
the exclusion articulated by the Appeals Chamber would equally remove from
consideration the prosecution of a man who, taking advantage of the diverted
attention of the police during an armed conflict, raped a female neighbour he had
coveted for years. The question is this: is it right to exclude this case of sexual vio-

...ence from a post-conflict prosecution programme?

The danger with the Rutaganda explanation is that it may lead to a limita-
tion of the conception of nexus to only positive or direct nexus. It is particularly
insightful that the Appeals Chamber alluded to murder and sexual violence, as
examples with which to illustrate the limitation at issue. Such limitation may be
permissible for murder. Murder is always perceived as the ultimate crime which
equally terrifies every member of society, hence its uniform abhorrence by every-


worldwide’ <http://www.un.org/apps/news/story.asp?NewsID=25893>, UNHCHR
Press Release (23 November 2008): ‘Real Equality and End to Impunity Needed to
Stop Violence against Women’ at <http://www.unchr.ch/hurricane/hurricane.nsf/0/
76CtFC885920DEB4C125739C0034A5AF?opendocument>, Editorial Opinion by
Louise Arbour: ‘Impunity for War Crimes against Women’ in the Daily News of Egypt
(8 March 2008) <http://www.dailystaregypt.com/article.aspx?ArticleID=6025>.

14 Prosecutor v Kunarac, supra, para 58.
15 Prosecutor v Rutaganda (Judgment) dated 26 May 2003 [ICTR Appeals Chamber],
para 570.
16 Loc cit.
one who is not an accomplice or sympathiser to the perpetration of the particular murder. The general plague of the terror of murder and the resulting implication of self-interest (or even the corporal fatality of its consequence) have traditionally ensured that policy-makers regard it as a primary evil that must be kept in check at all times. This undoubtedly assists in ensuring that murder remains an aberration, especially in pre- or post-conflict peacetime. As it always has been regarded as a primary evil exercising the anxieties and efforts of every man and woman and policy maker, there may be no great urgency in fearing that society would be so used to it as to permit a post-conflict toleration of it as a new social habit resulting from war.

Such a perpetually aberrant quality of murder gives it a distinguishing quality that may excuse—in respect of it—the theory of positive or direct nexus adumbrated by the ICTR Appeals Chamber in Rutaganda.

In contrast, the theory of positive or direct nexus affords an inadequate formula as regards the crime of sexual violence against women during armed conflicts. The reason is that the high frequency of sexual violence during armed conflicts and in peacetime has made the crime a particular scourge that has plagued humanity through the ages—and continues to plague the international community in modern times. Such high frequency of sexual violence against women resulted, no doubt, from failure of men traditionally to relate to the conduct as an act of terror or of abhorrence—to them—unlike the crime of murder. As recently as 2008, for instance, Ms Louise Arbour, the High Commissioner for Human Rights as she then was, lamented the fact that discrimination against women persists in all countries. According to her: ‘Perhaps the most pernicious and dangerous discrimination involves sexual abuse that is not recognized as such under a country’s laws, or is in effect tolerated by legislation that is either vague or not enforced. “Rape is recognized as a crime in most legal systems,” said Arbour. “But, even when it is, inadequate legislation or local traditions often mean laws are not properly enforced. In addition, at least 53 states still do not outlaw rape within marriage, and men frequently enjoy total impunity for physical as well as sexual violence against their wives.”’

Quite contrary to the existence in men of a natural impulse for the eradication of sexual violence against women, the high frequency of sexual violence against women has been explained by some Darwinian scholars as an evolutionary tactic that portends advantages to men. At the barest minimum, it is eminently reasonable to accept that the frequency of sexual violence against women results from a ‘general disregard for the bodily integrity of women.’ As UN Secretary-General Ban Ki-Moon correctly observed, ‘Most societies prohibit such vio-

17 See <http://www.un.org/apps/news/story.asp?NewsID=25893>.
18 R Thornhill and C T Palmer, A Natural History of Rape: Biological Bases of Sexual Coersion [Cambridge, Mass: MIT Press, 2000].
19 S Brownmiller, Against Our Will: Men, Women and Rape [New York: Simon & Schuster, 1975] p 37.
lence—yet the reality is that too often, it is covered up or tacitly condoned.’ An undoubted explanation for such cover-ups or tacit condonation is the fact that sexual violence against women was never seriously considered by the traditionally male policy-makers as a conduct whose elimination is of utmost priority—or even desirable—certainly never at the same degree as murder.

An aff ective combat against sexual violence against women as an evil requires a composite strategy that necessarily involves a policy of zero-tolerance against the conduct. The policy of zero-tolerance ought to warrant all efforts made to prevent any accretion to the gnarled culture of peacetime or conflict-inspired sexual violence against women. Such accretion may result from failure to prosecute sexual crimes committed against women during armed conflicts, on grounds that they were opportunistic acts of sexual violence not committed by those closely connected to the armed conflicts. The resulting impunity gap naturally fuels the fear of wartime sexual violence becoming peacetime reality for women.21

To prevent this, a circumstantial or indirect theory of nexus must be permitted to allow prosecution of sexual violence against women committed during an armed conflict. Hence, a proper policy of zero tolerance against misogynistic sexual violence ought to bring within the scheme (of post-conflict prosecution of conflict-inspired crimes) sexual violence against women committed by anyone who took advantage of lawlessness resulting from war—or diversion of the attention of the security forces—to commit acts of sexual violence against women during an armed conflict. Hence, it is wholly necessary to accommodate within the post-conflict prosecution strategy the case of the man who, taking advantage of the diverted attention of the police during an armed conflict, raped a woman he had coveted for years.

As indicated earlier, the need for this approach is to close the impunity gap that might result where post-conflict prosecution efforts are limited to sexual violence with clear links to the armed conflicts, notwithstanding that in many instances such crimes would have such links, and may thus be prosecuted without much difficulty. Such an impunity gap becomes particularly odious in view, as will be explained presently, of the potential for the deformation of post-conflict social mores, such as might allow tolerance for sexual violence against women, in a society that had grown so used to such crimes during an armed conflict.

Post-Conflict Social (Re)Engineering as an Objective of the Prosecution Strategy

In the nature of things, armed conflicts are fiery social upheavals that afford potential and opportunity for undesirable social conducts, such as rape and other

20 UN, Violence against Women Fact Sheet <http://www.un.org/en/women/endvio-
lence/pdf/VAW.pdf>

21 This was the theme of a high-level experts meeting held from 22 to 24 June 2009, under the auspices of UNIFEM. See < http://www.unifem.org/news_events/story_ detail.php?StoryID=894>
manner of sexual violation of women. This is the case, however brief the period of the armed conflict. And the longer a particular conflict lasts the greater the chances that such undesirable social conducts may solidify into new social norms. Perpetrators, victims and society may become so used to the bad behaviours that such behaviours lose some of their quality of social infamy, with altered perceptions of tolerable normalism. The social process by which armed conflicts generate such ignominious cultural habits very much brings to mind the physical process of formation of igneous rock from molten magma following a volcanic eruption.

With particular reference to sexual violence, the risk of such maladjustment (an incidence of armed conflict) grows larger in societies—and there are many around the world—in which discrimination and violence against women have enjoyed a pre-existent or long history.

From available research literature, the Colombian armed conflict is a case study in this sort of maladjustment of cultural paradigms. There is a general consensus, in published literature, that violence against women has been an endemic feature of the Colombian armed conflict, often perceived as a strategic instrument of war employed by both sides.22

In a 2004 report, Amnesty International observed that in the Colombian armed conflict, ‘[women’s] bodies have become a battleground in which the most brutal violence is committed. This has sometimes reached horrific proportions, such as the tearing open of the bellies of pregnant women in order to rip out the foetus. “Don’t leave even the seed behind” (“No dejar ni la semilla”)—an expression that dates back to the atrocities perpetrated during La Violencia in the 1950s but still used today—is a reflection of the extreme cruelty involved. Many men have also been castrated for similar reasons in the context of massacres and selective killings committed during the armed conflict.’23 Following her 2001 visit to Columbia to investigate and evaluate the impact of the armed conflict on the protection of women’s rights, the UN Rapporteur on violence against women and its causes and consequences reported that the conflict ‘reproduces and deepens discrimination between the different groups and women suffer intersectional discrimination on the basis of their gender, and their ethnic and cultural origin. Although men are most frequently the victims of summary executions and massacres, violence against women, particularly sexual violence by armed groups, has become a common practice in the context of a slowly degrading conflict and lack of respect for international humanitarian law.’24

22 See generally, Amnesty International, Colombia: Scarred bodies, hidden crimes—Sexual Violence against Women in the Armed Conflict, Doc No AI Index: AMR 23/040/2004, 13 October 2004. See also Oxfam International, ‘Sexual Violence in Colombia: Instrument of War’ 9 September 2009.
23 Amnesty International, Colombia: Scarred bodies, hidden crimes—Sexual Violence against Women in the Armed Conflict, supra, p 11–12.
24 United Nations, Report submitted by Ms Radhika Coomaraswamy, Special Rapporteur on violence against women, its causes and consequences: Mission to Colombia (1-7 November 2001), E/CN.4/2002/83/Add.3, dated 11 March 2002, para 42.
Spanning over half a century, the Colombian armed conflict is one of the longest running armed conflicts in the modern world. By some accounts, the current Colombian civil war is a violent culmination of historical rivalry between forces of conservative and liberal politics in the country. The rivalry dates back to the 19th and 20th centuries, with flashes of violence along the way. But the genesis of the current violence is traceable to 9 April 1948, with the assassination in Bogota of Jorge Eliécer Gaitán, the dissident Liberal politician and a leading presidential candidate. The assassination triggered the Bogotazo, a popular uprising by the Liberal lower classes that resulted in massive destruction and looting in Bogota that spread throughout the country, pitting Liberal militants against their Conservative opponents and others caught in between. Afraid that the violence might metamorphose into a class-based, Bolshevik-style revolution, the Liberal elites reportedly supported the uncompromising methods employed by the Conservative government to suppress the uprising. All of this triggered La Violencia of the 1950s—a period characterised by a cycle of political violence that ebbed and flowed; with political alliances between Conservative and Liberal elites forged and broken, increasing suspicion and distrust between political factions and social classes. These events eventually snowballed into guerrilla warfare between government forces and variegated bands of armed guerrilla movements operating in rural areas and from deep in the jungles of Colombia.

In 1966, many of these guerrilla movements merged into the Fuerzas Armadas Revolucionarias de Colombia (FARC), which became the main guerrilla movement, alongside lesser known ones such as the Ejército de Liberación Nacional (ELN). In an effort to counter the sustained insurgency of these guerrilla movements, paramilitary forces, mainly organised under the umbrella of the Autodefensas Unidas de Colombia (AUC), were formed in the 1970s and 1980s to support the government forces. According to Amnesty International and the Inter-American Commission of Human Rights, these paramilitary forces have continued in existence, although they were, in 1989, technically stripped of legitimacy. Following the breakdown of peace negotiations in February 2002, fighting continued. ‘The armed conflict entered a new critical phase with serious consequences for human rights.’

See Gary Leech, ‘50 Years of Violence’, Colombia Journal (2000) <http://colombia-journal.org/special-reports/fiftyyearsfordgtheviolence> See Leech, generally.

Amnesty International, Colombia: Scarred bodies, hidden crimes—Sexual Violence against Women in the Armed Conflict, supra, p 7.

Ibid, p 7. See also Organisation of American States, Inter-American Commission of Human Rights, Violence and Discrimination against Women in the Armed Conflict in Colombia’ Doc No OEA/Ser.L/V/II Doc 67 of 18 October 2006, para 35.

Amnesty International, Colombia: Scarred bodies, hidden crimes—Sexual Violence against Women in the Armed Conflict, supra, p 7.
One notable feature of this armed conflict—and the resulting violation of human rights—has been the prevalence of sexual violence against women. According to Oxfam International, ‘During the half century of Colombian conflict all armed groups—State military forces, paramilitaries and guerrilla groups—have sexually abused or exploited women, both civilians and women within their own ranks. Women can be direct or collateral victims of different forms of violence as a result of their caring relationships as daughters, mothers, spouses, sisters or friends.’

The violence is systematic. According to Oxfam, ‘Far from being a sporadic occurrence, the use of sexual violence is normal practice that has become an integral part of the armed conflict.’

As in many parts of the world, the incidence of discrimination and violence against women enjoys a long history in Colombia. It is this wider historical context of discrimination and sexual violence against women that has made even more invidious the presence of these evils in the Colombian armed conflict. As observed by Amnesty International:

Women and girls in Colombia not only suffer the danger, hardship and suffering inherent in any armed conflict, but have to endure the gender discrimination which is prevalent in many societies around the world, including Colombia. It is this continuum—from domestic- to conflict-related sexual violence—that is particularly corrosive.

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30 Oxfam International, ‘Sexual Violence in Colombia: Instrument of War’ 9 September 2009, p 11.
31 Ibid, p 12.
32 As observed by Amnesty International, ‘Sexual and gender-based violence is not a new phenomenon in Colombia; it has been a constant in the country’s history, and a defining part of the conflict. The conflict has pitted the security forces and army-backed paramilitaries against several guerrilla groups, with each group vying for control of territory and economic resources. Rape, used as a method of torture or a means of injuring the “enemy’s honour”, has been a common feature of the conflict’: Amnesty International, Colombia: Scarred bodies, hidden crimes—Sexual Violence against Women in the Armed Conflict, supra, p 8. Also, recall the observations of the UN Special Rapporteur on violence against women who noted that the conflict ‘reproduces and deepens discrimination between the different groups and women suffer intersectional discrimination on the basis of their gender, and their ethnic and cultural origin:’ United Nations, Report submitted by Ms Radhika Coomaraswamy, Special Rapporteur on violence against women, its causes and consequences: Mission to Colombia, supra, para 42. See also Organisation of American States, Inter-American Commission of Human Rights, ‘Violence and Discrimination against Women in the Armed Conflict in Colombia’, supra, paras 3 and 42–46.
33 Amnesty International, Colombia: Scarred bodies, hidden crimes—Sexual Violence against Women in the Armed Conflict, supra, p 10.
The point was even more elaborately made by the Inter-American Commission of Human Rights (IACHR) of the Organisation of American States in the following compelling way:

The IACHR has repeatedly stated that both civilian men and women in Colombia have their rights violated during the Colombian armed conflict and suffer the worst consequences. However, although both suffer human rights violations and bear the burdens of this conflict, the effects are different for each. The source of this difference is that Colombian women have suffered situations of discrimination and violence because they are women since they were born, and the armed conflict has worsened and perpetuated this history. The violence and discrimination against women is not solely the product of the armed conflict—they are fixtures in the lives of women during times of peace that worsen and degenerate during the internal strife.

Within the armed conflict, all the circumstances that have historically exposed women to discrimination and to receive an inferior treatment, above all their bodily differences and their reproductive capacity, as well as the civil, political, economic and social consequences of this situation of disadvantage, are exploited and manipulated by the actors of the armed conflict in their struggle to control territory and economic resources. A variety of sources, including the United Nations, Amnesty International and civil society organizations in Colombia, have identified, described and documented multiple forms in which the rights of women are infringed upon in the context of the armed conflict, because of their condition as women.34

An unfortunate outcome of all of this is the danger of apparent acceptance of these wrongs as part of life in Colombia. In a briefing note late in 2009, Oxfam International observed a tendency within Colombian society to ‘accept’ sexual violence ‘as “normal” … and many women do not consider themselves victims because they do not know that sexual violence is a crime.’35

The length of the Colombian armed conflict, which undoubtedly is partly responsible for this misshapen attitude, compels a certain need for elevated, conscious effort by way of determined social (re)engineering, aimed at correcting any cultural malformation in the manner of diminution of the opprobrium normally associated with sexual violence against women. One way of achieving that would be to accept without equivocation the idea of zero tolerance for sexual violence within the Colombian society. And one concrete way of communicating that message in practice will be to prosecute—as a matter of course—all instances of sexual violence against women committed during that armed conflict. This should cer-

34 Organisation of American States, Inter-American Commission of Human Rights, ‘Violence and Discrimination against Women in the Armed Conflict in Colombia’, supra, paras 44 and 46.
35 Oxfam International, ‘Sexual Violence in Colombia: Instrument of War’, supra, p 2.
tainly be the case wherever the nexus of the crime to the armed conflict is either direct or indirect.

**The Need to Avoid Double Victimisation of Women**

It is not unusual that good intentions turn out quite badly in execution. Prosecution of sexual violence is fraught with such a risk, in the shape of the possibility of double victimisation of the victims through prosecution of the perpetrators. The risk is particularly inherent in how rape is conceived and its prosecution executed, from the perspective of its definition.

A traditional conception of rape in many national jurisdictions hinges upon a view of rape as an act of sex without the consent of the (usually female) victim. A classic example of such a definition was that found in Sexual Offences Act 1956, as amended by the Sexual Offences (Amendment) Act 1976, of the England. Section 1(1) of the 1956 Act proscribed rape by the simple provision: ‘It is an offence for a man to rape a woman.’ But rape was not defined until the 1976 Act which provided:

> For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—
> (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
> (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it;

[...].

That rape was viewed as ‘sexual intercourse with a woman who at the time of the intercourse does not consent to it’, in due course sparked genuine consent debate regarding whether the legal opprobrium regarding the law of rape should focus on the sex or the violence of the occasion. The relevant discussion in this respect has generally been done in Chapter 3 and need not be repeated. It warrants reiterat-

36 See <http://www.opsi.gov.uk/RevisedStatutesActs/ukpga/1976/cukpga_19760082_en_12>. This definition of rape was fundamentally altered in 1994, by the Criminal Justice and Public Order Act, section 142 of which now provides the new definition in the following words:

(i) It is an offence for a man to rape a woman or another man.

(ii) A man commits rape if—

(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and

(b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.

(iii) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.

See <http://www.opsi.gov.uk/acts/acts1994/ukpga_19940033_en_16#pt11-pb1-l1g142>.
ing, however, that there are practical consequences in the choice of focus upon the violent circumstances in which rapes are normally committed during armed conflicts, rather than on consent of the victims. To focus the inquiry on the consent of the victim will risk preoccupation with the conduct of the victim. Many victims will find such a forensic spotlight on them so uncomfortable that they may justly feel doubly victimised. This may result in the victims’ refusal to cooperate with the prosecution, to the extent of resulting in a failed prosecution. This truly is a recipe for impunity for the perpetrator.

Conclusion

The need to stamp out both the historical legacy of sexual violence against women and the distorted culture of its acceptance or toleration, induced or encouraged by war, compels a special place for sexual violence as a necessary component of the justice and social reconstruction programme in post-conflict societies. The need for this is accentuated by the constant complaint of inaction levelled against legitimate authorities in the societies involved, with traditionally sexist attitudes, that it behoves them to make determined efforts to prosecute sexual crimes committed.

The sexual crimes to be prosecuted must include those that were committed as an integral part of the armed conflicts, such as where a particular offence was employed as a weapon of the armed conflict or was committed by persons who abused their military positions. Also to be included are crimes committed by persons who took the advantage of the conflict-created lapses in public safety, such as the diverted attention of the security forces, to commit sexual crimes.