

**REFRAMING SEXUAL AND GENDER-BASED VIOLENCE:
PROPOSED PRACTICES FOR AN INTERNATIONAL
CRIMINAL TRIBUNAL IN SYRIA**

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ABSTRACT

Syria has been trapped in the throes of civil war for several years, and the turmoil is only growing. The unrest has led to catastrophic violence in the region and expansive migration. Among the violence, there have been severe instances of sexual and gender-based violence against men, women, and children. The United Nations has been unable or unwilling to authorize any prosecutions in the region or refer any individuals to the International Criminal Court. The only action the United Nations has taken thus far is to create the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committee in the Syrian Arab Republic since March 2011. The Mechanism has a limited mandate that is focused on preserving evidence at a prosecutorial standard for future tribunals.

This Comment provides an introduction to the Mechanism and focuses on the prosecution of sexual and gender-based violence by previous international tribunals. It focuses on missteps past international tribunals have made while prosecuting sexual and gender-based crimes. This Comment encourages the Mechanism to advance international law by recognizing novel crimes of sexual and gender-based violence, recognize unique procedural concerns and overcome them, and bridge the justice gap. Finally, this Comment provides recommendations for the Mechanism to re-define sexual and gender-based violence, establish proper investigative tools, and create support services for victims.

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I. INTRODUCTION

In 2011, unrest in Syria quickly devolved into a full-scale civil war due to increased government restriction and oppression of civilians.¹ To date, hundreds of thousands of people have been killed,² and millions more have been displaced.³ The large array of actors involved, including rebel groups, the Syrian government, terrorist cells, the United States,⁴ and Russia,⁵ has created further complications. Due to the nature of the Syrian Civil War, many of the atrocities committed during the conflict have gone unpunished.⁶ However, some Western European states have

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1. Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps into the Breach*, 15 J. INT'L CRIM. JUST. 231, 231–32 (2017).

2. *Id.*

3. See *Internally Displaced People*, UNHCR, <https://www.unhcr.org/sy/internally-displaced-people> (last visited Oct. 17, 2019) (indicating that there are currently 6.2 million internally-displaced persons within Syria).

4. See Karen DeYoung et al., *As Trump Withdraws U.S. Forces from Northern Syria, His Administration Scrambles to Respond*, WASH. POST (Oct. 13, 2019), https://www.washingtonpost.com/world/national-security/trump-orders-withdrawal-of-us-forces-from-northern-syria-days-after-pentagon-downplays-possibility/2019/10/13/83087baa-edbb-11e9-b2da-606ba1ef30e3_story.html (explaining that U.S. forces that have fought in Syria for several years are currently in the process of withdrawing from the northeastern part of the country, though a small contingent of U.S. troops will remain at a base in the southwestern portion of the country near the al-Tanf border crossing on the Syria-Iraq border).

5. *Syria's Civil War Explained from the Beginning*, AL JAZEERA (Apr. 14, 2018), <https://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>.

6. See Mark Kersten, *Here's How Perpetrators of Crimes in Syria Are Being Prosecuted*, WASH. POST (Mar. 4, 2019), <https://www.washingtonpost.com/politics/2019/03/04/heres-how-perpetrators-crimes-syria-are-being-prosecuted/> (suggesting that the conflicting aims of the world powers that have intervened in the Syrian civil war have resulted in a lack of accountability for the

prosecuted persons responsible for atrocities committed in the Syrian conflict, and investigations into war crimes perpetrated in the course of the Civil War have been initiated in France, Germany, the Netherlands, Norway, Sweden, and Switzerland.⁷

Numerous international crimes and human rights violations have been committed in Syria over the course of the Civil War,⁸ including well-documented instances of sexual and gender-based violence and especially rape.⁹ The Syrian regime, led by President Bashar al-Assad,¹⁰ has resorted to every possible tactic to remain in control of the country.¹¹ Regime forces have raped women both as punishment for participating in peaceful demonstrations and in order to deter husbands, fathers, and brothers from opposing the regime.¹² From the beginning of the conflict, sexual violence “has been a characteristic of the . . . conflict”¹³ and “continues to be systematically used as a tactic of warfare, torture and terrorism.”¹⁴

atrocities committed).

7. See Milena Sterio, *Sequencing Peace and Justice in Syria*, 24 ILSA J. INT’L & COMP. L. 345, 351 (2018) (first citing *Q&A: First Cracks to Impunity in Syria, Iraq*, HUM. RTS. WATCH (Oct. 20, 2016), <https://www.hrw.org/news/2016/10/20/qa-first-cracks-impunity-syria-iraq> (documenting that, in 2015, French prosecutors opened a preliminary investigation into war crimes committed by the Syrian government and referring to media reports that French immigration services conveyed information about potential suspects to the prosecutorial authorities); then citing Mark Chadwick, *Justice in Syria: Five Ways to Prosecute International Crime*, CONVERSATION (July 10, 2017, 9:05 AM), <http://theconversation.com/justice-in-syria-five-ways-to-prosecute-international-crime-75908> (reporting that in Sweden, Finland, Germany, and Switzerland, refugees present in those countries and suspected of international crimes are being prosecuted under the universal jurisdiction doctrine)).

8. See Stephanie Nebehay, *War Crimes Evidence in Syria ‘Overwhelming’, Not All Can Be Pursued: U.N.*, REUTERS (Mar. 26, 2018, 1:54 PM), <https://www.reuters.com/article/us-mideast-crisis-syria-warcrimes/war-crimes-evidence-in-syria-overwhelming-not-all-can-be-pursued-u-n-iduskbn1h22gn> (referring to a report issued by the Commission of Inquiry on Syria, a U.N. quasi-prosecutorial body, that said Syrian regime forces had committed war crimes and crimes against humanity); see also *Headless Bodies Found in Mass Graves in IS Syrian Stronghold Thought to Be Those of Sex Slaves*, ABC NEWS (Mar 1, 2019, 2:31 AM), <https://www.abc.net.au/news/2019-03-01/is-mass-grave-yazidi-sex-slave-islamic-state-syria-baghouz/10862994> (discussing the recent discovery of mass graves thought to contain the bodies of dozens of Yazidi people who were enslaved in a part of Syria previously occupied by ISIS).

9. Marie Forestier, “*You Want Freedom? This is Your Freedom*”: *Rape as a Tactic of the Assad Regime* 1 (London Sch. of Econ. Ctr. for Women, Peace, & Sec., Working Paper No. 3, 2017), http://eprints.lse.ac.uk/69475/1/Forestier_You_want_freedom_this_is_your_freedom_WP3_2017.pdf.

10. *Profile: Bashar al-Assad*, AL JAZEERA (Apr. 17, 2018), <https://www.aljazeera.com/news/middleeast/2007/07/200852518514154964.html>. President Assad has been in power since 2000, and since the onset of the Syrian Civil War in March 2011, 465,000 people have been killed under his rule. *Id.*

11. Forestier, *supra* note 9, at 1.

12. *Silent War: How Rape Became a Weapon in Syria*, AL JAZEERA (Jun. 11, 2018), <https://www.aljazeera.com/programmes/witness/2018/06/silent-war-rape-weapon-syria-180611071447939.html>.

13. Forestier, *supra* note 9, at 1 (quoting U. N. Secretary-General, *Report of the Secretary-General on Conflict Related Sexual Violence*, ¶ 60, U.N. Doc S/2015/203 (Mar. 23, 2015)) (internal quotation marks omitted).

14. *Id.* at 1 (quoting U. N. Secretary-General, *Report of the Secretary-General on Conflict*

Within Syria, sexual and gender-based violence has been politically motivated and occurred most frequently between 2011 and 2013.¹⁵ However, sexual and gender-based violence does not uniquely target women and is not intrinsically motivated by either sexual gratification or politics, as there is evidence that extremist groups in Syria, such as the Islamic State, have imposed “‘mediaeval punishments on men accused of homosexuality,’ including throwing them off tall buildings.”¹⁶ Among state actors, twenty government and military branches have reported incidents of rapes of women, while fifteen branches have documented accounts of rapes of men and boys.¹⁷ Discussions by the U.N. Security Council on violence against women in Syria have predominantly focused on violence conducted by extremist or terrorist groups, such as violence against Yazidi¹⁸ women.¹⁹ Violence by the Assad regime against other Syrian women has been overlooked, because so few survivors are willing to speak out.²⁰ Societal norms in Syria operate to prevent women subjected to sexual violence from speaking out, because familial honor is closely connected to women.²¹

In an effort to start the process of holding actors in Syria accountable, the United Nations authorized the creation of a new transitional justice body in Syria.²² On December 21, 2016, the U.N. General Assembly adopted a mechanism (Mechanism) to assist in the investigation and prosecution of those responsible for crimes committed in Syria.²³ The Mechanism was established to:

Related Sexual Violence, ¶ 68, U.N. Doc S/2016/361 (Apr. 20, 2016) (internal quotation marks omitted).

15. *Id.* at 1–3. Security forces targeted women who were thought to be aiding the revolution or had male relatives that were involved in anti-government activities. *Id.* at 3. The intended political effect of those crimes was to quell rebellion by damaging communities and harming families opposed to the regime. *Id.* at 10.

16. Stephanie Nebehay, *Thousands of Women, Men, Children Raped in Syria's War*: U.N. Report, REUTERS (Mar. 15, 2018, 8:33 AM), <https://www.reuters.com/article/us-mideast-crisis-syria-warcrimes-sexual/thousands-of-women-men-children-raped-in-syrias-war-u-n-report-idUSKCN1GR1PZ>.

17. Human Rights Council, “I Lost My Dignity”: Sexual and Gender-Based Violence in the Syrian Arab Republic, at 1, U.N. Doc. A/HRC/37/CRP.3 (Mar. 8, 2018) [hereinafter “I Lost My Dignity”] (detailing rape and sexual violence committed throughout Syria in the course of the civil war by both Syrian government and pro-regime forces, as well as other armed groups).

18. Yazidi people are members of a Kurdish religious minority who live primarily in Syria, Iraq, Iran, and Turkey. *Yazidi, Religious Sect*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Yazidi> (last visited Oct. 20, 2019). The Yazidi faith is an integration of some elements of ancient Iranian religions, Judaism, Christianity, and Islam. *Id.*

19. Forestier, *supra* note 9, at 1.

20. *Id.*

21. *Id.*

22. *Mandate*, INT'L, IMPARTIAL & INDEP. MECHANISM, <https://iiim.un.org/mandate/> (last visited Oct. 20, 2019). The International Criminal Court has no jurisdiction over Syria, and crimes committed in the Syrian Civil War cannot be prosecuted by the Court absent a referral by the U.N. Security Council. See Somini Sengupta, *War Crimes Proposal Would Help U.N. Build Cases on Syria*, N.Y. TIMES (Dec. 20, 2016), <https://www.nytimes.com/2016/12/20/world/middleeast/syria-war-crimes.html> (indicating that crimes committed in the Syrian Civil War could be referred to the International Criminal Court by the U.N. Security Council were it not for Russia's use of its veto).

23. G.A. Res. 71/248, ¶ 4, U.N. Doc. A/RES/71/248 (Dec. 21, 2016) [hereinafter General

[C]ollect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law[.]²⁴

The passage of this resolution was the first time the U.N. General Assembly established a pre-tribunal body with a prosecutorial standard for collecting evidence for future tribunals.²⁵ Commentators have called the Mechanism a meaningful step towards accountability despite its lack of prosecutorial or adjudicative powers.²⁶ The duty of the Mechanism is to collect and preserve evidence to build cases for prosecution.²⁷ This also means the Mechanism will work off of existing documents and collections of evidence,²⁸ such as those recorded by the U.N. Commission of Inquiry for Syria (UNCOI).²⁹

The Mechanism does not have a specific policy in place to manage sexual and gender-based crimes.³⁰ The Terms of Reference for the Mechanism acknowledge gender-based crimes, specify that measures will be taken to respect and ensure the confidentiality of victims of gender-based crimes, and indicate that individuals specializing in gender-based crimes will be hired as staff members.³¹ However, there are no policies and procedures in place dictating how the Mechanism will go about collecting and preserving evidence of gender-based crimes.³²

The Mechanism has two broad goals: (i) “collect[ing], consolidat[ing], preserv[ing], and analy[zing] evidence [or information] of violations of international humanitarian law and human rights violations and abuses” and (ii) preparing files to facilitate and expedite criminal proceedings in “national, regional, or international

Assembly Resolution to Establish the Mechanism].

24. *Id.*

25. Whiting, *supra* note 1, at 231–32.

26. Ingrid Elliott, ‘A Meaningful Step Towards Accountability’? *A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria*, 15 J. INT’L CRIM. JUST. 239, 241 (2017).

27. *Id.*

28. *See id.* (indicating that some Syrian and international groups have already engaged in the activities the International, Impartial, and Independent Mechanism is mandated to undertake).

29. *See Terms of Reference*, INT’L, IMPARTIAL & INDEP. MECHANISM, ¶¶ 5, 24–25, 30, <https://iiim.un.org/terms-of-reference-of-iiim/> (last visited Oct. 18, 2019) (explaining that the Mechanism primarily collects evidence that is first obtained by other sources, such as states, parties to the Syrian Civil War, or the Independent International Commission of Inquiry on the Syrian Arab Republic, although it is empowered to collect some evidence on its own if necessary).

30. *See id.* ¶¶ 3–4 (omitting discussion of a specific policy for sexual and gender-based crimes).

31. *See id.* ¶¶ 19–21, 31–33 (stating that the Mechanism will utilize evidentiary standards capable of ensuring the privacy, safety, and well-being of victims; be headed by a senior judge or prosecutor who is committed to gender equality; recruit staff with experience in sexual and gender-based crimes and violence; and give due consideration to the gender balance of its staff).

32. *See id.* ¶¶ 3–4 (omitting discussion of a specific policy or procedure for sexual and gender-based crimes).

courts or tribunals that have or may in the future have jurisdiction.”³³ The Terms of Reference, adopted shortly after the Mechanism was passed,³⁴ further elaborate that the Mechanism has a quasi-prosecutorial function.³⁵ In this capacity, the Mechanism is empowered to use evidence collected by other organizations as well as evidence it has itself collected, when appropriate.³⁶ However, the Mechanism does not have the inherent power to compel adjudications.³⁷ Instead, the implicit central mission of the Mechanism is to foster cooperation among the many actors in the Syrian Civil War and to take the lead in the gathering of evidence.³⁸

The Mechanism will primarily source information from other international and national actors and will supplement that activity by collecting evidence on its own if necessary.³⁹ The Mechanism will then parse through the evidence with “a methodical analysis of evidence facilitated by advanced, state-of-the-art criminal investigative and prosecutorial software.”⁴⁰ The Mechanism will subsequently prepare files on the criminal conduct of those responsible and conduct preliminary assessments of that material through a prosecutorial lens.⁴¹ Some of the primary preservation bodies operating with respect to the Syrian conflict, including UNCOI⁴²

33. See Whiting, *supra* note 1, at 232–33 (quoting U.N. General Assembly, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. A/71/L.48 (Dec. 19, 2016)) (explaining that the Mechanism will first source evidence collected by various parties and will then analyze that evidence and prepare materials about it that could be provided to an adjudicatory body).

34. *Terms of Reference*, *supra* note 29, ¶ 2.

35. See *id.* ¶¶ 3–16 (delineating the mandate with which the Mechanism is charged, which relates to investigative and analytical functions designed to support future potential prosecutions).

36. *Id.* ¶ 5.

37. Elliott, *supra* note 26, at 241; Christian Wenaweser & James Cockayne, *Justice for Syria?: The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice*, 15 J. INT'L CRIM. JUST. 211, 214–15 (2017).

38. Wenaweser & Cockayne, *supra* note 37, at 214–15; see Elliott, *supra* note 26, at 241 (suggesting that, given the substantial level of evidence-gathering activity that has already occurred among local actors in the Syrian conflict, the Mechanism would operate so as to facilitate the process of compiling that evidence and utilizing it to build potential criminal cases).

39. *Terms of Reference*, *supra* note 29, ¶ 5.

40. Wenaweser & Cockayne, *supra* note 37, at 215–16 (quoting U.N. Secretary-General, *Implementation of the Resolution Establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, ¶ 15, U.N. Doc. A/71/755 (Jan. 19, 2017) [hereinafter *Implementation of the Resolution Establishing the International, Impartial and Independent Mechanism*]).

41. *Id.* at 214–15 (explaining that the Mechanism's preliminary assessments of evidence and materials will focus on identifying areas where further investigations will be required before criminal cases can move forward).

42. See Elliott, *supra* note 26, at 242–43 (explaining that UNCOI, which was established in 2011 by the U.N. Human Rights Council, is purposed to investigate and document violations of International Human Rights Law in the Syrian Civil War, and has done so since the time of its creation); see, e.g., “I Lost My Dignity,” *supra* note 17 (documenting violations of international human rights law in the Syrian Civil War).

and other non-governmental organizations,⁴³ such as the Commission of International Justice and Accountability (CIJA), have already begun collecting and preserving evidence and building case files on war crimes committed in Syria.⁴⁴ The evidence collected by non-governmental entities in Syria includes original documentation, as well as a large database containing the names of alleged war criminals, and those organizations then plan to use this data to link unique actors with key events in the region and build leadership cases.⁴⁵ CIJA continues its operation in Syria and works with national governments in order to forward evidence for prosecution.⁴⁶

Part II discusses how previous international mechanisms and tribunals handled sexual and gender-based violence to contrast the new methods that should be employed by the Mechanism. Part III recommends that the Mechanism adopt a novel definition of sexual and gender-based violence in international law and makes recommendations as to how the Mechanism can further the development of sexual and gender-based violence, particularly in techniques for handling the collection of evidence in such cases. Specifically, the Mechanism should establish joint legal and medical facilities to simplify reporting of sexual and gender-based violence, advocate for increased female presence among local police and national military operations, and finally, create a gender-balanced sexual and gender-based violence unit within the Mechanism. Finally, the Comment concludes by arguing that the Mechanism is well-positioned to further international law as it relates to sexual and gender-based violence.

II. LEARNING FROM PAST MECHANISMS

The Mechanism is a unique approach by the United Nations to address international crimes and promote justice in Syria.⁴⁷ The United Nations has authorized various international courts and mechanisms,⁴⁸ yet none possess the unique mandate with which the Mechanism has been charged.⁴⁹ Since the creation of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the United Nations has developed international models of justice other than the purely international ad hoc tribunals.⁵⁰

The United Nations has begun to experiment with hybrid tribunals that

43. Elliott, *supra* note 26, at 245 (stating that a wide variety of non-governmental organizations have already pursued and continue to pursue the same missions that the Mechanism is mandated to undertake).

44. *Id.*

45. *Id.*

46. *Id.*

47. General Assembly Resolution to Establish the Mechanism, *supra* note 23, ¶4 (establishing the Mechanism and its purposes).

48. Andrew Hudson & Alexandra Taylor, *The International Commission Against Impunity in Guatemala*, 8 J. INT'L CRIM. JUST. 53, 53–54 (2010).

49. See *supra* Part I for a discussion of the Mechanisms, powers, and authorities. See also Hudson & Taylor, *supra* note 48, at 55 (contrasting the prosecutorial powers of other mechanisms to the Mechanism's main goal of collecting evidence at a prosecutorial standard).

50. Hudson & Taylor, *supra* note 48, at 53–54.

incorporate features of international and domestic law.⁵¹ Such hybrid models were created to establish more local legitimacy, incorporate legal practices into domestic legal systems, and train local justices at a lower cost than international courts.⁵² The Mechanism furthers many of these same goals, but unlike the hybrid models that operate domestically, the Mechanism for Syria does not.⁵³ The Mechanism is in a unique position to build on what previous international mechanisms have been able to accomplish by recognizing novel sexual and gender-based violence crimes, learning from procedural issues, and continuing to develop new ways to bridge the justice gap for victims.

A. Recognizing Novel Crimes of Sexual and Gender-Based Violence

Previous international justice mechanisms have continued to build on each other by recognizing new forms of sexual and gender-based violence.⁵⁴ The Mechanism will need to balance the drive to prosecute novel crimes with the goals outlined in the *International Covenant on Civil and Political Rights*.⁵⁵ In the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Prosecutor attempted to charge the defendants with rape.⁵⁶ Rape was included as a crime against humanity in ECCC law; however, it was not yet recognized as a crime against humanity by international law.⁵⁷ The Court held that because of the conflicting statutory language of the relevant law, it would follow the general legal principle that one cannot be tried for a crime that was not recognized as a crime at the time it was committed.⁵⁸ Therefore, because rape was not a crime under international

51. *See id.* at 54 (discussing common characteristics in hybrid mechanisms).

52. *Hybrid Tribunals: Core Elements*, PUB. INT'L L. & POL'Y GROUP, 2–5 (June 2013), http://syriaaccountability.org/wp-content/uploads/PILPG-Syria-Hybrid-Tribunals-Memo-2013_EN.pdf.

53. *See* General Assembly Resolution to Establish the Mechanism, *supra* note 23, ¶¶ 1, 3–5 (committing to an international, independent, and impartial mechanism).

54. *See, e.g.*, Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 *NEW ENG. J. INT'L & COMP. L.* 135, 137 (2005) (discussing how The International Court of Rwanda was the first to convict someone of rape as a form of genocide); Michelle Staggs Kelsall & Shanee Stepakoff, “*When We Wanted to Talk About Rape*”: *Silencing Sexual Violence at the Special Court for Sierra Leone*, 1 *INT'L J. TRANSITIONAL JUST.* 355, 359 (2007) (stating that the SCSL Article 2(g) recognizes for purposes of prosecution: rape, sexual slavery, enforced prostitution, forced pregnancy, etc.); *Sepur Zarco Case: The Guatemalan Women Who Rose for Justice in a War Torn Nation*, U.N. WOMEN (Oct. 19, 2018), <http://www.unwomen.org/en/news/stories/2018/10/feature-sepur-zarco-case> (stating that the prosecution of the Sepur Zarco case was the first time a national court prosecuted sexual slavery during a conflict using a combination of national and international law).

55. *See* Rachel Killean, *An Incomplete Narrative: Prosecuting Sexual Violence Crimes at the Extraordinary Chambers in the Courts of Cambodia*, 13 *J. INT'L CRIM. JUST.* 331, 339 (2015) (citing International Covenant on Civil and Political Rights art. 15(1), Dec. 16, 1966, 999 U.N.T.S. 171) (“This decision was based on the principle of legality, under which no one shall be held guilty for an act that did not constitute an offence at the time it was committed.”).

56. *Id.* at 338.

57. *See id.* at 339 (explaining that on appeal in 1975, the Court held that rape was not considered a crime against humanity under international law).

58. *Id.*

humanitarian law in 1975, the accused could not be tried for rape.⁵⁹

Apart from recognizing new crimes of sexual and gender-based violence, tribunals can recontextualize how crimes of sexual and gender-based violence are viewed. The ICTR and ICTY both recognized rape in new and different contexts.⁶⁰ The ICTR viewed rape in the context of genocide, where the greater harm was to the affected ethnic community, not to the individual women who were victimized.⁶¹ The ICTY recognized rape as torture and adopted special rules of evidence to protect witnesses who were victims of sexual and gender-based violence.⁶² In 2016, the International Criminal Court (ICC) decided *Prosecutor v. Jean-Pierre Bemba Gombo*,⁶³ in which rape was recognized as an international crime without the need for “justifi[cation] through another nominate crime.”⁶⁴ This is a welcome departure from the ICTY and ICTR, where rape was regarded at a lower status than other crimes.⁶⁵ In those tribunals, judges contextualized rape through the harm it caused others.⁶⁶ The *Bemba* case reframed rape to focus on the harm to the individual in the same way that murder and pillaging are considered crimes against an individual.⁶⁷

Although *Bemba* was a step forward in the prosecution of sexual and gender-based violence, there is still much room for improvement. In 2018, the ICC Appeals Chamber overturned the Trial Chamber’s judgment in *Bemba*, resulting in Bemba’s acquittal.⁶⁸ The case originally conceptualized rape as broadly victim-focused,⁶⁹ but the actual definition of rape used by the Court was more “mechanical” and missed an opportunity to advance a modern definition.⁷⁰ The ICC defined rape as “requir[ing] ‘invasion’ of a person’s body by ‘conduct resulting in penetration, however slight, of any part of the body . . . with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.’”⁷¹ This

59. *Id.*

60. Marie-Alice D’Aoust, *Sexual and Gender-Based Violence in International Criminal Law: A Feminist Assessment of the Bemba Case*, 17 INT’L. CRIM. L. REV. 208, 210 (2017).

61. *Id.*

62. *Id.*

63. See generally Case No. ICC-01/05-01/08, Judgment Pursuant to Art. 74 of the Statute, ¶¶ 98–112 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf (finding defendant guilty of murder as war crime and crime against humanity, rape as war crime and crime against humanity, and pillaging as war crime).

64. D’Aoust, *supra* note 60, at 213; Bemba Gombo, Case No. ICC-01/05-01/08, ¶ 98.

65. D’Aoust, *supra* note 60, at 213–14 (citing Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 25 WINDSOR Y.B. ACCESS TO JUST. 3, 14 (2007)); Bemba Gombo, Case No. ICC-01/05-01/08, ¶¶ 98–112.

66. D’Aoust, *supra* note 60, at 214 (citing Buss, *supra* note 65); Bemba Gombo, Case No. ICC-01/05-01/08, ¶ 98.

67. D’Aoust, *supra* note 60, at 214 (citing Bemba Gombo, Case No. ICC-01/05-01/08, ¶¶ 99–112).

68. Oumar Ba, *What Jean-Pierre Bemba’s Acquittal by the ICC Means*, AL JAZEERA (June 13, 2018), <https://www.aljazeera.com/indepth/opinion/jean-pierre-bemba-acquittal-icc-means-180612121012078.html>.

69. D’Aoust, *supra* note 60, at 214.

70. *Id.* at 216.

71. Bemba Gombo, Case No. ICC-01/05-01/08, ¶ 99 (quoting Report of the Preparatory Comm. for the International Criminal Court, Addendum: Finalized Draft Text of the Elements of

acquittal brings into question the ICC's ability to bring justice to victims and undermines command responsibility doctrine in the context of rape.⁷² By emphasizing the physical criteria to establish rape, the Court ignores the psychological violence women experience from rape.⁷³ Modern domestic courts have modified their rape statutes to encapsulate varying degrees of sexual violence and have also adopted "gender-sensitive" approaches.⁷⁴

B. Procedural Concerns

Unique procedural issues arise when prosecuting crimes of sexual and gender-based violence. Not only must tribunal officers grapple with the unusual sensitivities of these cases,⁷⁵ but they must also adequately handle due process concerns.⁷⁶ In Rwanda, there were unique difficulties because of the sensitivity of the crime.⁷⁷ The accused would accept plea deals and admit to a variety of violent crimes but would deny any allegations of rape.⁷⁸ Victim-witnesses were also hesitant to speak to interviewers, because they feared for their safety.⁷⁹ The extended period of time between when the ICTR investigators interviewed witnesses and when the ICTR sought out these victims to testify in court further complicated matters for the prosecution of sexual and gender-based violence cases in Rwanda.⁸⁰

Tribunals are tasked with ensuring the timeliness of trials and preserving the rights of the accused, while also balancing the need for justice.⁸¹ The procedures surrounding the Special Court for Sierra Leone's (SCSL) prosecution of the Civil Defence Forces (CDF) provide an example of this paradigm in practice. When the

Crimes, art. 7(1)(g)-1, U.N. Doc. PCNICC/2000/1/Add.2 (2000)).

72. See Ba, *supra* note 68 (discussing the implications of Bemba's overturned conviction for both the Court's body of law and his victims).

73. D'Aoust, *supra* note 60, at 216.

74. See *id.* at 216–17 (noting that the United Kingdom, Canada, and nearly all of the United States have amended sexual offense laws).

75. See Jonneke Koomen, "Without These Women, the Tribunal Cannot Do Anything": *The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda*, 38 SIGNS J. WOMEN CULTURE & SOC'Y 253, 258 (2013) (describing how female witnesses in the *Akayesu* case were harassed or murdered after testifying).

76. Killean, *supra* note 55, at 339 (discussing how in the ECCC, rape was encapsulated within the torture category and therefore was a crime against humanity instead of being recognized as a unique crime by itself).

77. "If you interview a witness who is a Hutu from the attackers' side, he will not tell you anything [about rape]. He will not admit anything due to the sensitivity of the crime. No one wants to admit publicly." Koomen, *supra* note 75, at 259 (quoting an ICTR prosecution investigator).

78. *Id.*

79. *Id.*

80. See *id.* at 262–63 (describing a prosecutor's visit in 2006, years after the initial conflict, and found her malnourished and taking care of orphan children). Due to the intimate nature of subsistence farming communities, it was almost impossible for the prosecutor to preserve the victim's privacy, as all members of the community knew she represented a non-governmental organization due to her vehicle. *Id.*

81. See, e.g., Kelsall & Stepakoff, *supra* note 54, at 360 ("[Special Court for Sierra Leone judges] endeavor to balance the right of the accused to be tried without delay against the prosecution's obligation to prosecute crimes of sexual violence.").

Office of the Prosecutor for the SCSL filed its case against the rebel group members of the CDF, there was not yet enough evidence to support charges of sexual violence.⁸² Shortly after the initial indictment was filed, but four months before the actual trial, the Prosecutor tried to obtain leave to amend the indictment to include counts of rape, sexual slavery, forced prostitution, and forced marriage.⁸³ The Court denied both the Prosecutor's initial motion to amend the indictment and the appeal from that decision.⁸⁴

In its opinion, the Court cited the length of time between when evidence of sexually violent crimes first arose in June of 2003 and when the Prosecutor moved to file an amended indictment in February of 2004.⁸⁵ The majority opinion emphasized the need to balance the right of the accused; therefore, the "time-limited mandate" of the SCSL changed the normal construction of undue delay to shorten the time frame typically seen in other jurisdictions.⁸⁶ The Court attempted to balance the right of the accused to an expeditious trial with the prosecution's obligation to try crimes of sexual violence.⁸⁷ However, the Court refused to acknowledge the special circumstances surrounding sexually violent crimes, and the initial SCSL Rules failed to create a unique rule from the outset.⁸⁸ Despite the denial of the amended indictment, the prosecution still attempted to present evidence of sexual violence, even if it was to support original crimes in the indictment such as physical violence and mental suffering.⁸⁹

Apart from failing to amend complaints to include charges of sexual and gender-based violence, prosecutors may fail to follow up on evidence of these crimes given by victims.⁹⁰ For example, in the ICTR, the Tribunal called witnesses to testify about a variety of crimes they had witnessed or were subject to, but not specifically crimes of sexual or gender-based violence.⁹¹ One witness testifying about the murder of one of her family members also mentioned that her young daughter had been

82. *Id.* at 359–60.

83. *Id.* at 360 (citing Prosecutor v. Samuel Hinga Norman, Moinina Fofana & Allieu Kondewa, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment (May 20, 2004)).

84. *Id.*

85. *Id.*

86. *See id.* at 360–61 (citing Norman et al., Case No. SCSL-04-14-PT, ¶ 53).

87. "The rules relating to the detection and prosecution of [sexual violence] offences are the same as those governing the other war crimes . . . and must not constitute nor give rise to *any exceptions to the general rules* that relate to the respect and protection of the interest of the . . . Prosecution and the Accused . . . and the overall interests of justice." *Id.* at 360–61 (quoting Norman, Case No. SCSL-04-14-PT, ¶¶ 53, 83).

88. Kelsall & Stepakoff, *supra* note 54, at 361.

89. *Id.* at 363.

90. *See* Susana SáCouto & Katherine Cleary, *Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL'Y & L. 337, 350 (2009) (describing how prosecutors failed to inquire into sexual and gender-based violence after two witnesses testified).

91. *See* Kelsall & Stepakoff, *supra* note 54, at 363 (indicating that the judge warned the prosecution against allowing witnesses to testify to sexual violence).

raped.⁹² Members of the Tribunal questioned the witness about the rape of her daughter, and the witness testified that “she was never questioned about rape by ICTR investigators.”⁹³ Another witness called to testify in the same case attempted to discuss her own rapes or the rapes of other women about which she had heard during the course of testimony.⁹⁴ It was only after this repeated testimony of rape that amicus curiae briefs were filed to “[call] upon the Trial Chamber to exercise its inherent supervisory authority to invite the Prosecution to amend the indictment against Akayesu to charge rape and other serious acts of violence.”⁹⁵ Finally, after the amicus curiae briefs were filed, the Prosecutor amended the indictment to include charges of rape.⁹⁶

Rigid rules that do not allow for the flexibility to amend complaints fail to take into account many of the fundamental barriers that exist when prosecuting sexually violent crimes.⁹⁷ Like the SCSL, the ECCC prosecutors also failed to initially investigate forced marriage.⁹⁸ Currently, forced marriage is the second-most common charge by civil parties.⁹⁹ Additionally, there is often a large gap in public perception as to how perpetrators and victims are seen in the community.¹⁰⁰ The victim-witnesses in these cases may continue to live in the same communities as supporters of the perpetrators.¹⁰¹ These particularly rigid social structures can have stronger adverse effects on young girls who are victims of sexual and gender-based violence.¹⁰² For example, in Sierra Leone, there is evidence to suggest that almost all girls who were abducted during the conflict were raped.¹⁰³

Beyond pre-trial motions and discussions, in-trial procedural elements can still adversely affect victims. During the SCSL CDF trial, the Prosecution called victims of sexual violence to testify; however, the defense immediately objected to their

92. SáCouto & Cleary, *supra* note 90, at 350.

93. *Id.*

94. *Id.*

95. *Id.* at 350 (quoting Beth Van Schaack, *Engendering Genocide: Akayesu and the Affirmation of Genocidal Rape*, in HUMAN RIGHTS ADVOCACY STORIES 193, 199 (Deena R. Hurwitz et al. eds., 2008)).

96. *Id.* at 350–51.

97. See Kelsall & Stepakoff, *supra* note 54, at 360–61 (noting chamber’s refusal to amend a complaint).

98. Theresa de Langis, *A Missed Opportunity, A Last Hope? Prosecuting Sexual Crimes Under the Khmer Rouge Regime*, 3 CAMBODIA L. & POL’Y J. 39, 40 (2014).

99. *Id.*

100. Kelsall & Stepakoff, *supra* note 54, at 361 (explaining how accused perpetrators of the sexually violent crimes were viewed by some as national heroes in Sierra Leone).

101. *Id.* at 361.

102. See generally Augustine S. J. Park, ‘Other Inhuman Acts’: *Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone*, 15 SOC. & LEGAL STUD. 315, 331 (2006).

103. *Id.* at 321 (citing McKay Susan & Dyan Mazurana, *Where Are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War*, INT’L CTR. FOR HUM. RTS. & DEMOCRATIC DEV. 6, 58 (2004), https://www.peacewomen.org/sites/default/files/wps_wherearethegirls_girlsfightingfrocesinugandasierraleoneandmozambique_march2004_0.pdf).

testimony as it began to turn towards the sexual violence they experienced.¹⁰⁴ The defense was aware that the testimony would take on this character, because the general nature of the sexual violence experienced by the witnesses was included in the prosecution's pre-trial brief.¹⁰⁵ The women were led to believe they would have the opportunity to air their pain and suffering to the Court by testifying against their abusers.¹⁰⁶ After this initial testimony, the Prosecution sought to clarify the extent to which their witnesses could testify,¹⁰⁷ but the Court issued only a brief order excluding evidence of sexual violence with a full opinion to follow at a later date.¹⁰⁸ Thus, the Prosecution attempted to elicit more limited testimony from the witnesses about the sexual violence they experienced, only for the Court to later rule it inadmissible.¹⁰⁹ The rigid trial rules forced victims to relive their trauma, only for the testimony to be excluded.¹¹⁰ Timeliness should be an important rule for the Court, not just in hearing trials, but also in ruling on motions to ensure victims do not need to testify unnecessarily.

In regard to prosecuting sexually violent crimes, the first case the ECCC tried, Case 001, only included one incident of rape.¹¹¹ Like in the SCSL trial of the CDF leaders, the ECCC Trial Chamber in Case 001 refused to allow additional charges of sexual and gender-based violence, because the evidence was discovered late in the proceedings.¹¹² In Case 002, the Court refused to acknowledge in its Closing Order, or charging instrument,¹¹³ other forms of sexual and gender-based violence apart from the original charge of forced marriage and rape within the context of that marriage.¹¹⁴ Commentators have widely criticized the Closing Order for ignoring evidence of other forms of sexual violence and for denying a remedy to victims.¹¹⁵

104. Kelsall & Stepakoff, *supra* note 54, at 363. As the prosecutor's pre-trial motions to include crimes of sexual and gender-based violence had been denied by the court, the prosecutors instead attempted to elicit evidence of crimes of sexual and gender-based violence through the crimes of "Physical Violence" and "Mental Suffering." *Id.* Therefore, the prosecutors intentionally lead witnesses towards giving testimony of rape and other sexually violent crimes all while knowing that said testimony might result in objections. *Id.*

105. *Id.*

106. *See id.* at 372–73 (recounting the pain of witnesses when they were barred from testifying to the sexual violence each suffered).

107. *Id.* at 363.

108. *Id.*

109. *Id.* at 363–64.

110. *Id.*

111. Killeen, *supra* note 55, at 338.

112. *Id.*

113. The Closing Order is the charging instrument of the ECCC. *See, e.g., id.* at 342–43 ("These failures [in ECCC investigations] have resulted in a Closing Order that does not accurately reflect the full range of crimes that the senior leaders of the Khmer Rouge could be charged with.").

114. de Langis, *supra* note 98, at 42.

115. *Id.* at 40–42. After the Closing Order was released, its evidentiary conclusions were undermined by the Cambodian Women's Hearing on Sexual Violence under the Khmer Rouge, as well as by the Special Representative of the Secretary-General on Sexual Violence in Conflict, who sent letters to the Royal Government of Cambodia and the United Nations. *Id.*

C. *Bridging the Justice Gap*

While it is important for the Mechanism to investigate novel sexual and gender-based crimes, it should also seek justice for victims of those crimes and serve as a model for future investigations and prosecutions. Sexual and gender-based violence is closely linked with broader gender inequality.¹¹⁶ Therefore, justice for victims has an intricate connection with gender norms.¹¹⁷ These forms of violence in the context of war are in some ways easier to prosecute than the violence that often constitutes the everyday experiences of women in these conflict zones.¹¹⁸

Presently, the Mechanism operates outside of Syria,¹¹⁹ which poses unique problems for securing witness testimony.¹²⁰ The Mechanism needs to ensure that prosecutors and interpreters interviewing witnesses are sensitive to the victims' experiences. Additionally, Mechanism staff will need to be conscious of the resources they can provide by managing legal support with access to medical and psychological services. Should the Mechanism transition into a full tribunal, it will be important that the tribunal provide adequate transportation to Geneva or other international locations for victim-witnesses and other necessary victim resources. For example, in the early days of the ICTR, the Court did not provide stipends for witnesses who had to travel to Arusha, Tanzania, where the ICTR was headquartered.¹²¹ Such transportation issues may not arise if the tribunal were to pick a location in Syria.

Different yet related questions of justice can also arise when victims are asked to testify at the trials of their attackers.¹²² Depending on the procedural constraints of the court,¹²³ victims may be called to testify about their trauma, only for the defense to make objections or to have the testimony stricken from the record later.¹²⁴

Should the Mechanism convert to a tribunal, one potential innovative method for bringing justice to victims of sexual and gender-based violence is the model pioneered by the ECCC, which permitted victims to participate as parties in the

116. *D'Aoust*, *supra* note 60, at 215.

117. *Id.* at 216 (discussing the relationship with international norms and regulations and how these regulations can reproduce gender discrimination).

118. "With regard to crimes against women, there is unfortunately not so sharp a difference between war and everyday life. Torture and rape in conflict situations have too much in common with rape in the marital bedroom, battering in the home, and gang rape in bars and streets These are examples of egregious gender violence that is committed on a widespread or systematic scale and involves policies of legitimation, whether policies of active encouragement or policies of knowing omission, invisibilization, and toleration." *Id.* at 218 (quoting Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 239 (2000)).

119. *Implementation of the Resolution Establishing the International, Impartial and Independent Mechanism*, *supra* note 40, ¶ 33.

120. See generally *Taking Evidence from Witnesses in Foreign Jurisdictions*, HARDWICKE (Jan. 3, 2017), <https://hardwicke.co.uk/taking-evidence-from-witnesses-in-foreign-jurisdictions/>.

121. *Koomen*, *supra* note 75, at 262–64.

122. *Kelsall & Stepakoff*, *supra* note 54, at 361.

123. *Id.* at 363.

124. *Id.* at 363–64.

judicial process.¹²⁵ Not only could victims participate as witnesses, but they could also participate as civil parties with rights to legal representation, to participation in pre-trial and trial stages, and to make claims for reparations.¹²⁶ This allows victims to participate in the judicial process and potentially secure some form of justice while ensuring that they are not forced to relive their trauma only for the testimony to be stricken from the record later.

Other developments in the international investigation and prosecution of sexual crimes have occurred in Guatemala. The International Commission Against Impunity in Guatemala (CICIG) helped support the prosecution of members of paramilitary groups.¹²⁷ Prior to the formation of CICIG, the United Nations originally sponsored a Commission for Historical Clarification (CEH).¹²⁸ The Commission issued a report that detailed the crimes committed during the decades-long war.¹²⁹ The CEH included testimony of indigenous women during the war who experienced rape and sexual violence.¹³⁰

This testimony collected by CEH led to a recent case prosecuted in Guatemala focused on the military outpost in Sepur Zarco.¹³¹ In 2011, survivors of the Sepur Zarco Camp pursued criminal charges against two former military officers, seeking justice and reparations.¹³² This case “was the first time in history that a national court prosecuted sexual slavery during conflict using national legislation and international criminal law.”¹³³ In 2016, the Guatemalan court convicted the two former officers and ordered reparations for the victims.¹³⁴

For the ICC, the Rome Statute also represents a victim-friendly approach to legal proceedings, because victims can submit an application to participate in the trial.¹³⁵ The statute also requires the ICC “to take appropriate measures to protect the safety, physical, and psychological well-being, dignity and privacy of victims and witnesses.”¹³⁶ At pre-trial and at trial, victims who have been allowed to

125. Killean, *supra* note 55, at 338.

126. *Id.*

127. *CICIG: A Mechanism for Justice and Security Sector Reform—Guatemala*, INT’L SECURITY SECTOR ADVISORY TEAM, <https://issat.dcaf.ch/Learn/Resource-Library/Case-Studies/CICIG-A-Mechanism-for-Justice-and-Security-Sector-Reform-Guatemala> (last visited Oct. 28, 2019).

128. Catherine Nolin Hanlon & Finola Shankar, *Gendered Spaces of Terror and Assault: The Testimonio of REMHI and the Commission for Historical Clarification in Guatemala*, 7 *GENDER, PLACE & CULTURE: J. FEMINIST GEOGRAPHY* 265, 265 (2000).

129. *Id.* at 266.

130. *Id.* at 265, 268, 275.

131. *Sepur Zarco Case: The Guatemalan Women Who Rose for Justice in a War-Torn Nation*, *supra* note 54.

132. *Id.*

133. *Id.*

134. *Id.*

135. Khadija Ali, *Sexual and Gender Based Crimes in International Criminal Law: Moving Forwards or Backwards?*, 9 *WORLD ACAD. SCI., ENGINEERING & TECH. INT’L J. L. & POL. SCI.* 3619, 3621 (2015).

136. Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 *CASE W. RES. J. INT’L L.* 475, 479 (2011).

participate¹³⁷ have a broad range of rights and privileges.¹³⁸ Victims are even entitled to legal representation.¹³⁹

III. RECOMMENDATIONS

The Mechanism should redefine sexual and gender-based violence in order to further the development of the law in this area. The Mechanism should analyze previous definitions used by international courts and organizations in order to take a novel approach to its definition of sexual and gender-based crimes.

A. *Defining Sexual and Gender-Based Violence*

Attention to international sexual and gender-based violence has increased such that in 2008 the U.N. Security Council passed a resolution¹⁴⁰ that led to the creation of the Office for the U.N. Special Representative of the U.N. Secretary-General on Sexual Violence in Armed Conflict.¹⁴¹ In 2014, the Office of the Prosecutor for the ICC issued a policy paper reinforcing the Court's commitment to prosecuting sexual and gender-based violence and announcing policies and procedures governing how the Office of the Prosecutor will handle victims, witnesses, and the collection of evidence.¹⁴²

"The 1998 Rome Statute was the first international legal document to recognize widespread and systematic acts of sexual and gender-based violence . . . as an act of genocide, a war crime and a crime against humanity."¹⁴³ There is no universal definition of sexual and gender-based violence; however, most definitions focus on the fact that the violence occurs because of a person's gender or their role in

137. "Victim who wish to participate in the proceedings must make an application to the Registrar, who then transmits the application to the Chamber. For each individual victim, the Chamber must assess whether he or she satisfies the criteria; i.e., whether the applicant qualifies as a victim under Rule 86 of the Rules of Procedure and Evidence. In practice, this means that for every applicant, the Chamber must make an individual decision based on a *prima facie* assessment of the victim-status of the person or organization in question." *Id.* at 481 (first citing Rules of Procedure and Evidence, r. 89, ICC-ASP/1/3 (Sept. 9, 2002); and then citing *id.* r. 85).

138. *Id.* at 485. Victims can attend public sessions of the confirmation hearing and present views and concerns. *Id.* at 485–86. They have access to and are notified of all public filings, decisions, and evidence, as long as it is public. *Id.* Furthermore, witnesses have been granted permission to make short opening and closing statements as well as submit written documents addressing law and fact. *Id.*

139. Ali, *supra* note 135, at 3621.

140. Sara E. Davies & Jacqui True, *Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In*, 46 SECURITY DIALOGUE 495, 495–96 (2015).

141. *About the Office*, U.N. OFF. SPECIAL REPRESENTATIVE SECRETARY-GEN. ON SEXUAL VIOLENCE IN CONFLICT, <https://www.un.org/sexualviolenceinconflict/about-us/about-the-office/> (last visited Feb. 24, 2019) (explaining that the office was formed after a series of resolutions that recognized the detrimental impact sexual violence in conflict has on communities and to serve as the spokesperson and political advocate on conflict-related sexual violence for the United Nations).

142. See generally Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, 24 WM. & MARY J. WOMEN & L. 443 (2018) [hereinafter Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*].

143. Davies & True, *supra* note 140, at 495.

society.¹⁴⁴ Prior to the Rome Statute, protections for women's "dignity" and "honor" had been included in the Fourth Geneva Convention.¹⁴⁵ More recent definitions of sexual and gender-based violence include both men and women and can be defined as "violence that is targeted at women or men because of their sex and/or their socially constructed gender roles."¹⁴⁶ However, these crimes are often rooted in the physical violence experienced by the victims or the harm suffered by close relatives via damage to familial honor rather than focusing on the individual victims themselves or how the crime occurs in the greater context of their gender.¹⁴⁷

The signing of the Rome Statute was the first time in international criminal law that acts of sexual and gender-based violence, such as "rape, sexual slavery, enforced prostitution, forced pregnancy, [and] enforced sterilization," were recognized as stand-alone offenses¹⁴⁸ not requiring the presence of a conflict or other cases of sexual and gender-based violence.¹⁴⁹ To date, seven U.N. Security Council resolutions have addressed women, peace, and security.¹⁵⁰

More broadly, sexual and gender-based violence can encompass a variety of harmful behaviors, such as "wife abuse, sexual assault, dowry-related murder, marital rape, selective malnourishment of female children, forced prostitution, female genital mutilation, and sexual abuse."¹⁵¹ Verbal and forms of physical abuse other than those listed above may also be categorized as sexual and gender-based violence, such as "any act of verbal or physical force, coercion or life-threatening deprivation," among other acts.¹⁵²

Sexual and gender-based violence takes place in an array of armed conflicts and occurs in the context of broader gender-based discrimination.¹⁵³ Such violence can be motivated by ideology, social hierarchy, or instrumental purpose.¹⁵⁴ However, each of these motivations must be contextualized by examining societal gender roles and structural inequalities.¹⁵⁵ In 2014, the Office of the Prosecutor published the Policy Paper on Sexual and Gender-Based Crimes,¹⁵⁶ which explained

144. R. Charli Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, 37 SECURITY DIALOGUE 83, 85–86 (2006).

145. D'Aoust, *supra* note 60, at 209 n.3.

146. *Clarification of Term 'Gender,'* ICC WOMEN, <http://iccwomen.org/resources/gender.html> (last visited Oct. 28, 2019).

147. *See* D'Aoust, *supra* note 60, at 209–10 n.3 (listing the initial goals of the Geneva Conventions).

148. Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, *supra* note 142, at 443.

149. Davies & True, *supra* note 140, at 496–97.

150. *Id.* at 495.

151. L. Heise et al., *A Global Overview of Gender-Based Violence*, 78 INT'L J. GYNECOLOGY & OBSTETRICS S5, S6 (2002).

152. *Id.*

153. Davies & True, *supra* note 140, at 496.

154. *Id.*

155. *See id.* (discussing the need to examine gendered structural conditions in order to understand what makes sexual and gender-based violence possible).

156. *See generally* International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, ¶¶ 19–20 (June 2014) [hereinafter *Policy Paper*], <https://www.icc->

that “sexual violence is the product of gendered power relations.”¹⁵⁷ It explained how sexual and gender-based violence can also be used by “governments, rebel groups, insurgents, or terrorist organizations” to further their political goals.¹⁵⁸

In the early days of international criminal law, rape as a form of sexual and gender-based violence was recognized mostly as a crime that impacted others rather than a crime directed against the victim.¹⁵⁹ In societies with deeply rooted patriarchal norms, to rape a woman is to attack the honor of her male family members.¹⁶⁰ Rape is a “symbolic gesture, sending a message to a second target, be it the woman’s husband, father, or other men of her community.”¹⁶¹ Early international law classifications of rape as a violation of family honor implied that the emotional and physical ramifications to the woman herself were secondary to the damage done to her family.¹⁶² As international criminal law continued to develop through the ICTY and ICTR, rape was contextualized as an act that directly impacts the victimized woman, and not just her family members.¹⁶³ Additionally, the international community broadened the definition of rape to include all forms of sexual penetration used to torture women, including oral and anal penetration, and penetration by any object.¹⁶⁴

Initially lauded as a step forward, *Prosecutor v. Jean-Paul Akayesu*¹⁶⁵ of the ICTR was the first case to convict someone of genocidal rape, and *Prosecutor v. Pauline Nyiramasuhuko*¹⁶⁶ was the first to convict a woman for encouraging and directing genocidal rape.¹⁶⁷ These same cases also reveal the importance of maintaining a gendered perspective. Although recognizing rape in the context of genocide proved important in convicting mass offenders, it once again draws the actual violence away from the woman herself and instead focuses on how the crime affects her community and her ability to procreate.¹⁶⁸ Although the *Akayesu* and *Nyiramasuhuko* decisions are important steps forward in the development of international law in the field of sexual and gender-based violence, patriarchal norms are still implicit in international criminal law and must be analyzed and critiqued to

[cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf](http://www.cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf).

157. Davies & True, *supra* note 140, at 497 (citing *Policy Paper*, *supra* note 156, ¶¶ 19–20).

158. *See id.* (viewing sexual and gender-based violence through the lens of politics as a means to produce and perpetuate gender stereotypes).

159. *See generally* Ali, *supra* note 135, at 3619–20.

160. *See id.* at 3619 (pointing to the role that patriarchal norms play in the victimization of women in gender-based crimes).

161. *Id.* (quoting Sara Meger, *Rape of the Congo: Understanding Sexual Violence in the Conflict in the Democratic Republic of Congo*, J. CONTEMP. AFR. STUD., 119, 130 (2010)).

162. *Id.* at 3619–20.

163. *See id.* (discussing the evolution of the international community’s discussion about rape to include consideration of the victim herself).

164. *See, e.g., id.* at 3620 (noting that the definition’s expansion took place during the ICTR and the ICTY).

165. Case No. ICTR-96-4, Judgment, (Sept. 2, 1998).

166. Case No. ICTR-98-42, Judgment, (Dec. 14, 2015).

167. Ali, *supra* note 135, at 3620.

168. *See id.* (discussing how viewing rape in the context of genocide puts more focus on the woman’s identity as it relates to her ethnicity and community).

ensure victims remain the focus.

“Gender” does not have a uniform definition in international law.¹⁶⁹ A survey of different United Nations bodies reveals various particularities in the term’s definition.¹⁷⁰ Generally, the United Nations uses “gender” as a synonymous term with “female,”¹⁷¹ or collapses gender under the umbrella of sexual violence.¹⁷² This exclusive focus on women has been detrimental to international mechanisms.¹⁷³ Regions with service providers that focus solely on women overlook male victims, therefore forcing men to “suffer in silence.”¹⁷⁴ Sexual violence against men and children requires specialized training of its own.¹⁷⁵ The lack of uniformity between these definitions can be attributed to the difficult diplomatic negotiations that often come with discussions about defining gender.¹⁷⁶ Despite the varying definitions of gender across U.N. bodies,¹⁷⁷ gender can be defined broadly as “a socially constructed concept of ‘maleness’ and ‘femaleness’ that can vary across cultures and over time.”¹⁷⁸ Even though they often occur together, it is important to note the distinction between gender-based violence and sexual violence.¹⁷⁹

Although the charges centered around sexual violence,¹⁸⁰ the ICTR offers precedent for gender-based crime adjudication in the international sphere.¹⁸¹ The ICTR Trial Chamber found that Tutsi women were seen as “seductive agents of the enemy.”¹⁸² Such characterization made sexual violence against women a foreseeable consequence.¹⁸³ Other courts, such as the SCSL, attempted to charge defendants

169. Valerie Oosterveld, *Gender-Based Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 78, 78–79 (Leila N. Sadat ed., 2011) [hereinafter Oosterveld, *Gender-Based Crimes Against Humanity*].

170. *See id.* (listing a number of definitions of “gender” in international criminal law).

171. *Id.* at 78; *see* Carpenter, *supra* note 144, at 83–84 (critiquing current international law and scholarship for perceiving gender-based violence as violence that only affects women while overlooking the gender-based violence men may face in conflict zones).

172. Oosterveld, *Gender-Based Crimes Against Humanity*, *supra* note 169, at 79.

173. *See* Office of the Prosecutor, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, INT’L CRIM. TRIBUNAL FOR RWANDA ¶ 38 (Jan. 30, 2014) [hereinafter *Best Practices Manual*], <https://unictr.irmct.org/sites/unictr.org/files/publications/ICTR-Prosecution-of-Sexual-Violence.pdf> (discussing how the focus on investigating and prosecuting sexual violence involving women has led to a lack of legal and health services for male and minor victims of sexual violence).

174. *Id.* ¶ 39.

175. *Id.* ¶ 38.

176. Oosterveld, *Gender-Based Crimes Against Humanity*, *supra* note 169, at 82.

177. *See id.* at 79–83 (providing different examples of the way “gender” is defined by various international organizations).

178. *Id.* at 79.

179. *Id.*

180. *See id.* (describing links between the media’s objectification of Tutsi women as seductive weapons and the sexual violence and murder they experienced as a consequence of such portrayal).

181. *See id.* at 95 (noting that the ICTR recognized certain acts that qualify as gender-based persecution).

182. Oosterveld, *Gender-Based Crimes Against Humanity*, *supra* note 169, at 95.

183. *Id.*

with broader gender-based violence.¹⁸⁴ The Trial Chamber of the SCSL endeavored to charge defendants with the crime of forced marriage;¹⁸⁵ however, the Court declined to recognize the unique crime of forced marriage and instead looked to the recognized crimes under sexual violence.¹⁸⁶ The Court found the charge redundant, because it was too substantially similar to sexual slavery.¹⁸⁷ The Appeals Chamber of the SCSL found this to be erroneous and created a new definition of forced marriage.¹⁸⁸ The question remained whether this new definition would reinforce patriarchal gender norms by once again framing gender-based violence as a crime against women alone.¹⁸⁹

The Mechanism should try novel gender-based crimes to influence normative change and set a precedent for future international mechanisms and courts. One issue the Mechanism will need to address is the general principle of legality in international law, which is designed to prevent ex post facto laws, as well as ensure there is a clear punishment for breaking the law.¹⁹⁰ Previous international mechanisms, such as the ICTR, have had to balance the principle of legality with the drive to continue to develop international law.¹⁹¹ Perhaps an appropriate definition for gender-based crimes is “the social construction of maleness and femaleness” that “can vary within and across cultures, over time, and may be influenced by its intersection with other factors, such as age.”¹⁹² Such a definition would allow the Mechanism to set a broad normative definition for future tribunals while still encapsulating the unique experiences of victims in Syria.

The Mechanism acknowledged the importance of addressing sexual and gender-based violence.¹⁹³ The mandate for the Mechanism expressly states that sexual and gender-based violence will receive specialized attention and reiterates its

184. *See id.* at 97 (discussing how the Prosecutor for the SCSL argued that instances of forced marriage should be deemed crimes against humanity).

185. *See id.* (describing the sexual and domestic servitude women suffered at the hands of their oppressors who deemed them “wives”).

186. *Id.*

187. *Id.*

188. Forced marriage is defined as “a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.” Oosterveld, *Gender-Based Crimes Against Humanity*, *supra* note 169, at 97.

189. *Id.* at 97–98.

190. *See* Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT'L CRIM. JUST. 1007, 1008 (2004) (describing the principles and requirements that come together to give effect to the principle of legality).

191. *See* Oosterveld, *Gender-Based Crimes Against Humanity*, *supra* note 169, at 83–85 (discussing the ICTY and ICTR Trial Chambers drafting detailed definitions of acts that constitute rape despite no concrete precedent).

192. *Id.* at 83. Furthermore, there is no need to reference sex because there is a trend among the United Nations toward defining gender without referencing biology. *Id.*

193. U.N. Secretary-General, *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic Since March 2011*, ¶ 23, U.N. Doc. A/72/764 (Feb. 28, 2018) [hereinafter *Report of the Mechanism*].

determination to follow through on this commitment.¹⁹⁴ While acknowledging that a myriad of effective approaches to investigating sexual and gender-based violence exist, the Mechanism approaches the issue by committing to hiring those with relevant expertise, along with developing policies and operational guidelines.¹⁹⁵ The Mechanism committed to training its staff about the sensitive nuances in investigating sexual and gender-based violence.¹⁹⁶ However, the Mechanism should take an additional step forward by striving to prosecute novel forms of sexual and gender-based violence.

B. Investigative and Support Recommendations

Criminal investigations require a range of fact-finding efforts in order to present a case.¹⁹⁷ They require the gathering of relevant historical data, circumstantial facts, and proof of physical aspects of the crime.¹⁹⁸ In investigations of sexual and gender-based violence, all of the previous considerations remain true, but certain portions may become particularly sensitive.¹⁹⁹ Interview-based evidence is a fundamental tool used to collect the historical narrative surrounding the alleged crime.²⁰⁰ Unfortunately, stories of crimes relating to sexual and gender-based violence are particularly difficult to elicit from victims because of their sensitive nature.²⁰¹

The fact that many of the investigators tend to be male further complicates the interviews.²⁰² This can create an uncomfortable dynamic, particularly for women who may have experienced their trauma “at the hands of a man.”²⁰³ The trauma that victims have experienced can create an additional barrier by affecting their ability to fully remember and retell their experiences.²⁰⁴

Interpreters can pose a subtle barrier in interviewing victims by interfering with interviewers’ ability to build rapport with victims and making victims feel less

194. *Id.*

195. *Id.* ¶ 24.

196. *See id.* ¶ 25 (“Training programmes with respect to crimes of sexual and gender-based violence must be designed to address the intangible barriers to effective approaches. These include ongoing misconceptions about the nature and the seriousness of sexual violence that have thwarted or weakened accountability efforts in the past. The Mechanism will also ensure that its work on gender issues is not limited to sexual violence, but addresses the full range of gender-based crimes arising in the Syrian context, as well as other gender issues, such as ensuring that the voices of women are properly heard in the accountability process.”).

197. Kim Thuy Seelinger et al., *The Investigation and Prosecution of Sexual Violence* 18 (May 2011) (working paper) (on file with the University of California Berkeley Human Rights Center), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Investigation-and-Prosecution-of-Sexual-Violence-SV-Working-Paper.pdf>.

198. *Id.*

199. *Id.*

200. *See generally id.* at 18–19.

201. *See generally id.*

202. *See id.* at 19 (“[M]ost investigators tend to be male, creating a gender dynamic that may be especially uncomfortable for a woman who has suffered sexual violence at the hands of a man.”).

203. Seelinger et al., *supra* note 197, at 19.

204. *See id.*

comfortable with the vulnerability of the interviewing process.²⁰⁵ Victims may also fear for their security and the confidentiality of their statements if the victim and interpreter share the same background or come from the same community.²⁰⁶ The Mechanism should provide interpreters who come from different regions with local language sheets to ensure that the staff is familiar with local terminology and can appropriately respond to any issues.²⁰⁷ The Mechanism should also ensure that there are local Syrian people on staff to ensure international staff are familiar with the cultural norms of the region.²⁰⁸

Where interviewing leaves gaps in the testimony, other evidence such as forensics and nonvictim-witness testimony can often fill in those gaps and confirm the victim's testimony.²⁰⁹ For example, *The New York Times* has been able to recreate potential crime scenes in Syria through publicly available information.²¹⁰ Additionally, DNA evidence has typically been used in domestic cases of sexual and gender-based violence in many countries.²¹¹ With regard to international law, there is developing research to suggest that DNA evidence can be collected and used to create profiles of groups of perpetrators as they move throughout a region.²¹² This data could prove particularly valuable in the context of the Mechanism, as it works to create case files that meet a broad variety of evidentiary needs in both sexual and gender-based violence cases and in war crimes cases generally.²¹³ Where witness testimony is lacking, a collective DNA profile mapped across a region can be used to match the movements of armed groups to connect members of the group to particular crimes.²¹⁴ Cutting-edge technology like that used by *The New York Times* can help recreate crime scenes and bring to life the stories of sexual and gender-based violence that may have occurred years ago.

The Mechanism should partner with existing actors in Syria or establish its own facilities in order to offer joint medical and legal services. There are two models for joint medical-legal services—one that centers on medical services and another that

205. *Id.*

206. *Id.*

207. *Best Practices Manual*, *supra* note 173, ¶¶ 37, 46 (commenting that victims of sexual violence in Rwanda often used euphemisms to describe their assault thus giving interpreters lists with local euphemisms and colloquialisms can ensure that they are adequately equipped to conduct interviews).

208. *Id.* ¶ 46 (noting that interpreters and language assistants trained in Rwandan cultural norms facilitated the investigative and prosecution staff in Rwanda).

209. *Id.* ¶ 94.

210. Malachy Browne et al., *How We Created a Virtual Crime Scene to Investigate Syria's Chemical Attack*, N.Y. TIMES (June 24, 2018), <https://www.nytimes.com/interactive/2018/06/24/world/middleeast/douma-syria-chemical-attack-augmented-reality-ar-ul.html> (creating of a virtual crime scene through Russian reports, photos, and videos from first-hand victims).

211. Seelinger et al. *supra* note 197, at 30.

212. *Id.*

213. *See Report of the Mechanism*, *supra* note 193, ¶ 34 (mentioning that the Mechanism's broad approach to collecting evidence can assist with informing the immediate case file and a wide range of evidentiary issues that may become relevant).

214. Seelinger et al., *supra* note 197, at 30.

centers on legal services.²¹⁵ In the medical-centered model, victims come for medical care and a forensic examination, and are then seamlessly referred to legal assistance or law enforcement partners who pursue their cases.²¹⁶ In a legal-centered model, victims are referred to a legal service provider where a legal professional conducts an intake interview and then refers the victims to a medical service provider if they have not yet sought medical care.²¹⁷ Then, to complete any relevant documentary requests and ensure legal access to medical examination results, legal staff will accompany the victims to the hospital or medical facility for examination and treatment.²¹⁸

International Justice Mission, an international human rights organization, further expands on the medical-legal model by bringing in mental health professionals.²¹⁹ When International Justice Mission litigates the sexual assault of a minor, the minor is assigned to a team consisting of a lawyer, a mental health specialist, and a case manager.²²⁰ This trifecta ensures that the child is receiving adequate medical and legal care while also providing ongoing counseling and support.²²¹

Integrating medical and legal services can also have the added benefit of treating many of the illnesses and injuries victims of sexual and gender-based violence experience.²²² Victims of sexual and gender-based violence may be exposed to sexually transmitted diseases, which if gone untreated, further increase a victim's risk of injury as well as potentially spreading the diseases to others.²²³ Some women may also experience permanent damage to their reproductive organs as a result of enduring brutal rape and abusive conditions.²²⁴

The Mechanism should streamline procedures of collecting evidence by coordinating with service providers already on the ground in Syria to ensure that legal and medical facilities are closely approximated, if not in the same location. Streamlining these procedures can set a valuable precedent for future mechanisms and show a prioritization of victims and their needs. Fortunately, the Mechanism has demonstrated that it is willing to refer victims of sexual and gender-based violence to appropriate medical and psychological services.²²⁵ It is important that the

215. *See id.* at 32 (stating that legal and medical resources must be linked to effectively assist victims).

216. *See id.* (stating that efforts to streamline victim services have occurred in either a traditional medical-centered model or a more recent legal-centered model).

217. *Id.* at 32–33.

218. *Id.*

219. *Id.* at 33.

220. Seelinger et al., *supra* note 197, at 33.

221. *Id.*

222. *See* Rashida Manjoo & Calleigh McRaith, *Gender-Based Violence and Justice in Conflict and Post-Conflict Areas*, 44 CORNELL INT'L L.J. 11, 16–17 (2011) (explaining that victims of gender based violence may face sexually transmitted diseases, permanent physical injuries, social stigma, and obstacles in the path to justice and reparations).

223. *Id.* at 16.

224. *Id.*

225. *See* Catherine Marchi-Uhel, Head of the Mechanism, United Nations, Prevention,

Mechanism follows through with this commitment and implements a streamlined process for referring victims.

Standardized investigative guidelines and training can ensure that the majority of Mechanism staff are adequately trained to handle sexual and gender-based violence.²²⁶ A streamlined program can result in numerous benefits for Mechanism staff and victims. Standardizing training across the investigative portions of the Mechanism can ensure any investigator is capable of detecting instances of sexual and gender-based violence,²²⁷ effectively interviewing victims, and elevating the seriousness of sexual and gender-based crimes to the level of other serious crimes.²²⁸ Furthermore, senior officials must ensure that there are clear guidelines for staff, as well as adequate resources and training for staff members to successfully implement guidelines.²²⁹ Specific sexual assault teams should be properly trained and sensitized;²³⁰ however, broadly training all investigators can more strongly implement sexual assault training.²³¹

A gender-balanced Mechanism staff can ensure the appropriate handling of victims and witnesses of sexual and gender-based violence. For example, the SCSL had two full-time gender crimes investigators and conducted gender sensitivity training for all members of its investigations team.²³² In contrast, the ECCC had a notable gender imbalance, with a lack of female interpreters, analysts, and investigators.²³³ Furthermore, the ECCC had no Legal Advisor on Gender,²³⁴ which is a departure from the ICTR, ICTY, and ICC, which each had a gender advisor.²³⁵ The gender-imbalanced staff at the ECCC failed to receive adequate gender sensitivity training and therefore used terminology such as “making love”²³⁶ when interviewing witnesses about rape, potentially obscuring or confusing the victim as to the interviewer’s true question.²³⁷

Accountability and Gender: International Responses and Fighting Imputing by Investigating and Prosecuting Sexual and Gender-based Violence 4 (Nov. 7, 2017) [hereinafter Prevention, Accountability and Gender] (transcript available at https://iiim.un.org/wp-content/uploads/2017/12/Statement_prevention_accountability_and_gender.pdf) (explaining that the International Impartial and Independent Mechanism is required to provide clear referral pathways for victims of conflict-related sexual violence who may need medical and psychological support).

226. See Seelinger et al., *supra* note 197, at 22–23 (discussing the benefits of having standard protocol in place in the investigation of sexual violence cases).

227. *Id.* at 22–23.

228. *Id.* at 23.

229. *Best Practices Manual*, *supra* note 173, ¶¶ 24–25.

230. Seelinger et al., *supra* note 197, at 23.

231. See *Best Practices Manual*, *supra* note 173, ¶ 29 (stating that the ICTR eventually disbanded its initial model of dedicated Sexual Assault Teams because Sexual Assault Team members would focus on collecting only evidence of sexual violence at the expense of other evidence connected to the broader genocide while investigators who were not a part of the Sexual Assault Team tended to overlook evidence of sexual violence).

232. Kelsall and Stepakoff, *supra* note 54, at 359.

233. Killean, *supra* note 55, at 341.

234. *Id.* at 342.

235. *Id.*

236. *Id.*

237. *Id.* at 341–42.

It is critical to ensure that any investigative team possesses robust gender diversity.²³⁸ Many victims of sexual and gender-based violence are more comfortable speaking with a female investigator; therefore, it is vital to ensure each investigative team has a diverse pool of trained investigators.²³⁹ The countervailing interest to having a diverse gender staff is ensuring that female staff exist at all levels, so that expertise is not developed based solely on gender.²⁴⁰ Ensuring gender diversity through all levels of the Mechanism's staff ensures that women are not excluded from more traditionally male-dominated positions.²⁴¹ Appropriately equipping staff with gender sensitivity training, as well as proper investigative techniques, can help the Mechanism avoid the errors made by the investigators at the ECCC.

IV. CONCLUSION

The Mechanism intends to take a strong stance on sexual and gender-based violence,²⁴² and could stand as a model for future international justice mechanisms in addressing sexual and gender-based violence. The governing documents of the Mechanism demonstrate a strong commitment to addressing sexual and gender-based violence²⁴³ as well as a commitment to learning from the mistakes of past international mechanisms.²⁴⁴ The leadership of the Mechanism has committed to ensuring that gender-based crimes are a core part of the work of the staff within the Mechanism²⁴⁵ by formulating effective policies and guidelines, training all staff members on gender-based crimes, and collating the results of the Mechanism's work into operating guidelines.²⁴⁶ The Mechanism could also serve as a catalyst for a shift in international criminal law toward focusing on novel gender-based crimes.²⁴⁷ The Mechanism is still in the early stages of existence and is currently in the process of creating a modern, state-of-the-art evidence collection and housing system.²⁴⁸ Despite its recent creation, the Mechanism has already collected more than three-quarters of a million pages of documentation.²⁴⁹

The Mechanism stands in a unique position to influence future international

238. Seelinger et al., *supra* note 197, at 23–24.

239. *Id.* at 23; see *Best Practices Manual*, *supra* note 173, ¶ 22 (noting that during the ICTR, female victims were particularly hesitant to discuss sexual violence with men, especially young men).

240. Seelinger et al., *supra* note 197, at 23.

241. *Id.* at 23–24.

242. See generally *Prevention, Accountability and Gender*, *supra* note 225.

243. *Id.* at 2.

244. *Id.* at 3.

245. *Id.*

246. *Id.* at 2–3.

247. See *id.* at 4–5 (expressing IIM's willingness to share dossiers covering gender-based crimes with international and regional jurisdictions).

248. *Prevention, Accountability and Gender*, *supra* note 225, at 2–3.

249. Catherine Marchi-Uhel, Head of the Mechanism, United Nations, Informal Debate on the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 2 (Apr. 18, 2018).

norms. Mechanism officials seem aware and prepared to use the Mechanism as a tool for normative standard creation.²⁵⁰ In her speech to the U.N. General Assembly, Head of the Mechanism, Catherine Marchi-Uhel stated “[i]t is also crucial that the IIIM’s approach reflects the broader scope of gender-based crimes, not only limited to sexual violence.”²⁵¹ Marchi-Uhel went on to say:

Much of the attention to date has been focused on sexual violence – and this has been an important achievement, given that this violence has historically been shrouded in silence. But we now need to use our understanding of the documentation of conflict-related sexual violence to expand our focus and address more fully other gender-based crimes in international criminal law. We must accurately understand the distinctive impact of the Syrian conflict on males and females ensure that our approach to building cases reflects the experience of both.²⁵²

It appears that the Mechanism is particularly prepared to expand existing international law related to forced disappearance.²⁵³ Marchi-Uhel notes the specific consequences this type of action can have on the men who are forced to leave, as well as the women and children who are left behind and who may become victims of crimes.²⁵⁴ This is a special concern in Syria, as women are not generally recognized as decision-makers over issues related to the health of their children.²⁵⁵ Finally, Marchi-Uhel recommits the Mechanism to ensuring that women’s voices are heard and considered in the process of pursuing accountability.²⁵⁶

Accordingly, the Mechanism is well-positioned to further international law as it relates to sexual and gender-based violence. The Mechanism can incorporate restorative justice practices and integrated legal services to more fully redress the harms of victims. In that same vein, the Mechanism can broaden current conceptions of sexual and gender-based violence by connecting forced disappearance to sexual and gender-based violence and the harms such disappearances can have on individuals and the larger community.

250. *See* Prevention, Accountability and Gender, *supra* note 225, at 4–5 (stating that the IIIM’s approach to investigating and prosecuting conflict-related violence can serve as a model for documenting gender-based crimes in international criminal law, in general).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *See id.* (noting that only 13% of witnesses were women at the ICTY).