

**Questioning Hierarchies of Harm:
Women, Forced Migration, and International Criminal Law**
Jaya Ramji-Nogales¹

Abstract

Though international criminal law has made great strides in addressing harm perpetrated against women in wartime, its gendered structure diverts attention away from other significant harms that women endure as a result of armed conflict. In particular, international criminal law's hierarchy of harm elevates crimes committed as part of a plan or pattern across political groups over equally serious forms of harm perpetrated randomly, often within political groups. Thus the private and opportunistic harms enabled by situations of displacement and perpetrated against female forced migrants do not fall clearly within the framework of international criminal law. This vacuum of accountability extends beyond international criminal law, as female forced migrants cannot rely on their own governments, their host governments, and often even international humanitarian organizations to protect them against opportunistic violence. International criminal law could fill the void only after quite serious reconstruction, namely expansion of its scope and restructuring of its focus. It may be that a structure designed specifically to prevent and account for opportunistic violence against female forced migrants would be better equipped to perform that task. Criminal accountability might be better performed in national legal systems or informal justice systems created within camp environments. There are also solutions other than criminal accountability, such as human rights law, that might be more appropriate in addressing such harms. In the meantime, until a solution is found that places these 'private' crimes on equal footing with 'public' attacks currently prohibited by international criminal law, the serious and frequent harms suffered by forcibly displaced women will continue to be overlooked, relegated to the bottom of the hierarchy of harm.

Keywords: forced migration, gender, international criminal law

From the *Akayesu* case² to the *Revolutionary United Front* decision,³ international criminal law has made great strides in addressing harm perpetrated against women in

¹ Associate Professor of Law, Temple University, Beasley School of Law. J.D., Yale Law School; LL.M., Georgetown University Law Center; B.A. University of California at Berkeley. Many thanks to Diane Marie Amann, Margaret deGuzman, Jean Galbraith, Galit Sarfaty, Beth Van Schaack, Gerardo Vildostegui, and David Zaring, as well as the participants at the Women and International Criminal Law Roundtable at the American Society of International Law for their insightful comments. I am grateful to Toni Holness, John Holovat, Victor Mercado, and Qudsiya Naqui for excellent research assistance.

² *Prosecutor v. Jean Paul Akayesu*, Sep. 2, 1998, International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T, <www.un.org/ict/english/judgements/akayesu.html>, Jan. 14, 2011.

³ *Prosecutor v. Issa Hassan Sessay, Morris Kallon, and Augustine Gbao*, Feb. 25, 2009, Special Court for Sierra Leone, Case No. SCSL-04-15-T, <www.scsl.org/LinkClick.aspx?fileticket=AoknUKBsH50%3d&tabid=215>, Jan. 14, 2011; *see also* Valerie Oosterveld, Sierra Leone Special Court: sentences of 25, 40, and 52 years for gender-based crimes, *IntLawGrrls*, Apr. 8, 2009, <intlawgrrls.blogspot.com/2009/04/gender-based-crimes-at-special-court.html>, Jan. 14, 2011.

wartime.⁴ Though these doctrinal developments are laudable, this paper focuses on the gendered structure of international criminal law and the ways in which it diverts attention away from other significant harms that women endure as a result of armed conflict.⁵ In particular, the paper challenges international criminal law's hierarchy of harm. This hierarchy elevates crimes committed as part of a plan or pattern across political groups – for example, by members of one group against members of a second group on the other side of a political conflict, whether during war or otherwise – over equally serious forms of harm perpetrated randomly, often within political groups – for example, by men against women on the same side of a conflict. To illustrate the problem with this approach, the paper explores the serious harms suffered by female forced migrants that fall outside the framework of international criminal law.⁶ These harms include rape, sexual assault, and other forms of physical violence that are not part of a master criminal plan but are rather private and opportunistic harms enabled by situations of displacement.⁷

The paper begins by cataloguing the harms suffered by refugees and the internally displaced at the hands of husbands, boyfriends, family members, neighbours, aid workers, peacekeepers, and strangers, none of whom is acting at the behest of a state or militia or fulfilling an organizational master plan.⁸ It next discusses the applicability of the Rome Statute of the International Criminal Court to these crimes.⁹ While the language

⁴ See Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' in this volume; Margaret M. deGuzman, 'Giving Priority to Sex Crime Prosecutions: The Philosophical Foundations of a Feminist Agenda', in this volume; Fionnuala Ní Aoláin, Naomi Cahn and Dina Haynes, 'Criminal Justice for Gendered Violence and Beyond', Section I.B, in this volume; Beth Van Schaack, 'Codifying the Crime of Aggression: A Feminist Project?' in this volume.

⁵ Hilary Charlesworth describes the cultural feminist perspective as noting that "[p]art of the structure of male domination . . . is that law privileges a male view of the universe and the law. . . A cultural feminist might observe that the realities of women's lives do not fit easily into the categories and concepts of international law." Hilary Charlesworth, 'The Hidden Gender of International Law', 16 *Temple International and Comparative Law Journal* (2002) 95-96; see also Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law', 85 *American Journal of International Law* (1991) 625.

⁶ This paper focuses on refugees and the internally displaced; in other words, those who remain within their home state or a neighboring state, as they comprise the vast majority of female forced migrants. Those female migrants "lucky" enough to access asylum procedures in the developed world face a separate set of gendered barriers to protection. See, e.g., Jane Freedman, *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan, Hampshire, 2007) 135-67.

⁷ Hilary Charlesworth, 'Feminist Methods in International Law,' 93 *American Journal of International Law* (1999) 387 (contending that "international criminal law incorporates a problematic public/private distinction: it operates in the public realm of the collectivity, leaving the private sphere of the individual untouched."); Alice Edwards, 'The 'Feminizing' of Torture Under International Human Rights Law', 19 *Leiden Journal of International Law* (2006) 355-58; Charlesworth et al., *supra* note 5, pp. 626-29 (describing public-private dichotomy in the normative structure of international law); c.f. Karen Engle, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights', 25 *Studies in Transnational Legal Policy* (1993) 148-51 (describing disadvantages of critiques of lack of regulation in the private sphere). See also Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff, the Hague, 1997) 289-90 (describing opportunistic rape in wartime).

⁸ Charlesworth, *supra* note 7, pp. 387-88.

⁹ *Rome Statute of the International Criminal Court* (U.N. Doc. A/CONF.183/9*).

of the statute does not provide an obvious basis for prosecuting opportunistic crimes against female forced migrants, international refugee law offers a potential avenue for interpreting international criminal law to cover such crimes. Even so, the fit is imperfect – perhaps unsurprisingly given that international criminal law was created to address very different crimes. The paper then explores the vacuum of accountability that exists on several levels in situations of forced displacement. Female forced migrants cannot rely on their own governments, their host governments, and often even international humanitarian organizations to protect them against opportunistic violence.

Should international criminal law step into the void? One might argue that the purpose of international criminal law is to provide accountability for conflict-related harms that would not otherwise be addressed.¹⁰ Redress for the myriad forms of violence suffered by female forced migrants – harms that usually fall outside of any legal accountability mechanisms – seems an important component of that goal. Similarly, if the central aim of international criminal law is to account for crimes of such severity that they can be considered to be harms against all humankind, violence against women in situations of displacement is so prevalent and destructive that its prosecution should be viewed as a significant component of this goal. Such a step would require quite serious reconstruction of international criminal law, namely expansion of its scope and restructuring of its focus.

It may be that a structure designed specifically to prevent and account for opportunistic violence against female forced migrants would be better equipped to perform that task. Criminal accountability might be better performed in national legal systems or informal justice systems created within camp environments. There are also solutions other than criminal accountability, such as human rights law, that might be more appropriate in addressing such harms. In the meantime, until a solution is found that places these ‘private’ crimes on equal footing with ‘public’ attacks currently prohibited by international criminal law, the serious and frequent harms suffered by forcibly displaced women will continue to be overlooked, relegated to the bottom of the hierarchy of harms.

Harms to female forced migrants

Female forced migrants in refugee and displaced persons camps face sexual violence at the hands of a myriad of actors, including relatives, acquaintances, and strangers, whose actions are not part of a state or organizational policy.¹¹ Perpetrators of sexual violence

¹⁰ Of course, international criminal law might be seen to have other purposes, such as addressing threats to the peace and security of the world or preventing crimes that target a group. Margaret A. deGuzman, ‘Crimes Against Humanity’, in William A. Schabas and Nadia Bernaz, (eds.), *Routledge Handbook of International Criminal Law* (Routledge, Oxford, 2011) , pp. 128-30; David Luban, ‘A Theory of Crimes Against Humanity’, 29 *Yale Journal of International Law* (2004) 139.

¹¹ Though refugee and displaced women living outside of camps may suffer even more than women in camps, because of the dearth of studies of violence against such women, this paper focuses on women within camp environments. International Committee of the Red Cross, ‘Internal Displacement in Armed Conflict: Facing Up to the Challenges’, Nov. 2009, pp. 20-22, <www.icrc.org/eng/assets/files/other/icrc_002_4014.pdf>, Jan. 14, 2011.

include fellow refugees, local residents, peacekeepers, and aid workers.¹² A recent study by Columbia University's Care and Protection of Children in Crisis-Affected Countries Learning Network found that in five crisis-affected settings, a woman was much more likely to be raped in her home by someone she knew than by a stranger.¹³ Camps in particular breed violence, with rape and forced prostitution commonplace.¹⁴ Vulnerability to rape is increased by the lack of secure shelter and protection for women and the need to walk long distances to search for firewood.¹⁵ Official documents relating to food rations and other forms of assistance are commonly given to male heads of household, forcing many women to turn to prostitution in order to feed their children.¹⁶ Female forced migrants who leave the camps are also sexually vulnerable because they may lack proper documentation and/or may be obviously not native to the region or country in which they reside.¹⁷

The situation of Burundian women who lived in refugee camps in Tanzania in the late 1990s is typical.¹⁸ Levels of domestic violence were high; a significant proportion of the women interviewed had suffered repeated and brutal physical assaults at the hands of their husbands or intimate partners while living in the camps as refugees.¹⁹ Though many women reported this violence to the Tanzanian police responsible for security in the

¹² United Nations High Commissioner for Refugees, *Sexual Violence Against Refugees: Guidelines on Prevention and Response* (1995) §1.3(b)-(c), <www.unhcr.org/3b9cc26c4.html>, Jan. 14, 2011 (hereinafter '1995 UNHCR Guidelines'); United Nations High Commissioner for Refugees, *Sexual and Gender-Based Violence against Refugees, Returnees, and Internally Displaced Persons: Guidelines for Prevention and Response* (2003) 14-15, <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3edcd0661&page=search>, Jan. 14, 2011 (hereinafter '2003 UNHCR Guidelines').

¹³ Care and Protection of Children Learning Network, 'Rethinking Gender-Based Violence', (2010), p. 2, <resources.cpclearningnetwork.org/cpc-document-list/gbv-policy-and-practice-implications>, Jan. 14, 2011.

¹⁴ Michelle Hynes, et al., 'A Determination of the Prevalence of Gender-based Violence among Conflict-affected Populations in East Timor', 28 *Disasters* (2004) 307 (noting that women displaced to a camp in West Timor were 2.7 times more likely to report sexual violence than women who had not been displaced to camps; results for both sets of women came from the same study, using the same methodology and standardized questionnaire.)

¹⁵ Michelle Hynes and Barbara Lopes Cardozo, 'Observations from the CDC: Sexual Violence against Refugee Women', 9 *Journal of Women's Health and Gender-Based Medicine* (2000) 820.

¹⁶ 1995 UNHCR Guidelines, *supra* note 12, §1.6(b); Women's Commission for Refugee Women and Children, 'UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation' (2002), pp. 27-28, <www.unhcr.org/3de78c9c2.html>, Jan. 14, 2011.

¹⁷ 1995 UNHCR Guidelines, *supra* note 12, §1.6(b).

¹⁸ Human Rights Watch, 'Seeking Protection: Addressing Sexual and Domestic Violence in Tanzania's Refugee Camps' (2000), <www.hrw.org/legacy/reports/2000/tanzania/>, Jan. 27, 2011. *See, e.g.*, Human Rights Watch, 'Trapped by Inequality: Bhutanese Refugee Women in Nepal' (2003), <www.hrw.org/en/reports/2003/09/23/trapped-inequality-0>, Jan. 27, 2011; Saba Gul Khattak, 'Living on the Edges: Afghan Women and Refugee Camp Management in Pakistan', 32 *Signs: Journal of Women in Culture and Society* (2007) p. 575; United Nations High Commissioner for Refugees, 'How To Guide: Sexual and Gender-based Violence Programme in Guinea' (2001).

¹⁹ Human Rights Watch, 'Seeking Protection: Addressing Sexual and Domestic Violence in Tanzania's Refugee Camps', *supra* n. 18 at p. 26. As with nearly every other report on domestic and gender-based violence in refugee camps, the statistics are unreliable and significantly understate the problem due to women's reluctance to report such crimes.

camps, these officials did not arrest the men responsible.²⁰ Some of these refugee women expressed a desire to return to Burundi, despite the on-going conflict, to escape from their abusive husbands.²¹ Women were raped not only by their intimate partners but also by other Burundian refugees and Tanzanians from nearby villages. Girls as young as seven years old were raped by neighbours and relatives with impunity, despite the girls' and often their mothers' desire to see justice.²² In May 1999, approximately fifty refugee women were raped by over 100 Tanzanian men. Only eleven men were arrested; the case against them was dismissed because the prosecutor was late to appear in court.²³ The camp structures perpetuated gender dependence, as ration cards were provided to male heads of household and there were no shelters for abused women.²⁴

A 2002 report by the United Nations High Commissioner for Refugees and Save the Children-UK tells an even more troubling story of exploitation of refugee girls by UN peacekeepers, by international and local NGO workers, and by government agencies responsible for humanitarian response in camps in Guinea, Liberia, and Sierra Leone.²⁵ With regard to sexual exploitation, the assessment found that "Most of the allegations involved male national staff, trading humanitarian commodities and services . . . in exchange for sex with girls under 18."²⁶ Even teachers were reported to have required sexual favours from children in exchange for good grades. Some parents turned a blind eye to the source of much-needed income, while others allegedly sent their daughters out to trade sexual acts for money. Refugees in the camps studied had insufficient avenues for reporting abuse, and were unable to do so confidentially. Neither humanitarian workers nor refugee leaders attempted to enforce rules against the perpetrators; the only reported enforcement mechanism was pursued against girls, who were paraded and mocked by the community for having sex with peacekeepers. Girls also reported sexual violence at the hands of neighbours, parents, grandparents, medical staff, and strangers who lay in wait in areas such as streams where children bathed, latrines, and the bush where children went to look for food.²⁷

In short, a breakdown of social mores against violence similar to that experienced in situations of mass violence characterizes many refugee and displaced persons camps.²⁸ The collapse of social norms and sanctions to enforce those norms leaves female refugees at greater risk of domestic and community violence.²⁹ This situation is compounded by

²⁰ *Ibid* pp.35-40.

²¹ *Ibid.*, p. 30.

²² *Ibid.*, pp. 60-67.

²³ *Ibid*, p. 52.

²⁴ *Ibid.*, pp. 41, 49.

²⁵ United Nations High Commissioner for Refugees and Save the Children-UK, *Note for Implementing and Operational Partners by UNHCR and Save the Children-UK on Sexual Violence & Exploitation*, <www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.pdf?id=3c7cf89a4&tbl=PARTNERS>, Jan. 14, 2011.

²⁶ *Ibid.*, p. 4.

²⁷ *Ibid.*, pp. 12-13.

²⁸ See Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, Cambridge, 2007) p. 32 (discussing breakdown of social mores in situations of mass violence).

²⁹ Rebecca Horn, 'Exploring the Impact of Displacement and Encampment on Domestic Violence in Kakuma Refugee Camp', 23 *Journal of Refugee Studies* (2010), p. 372; Elizabeth G. Ferris, 'Abuse of Power: Sexual Exploitation of Refugee Women and Girls', 32 *Signs: Journal of Women in Culture and*

the hardships suffered by displaced males who, unable to adapt to their newfound position of powerlessness within families and communities, may become depressed, which can in turn lead to high levels of alcoholism and domestic violence.³⁰ Enforcement mechanisms are weak or non-existent. Camps are marked by general lawlessness and a lack of police protection that promotes the proliferation of norm collapse.³¹ In some cases, authorities themselves take advantage of the breakdown of social norms by accepting bribes to ignore or even being involved in abuse or exploitation.³²

International Criminal Law

International criminal law does not appear to encompass opportunistic violence against female forced migrants as such crimes are generally not committed during armed conflict or as part of a plan to destroy a national, ethnic, racial, or religious group.³³ As a result, they are not susceptible to prosecution as genocide or war crimes; they fall within the scope only of crimes against humanity.³⁴ But this shoe doesn't seem to fit either, because of the state or organizational policy requirement.³⁵ Though the customary international law definition of crimes against humanity arguably contains no such limitation,³⁶ the Rome Statute may represent a shift towards a state-centric approach to international crimes. In contrast, in recent years, refugee law has dismantled similar requirements, thus extending its protections to cover 'private' harms. International criminal law should follow this lead of refugee law by addressing at least some opportunistic harms perpetrated by individuals.

The Rome Statute defines crimes against humanity as acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."³⁷ These acts "must be pursuant to or in furtherance of a State or

Society (2007), p. 584; 1995 UNHCR Guidelines, *supra* note 12, §1.6(a); 2003 UNHCR Guidelines, *supra* note 12, p. 22.

³⁰ Maria E. Kett, 'Internally Displaced Peoples in Bosnia-Herzegovina: Impacts of Long-term Displacement on Health and Well-Being', 21 *Medicine, Conflict & Survival* (2005), pp. 208-09; 1995 UNHCR Guidelines, *supra* note 12, §1.6(a); Roselidah Ondeko and Susan Purdin, 'Understanding the causes of gender-based violence', 19 *Forced Migration Review* (2004), p. 30.

³¹ 2003 UNHCR Guidelines, *supra* note 12, p. 22.

³² 1995 UNHCR Guidelines, *supra* note 12, §1.6(b).

³³ Certainly these same women may have faced violence during the conflict, but this paper focuses on harms perpetrated against them after they have become forced migrants – that is, after they have fled the conflict.

³⁴ *Rome Statute*, *supra* note 9, Arts. 5, 6 & 8.

³⁵ The widespread and systematic attack requirement may similarly pose a barrier to prosecution, though given the pervasive nature of opportunistic violence in refugee and internal displacement camps, an argument can be made that this element has been fulfilled by omission. *See, e.g., Prosecutor v. Tadic*, 15 July 1999, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-94-1-A, <www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>, January 28, 2011, paras. 260-62 (citing four decisions of the Supreme Court of the British Zone for the proposition that "an attack against a single victim for personal reasons can be considered a crime against humanity if there is a nexus between the attack and the National Socialist rule of violence and tyranny.").

³⁶ *Prosecutor v. Kunarac*, 12 June 2002, International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No. IT-96-23 & IT-96-23/1-A, para. 98, <www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>, Jan. 14, 2011. *See also* deGuzman, *supra* note 10, pp. 131-32.

³⁷ *Rome Statute*, *supra* note 9, Art. 7(1).

organizational policy.”³⁸ At first glance, gender-based violence in refugee and displaced person camps does not appear to further any organizational policy; by definition it is random and opportunistic. One group of legal scholars, including M. Cherif Bassiouni and William A. Schabas, has argued that crimes against humanity should embrace violations of human rights perpetrated only by states or organizations.³⁹ Following this view, gender-based violence against forced migrants does not fall within the scope of international criminal law. Take as an example the violence perpetrated by United Nations peacekeepers against migrant women and girls. Although the peacekeepers are organizational actors, they arguably did not act according to an organizational policy to commit such attacks.

Drawing a parallel from refugee law, the failure to protect women from sexual and gender-based violence should instead be viewed as a state policy undergirded by discrimination against women.⁴⁰ As Lord Hoffman explained in 1999, in the House of Lords’ seminal asylum case, *Islam and Shah*:

First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing

³⁸ *Rome Statute*, supra note 9, Art. 7(2)(a). While this definition may not reflect customary law, the Rome Statute will provide the dominant model going forward. Moreover, many domestic codes will mirror this language.

³⁹ M. Bassiouni, *The Legislative History of the International Criminal Court* (Transnational Publishers, Ardsley, N.Y., 2005), pp. 151-52; W. Schabas, ‘State Policy as an Element of International Crimes’, 98 *Journal of Criminal Law and Criminology* (2008) 959. *But see* deGuzman, supra note 10, p. 131 (noting that the Rome Statute’s is the first statutory definition of crimes against humanity that includes this requirement, though some jurisprudence included the requirement). Some of the prior statutory definitions of crimes against humanity would not cover opportunistic sexual violence against forcibly displaced women for different reasons. The statute of the International Criminal Tribunal for the Former Yugoslavia defines crimes against humanity to include a requirement that the relevant crime be committed in armed conflict. *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, Sept. 2009, Art. 5 <www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>, Jan. 14, 2011. The statutes of the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Tribunal for Rwanda define crimes against humanity to include a requirement that the attack be committed on national, political, ethnic, racial or religious grounds. *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004* (NS/RKM/1004/006), Art. 5, <www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf>, Jan. 14, 2011; *Statute of the International Criminal Tribunal for Rwanda*, Art. 3, <www.un.org/ictt/statute.html>, Jan. 14, 2011. *See also* Hilary Charlesworth, ‘Worlds Apart: Public/Private Distinctions in International Law’, in Margaret Thornton, (ed.), *Public and Private: Feminist Legal Debates* (Oxford University Press, South Melbourne, 1995), pp. 254-55 (critiquing international law for dealing “only with violence with which the state is directly associated.”).

⁴⁰ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (HCR/IP/4/Eng/REV.1), para. 65 (“Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”); *see also* Valerie Oosterveld, ‘Gender, Persecution, and the International Criminal Court: Refugee law’s Relevance to the Crime Against Humanity of Gender-Based Persecution’, 17 *Duke Journal of Comparative and International Law* (2006) 69-73.

personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men.⁴¹

It is this failure to protect that enables widespread criminal behaviour; the state's decision or policy not to address these crimes creates a culture of impunity in which sexual and gender-based violence is acceptable and even encouraged.⁴²

Of course, the parallel between international criminal law and international refugee law is not perfectly apt, as the text of the Refugee Convention requires only that a refugee be "unable or unwilling" to seek protection from her state⁴³ – not that persecution be perpetrated pursuant to state or organizational policy. The Convention Against Torture, which does contain a state consent or acquiescence requirement,⁴⁴ has generally been interpreted more strictly; nevertheless, police failure to protect has been interpreted as state acquiescence by the Committee Against Torture in at least one individual submission.⁴⁵ Moreover, the idea that state policy plays out not only through commission but also through omission has deep roots in international law.⁴⁶ To cite the landmark

⁴¹ *Islam v. Secretary of State for the Home Department and Regina v. Ex Parte Shah*, 25 March 1999, UK House of Lords, p. 17, <www.unhcr.org/refworld/docid/3dec8abe4.html>, Jan. 14, 2011. Similarly, the UN Human Rights Committee in its General Comments has interpreted the definition of torture in the International Covenant on Civil and Political Rights to cover violence perpetrated by non-state actors. *CCPR General Comment 20*, 20 Mar. 1992, para. 2; *see also* Edwards, *supra* note 7, pp. 365-66.

⁴² Patricia Wald, 'What do women want? International law that matters in their day-to-day lives', *IntLawGrrls*, 7 October 2009, <intlwgrrls.blogspot.com/2009/10/what-do-women-want-international-law.html>, Jan. 14, 2011.

This is not to downplay the serious and significant harms, sexual and otherwise, faced by male forced migrants. This paper argues only that states are generally less willing to extend protection to women who have suffered opportunistic sexual violence. It might also be argued that forced migrants generally receive inadequate protection from the state; if this is the case, one could similarly argue that the failure to protect is a state policy.

⁴³ *United Nations Convention Relating to the Status of Refugees*, Art. I(A)(2), <www.unhcr.org/3b66c2aa10.html>, Jan. 14, 2011.

⁴⁴ *United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment*, Art. 1 <www2.ohchr.org/english/law/cat.htm>, Jan. 14, 2011 (requiring that torture be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.").

⁴⁵ *Dzemajl v. Yugoslavia*, 2 December 2002, UN Committee Against Torture, (CAT/C/29/D/161/2000), paras. 2.7-2.9, 8.9-8.10, 9.2 <www.unhcr.org/refworld/country,,CAT,,SRB,,3f264e774,0.html>. Jan. 14, 2011; *see also* Edwards, *supra* note 7, pp. 368-73.

⁴⁶ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 2, <untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>, Jan. 14, 2011 (stating that internationally unlawful acts by a state can consist of an action or an omission); *Velasquez Rodriguez v. Honduras*, July 29, 1998, Inter-American Court of Human Rights, Ser. C. No. 4, para. 172, <www1.umn.edu/humanrts/iachr/b_11_12d.htm>, Jan. 14, 2011 (An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.); *Opuz v. Turkey*, 9 June 2009, European Court of Human Rights, paras. 128-30 <www.unhcr.org/refworld/docid/4a2f84392.html>, Jan. 14, 2011. *See also* Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing, Oxford, 2010), pp. 203-07 (laying out elements of state responsibility and their application to systemic intimate violence)

Rwanda Tribunal judgment on the crime of sexual violence, even Jean-Paul Akayesu was not found guilty of committing but rather of endorsing mass rape.⁴⁷ It is the gap between state actors endorsing sexual violence and those actors enabling sexual violence through impunity that international criminal law needs to bridge.

Vacuum of accountability

Enabling these crimes against female forced migrants is a broader vacuum of accountability that includes failures not only of international criminal law but also of traditional justice systems, camp-administered justice systems, and national legal systems.⁴⁸ Each of these systems of accountability has failed to protect these women from sexual violence, and this gap in protection suggests the need for an international legal solution.

In many refugee and displaced persons camps, communities replicate the traditional justice systems of their home states.⁴⁹ These systems may be more powerful within camp communities than any other system of justice because they reflect social norms with which the refugees are familiar and comfortable. These norms, of course, may accept or even enable violence against women, and therefore fail to provide adequate recourse against gender-based violence.⁵⁰

Also within the camps, international organizations and non-governmental organizations charged with camp administration – namely the Office of the UN High Commissioner for Refugees and its implementing partners – have repeatedly failed to prevent sexual abuse. While UNHCR has promulgated quite thorough guidelines to protect refugees against sexual and gender-based violence, protection gaps remain.⁵¹ Despite the guidelines, some camp administrations fail to plan the camp's physical structure, systems of aid disbursement and accountability mechanisms in a manner geared towards preventing sexual abuse. In part, this problem is due to UNHCR's and NGOs' continued failure to grasp that gender-based violence can take a myriad of forms.⁵² For example, in the case of a woman who had to barter sex for food (and consequently kept getting pregnant), UNHCR and its implementing partners determined that she had too many children and the solution was for her to stop having children.⁵³ In other cases, UNHCR protection officers view asylum determination, rather than gender violence, to be their primary realm of responsibility.⁵⁴ Failures of outreach compound these protection gaps. In many cases, women don't understand that UNHCR is there to protect them;

⁴⁷ *Akayesu*, *supra* note 2, secs. 6.2, 7.7

⁴⁸ Sharon Carlson, 'Contesting and Reinforcing Patriarchy: An Analysis of Domestic Violence in the Dzaleka Refugee Camp', *Univ. of Oxford Refugee Studies Centre Working Papers* (Mar. 2005) No. 23, p. 30 (providing example of "how the host community and camp officials can have a significant effect on domestic violence.").

⁴⁹ *See, e.g.*, Jeff Crisp, 'A state of insecurity: the political economy of violence in refugee-populated areas of Kenya', *UNHCR Working Papers* (1999) No. 16, p. 5 (describing administration of justice by "traditional judges" in refugee camps in Kenya).

⁵⁰ *Ibid.*, p. 6; 2003 UNHCR Guidelines, *supra* note 12.

⁵¹ 2003 UNHCR Guidelines, *supra* note 12, p. 48.

⁵² Women's Commission, *supra* note 16, pp. 22-23.

⁵³ *Ibid.*, p. 27.

⁵⁴ *Ibid.*, pp.22-23.

rather, they view the organization as responsible solely for the disbursement of humanitarian aid.⁵⁵ In the most egregious circumstances, some officials from IOs and NGOs have benefited from sexual abuse of forced migrants.

Apart from the camp authority structure, host states bear primary responsibility for the protection of refugees within their territory. However, laws against gender-based violence may not exist or may not be enforced.⁵⁶ Even in countries that maintain and enforce laws against such violence, police and courts may be inaccessible for women living in remote camps.⁵⁷ Serious enforcement efforts are rare. Countries that host refugee camps are generally in the developing world, and do not have sufficient resources to expend on ensuring physical safety of refugees. Simply ensuring that women will report gender-based violence requires significant resource allocation in training local law enforcement authorities and building the trust of refugee populations.⁵⁸

In the worst cases, local authorities may be hostile to refugee populations for political and economic reasons.⁵⁹ And in many situations, local police or military may themselves perpetrate rape and sexual exploitation of forced migrants, rendering any hope of local protection moot.⁶⁰ For the internally displaced residing in camps within their home state, similar problems of enforcement arise. Additionally, the conflict may disrupt infrastructure that ensures physical security and will nearly certainly drain scarce resources away from the protection of women in displacement camps.

Solutions

Given that sexual and gender-based violence is a widespread problem for female forced migrants, not adequately addressed by existing national or informal justice systems, an international solution is in order. But such a solution might take one of many directions. We might argue that sexual violence perpetrated against forced migrants should be prosecuted before the International Criminal Court as a violation of international criminal law. A different solution might focus on capacity building within local criminal justice systems through positive complementarity. Some might argue that criminalization is entirely the wrong solution, and that a human rights approach might be more effective. The issue of sexual violence against forced migrants raises larger questions about international criminal law and feminist approaches to accountability.

The International Criminal Court is arguably the most powerful and resource-rich contemporary mechanism for securing accountability for harms perpetrated against individuals in violation of international law. Feminists might then try to harness this

⁵⁵ *Ibid.*, p. 25.

⁵⁶ 2003 UNHCR Guidelines, *supra* note 12, p. 48 (listing various legal framework and practices in host country that are risk factors for sexual and gender-based violence); *Ibid.*, p. 34 & n. 67 (2002) (noting impunity for rape throughout Ethiopia).

⁵⁷ 2003 UNHCR Guidelines, *supra* note 12, p.22.

⁵⁸ Women's Commission, *supra* note 16, pp. 24-25.

⁵⁹ *Ibid.*, p. 65 (in 2001, noting hostility of Pakistani government to Afghan refugees); 2003 UNHCR Guidelines, *supra* note 12, p.22 (noting that relative material privilege of refugees creates resentment on the part of host populations).

⁶⁰ Women's Commission, *supra* note 16, p. 34

power, particularly its expressive dimension, by shaping international criminal law in a feminist direction. While this approach has some appeal, it may not be effective to graft women's issues onto a patriarchal structure.⁶¹ Should feminists reject the ICC as excessively focused on public harms, then, and recommend the creation of a more feminist mechanism of accountability? Such an approach might address the needs of women more fully, but it risks ghettoizing women's issues by failing to include them within the dominant power structure.

Several factors weigh in favour of expanding the coverage of the Rome Statute to include private harms, including sexual violence perpetrated against forced migrants, and subjecting such crimes to prosecution before the ICC. First of all, as suggested above, the criminalization of these harms sends a powerful and important expressive message that such violence is not condoned by the international community.⁶² Moreover, many displaced women have suffered public as well as private violence, and the prosecution of both before the ICC would create a more holistic account of harms against women.⁶³ Finally, expansion of the ICC's jurisdiction to incorporate private harms could lead to greater recognition that not only women, but also men, are harmed by private violence and that not only women, but also men, will benefit from international efforts to end impunity for such harms.

These rationales for prosecution of private harms before the ICC may be stymied by the reality of the Rome Statute. The court would have to interpret broadly the requirement of state or state-like action, an approach possibly at odds with statutory text. Even if the ICC circumvents the state action requirement, the very difficult question of who will be held accountable remains. Were the ICC to prosecute individual men who perpetrated one or more acts of sexual violence, these men would have to be transported to The Hague for trial. Questions of resource allocation and effectiveness – that is, prioritizing prosecutions that shift incentives for those most able to put an end to such violence – render this a poor choice. The ICC might instead prosecute officials of host states that fail to take steps to protect women against gender-based violence⁶⁴ or the principals of international and non-governmental organizations that fail to protect women in camps. In both cases, prosecution seems a counterproductive and dangerous response to actors that in many cases are trying to assist refugees, and may in future be chilled in their humanitarian response. The prosecution might instead focus on those responsible for the conflict that caused the women to flee. While the locus of moral culpability may lie with these actors, the thread of liability is fairly tenuous, from conflict to displacement to legal impunity to violence. These options lead to the conclusion that the ICC, as currently structured, is an inappropriate mechanism to account for private violence against displaced women.

⁶¹ Ní Aoláin et al., *supra* note 4.

⁶² Meyersfeld, *supra* note 46, pp. 266-69; Charlesworth et al., *supra* note 5, p. 635.

⁶³ Ní Aoláin et al., *supra* note 4.

⁶⁴ Meyersfeld, *supra* note 46, p. 225 (suggesting that state responsibility to prevent domestic violence lies with police, state lawyers and prosecutors, court administrative officials, welfare departments, and public hospitals).

The concept of positive complementarity presents a potential solution to this impasse.⁶⁵ The ICC, perhaps with support from the international community, might step in by providing assistance in capacity-building in local justice systems.⁶⁶ International criminal law could be used to provoke prosecutions of sexual violence in national courts or in the creation of justice systems within refugee camps.⁶⁷ Alternatively, this problem might point to the need for a new refugee instrument that would focus on crimes against refugees and create accountability and enforcement obligations for host states.⁶⁸

Though this approach might resolve the question of who should be prosecuted, concerns about the appropriateness of a criminal solution to private violence remain.⁶⁹ Criminal law, international or otherwise, might not be effective in shifting norms against sexual violence in displacement camps.⁷⁰ Such efforts, if not grounded in local norms, may be rejected as manifestations of cultural imperialism or simply irrelevant. Moreover, any long-term and effective solution to the problem of opportunistic violence against forced migrant women requires a change in social norms, which depends upon the engagement of men.⁷¹ Criminal prosecution may work at cross-purposes with efforts to redress gender-based power imbalances by including men. Perhaps more importantly, criminalization is arguably inadequate in addressing the needs of forced migrants who have suffered sexual violence.⁷² Some feminist scholars have contended that international criminal law is excessively focused on sexual violence rather than on harms that women deem to be primary.⁷³ Criminal prosecutions are not likely to have any real impact in altering political and economic inequalities.⁷⁴ Criminalization is a particularly fraught approach with respect to victims of domestic violence; on the one hand, they may not want criminal sanctions brought against their spouses or domestic partners, but on the other hand, they might be coerced into withdrawing complaints that they would prefer to prosecute.

A feminist approach, then, might advocate for an entirely different approach to accountability for sexual violence against forced migrants. Given that domestic violence has traditionally been viewed as a human rights issue, rather than as a question of international criminal law, arguing in favour of strengthened enforcing of international human rights law might be more appropriate. The UNHCR has promulgated comprehensive guidelines aimed at protecting displaced women from sexual and gender-

⁶⁵ William W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice', 49 *Harvard International Law Journal* (2008) 53.

⁶⁶ Reports from Kampala suggest that the ICC is not eager to get involved in funding such efforts. Morten Bergsmo, Olympia Bekou, and Annika Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools', 2 *Goettingen Journal of International Law* (2010) 798.

⁶⁷ Women's Commission, *supra* note 16, p. 73 (noting the creation of mobile courts within some refugee camps).

⁶⁸ Thanks to Beth Van Schaack for this suggestion.

⁶⁹ Buss, *supra* note 4.

⁷⁰ Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach', 32 *Michigan Journal of International Law* (2010) 12-16.

⁷¹ Dale Buscher, 'Refugee Women: Twenty Years On', 29 *Refugee Survey Quarterly* (2010) 14.

⁷² Meyersfeld, *supra* note 46, pp. 160-64.

⁷³ Ní Aoláin et al., *supra* note 4; Buss, *supra* note 4.

⁷⁴ Charlesworth et al., *supra* note 5, p. 645.

based violence; it lacks only the resources to implement its recommendations.⁷⁵ Some feminist scholars, however, have argued that legal rights are excessively masculine in form, interpretation, and access to enforcement.⁷⁶ A more responsive approach to sexual violence might include displaced women's perspectives in the process of formulating accountability mechanisms.⁷⁷

Conclusion

The sceptical reader might be left with the question of whether the failure of international criminal law to address sexual violence against forced migrants is really a problem. One might argue that the present system, in which international criminal law addresses crimes committed by state or state-like actors and humanitarian organizations tend to the needs of displaced women, is working correctly. It is not. International criminal law creates a hierarchy of harm that draws moral outrage and scarce international funds away from the problem of violence against displaced women.⁷⁸ An exploration of this imbalance is crucial, in Hilary Charlesworth's words, "to identify and destabilize the unspoken gendered assumptions of international law and politics" in order to "begin to be able to imagine broader and more durable solutions to our most pressing problems."⁷⁹ Only then will we be able to address all of the significant harms suffered by women as a result of armed conflict; only then will we begin to dismantle international criminal law's hierarchy of harm.

⁷⁵ 2003 UNHCR Guidelines. The lack of effective complaint mechanisms, codes of conduct, and access to justice are raised repeatedly in the literature as serious gaps in addressing gender-based violence against forced migrant women.

⁷⁶ Charlesworth et al., *supra* note 5, pp. 634-38.

⁷⁷ Suggesting that solutions should include women in distribution of food and other essential items and create educational and income-generating activities in camps to alleviate boredom and powerlessness., Hynes and Cardozo, *supra* note 15, p. 821.

⁷⁸ Buss, *supra* note 4; Jeanne Ward, 'If Not Now, When? Addressing Gender-based Violence in Refugee, Internally Displaced, and Post-conflict Settings', (Reproductive Health Response in Crises Consortium, 2002), p. 13, <<http://www.rhrc.org/resources/gbv/ifnotnow.html>>, Jan. 14, 2011 ("Yet another gap in addressing GBV is the tendency of donors and humanitarian organizations to focus on sexual crimes committed during conflict."); James J. Silk, 'International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law?', *Yale University Working Paper Series* (2009) 12-13, <papers.ssrn.com/sol3/papers.cfm?abstract_id=1459513>, Jan. 14, 2011.

⁷⁹ Charlesworth, *supra* note 5, p. 102.