

ANNEX B1

PUBLIC

**WOMEN'S CAUCUS
FOR GENDER JUSTICE
IN THE
INTERNATIONAL
CRIMINAL
COURT**

WAR CRIMES

PART III

**Recommendations and Commentaries
to the
December Preparatory Committee Meeting
December 1-12, 1997**

WAR CRIMES

SUGGESTIONS & COMMENTARY

The Women's Caucus has three primary concerns regarding the jurisdiction of the ICC over war crimes at the same time as we express our opposition to the legalization of war that is accomplished by humanitarian law:

I. Non-dilution of war crimes in humanitarian law.

Recommendation 1: War crimes should encompass, without dilution, all violations in internal as well as international armed conflict.

Recommendation 2: The proposed chapeau, conditioning jurisdiction over war crimes on their being systematic or large-scale, should be rejected in any form.

Recommendation 3: The scope of war crimes should encompass all those recognized in the Geneva Conventions, Protocols I and II and the progressive developments in the laws and customs of war.

II. Non-discriminatory incorporation of rape and other sexual and gender violence.

Recommendation 4: The chapeau should incorporate the principle of humanitarian law against adverse discrimination in relation to the prosecution of war crimes, particularly as it affects sexual and gender violence.

Recommendation 5: The chapeau should codify the progressive development of the non-discrimination principle in customary law and recognize that sexual and gender violence take many forms and are constituent acts of one or more of the enumerated crimes against the person (such as torture, mutilation, enslavement, inhuman treatment, depending upon the character of the violence at issue) in all armed conflict.

Recommendation 6: The Statute should clearly reject the prior treatment of rape and other sexual violence as simply "humiliating and degrading treatment" or as linked to a particular offense by eliminating the reference to rape and other sexual violence in this regard.

Recommendation 7: Following the approach of the article on crimes against humanity, the enumeration of war crimes in both internal and international armed conflict should include a subparagraph identifying rape, sexual slavery, enforced prostitution, forced sterilization and other forms of sexual and gender violence as war crimes in themselves.

III. Explicit recognition of additional war crimes of customary dimension.

Recommendation 8: The Statute should recognize enslavement and slavery-like practices as a violation in all war, internal and international

Recommendation 9: The Statute should prohibit the recruitment of children under 18 for military service or participation in hostilities.

Format Note: All suggestions are based on the Chair's text contained in the Report of the February PrepCom. A/AC.249/1997/L.5. Additions are in CAPITAL LETTERS ; deletions are bracketed and preceded by "DELETE;" already bracketed text is to be omitted when preceded by DELETE, and retained when preceded by DELETE BRACKETS.

I. Non-Dilution of Humanitarian Law: Applicability to Internal Armed Conflict and Scope of Enumerated Crimes.

Recommendation 1: *Given the proliferation of internal armed conflict today, the Women's Caucus urges that the ICC have jurisdiction over the full range of war crimes recognized under international humanitarian law in both international and internal war.*

Suggested text: Remove brackets from crimes listed in section C of the Chair's draft.

Commentary:

WC.1 Accountability for violations of international humanitarian law in internal armed conflict is crucial to prevent as well as punish impermissible attacks in war. The victims of war crimes--largely the civilian population--do not experience such attacks in internal war as any less devastating than those which occur in international war. Indeed, recent experience suggests that the civilian population is likely to be a greater target in civil as opposed to international wars.

Recommendation 2: *The ICC Statute should not impose criteria appropriate to crimes against humanity either in the chapeau to the definition of war crimes or elsewhere.*

Suggested Text: delete from chapeau::

[DELETE: For the purpose of the present Statute, any of the following war crimes constitutes a crime within the jurisdiction of the court when committed as part of a systematic plan or policy or as part of a large-scale commission of such crimes:]

Commentary:

WC.2.1 The proposed addition to the chapeau (or its placement elsewhere) would seriously dilute humanitarian law by conflating the jurisdiction over war crimes with that over crimes against humanity. Given the resources and mandate of the ICC, it is unlikely that isolated war crimes would be investigated or prosecuted unless they were particularly grave in and of themselves.

WC.2.2 The bracketed chapeau would require a new and difficult element of proof. Would, for example, the massacre of one small village or isolated assassinations designed to terrorize the civilian population be prosecutable as a war crimes? If it is impossible to show that these acts are part of a larger plan and if a small number of people are killed, the ICC might not have jurisdiction.

WC.2.3 With respect to the prosecution of sexual and gender violence, it may be impossible to prove that sexual violence is part of a plan. Rape has been so common and

so “accepted” in war that it often occurs as a result of marauding soldiers’ or paramilitaries’ belief in their own entitlement. Moreover, proving that sexual violence is large-scale (or widespread) is also difficult given the reluctance of people to testify due to insensitive investigatory methods, the dangers of re-traumatization, loss of privacy, potential stigma, and the danger of retaliation. Proper investigation and prosecution of sexual violence (involving personnel, training, methodologies designed to minimize trauma, and protection of identity and safety) is still far from a routine matter. Recently, in the Akayesu trial in the ICTR, rampant sexual violence would not even have been charged but for the consistent and expensive monitoring, documentation and interventions, ultimately as amicus curiae, by women’s human rights NGOs. And still, rape continues to be omitted from other indictments. In the Tadic trial before the ICTY, several women who were expected to testify about sexual violence at Omarska--where rape and the threat of rape were routine--declined because of the risks of exposure.

Recommendation 3: *The enumeration of war crimes in both internal and international law should encompass all the crimes listed in the Geneva Conventions and Protocols I and II thereto as well as the laws and customs of war.*

Suggested text:

Remove brackets from all war crimes enumerated in the Chair’s draft in accordance with the amendments and inclusions proposed by the Women’s Caucus.

Commentary:

WC.3 The Women’s Caucus opposes diluting or eliminating any of the currently recognized crimes under the Geneva Conventions or the Protocols or the customary humanitarian law. The Conventions and the Protocols are widely ratified and therefore reflect international customary law. This is reinforced by progressive developments since the Protocols in international human rights law, which like Protocol II, apply to the actions of states in regard to their own citizens. To eliminate or dilute the force of these Conventions or Protocols in the ICC Statute would cast these progressive developments, particularly as to internal armed conflict, into question and render the ICC Statute consonant with the position of the most recalcitrant States.

II. Incorporating the Non-Discrimination Principle and Progressive Developments Respecting Sexual and Gender Violence as War Crimes.

Introductory note

Throughout the history of war, women have suffered, largely ignored and in silence, the extreme and long-lasting physical and mental effects of sexual violence, while the perpetrators have enjoyed a near total impunity. The failure--until recently-- of international law to recognize the severity of sexual and gender violence has contributed to that invisibility and silence. The characterization of rape, for example, as a “crime against honor and dignity” or as simply “humiliating and degrading treatment” has reinforced the stigma that society attaches and that women suffer as a result of sexual and gender violence.

The ICC treaty must codify the progressive developments in international humanitarian law and the pertinent developments in human rights law which

recognize sexual and gender violence as among the gravest violations, e.g., torture, enslavement etc. It would be a retrogression for the ICC Statute to reiterate the approach to sexual and gender crimes contained in the Geneva Conventions and the Protocols. It is no longer acceptable--nor in accord with customary law-- to treat rape and other sexual violence as an inevitable byproduct rather than a central weapon of war, as conduct which cannot be controlled rather than conduct that should be punished, as conduct which merely "degrades" rather than brutalizes. The minimization of sexual violence and the failure to condemn gender violence violate humanitarian law's core principle against discrimination based on sex. Sexual and gender violence must be explicitly recognized as among and forms of the gravest violence within the substantive jurisdiction of the ICC, if the ICC is to be an institution of universal as opposed to partial justice.

Recommendation 4: *The chapeau should incorporate the fundamental principle of humanitarian law against adverse discrimination in relation to the prosecution of war crimes, particularly in regard to sexual and gender violence*

Recommendation 5: *The chapeau should codify the progressive implementation of the non-discrimination principle in customary law and recognize that sexual and gender violence takes many forms and are constituent acts of one or more of the enumerated crimes against the person in all armed conflict.*

Suggested text --revised chapeau:

For the purpose of the present Statute, "war crimes"

SHALL BE PROSECUTED WITHOUT ANY ADVERSE DISCRIMINATION BASED ON RACE, COLOUR, SEX, LANGUAGE, RELIGION OR BELIEF, POLITICAL OR OTHER OPINION, NATIONAL OR SOCIAL ORIGIN, WEALTH, BIRTH, SEXUAL ORIENTATION, HEALTH OR OTHER SIMILAR STATUS OR CRITERIA; AND

SHALL ENCOMPASSES SEXUAL AND GENDER VIOLENCE WITHIN ALL THE ENUMERATED CRIMES AGAINST PHYSICAL OR MENTAL INTEGRITY OR HEALTH; AND

means:

Recommendation 6: *The Statute should clearly reject the previous treatment of rape and other sexual violence as simply humiliating and degrading treatment or as any particular war crime by eliminating the reference to rape and other sexual violence in regard to specific war crimes..*

Suggested text--deletion re B(3)(n):

(n) outrages upon personal dignity [DELETE: in particular, rape, enforced prostitution and other sexual violence of comparable gravity.]

Suggested text-deletion re C(1)(c)

(c) [DELETE BRACKETS: outrages upon personal dignity, in particularly humiliating and degrading treatment [DELETE BRACKETED TEXT: {rape and enforced prostitution *or in the alternative:* in particular rape, enforced prostitution and other sexual violence of comparable gravity.}]

Suggested text-deletion re A(c)

(c)[DELETE BRACKETS: wilfully causing great suffering, or serious injury to body or health][DELETE: wilfully causing great suffering, serious injury to body or health, including rape, enforced prostitution and other sexual violence of comparable gravity.]

Recommendation 7: *The enumeration of war crimes should include a subparagraph identifying, as examples, rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization and other forms of sexual and gender violence as war crimes in themselves.*

Suggested text: With regard to each distinct category of crimes accepted by the Conference, and with respect to both international and internal armed conflict there should be added the following language immediately after the listing of crimes against physical or mental integrity or health:

Add as: A. (b) bis; B.4 (a) bis; and C.(1)(a) bis:

()RAPE, SEXUAL SLAVERY, FORCED PROSTITUTION, FORCED PREGNANCY, FORCED STERILIZATION AND OTHER SEXUAL AND GENDER VIOLENCE OR ABUSE.

Commentary to Recommendation 4:
Incorporating the principle against discrimination of any kind.

WC.4.1 The principle against adverse discrimination is fundamental to the Geneva Conventions and the Protocols. It is repeated in all four Conventions as well as contained in Protocols I AND II.¹ Moreover, as stated in the Commentary to Art. 27 of the Fourth Convention, the protection against discrimination implies active steps such as the elimination of discriminatory laws.²

WC.4.2 This negotiation must be guided by the 1993 Conference on Human Rights in Vienna (Vienna Conference) which declared that women's rights are an "inalienable, integral, indivisible and interdependent part of all human rights" and emphasized the need to condemn and prevent "violations of the human rights of women in situations of armed conflict." IIB, par. 38. See also, I, par. 28. The Vienna Conference's call for the mainstreaming of gender throughout the human rights system, has been frequently reiterated by the Human Rights Commission and its constituent bodies, most recently in the Commission's 1997 resolution on the ICC which called upon states negotiating the ICC statute "to give full consideration to integrating a gender perspective. . . ." This requires,

among other things, explicit and non-discriminatory integration of sexual and gender crimes in the ICC treaty.

WC.4.3 Application of the principle against adverse discrimination requires recognition that the enumerated war crimes, including both grave breaches and violations of fundamental guarantees, may consist of sexual or gender violence. Thus, as discussed below, the more recent progressive developments in international humanitarian and pertinent human rights law recognizing sexual and gender violence as forms of the enumerated war crimes (such as torture), and as crimes in and of themselves (such as rape), are firmly and centrally rooted in conventional humanitarian law.

WC.4.4 Gender violence is the most extreme form of gender discrimination. By gender violence or violations, the Women's Caucus means violence or violations which target or affect women exclusively or disproportionately because they are women. Gender violence also includes violence or violations which are based on or perpetuate socially constructed or stereotyped gender roles, or the power differential between men and women.³ Sexual violence, whether directed to women or men, is usually a form of gender violence, since it is an attack on one's gender identity, whether masculine or feminine. That is, women are raped, for example, to control and destroy them as women and to signal male ownership over them as property; men are raped to humiliate them through forcing them in the position of women and, thereby, rendering them, according to the prevailing stereotypes, weak and inferior. Gender violence also includes non-sexual attacks on women or on men based on their gender-defined roles; the physical or psychological targeting of women or their livelihoods to undermine the civilian population during war; attacks on reproductive integrity such as forced pregnancy or forced sterilization; the enslavement of women through forced marriage or otherwise for domestic as well as sexual service; and intentional or negligent disregard for the consequences of warfare on women--e.g. the impacts of chemical warfare.

WC.4.5 The text of the Conventions and Protocols as well as the ICRC Commentaries repeatedly make clear that the prohibited grounds of discrimination listed or referred to in the different provisions are not intended to be inclusive. As the Commentary to art. 27(3) of the Fourth Convention states: "...[A]ny discriminatory measure whatsoever is banned, unless it results from the application of the Convention."⁴ The recommended list is drawn from article 75 of Protocol I which is the most recent and complete list and reflects the breadth of discrimination also recognized in the Universal Declaration.

WC.4.6 Recognizing that the existing list is non-exhaustive, the Women's Caucus nonetheless recommends adding sexual orientation and health status given the discriminatory and atrocious treatment that remains largely unacknowledged and unredressed. In the Nazi Holocaust, for example, gay people were targeted for incarceration and mass murder in the concentration camps; and, especially torturous means of extermination were used. Yet, the genocide against them has been ignored by history and was not even recognized in the codification of genocide. Moreover, the inclusion of health status is particularly important today given the prevalence of HIV infection and AIDS in all parts of the world and the tendency, even in the civilian context, to isolate and discriminate against people with these diseases notwithstanding that they are not infectious.

***Commentary to Recommendation 5:
Mainstreaming sexual and gender violence and abuse.***

WC.5.1 Recommendation 5 calls for codifying the recent progressive developments by explicitly integrating sexual and gender violence and abuse into all the enumerated crimes of violence against physical and mental integrity and health where such treatment meets the elements of those offenses. This enables the prosecutor, on a case-by-case basis, to evaluate the facts and charge the range of sexual and gender violence as one or more of these traditionally enumerated crimes. Together with Recommendation 7 which calls for the listing of rape and other forms of sexual and gender violence as crimes in themselves, Recommendation 5 is designed to ensure the full prosecution of sexual and gender violence: --e.g., rape, is punishable as torture as defined by CAT, at the same as rape is punishable as a forcible sexual assault.

WC.5.2 One of the essential and defining characteristics of criminal law is gradation in the characterization or naming and punishment of crimes. In this way, society differentially condemns the perpetrator and recognizes the suffering of the victim. This is why, as discussed below, the Geneva Convention's treatment of rape and other forms of sexual violence as simply "attacks against honor"⁵ and "degrading and humiliating treatment" and not as forms of the gravest violence is discriminatory as well as a profound insult to women. While the ICRC has made a partial advance in linking rape solely to "wilfully causing great suffering or serious injury to body or health," this still underestimates the severity and character of various forms of sexual and gender violence as the practice of the OTP and the progressive developments, discussed below, reflect.

WC.5.3 It is now a matter of customary international law that rape and other forms of sexual and gender violence constitute grave breaches of humanitarian law. As discussed below, sexual and gender violence have been widely recognized as forms of torture, the wilful infliction of severe mental or physical suffering, inhuman treatment, slavery and mutilation as well as methods for causing death.

WC.5.4 The chapeau proposed in Recommendation 5 provides a simple and efficient method for incorporating the progressive developments in international law and implementing the non-discrimination principle with respect to sexual and gender violence. It calls for the "mainstreaming" of sexual and gender violence in all the appropriate categories of war crimes. Thereby, it avoids the need to repeat the same idea in every pertinent subparagraph (See Annex I, for example) and enables the prosecutor to treat sexual violence as any one or more of the range of enumerated war crimes, when the elements of those offenses are met.⁶

WC.5.5 Codification of the recognition in customary international law that sexual and gender violence should be understood as constitutive of the already recognized and enumerated war crimes is supported by the theory and practice adopted by the ICTY and the ICTR. The first Chief Prosecutor, Judge Richard Goldstone, explained the position:

Our policy...[is to] equat[e] rape to other serious transgressions of international law. Apart from the relevance to charges of genocide and crimes against humanity, rape and other sexual assaults will be prosecuted under the Statute's provisions for torture, inhumane treatment, wilfully causing great suffering or serious injury to body, and inhumane acts, and other provisions that adequately encompass the nature of the acts committed and the intent formulated.⁷

This position is further explained and illustrated in an expert paper prepared by Patricia Viseur-Sellers, the Legal Advisor on Gender in the Office of the Prosecutor (OTP) for the Expert Meeting on Gender-Based Persecution convened by the Division for the Advancement of Women:

In the general allegations[of the Gagovic (or Foca)] indictment, the Prosecutor stated that sexual assaults were to be alleged as evidence of divers provisions of the ICTY statute. The deconstructed conduct of the perpetrators consisted mainly of forcible sexual penetration, molestation, and forced nudity. The Prosecutor offered sexual violence as supporting evidence, not only of rape, but of torture and enslavement....

Deconstruction removes the fixation on rape and replaces it with the recognition of sexually violent conduct as evidence of several serious violations of international humanitarian law....

Currently, the Prosecutor has submitted testimony of sexual assaults before the *ad hoc* Tribunals. Pending cases before the Rwandan Tribunal of the accused Rutaganda, Kayishema and Ruzidana, and Akayesu, together with the ICTY proceedings against Delalic et al., have each presented evidence of sexually violent conduct. The Prosecutor's characterization of the conduct varied according to the factual circumstances. Charges thus consisted of the crimes: torture, inhumane treatment; killing; genocide; cruel treatment; as well as, acts that satisfy the crime of rape under the statutes.

Deconstruction of sexual violence fosters mainstreaming of such conduct throughout the provisions of the statutes of the *ad hoc* Tribunals. The implementation of international humanitarian law through a sexual violence lens is a worthy response to gender based crimes....⁸

The OTP and the current *ad hoc* Tribunals have charged and confirmed indictments for and/or presented evidence of sexual violence as torture, genocide, inhuman treatment and humiliating and degrading treatment depending on the conduct involved and the proof available.

WC.5.6 To illustrate the operation of the proposed chapeau, the following commentary outlines the factual and legal basis for the incorporation of sexual and gender violence into the major enumerated categories of war crimes against the person that are recognized in the ICC draft statute:

WC.5.6-1 Wilful killing. Rape and other forms of sexual mutilation and violence may be the vehicle of wilful killing. As the commentary to Protocol II makes clear, "[m]urder covers not only cases of homicide, but also intentional omissions that may lead to death. . ."⁹ The sexual mutilation of a man in Prosecutor v. Tadic was charged and confirmed by the ICTY as such.¹⁰ In Rwanda, women were brutally raped and left to die. According to Shattered Lives:

Sexual violence, like other forms of torture, can precede or be a medium of extrajudicial execution. . . [I]n Rwanda, acts of sexual mutilation and other life-threatening violence were inflicted in pursuit of the victims' eventual death. Women were gang raped, raped repeatedly with objects, and subjected to outrageous brutality, some of which involved mutilating women's sexual

organs. . . Many victims of sexual assault died in the course of or consequent to an attack. Sexual violence in such cases was a direct part of the killing. In other cases. . . , women survived sexual violence because their assailants left them for dead, believing they were mortally injured. ¹¹

In the case of *Prosecutor v. Kayeshima*, the Prosecutor has presented evidence to the ICTR that sexual mutilations, a breast-slashing and the impaling of a woman through her vagina, were a means to cause death. In addition, rape is today a method of willful killing in war because it is a means to transmit HIV infection.

WC.5.6-2 Torture. As a matter of customary law, rape and sexual violence, and the threat thereof, have been widely recognized by UN Rapporteurs, the Inter-American and European Human Rights bodies, and the ad hoc Tribunals as forms of torture.¹² The codification of these developments through the proposed chapeau to the ICC Statute of these developments is particularly significant to the Women's Caucus because it would formally acknowledge the gravity of rape.

WC.5.6-3 In every regard, rape and other serious sexual violence meet the international legal definition of torture, set forth in the Convention Against Torture, given the severity of physical and mental suffering inflicted,¹³ and the demonstrable purpose of sexual violence to punish, intimidate and discriminate against women on the basis of gender as well as against the group with which they are identified.¹⁴ Reflecting these developments in customary international law, the ICTY has affirmed the *Gagovic and Delalic* indictments charging rape and other forms of sexual violence as torture. In places which have suffered these atrocities, this is clear. Rwanda has codified the crime "sexual torture" and the Haitian Truth Commission has called for criminalizing rape as torture. The recognition of rape as a form of torture is echoed in the opinion of jurists as well as human rights experts.¹⁵

WC.5.6-4 The recent ruling of the European Court on Human Rights in *Aydin v. Turkey* described the torture of the petitioner, which included one act of rape. In concluding that the petitioner was subjected to torture (and not simply inhuman treatment), the Court emphasized the particularly cruel character of rape as a form of torture.¹⁶ The Inter-American Commission on Human Rights likewise has emphasized the severe impact which rape and sexual violence have on victims by stating that "it is clear that in the experience of torture victims, rape and sexual abuse are forms of torture that produce some of the most severe and long-lasting traumatic effects."¹⁷

WC.5.6-5 Mutilation. Sexual and gender violence too frequently take the form of mutilation. (Chair's draft, B(3)(a), C(1)(a)). In *Prosecutor v. Tadic*, the ICTY charged the sexual mutilation of a man as torture. As the documentation of the violence against women in Rwanda illustrates, attacking or impaling women through their sexual organs, slashing breasts, as well as cutting out pregnant women's uterus were common forms of mutilation.¹⁸ Rape itself is also frequently a form of mutilation. Because much of the damage of rape is ultimately internal and, therefore, invisible, however, this is often ignored. These brutal forms of violence not only invade the body, they often result in the loss of sexual function and infertility. According to *Shattered Lives*: "Some of these [sexual] attacks left women so physically injured that they may never be able to bear children."

WC.5.6-6 Sexual and Gender Slavery. Depending upon the context, rape, forced pregnancy and other serious sexual violence and abuse have also been recognized as sexual slavery. Enslavement and slavery-like conditions are enumerated as a war crime in the Chair's draft at para. C(1)(g) and should, as indicated in our Recommendation 7, be in every category. Slavery and enslavement are the exercise of control over another person as chattel. Kidnapping, deceiving or coercing a woman, under threat of death, bodily injury, starvation to herself or others, to submit to serial rape as "comfort women" or to be "temporary wives," providing both sexual and domestic services is, in the terms of article 1(1) of the 1926 Slavery Convention, placing her in "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." It may also qualify as a condition of "serfdom" under article 1(b) of the Supplementary Convention on the Abolition of Slavery.¹⁹

WC.5.6-7 Under international law, it does not matter whether a slave-like status was initiated by an "agreement" or involved some exchange. Sexual slavery involves the treatment of a person as chattel for the purpose of performing any sexual conduct whatsoever, whether for reward or not.²⁰ In the context of the atrocities and genocide in the former Yugoslavia and Rwanda, women were subjected to sexual slavery in a variety of ways: in prisons, occupied towns, and rape camps where they were held and repeatedly raped or subject to the threat thereof. In *Prosecutor v. Gagovic*, the Prosecutor charged and the Trial Chamber accepted that holding women in a house that quartered paramilitary soldiers, and forcing them to perform a range of sexual acts as well as submit to rape constituted a form of enslavement and, under art. 5 of the ICTY statute, a crime against humanity. In Rwanda, Algeria and other parts of the world, the practice of taking women as "temporary wives" or in forced "temporary marriage" is also sexual enslavement.

WC.5.6-8 Where impregnation or enforced pregnancy results, the invasion of the body and self is total. Women are being treated as chattel for the purpose of reproduction; this is another form of gender enslavement. Either a woman must submit to an abortion, which in circumstances of war and/or clandestinity can be fatal or debilitating, or she must suffer the continuation of a hated pregnancy. A more invasive form of violence is hardly imaginable: the pregnancy of rape is intended to and does take over a woman's body for nine months, at the end of which she faces the intolerable "choice" of keeping a child of rape, abandoning it, and, in some contexts, giving it up for adoption.²¹ The profound violence of forced pregnancy is, in fact, illustrated by the numbers of Rwandan women who abandoned the infants of rape despite a powerful cultural tradition of keeping and taking in unwanted children under normal circumstances.

WC.5.6-9 Just as the severity of rape has been diminished by calling it humiliating and degrading treatment, as discussed in WC.6.1-6.3, below, sexual enslavement has been diminished by calling it only "enforced prostitution." The term "enforced prostitution" lacks a clear legal definition and has been misapplied in the past to situations of sexual slavery and serial rape. It was originally coined early this century to describe the phenomenon of the coercing of young girls and women into brothels. It was adopted in the Geneva Conventions, and later repeated in the Protocols in response to the use of women to "service" armies during the Second World War. Despite very strong condemnation in the Commentary, it was still treated as different from physical violence.²²

WC.5.6-10 The term "enforced prostitution" muffles the degree of violence, coercion and control that is characteristic of sexual slavery. It suggests that sexual services are provided as part of an exchange albeit one coerced by the circumstances. When, as in the

Geneva Conventions, forced prostitution is equated with the “performance” of degrading acts, the term also suggests that sexual services are offered rather than brutally exacted. It hides the fact that this is rape, serial rape, physically invasive and psychologically debilitating in the extreme, and that women are reduced to and sexually bludgeoned as property, and that they are completely under the control of the perpetrator.

WC.5.6-11 More recent attention to the situation of the euphemistically named “comfort women” who were kidnapped or deceived into sexual slavery by the Japanese Army during World War II has revealed and engendered recognition of the essential slave-like conditions under which they were detained, repeatedly raped and often killed or left to die. As the Special Rapporteur on Violence Against Women has found:

“...[T]he practice of “comfort women” should be considered a clear case of sexual slavery and a slavery-like practice in accordance with the approach adopted by relevant international human rights bodies and mechanisms....[T]he Special Rapporteur concurs entirely with the view held by the members of the Working Group on Contemporary Forms of Slavery, as well as by representatives of non-governmental organizations and some academics, that the phrase “comfort women” does not in the least reflect the suffering, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in wartime. The Special Rapporteur, therefore, considers with conviction that the phrase “military sexual slaves” represents a much more accurate and appropriate terminology.”²³

Today the situation of such victims would be described as sexual slavery, consisting of slavery or slave-like conditions, serial rape, torture, and forced labor, even if the victims are paid for their “labor.” Similarly, women and girls who are forced to be subjected to serial rape in conditions of armed conflict are sexual slaves. History has taught us that most so-called “forced prostitution” during armed conflict constitutes sexual slavery.

WC.5.6-12 Nonetheless, the Women's Caucus recognizes that a category of forced prostitution may exist involving less than slave-like conditions. Women may be forced to submit to serial rape in exchange for their safety or that of others or the means of survival. Even though the women would not, strictly speaking, be prostitutes, they would be forced to engage in an exchange of sex for something of value for one or more men in a dominant position of power. But even in cases where women are free to go home at night or even to escape, the conditions of warfare might nonetheless be so overwhelming and controlling as to render them little more than sex slaves. The decision whether to charge someone with forced prostitution, sexual slavery or serial rape, would depend upon a thorough analysis of the facts in each case from the perspective of the woman.

WC.5.6-13 Enslavement is also gendered when it exploits women's or men's traditional roles. When, as discussed above, women are impressed into maternity, this is a form of gender enslavement. The same is true when women are impressed into providing domestic services whether on a large-scale or individualized (forced temporary marriage) basis. The same is true when minors are impressed into military service, discussed below.

WC.5.6-14 Wilfully causing great suffering or serious injury to body or health and inhuman treatment. Both these grave breaches encompass physical and psychological violence of a sexual or gender character which may not meet all the elements of torture, enslavement or mutilation. “Wilfully causing great suffering” was, in fact, written into the Fourth Geneva Convention when torture was understood to apply only to extraction of

information or confession through the use of violence.²⁴ While the line between torture and inhuman treatment is not a sharp one, it exists to encompass cases of sexual and gender violence which may not rise to the level of torture. The Women's Caucus cautions, however, that it is inappropriate to substitute these categories for rape and other sexual and gender violence which does and should properly be recognized and prosecuted as torture.²⁵ For this reason, Recommendation 6 calls for deletion of the exclusive linkage of rape and other sexual violence to "wilfully causing great suffering..." in paragraph A(c) of the grave breaches section of the Chair's text.

***Commentary to Recommendation 6:
Delinking sexual and gender violence from humiliating and degrading treatment.***

WC.6.1 In light of the importance of the gradation of crimes and punishment in criminal law, the linkage of sexual violence with "outrages upon personal dignity" should be deleted. The ICRC Commentaries make clear the difference between violence and an offense against honor or degrading treatment: The Commentary to the Fourth Convention explains: "Honor is a moral and social quality. . .[It includes] protection against slander, calumny, insults or any other action impugning...honor or affecting...reputation."²⁶ The Commentary to article 75 Protocol I, explains that "humiliating and degrading treatment" with which enforced prostitution and indecent assault is explicitly linked, "refers to acts which, *without directly causing harm to the integrity, physical and mental well-being of persons*, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts."²⁷ (italics supplied).

WC.6.2 This underestimation of both the purpose and effect of sexual violence is shocking today and deeply discriminatory now that the violent, terrible nature of rape and other sexual violence against women has finally been recognized. The ICC Statute must not repeat this error. The reference to rape and enforced prostitution in the Chair's draft, paragraph B(4)(n) and C(1)(c), must be deleted. To continue the linkage of rape, enforced prostitution (which, as discussed below, is usually at least serial rape) with "ridicule," "calumny" or "being forced to perform degrading acts" when what is being punished is the infliction of some of the most extreme and traumatizing forms of physical and psychological violence, amounting to sexual torture or slavery, is itself humiliating and degrading to women and reinforces the stigma that it is the purpose of justice to prevent.

WC.6.3 Nonetheless, the war crime of "humiliating or degrading treatment" should be included in the Statute, but not as the catchall for sexual violence. There are some acts of sexual abuse which might be appropriately charged as degrading treatment depending on the context. Thus, for example, forced nudity or sexual performance will, in some contexts, be a form of torture or inhumane treatment; in others, it will be appropriately charged as degrading or humiliating treatment. There are also forms of sexual harassment that could appropriately, in the context, be so charged. But rape and other forms of sexual violence, used so disproportionately against women, have been and must, in the ICC Statute, be clearly recognized as *grave violence* and as an *instrument of war* whether their purpose is to reward soldiers, brutally mark the victory, punish resisters, cause the civilian population to flee or disintegrate, or destroy a people in whole or in part.

WC.6-4 Similarly, Recommendation 6 calls for deletion of the mention of sexual violence in regard to international armed conflict in regard only to "willfully causing great

suffering....” because it potentially could undermine the progressive developments and limit the Prosecutor and the Court to charging sexual violence *only* in this category. For all these reasons, the Women’s Caucus urges adoption of the chapeau as the more efficient and appropriate means of incorporating sexual and gender violence that has previously gone unpunished or under-punished.

***Commentary to Recommendation 7:
Enumerating sexual and gender violence as crimes.***

WC.7.1 The Women’s Caucus recommends following the precedent set in the definition provided by ICTY, and ICTR Art. 5(g) of Crimes Against Humanity where sexual violence is identified in a separate paragraph as well as potentially chargeable as other enumerated crimes. It is necessary to add this paragraph enumerating forms of sexual and gender violence as well as to mainstream sexual violence for a number of reasons. Sexual and gender violence are severe and particular and their particularities should not be lost by mainstreaming. Where not explicit, they are too often ignored, even today. Moreover, even while sexual violence can meet the elements of the other enumerated crimes, criminal law provides definitions of rape, enforced prostitution, and forced sterilization and other forms of violence and abuse that are different from that of the enumerated crimes. The Prosecutor should be able to choose among the various options what is most appropriate to the case.

WC.7.2 The Women’s Caucus recommends adding sexual slavery to this list of illustrative forms of sexual and gender violence to highlight the importance, discussed in WC.5.6-6 -- 5.6-13, of distinguishing sexual slavery from enforced prostitution which requires different, and a lesser degree of proof than slavery or serial rape.

WC.7.3 The Women’s Caucus also urges deletion of the words “of comparable gravity” which qualify sexual violence in the Chair’s draft para. A(c); B(3)(n) and C(1)(c). These terms were suggested and bracketed by the February PrepCom. In our view, they will sow confusion and potentially limit the range of sexual and gender violence and abuse to which the jurisdiction of the ICC, like that of the ICTY and the ICTR, should extend. It raises questions such as what is meant by comparable? does it require some degree of penetration or attempted penetration? As reflected in the indictments and evidence before the ad hoc Tribunals, the range of sexual and gender violence or abuse in war will always constitute as well one or more of the traditionally enumerated violations and thus be of the requisite seriousness to warrant prosecution by the ICC.

III. Other Gender-Based Crimes.

Recommendation 8: Enslavement and slavery-like practices, now recognized only under para. C.(1)(g) of the Chair’s draft should be enumerated as a crime in all wars and should clearly encompass modern forms of sexual and gender enslavements.

Suggested text:

Add to : A. a bis and 2.9
Amend C. 2.g:

**ENSLAVEMENT AND SLAVERY-LIKE PRACTICES IN ALL THEIR
FORMS, INCLUDING BY SALE, DECEPTION, COERCION OR THREAT.**

Commentary:

WC.8.1 The absence of enslavement and slavery-like practices as enumerated crimes in all categories, affecting international and internal war and based on the Conventions or customary law, would be an unjustifiable oversight in the ICC Statute. Slavery and slave-like practices are *ius cogens*. The most recent ICRC Commentary, discussing the enumeration of slavery and the slave-trade in Protocol II, relies on article 8 of the International Covenant on Civil and Political Rights, art. 1 of the 1926 Slavery Convention, and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, and supports this view:²⁸

[Slavery and the slave trade are] one of the “hard core” fundamental guaranteesThe prohibition on slavery is now universally accepted; therefore the adoption of this sub-paragraph did not give rise to any discussion. . . .[T]he phrase “slavery and the slave trade in all their forms”. . . .[includes, but is not limited to] certain institutions and practices comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labor”

WC.8.2 The Women’s Caucus recommends adding the terms “INCLUDING BY SALE, DECEPTION, COERCION OR THREAT” to ensure the application of slavery-like practices to the full range of its forms. For example, women and girls are not only sold into forced marriage, but also kidnapped, coerced, threatened or deceived into “accepting” it.

WC.8.3 As discussed above in para. WC.6.5-6 *et seq.*, enslavement and slavery-like practices encompass sexual and gender violence and oppression, which is made explicit through the chapeau as well as in para A. (b) bis; B. 4 (a) bis; and C.(1)(a) bis. These include being impressed into maternity service through forced impregnation and pregnancy, and into domestic service through institutionalized and individualized enslavement. It also includes the involuntary recruitment of children for military service discussed below.

Recommendation 9: *Prohibit recruitment of or allowing people under 18 to participate in hostilities.*

Suggested text:

Amend B(3)(s) and C(1)(p):

() to recruit children under the age of [DELETE: fifteen] EIGHTEEN years in the armed forces, or to allow them to take part in hostilities.

Commentary:

WC.9.1 Studies estimate that 250,000 people under 18 are serving in the armed forces of governments and dissident groups. Children may be forcibly recruited through gangs and kidnapping or manipulated into participating. They are especially malleable and often the ones who are used to carry out extreme acts of violence, often directed against their own families or communities.²⁹

WC.9.2 Beyond the gross manipulation of children in hostilities, there is a pervasive gender impact of the fact and potential of military service generally and, particularly, for the

young. Overwhelmingly, those who are forced or recruited for hostilities are boys. The combination of the gender-specific nature of the military and the equation of military service with heroism, excitement, and masculinity have a profoundly detrimental effect on both boys and girls from the earliest years of childhood through adulthood. Military service, despite its pervasive glorification in many societies, is often profoundly traumatizing for those who perform it either because they must or cannot become inured to killing and to death. Military recruitment and service thus operate to divide society by gender and reinforce stereotypes about strength and weakness, protection and dependency, superiority and inferiority in violation of international norms designed to eliminate discrimination against women. Most members of the Women's Caucus do not believe that non-discriminatory recruitment will address the damaging gender-impact of the military. The role of the military perpetuates patriarchal values, reinforcing the view that violence and obedience to or assertion of authority are necessary and acceptable means of solving problems, and equipping people to use violence. Women are frequently the victims of this militarization, as targets of sexual and gender violence when used or tolerated as instruments of war. They are also targets of violence in war's aftermath: women suffer equivalent forms of violence in refugee camps created by war and are battered and raped--tortured in fact--by intimate partners and family members in their homes

WC.9.3 The Women's Caucus believes that, at the least, recruitment for or service in the hostilities, whether forced or voluntary, should not occur during a person's minority, at a time when malleability and impressionability are at a height. While older documents have recognized 15 as the age limit, there is, on the basis of current experience and study, a progressive trend toward setting the age at 18 which the Women's Caucus supports.³⁰

ANNEX I

A. grave breaches of the Geneva Conventions of 12 August 1949, namely, the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing, INCLUDING SEXUAL VIOLENCE CAUSING DEATH;

(a) bis: ALL FORMS OF ENSLAVEMENT, INCLUDING SEXUAL OR DOMESTIC ENSLAVEMENT AND FORCED MARRIAGE, by SALE, DECEPTION, COERCION OR THREAT;

(b) torture or inhuman treatment, including biological experiments, INCLUDING RAPE AND OTHER SEXUAL OR GENDER TORTURE, INCLUDING VIOLENCE AGAINST REPRODUCTIVE INTEGRITY;

(c) [DELETE: wilfully causing great suffering, or serious injury to body or health] [PRESERVE: wilfully causing great suffering, serious injury to body or health, including rape, enforced prostitution and other [DELETE: sexual violence of comparable gravity] SEXUAL OR GENDER VIOLENCE OR ASSAULT.

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, INCLUDING ATTACKS ON THE HOME OR LIVELIHOODS;

(e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power, INCLUDING COERCED SEXUAL OR DOMESTIC SERVICE;

(f) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial FREE OF DISCRIMINATION AND STEREOTYPES OF ANY KIND;

(g) unlawful deportation or transfer or unlawful confinement;

(h) taking of hostages.

1 See, art. 12, para. 2 of the First and Second Geneva Conventions; Art. 16 of the Third Convention; Art. 27(3) of the Fourth Convention; Art. 75 of Protocol I; and Protocol II Art. 2, 4(1).

2 Pictet, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (ICRC, 1958) art. 27(3) at 207 (hereinafter "Pictet Commentary").

3 See, UN Declaration on the Elimination of Violence Against Women; Convention on the Elimination of All Forms of Discrimination Against Women, arts. 1-5; CEDAW Recommendation No. 19 on Violence Against Women in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.2 (1996) at 112-113 (hereinafter "Human Rights Compilation")

4 Pictet Commentary, art. 27(3) at 206.

5 The Fourth Geneva Convention, art. 27, provides "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

6 Instead of a chapeau, this approach could be articulated in the subparagraph relating to sexual and gender violence discussed in Recommendation 7. But the Women's Caucus finds this a less effective means to emphasize the importance of mainstreaming. Thus the suggested text to Recommendation 7 would provide:

()RAPE, SEXUAL SLAVERY, ENFORCED PROSTITUTION, FORCED STERILIZATION AND OTHER SEXUAL OR GENDER VIOLENCE OR ABUSE WHICH MAY ALSO MEET THE ELEMENTS OF ONE OR MORE OF THE CRIMES AGAINST PHYSICAL OR MENTAL INTEGRITY OR HEALTH ENUMERATED IN THIS ARTICLE AS "WAR CRIMES."

7 Letter from Judge Richard Goldstone to Rhonda Copelon, Felice Gaer and Jennifer Green (Nov. 22, 1994).

8 Patricia Viseur-Sellers, Gender-Based Persecution, prepared for the UN Expert Group Meeting on Gender-Based Persecution, Toronto, Canada 9-12 November 1997, UN Doc. EGM/GBP/1997/EP.3 (6 November 1997) at pp. 3- 4. (hereinafter "Sellers"). Pillay, Gender -Based Persecution, prepared for the UN Expert Group Meeting on Gender-Based Persecution, Toronto, Canada 9-12 November 1997, UN Doc. EGM/GBP/1997/EP. (6 November 1997)(hereinafter "Pillay" who is a judge of the ICTR).

9 Pilloud Commentary on the Additional Protocols (ICRC 1986) para. 4532 at 1373(hereinafter "Pilloud Commentary").

10. The defendant was not convicted for wilful killing because the Trial Chamber found that the proof was insufficient to find that the sexual mutilation actually caused the death of the prisoner. Prosecutor v. Tadic,

11 Shattered Lives, Sexual Violence during the Rwandan Genocide and Its Aftermath (Human Rights Watch, September 1996)(hereinafter "Shattered Lives") at 35-36. The Commentaries also recognize that torture can be physical or psychological. See Pilloud Commentary, para 4532 at 1373.

12 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT) art. 1. In addition to the indictments confirmed by the ICTY, rape has been recognized as torture by the last two UN Rapporteurs on Torture since 1986. See, e.g., Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by the Special Rapporteur, UN Doc. E/CN.4/1986/15 para.33(1986)(Kooijmans); UN Doc. E/CN.4/1997/7 (1997) and E/CN.4/1995/34 (1994) (Rodley). It has been recognized as such by the UN Rapporteur on Violence Against Women. See, Report of Ms. Radhika Coomaraswamy, the Special Rapporteur on Violence Against Women its Causes and Consequences, UN Doc. E/CN.4/1997/47, at para. 20. It has also been recognized as such by the Inter-American Commission of Human Rights, Report on the Situation of Human Rights in Haiti (1994); and by the European Court of Human Rights Aydin v. Turkey, Eur. Ct.HR (1997). This understanding is also reflected in the writings of jurists. It is noted that the state action requirement of CAT is not applicable to war crimes. See discussion of torture in the Pilloud Commentary to Protocol II, art. 4 at 1373-74: "...[t]he act of torture (as defined by

12 See, art. 12, para. 2 of the First and Second Geneva Conventions; Art. 16 of the Third Convention;

Art. CAT) is reprehensible in itself, regardless of its perpetrator, and cannot be justified in any circumstances." See *id.* at 1374, n 22 which cites art. 1 of CAT which preserves "any other international instrument or any national law which contains or might contain provisions with a broader scope."

13 Torture is distinguished from inhuman treatment by the severity of suffering even though both the line is not a clear one. Human Rights Committee, General Comment 20 on Art. 7, para. 4 in Human Rights Compilation at 31. The UN Special Rapporteur on Torture, Mr. Nigel S. Rodley states that rape and other forms of sexual assault are common and especially traumatic means of torture. Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/1995/34 at para. 18-19. Quoting Mr. Kooijman's 1992 report, Mr. Rodley stated that "since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture." E/CN.4/1995/34, para. 16, quoting E/CN.4/1992/SR.21, para. 35. In classifying rape as torture, the Special Rapporteur includes rape with beatings, electric shock, sleep and food deprivation, and death threats, with no distinction being made between these other forms of torture and rape. E/CN.4/1997/7 10 January 1997. The Special Rapporteur on Violence Against Women stated that "[r]ape is often used as an instrument of torture" E/CN.4/1995/42, 22 November 1994, paras. 51, 173-174. Moreover, in assessing the impact of rape even in civil society, the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, compares the experience of rape victims with that of other survivors of traumatic event such as war and torture. Report of Ms. Radhika Coomaraswamy, the Special Rapporteur on Violence Against Women its Causes and Consequences, UN Doc. E/CN.4/1997/47, at para. 20.

14 In this regard, the Inter-American Commission elaborated the application of the definition of torture in its Report on the Situation of Human Rights in Haiti, OAS/Ser.L/V/II.88 ((1994):

"133. The Commission considers that rape represents not only inhumane treatment that infringes upon physical and moral integrity under Article 5 of the Convention, but also a form of torture in the sense of Article 5(2) of that instrument.

134. Consistent with the definitions elaborated in the Inter-American Convention to Prevent, Punish and Eradicate Torture, . . . and the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Commission considers that the rape and other sexual abuse of Haitian women inflicted physical and mental pain and suffering in order to punish women for their militancy and/or their association with militant family members and to intimidate or destroy their capacity to resist the regime and sustain the civil society particularly in the poor communities. Rape and the threat of rape against women also qualifies as torture in that it represents a brutal expression of discrimination against them as women. From the testimonies and expert opinion provided in the documentation to the Commission, it is clear that in the experience of torture victims, rape and sexual abuse are forms of torture which produce some of the most severe and long-lasting traumatic effects."

15 Meron, Rape as a Crime Under International Humanitarian Law, 87 American Journal of Int'l Law 424 (1993); Copelon, Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law, 5 Hastings Women's Law Journal 243 (1994); Thomas & Ralph, Rape in War: Challenging the Tradition of Impunity, 14 SAIS Review 81 (1994); Sellers, n. 9; Pillay, n. 9.

16 Eur. Ct. Hum. Rts. 57/1996/676/866 (25 September 1997). At para. 83 the Court stated: "Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally."

The Court therefore concludes that "... the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture under the

Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.” Id. at para. 86.

17 Report on the Situation of Human Rights in Haiti, OEA/Ser.L/V.II.88, para. 134 (1995).

18 See, *Visser-Sellers*, discussed *supra* WC.5.5 .

19 Slavery Convention (1926); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

20 See, M. Cherif Bassiouni, *A Draft International Criminal Code*, Article VII, sec. 2 (1993).

21 See Anne Tierney Goldstein, *Recognizing Forced Impregnation as a War Crime Under International Law* (Center for Law and Reproductive Policy, 1993).

22 Pictet Commentary, art. 27 at 2007-208.

23 Special Rapporteur on Violence Against Women, Its Causes and Consequences, Report on the mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1 at paras. 8-10 and generally (4 January 1996).

24 Pilloud Commentary, art. 75(a)(ii) at 873.

25 It should be noted that, when the issue of whether rape in the former Yugoslavia qualifies as a grave breach of the Geneva Conventions and before the fuller examination of sexual violence as a form of torture had taken place, the ICRC issued an aide memoire indicating that it is a grave breach falling into this category. ICRC, *Aide Memoire* (December 3, 1992).

26 Pictet Commentaries, art. 27 at 202. Art. 75(b) of Protocol I and Protocol II, art. 4, also place sexual violence in the category of “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.”

27 Pilloud Commentary, Protocol I, art. 75 at 873.

28 Pilloud Commentary, Protocol II, art. 4, para. 4541 at 1376.

29 See, Report of Graca Machel, Expert of the Secretary-General of the United Nations, on the impact of armed conflict on children, UN Doc. A/51/306, paras. 34-62 (11 November 1996); Rachel Brett and Margaret McCallin, *Children: The Invisible Soldiers* (1996); Human Rights Watch Children’s Rights Project, *The Scars of Death: Children Abducted by the Lord’s Resistance Army in Uganda* (1997).

30 Identifying 15 years as the cut-off: art. 38 of the Convention on the Rights of the Child, G.A. res.44/25, annex 44 UNGAOR Supp. (No. 49) at 167; art. 77 to Protocol I and art. 4(3) to Protocol II. Identifying 18 years: arts. 2 and 22 of the African Charter on the Rights and Welfare of Children; the Working Group of the UN Commission on Human Rights to draft an optional protocol to the Convention on the Rights of the Child has reached consensus on the age of 18 for compulsory recruitment and will be examining the minimum age for participation at its 1998 session.