

**UNOFFICIAL ACCOUNTABILITY:  
A PROPOSAL FOR THE PERMANENT WOMEN'S TRIBUNAL ON SEXUAL  
VIOLENCE IN ARMED CONFLICT**

Abstract

The ongoing sexual violation of women during recent conflicts stands in sharp contrast to increasing recognition that rape, sexual slavery, and other forms of sexual violence in armed conflict violate international law. This paper argues that State-based fora cannot adequately hold individual perpetrators and State sponsors of such violence accountable. Accordingly, it posits that “unofficial” mechanisms---created by private individuals without authorization from any State---be considered as means to eliminate impunity for sexual violence committed during armed conflict. To that end, it evaluates the “people’s tribunal” format, in which proceedings similar to a judicial trial are organized and carried out by private individuals. The paper traces the historical development of people’s tribunals, focusing on their use by the international women’s movement. A close analysis of the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery during WWII illustrates the potential effectiveness of the format for addressing sexual violence against women during armed conflict. Based on this example, the paper argues that a people’s tribunal could serve not simply as a last resort for victims denied justice in other fora, but rather as a lasting compliment to established international legal institutions. Accordingly, the paper concludes by proposing the creation of a Permanent Women’s Tribunal for Sexual Violence in Armed Conflict and describing the attributes that would best enable the Tribunal to serve as a legitimate source of justice for victims, while also having a progressive influence on State-based legal institutions and society as a whole.

Before an unofficial<sup>1</sup> “tribunal” organized by women’s rights activists during the 1993 Vienna World Conference on Human Rights (“Vienna Conference”), a Bosnian woman voiced her despair, highlighting the international legal order’s tragic failure to adequately address sexual violence during armed conflict: “When I heard Chin Sung Chung [describe her sexual enslavement at the hands of the Japanese army during WWII],” she said, “such an emptiness entered my soul because what happened over 40 years ago, what happened in Japan, is happening now.”<sup>2</sup>

Though the effects of armed conflict touch everyone, women have been recognized as

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<sup>1</sup> “Unofficial” refers herein to measures implemented by private entities without the authorization of a State or organization of States, such as the U.N. or E.U.; “official” measures are those authorized in whole or in part by a State or organization of States.

<sup>2</sup> Charlotte Bunch & Niamh Reilly, *Demanding Accountability: The Global Campaign and Vienna Tribunal for Women’s Human Rights* 36 (1994).

particularly vulnerable, due to “their status in society and their sex.”<sup>3</sup> Gender-related crimes have occurred “on an astronomical scale” in past and present conflicts, and sexual violence in particular has been “exceedingly commonplace” in both intra- and international armed conflict.<sup>4</sup> Although men are also victims<sup>5</sup> of sexual violence during armed conflict, as recently highlighted by the atrocities committed at the U.S.-run Abu Ghraib prison in Iraq,<sup>6</sup> rape and sexual slavery are much more often committed against women, and women are uniquely susceptible to the reproductive violations of forced pregnancy and forced abortion.<sup>7</sup> Thus, most sexual violence in armed conflict can be seen a gender-based crime,<sup>8</sup> and perceived license to commit sexual violence in armed conflict can be traced to what the U.N. Special Rapporteur on Violence Against Women calls “an unwritten legacy that violence against women during war is an accepted practice of conquering armies.”<sup>9</sup> The effects of such violence on women, their families, and societies can be devastating, and endure for generations.

The continuing prevalence of sexual violence in armed conflict stands in contrast to increased international recognition that rape, sexual slavery, and other forms of sexual violence in armed conflict violate established international law, including humanitarian, human rights,

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<sup>3</sup> Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, para. 136, U.N. Docs. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

<sup>4</sup> Kelly D. Askin, Discussion, *The Quest for Post-Conflict Gender Justice*, 41 Colum. J. Transnat'l L. 509, 509 (2003) [hereinafter Askin, *Quest*]; see also Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 Eur. J. Int'l L. 326, 327 (1994) (“rape and sexual violence are common to virtually all armed conflicts”) [hereinafter Chinkin, *International Law*].

<sup>5</sup> Use of the term “victim” has been criticized for disempowering those to whom it refers “by emphasizing their denial of and need for rights...strip[ping them] of choice and reduc[ing] their capacity for regaining agency.” Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* 120 (2002). Nevertheless, “victim” is used in this discussion because it highlights the criminal nature of the acts in question.

<sup>6</sup> See, e.g., Douglas Jehl & Eric Schmitt, *The Struggle for Iraq: Investigations; Army Discloses Criminal Inquiry on Prison Abuse*, N.Y. Times, May 5, 2004, at A1 (describing sexual humiliation of prisoners). The involvement of two female soldiers in the Abu Ghraib abuses demonstrates that women, like men, can act as the perpetrators of sexual violence.

<sup>7</sup> Charlotte Lindsey, *Women Facing War* 51 (2001).

<sup>8</sup> Chinkin, *International Law*, *supra* note 4, at 339.

<sup>9</sup> Radhika Coomaraswamy, *Report on Violence Against Women, Its Causes and Consequences*, Commission on Human Rights, 54<sup>th</sup> Sess., at Part I, para. 1, Provisional Agenda Item 9(a), U.N. Doc. E/CN.4/1998/54 (1998) [hereinafter Coomaraswamy, *Report*].

and *jus cogens* prohibitions.<sup>10</sup> But in spite of these legal prohibitions, sexual violence continues to occur in armed conflicts around the world,<sup>11</sup> as illustrated by the most recently publicized case of widespread sexual violence currently being perpetrated in Sudan.<sup>12</sup> The ongoing sexual violation of women during armed conflict exposes a pressing need for additional measures to end this dreadful form of gender-based violence.

While a number of social and structural factors---including patriarchal conceptions of women as property rather than persons, and as bearers of cultural identity<sup>13</sup>---contribute to the continued use of sexual violence as a component of armed conflict, the U.N. Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict has recognized that “the most immediate and effective deterrent to the use of sexual violence during armed conflict is to hold the perpetrators responsible for their crimes.”<sup>14</sup> Indeed, accountability for the individuals, groups, and states responsible for sexual violence during armed conflict is

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<sup>10</sup> See, e.g., Vienna Declaration and Programme of Action, Part II, para. 38, U.N. Doc. A/CONF.157/23 (1993) (“Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.”). A full explication of international legal prohibitions on sexual violence is outside the scope of this discussion. For a review of the development of international humanitarian law prohibitions on rape and other forms of sexual violence, see Askin, *Quest*, *supra* note 4, at 290-305. Askin argues that sexual violence may have achieved a status analogous to that of genocide, torture, slavery, and crimes against humanity as a *jus cogens* crime. *Id.* at 293-94.

<sup>11</sup> See, e.g., Radhika Coomaraswamy, *Report on Violence Against Women Perpetrated and/or Condoned by the State During Times of Armed Conflict*, U.N. Commission on Human Rights, 57<sup>th</sup> Sess., Provisional Agenda Item 12(a), paras. 68-113, U.N. Doc. E/CN.4/2001/73 (2001) (reporting sexual violence committed against women in armed conflict between 1997 and 2000 in Afghanistan, Burundi, Colombia, East Timor, Kosovo, India, Indonesia, West Timor, Myanmar, Chechnya, Sierra Leone, and Sri Lanka) [hereinafter Coomaraswamy, *Armed Conflict*].

<sup>12</sup> See, e.g., Amnesty International, *Sudan, Darfur: Rape as a Weapon of War*, Index No. 54/076/2004, available at [http://web.amnesty.org/library/pdf/AFR540762004ENGLISH/\\$File/AFR5407604.pdf](http://web.amnesty.org/library/pdf/AFR540762004ENGLISH/$File/AFR5407604.pdf) (2004).

<sup>13</sup> See Lindsey, *supra* note 7, at 53 (arguing that women are targeted for sexual violence due to their position in patriarchal societies as persons in need of male protection); Askin, *Quest*, *supra* note 4, at 298 (arguing that destructive capacity of rape stems from sexual stereotypes); Liz Kelly, *Wars Against Women: Sexual Violence, Sexual Politics and the Militarised State*, in *States of Conflict: Gender, Violence and Resistance* 45 (Susie Jacobs, et al., eds.) (2000) (“Women’s bodies and women as a group have...been constructed as the locus or carriers of culture. It is this, coupled with misogyny, which makes them targets in military conflicts.”).

<sup>14</sup> Gay J. McDougall, *Update to the Final Report on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess., Provisional Agenda Item 6, para. 21, U.N. Doc. E/CN.4/Sub.2/2000/21 (2000) [hereinafter McDougall, *Update*].

critical not only for deterrence, but also to promote social reforms that advance the elimination of sexual violence,<sup>15</sup> and to provide recompense, healing and closure to victims.<sup>16</sup> To this end, mechanisms of accountability---courts, war crimes tribunals, and other innovative formats like truth commissions---must be equipped to document and make known the full truth of these atrocities, bring perpetrators to justice by identifying and punishing them, and provide an effective remedy to victims.<sup>17</sup>

The international community has come to appreciate the importance of such accountability, as evidenced by the establishment over the past eleven years of *ad hoc* war crimes tribunals in Yugoslavia (“ICTY”) and Rwanda (“ICTR”), the hybrid national/international Special Court for Sierra Leone (“SCSL”), and the International Criminal Court (“ICC”).<sup>18</sup> These fora have made significant advances in addressing sexual violence as a violation of international law. For example, criminal convictions for sexual violence as a war crime, a crime against humanity, and genocide have been issued by the ICTY and ICTR,<sup>19</sup> and ten of the thirteen persons indicted by the SCSL face charges arising from sexual violence,

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<sup>15</sup> Increased awareness can help reverse the stigma attached to being a victim of sexual violence, thereby diminishing secondary harms to victims and their communities, and dismantling sexual violence as an effective weapon of war. See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int’l L. 288, 347 (2003) (stressing importance of reversing stereotypes to reflect that sexual violence shames and dishonors its perpetrators, not its victims) [hereinafter Askin, *Prosecuting*].

<sup>16</sup> See Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, at xliii (1997) (noting importance of accountability for these goals); Mani, *supra* note 5, at 7-8 (describing multiple benefits of accountability).

<sup>17</sup> Louis Joinet, *Final Report on Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49<sup>th</sup> Sess., Provisional Agenda Item 9, para. 16, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997) (determining that ending impunity requires the fulfillment of three basic rights of victims: to know the truth, to justice, and to reparations).

<sup>18</sup> See Lindsey, *supra* note 7, at 150 (noting that prior to the establishment of the ICTY, there were few prosecutions of individuals for war crimes, with the exception of the Nuremberg and Tokyo tribunals that followed WWII).

<sup>19</sup> See e.g., *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, Sep. 2, 1998 (conviction for rape as a form of genocide); *Prosecutor v. Delalic*, Judgment, IT-96-21-T, Nov. 16, 1998 (holding that sexual violence can constitute torture); *Prosecutor v. Kunarac*, Judgment, IT-96-23T, Feb. 22, 2001 (conviction for rape, sexual slavery, and outrages on personal dignity as war crimes and crimes against humanity). For a detailed analysis of recent ICTY and ICTR caselaw on sexual violence, see Askin, *Prosecuting*, *supra* note 15.

including the form of sexual slavery referred to as “forced marriage.”<sup>20</sup> The legal prohibitions on sexual violence have also been further solidified, following intense lobbying by women’s organizations, in the statute of the newly formed ICC, which explicitly includes rape and other forms of sexual violence within its definitions of war crimes<sup>21</sup> and crimes against humanity.<sup>22</sup>

Despite these promising strides, the abovementioned official tribunals suffer from a number of limitations on their ability to hold perpetrators fully accountable and to provide victims full justice. The ICTY and ICTR have been criticized for failing to adopt a sufficiently gendered approach to sexual violence,<sup>23</sup> and, although it represents a significant improvement on the terms of previous international legal prohibitions of sexual violence, the ICC has been subject to similar criticisms.<sup>24</sup> These international bodies are also distant, both physically and psychically, from the societies for which they work to provide justice. This can inhibit perceptions of accountability and justice within communities, in addition to drawing resentment for draining financial resources.<sup>25</sup> The ICTY and ICTR have also had difficulty addressing sexual violence because their limited ability to protect victims’ identity, physical security, and psychological health make women reluctant to report and testify about sexual violence before them.<sup>26</sup> Moreover, the perpetrator-oriented nature of war crimes tribunals and other adjudicative fora limits their ability to provide a full sense of justice to victims of sexual

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<sup>20</sup> See Special Court for Sierra Leone Website, at <http://www.sc-sl.org> (last visited Aug. 12, 2004).

<sup>21</sup> Rome Statute of the International Criminal Court, Art. 8(2)(b)(xxii), (2)(e)(vi), *adopted* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

<sup>22</sup> *Id.*, at Art. 7(1)(g).

<sup>23</sup> See, e.g., Rosalinda Dixon, *Rape as a Crime in International Humanitarian Law: Where to From Here?*, 13 Eur. J. Int’l L. 697, 701-05 (2002) (criticizing ICTY for failure to identify “Muslim women” instead of “Muslims” as targeted population in *Kunarac*, and noting patriarchal connotations of viewing sexual violence against women as a form of genocide).

<sup>24</sup> See, e.g., Coomaraswamy, *Armed Conflict*, *supra* note 11, paras. 18-20 (objecting to element of intent to affect ethnic composition for crime of forced pregnancy before the ICC, and to biologically-associated definition of gender); McDougall, *Update*, *supra* note 14, para. 29 (criticizing implication in ICC rules that commercial transaction is necessary element of crime of sexual slavery).

<sup>25</sup> See Mani, *supra* note 5, at 98.

<sup>26</sup> Kelly, *supra* note 13, at 54; Coomaraswamy, *Report*, *supra* note 9.

violence.<sup>27</sup> For example, strong procedural and evidentiary protections for the accused, necessary in any forum capable of imposing custodial sentences, may make testifying about their violations unduly dangerous or painful for women, or result in acquittals that deny them vindication altogether. The ICTY, ICTR, and ICC also have limited powers to issue the reparations that are integral to full accountability.<sup>28</sup>

Even more distressing than these structural and procedural limits, however, is the fact that official mechanisms of accountability are unable or unwilling to address the vast majority of sexual violations in armed conflict. Instances of sexual violence in armed conflict outside the former Yugoslavia, Rwanda, or Sierra Leone that occurred before July 1, 2002 are not within the jurisdiction of any official international mechanism of accountability. Further, resource constraints will drastically limit the capacity of the ICC to address crimes of sexual violence in future armed conflicts, forcing it to limit its efforts to the “worst” perpetrators.

Accordingly, Special Rapporteur McDougall has determined that international mechanisms such as the ICTY, ICTR, and ICC will only be able to address “a small fraction” of sexual violence committed in armed conflict, and that national prosecution for all sexual violations is “imperative.”<sup>29</sup> National courts, however, are rarely able or willing, for a variety of structural and political reasons, to provide satisfactory accountability after armed conflict.<sup>30</sup>

Ultimately, the limiting factor for both official national and international mechanisms of

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<sup>27</sup> See, e.g., Dixon, *supra* note 23, 705 (“the potential to recognise the specific and gendered harms suffered by the victims of war crimes and crimes against humanity is inherently limited within the international criminal process”); Chinkin, *International Law*, *supra* note 4, at 337 (raising concern that ICTY would be perpetrator-oriented); Mani, *supra* note 5, at 100 (describing limits of adversarial trials for achieving accountability).

<sup>28</sup> Christine M. Chinkin, Editorial Comment, *Women’s International Tribunal on Japanese Military Sexual Slavery*, 95 Am. J. Int’l L. 335, 340 (2001) [hereinafter Chinkin, *Tribunal*]; Dixon, *supra* note 23, at 710.

<sup>29</sup> McDougall, *Update*, *supra* note 14, para. 93.

<sup>30</sup> See, e.g., Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* 77-78, 135 (1999) (discussing obstacles to national justice and concluding that “even if national courts should...have jurisdiction...[it] may be long-delayed, or even denied on legal and/or political grounds, their impartiality may be challenged and their judgments labeled as victors’ justice.”). For an example, see the discussion of Japan’s resistance to accountability for sexual slavery committed during WWII, *infra* Part II.B.

accountability is that they require the authorization and support of a State or international organization. Despite significant progress made over the past decade, those entities have not had the will to fully and satisfactorily address sexual violence in armed conflict by expanding the jurisdiction of existing courts, providing adequate funding for their operation, or consistently bringing perpetrators to justice.

The pressing need for more accountability than is currently available in existing fora is demonstrated by the continued incidence of sexual violence in armed conflict. The fact that such atrocities are frequently committed in public further underscores the reality that perpetrators either do not believe their actions are prohibited, or do not anticipate that they will be held accountable.<sup>31</sup> This is hardly surprising, since it remains the case that “an overwhelming majority” of those who commit sexual violence are not brought to justice, and that “few survivors ever receive justice or any other form of accountability or reparation....”<sup>32</sup> Because the practical, structural and political limitations discussed above leave official mechanisms of accountability without the capacity to provide full accountability for sexual violence in armed conflict, unofficial mechanisms should be considered as potential means to pressure governments and international organizations to address these limitations, and as a means to help victims achieve justice directly.<sup>33</sup>

The following discussion will propose the use of one such unofficial mechanism---the people’s tribunal---as an effective supplement to official accountability for sexual violence in armed conflict. Part I describes the development and use of people’s tribunals as mechanisms of

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<sup>31</sup> Lindsey, *supra* note 7, at 52.

<sup>32</sup> Askin, *Quest*, *supra* note 4, at 520.

<sup>33</sup> See Mani, *supra* note 5, at 113 (“Sometimes when a government is unwilling to do much to address the past...unofficial measures undertaken by independent civil society groups outside the authority of governments assume importance. They may serve the role and functions of official mechanisms, or even outdo them in providing a measure of justice to citizens.”).

unofficial accountability, especially for the international women's movement. In Part II, a previous effort by women's groups to adapt the people's tribunal format to address sexual violence in armed conflict is presented as a model. The effectiveness of that tribunal, and the people's tribunal format in general, is critically evaluated in Part III, leading to the conclusion that a people's tribunal could make a significant contribution to official mechanisms of accountability for sexual violence in armed conflict. To that end, Part IV advocates the establishment of a Permanent Women's Tribunal for Sexual Violence in Armed Conflict ("PWT"), and describes the features that would best enable it to serve as a progressive influence on official legal institutions and society, while also functioning as a legitimate, though unofficial, mechanism of legal accountability in its own right.

### **I. Development of people's tribunals as unofficial mechanisms of accountability**

A "people's tribunal," generally resembles a judicial trial: evidence is presented, usually in a public session, and a judgment or analysis of the evidence on the basis of relevant legal instruments is issued by a panel of legal or other experts. Organized and executed by private entities, people's tribunals base their authority and legitimacy on "the understanding that 'law is an instrument of civil society' that does not belong to governments."<sup>34</sup> Thus, "the people" are competent to invoke and apply law in an unofficial forum, even when governments are unwilling or unable to do so in any official tribunal.

Although their unofficial status creates significant limitations for people's tribunals, it also conveys on them two unique benefits: first, since they require no government sanction, they can be used as a "fallback" forum when governments fail to ensure accountability for

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<sup>34</sup> Chinkin, *Tribunal*, *supra* note 28, at 339 (quoting Richard Falk, *The Rights of People (In Particular Indigenous Peoples)*, in *The Rights of Peoples* 17, 29 (James Crawford ed., 1988)).



international law violations; second, people's tribunals have more freedom to formulate their mandate and procedures in response to the demands of particular circumstances and the needs of victims. The following discussion explores the development of the people's tribunal as a tool for political and legal activism, and describes how the women's movement in particular has capitalized on the format's two key advantages.

#### A. *The Russell Tribunal*

The people's tribunal format was first developed in 1967 in the "Russell Tribunal" on U.S. military action in Vietnam.<sup>35</sup> Created by Bertrand Russell, and headed by French philosopher Jean-Paul Sartre, the Russell Tribunal met twice to hear evidence on alleged aggression and war crimes committed by the U.S. in southeast Asia.<sup>36</sup> Its organizers argued that the creation of an unofficial, judicial-style tribunal was necessitated by the absence of any official venue for trying international war crimes.<sup>37</sup>

The Russell Tribunal heard evidence from journalists, experts, eyewitnesses (including civilians injured during the war and three U.S. soldiers who admitted to participating in torture), and its own investigative team, sent to Vietnam to verify claims of the destruction of civilian targets.<sup>38</sup> In the interest of fairness, the tribunal's organizers invited the U.S. to send a representative to argue for the legality of its actions.<sup>39</sup> When the invitation was not accepted, tribunal members considered instead a U.S. government memorandum setting out the arguments

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<sup>35</sup> See generally *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal* (John Duffett ed., 1968) [hereinafter *Russell Proceedings*].

<sup>36</sup> Beigbender, *supra* note 30, at 139.

<sup>37</sup> Jean Paul Sartre, *Inaugural Statement*, in *Russell Proceedings*, *supra* note 35.

<sup>38</sup> *Verdict of the Stockholm Session*, in *Russell Proceedings*, *supra* note 35, at 302, 302; *Testimony and Questioning of David Kenneth Tuck*, in *Russell Proceedings*, *supra* note 35, at 403; *Testimony and Questioning of Peter Martinsen*, in *Russell Proceedings*, *supra* note 35, at 425; *Testimony and Questioning of Donald Duncan*, in *Russell Proceedings*, *supra* note 35, at 457.

<sup>39</sup> *Statement of the President of Session*, in *Russell Proceedings*, *supra* note 35, at 52, 52.

for legality to the Senate Foreign Affairs Committee.<sup>40</sup> The tribunal evaluated U.S. actions in light of several international legal instruments, including the Kellogg-Briand Pact, U.N. Charter, Hague Regulations, Nuremberg Statute, Geneva Conventions, and peace agreements that concluded the Vietnamese war for independence.<sup>41</sup>

Because it had no power to enforce its verdicts, the Russell Tribunal limited its judgment to whether and by whom a crime falling within the jurisdiction of the WWII-era Nuremberg Tribunal had been committed, and what punishment would have been applicable had the Nuremberg Tribunal adjudicated the matter.<sup>42</sup> The purpose of the exercise was, thus, to raise awareness not only about the illegality of U.S. actions in Vietnam, but also “to bring about a general recognition of the need for an [official] international institution for which [the Russell Tribunal] has neither the means nor the ambition to be a substitute....”<sup>43</sup> The Russell Tribunal sought to encourage, rather than replace, official mechanisms of accountability.

*B. Subsequent application of people’s tribunal format*

The Russell Tribunal addressed three other cases between 1974 and 1980: democratic rights in Latin America, civil rights violations in West Germany, and the rights of indigenous peoples in America.<sup>44</sup> It also inspired the foundation, in 1979, of the Permanent People’s Tribunal (“PPT”) by the Lelio Basso International Foundation for the Rights and Liberation of the Peoples.<sup>45</sup> The PPT distinguished itself from the Russell Tribunal, however, in that it focused on the “law of peoples,” which is “established not by states, but by the requirements

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<sup>40</sup> *Verdict of the Stockholm Session*, *supra* note 38, at 304-05.

<sup>41</sup> *Id.* at 305-08.

<sup>42</sup> Sartre, *supra* note 37, at 43.

<sup>43</sup> *Id.*

<sup>44</sup> Beigbeder, *supra* note 30, at 140.

<sup>45</sup> *Id.* at 141. Lelio Basso was a juror at the original Russell Tribunal. Lelio Basso International Foundation, Presentation webpage, at <http://www.grisnet.it/filb/filbeng.html> (last visited Aug. 5, 2004).

and exigencies of peoples.”<sup>46</sup> Over the past fifteen years, it has held thirty-one sessions on violations of the rights of specific ethnic or national groups, the rights of children, workers rights, and violations committed by the International Monetary Fund, World Bank, and private corporations.<sup>47</sup> The PPT met most recently in 2002 to address “International Law and the ‘New Wars.’”<sup>48</sup>

In addition to the PPT, myriad *ad hoc* people’s tribunals have been based on the Russell Tribunal model. These have addressed a wide variety of legal and political issues, ranging from war crimes,<sup>49</sup> to violations arising from colonial expansion,<sup>50</sup> to environmental damage,<sup>51</sup> to corporate responsibility for crimes against humanity,<sup>52</sup> to the allegedly unjust imprisonment and death sentence of activist Mumia Abu-Jamaal.<sup>53</sup> These and other similar tribunals vary widely in their legal content, formality, and procedures.

### C. *Use of people’s tribunal format by the international women’s movement*

The people’s tribunal format has special utility for the international women’s

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<sup>46</sup> Lelio Basso Foundation, Permanent People’s Tribunal webpage, at <http://www.grisnet.it/filb/tribu%20eng.html> (last visited Aug. 5, 2004) [hereinafter PPT Webpage]; see also Beigbeder, *supra* note 30, at 141 (noting that in addition to international humanitarian law, human rights conventions, and U.N. declarations and resolutions, the PPT applies the Universal Declaration of the Rights of the Peoples, an anti-imperialist document proclaimed by the Lelio Basso Foundation in 1976).

<sup>47</sup> Lelio Basso Foundation, Permanent People’s Tribunal Sentences webpage, at [http://www.grisnet.it/filb/sentenze\\_eng.html](http://www.grisnet.it/filb/sentenze_eng.html) (last visited Aug. 5, 2004) (list of PPT sessions) [hereinafter PPT Sentences].

<sup>48</sup> PPT Webpage, *supra* note 46.

<sup>49</sup> See Beigbeder, *supra* note 30, at 137-38 (describing people’s tribunal held in 1992 to try U.S. officials for aggression and crimes against humanity stemming from their conduct during the first Iraq war).

<sup>50</sup> See Sally Engle Merry, *Resistance and the Cultural Power of Law*, 1994 Presidential Address Before the Law and Society Association, in 29 *Law & Soc’y Rev.* 11, 20-22 (1995) (describing People’s International Tribunal that charged the U.S. with crimes committed during nineteenth century takeover of Hawaii).

<sup>51</sup> A permanent Indian People’s Tribunal on Human Rights and the Environment has been established. See *800 Starvation Deaths in Gardens*, *The Statesman*, Mar. 24, 2004 (describing Indian People’s Tribunal findings regarding hunger-related deaths). An International Peoples’ Tribunal on Human Rights and the Environment, founded by a coalition of NGOs, met in New York in June 1997. Beigbeder, *supra* note 30, at 144.

<sup>52</sup> *Global People’s Tribunal on Corporate Crimes Against Humanity*, at <http://www.converge.org.nz/pma/apcorp.htm> (last visited Aug. 15, 2004) (announcing plans to hold people’s tribunal during World Trade Organization meeting in Seattle, Washington in November, 1999).

<sup>53</sup> See *International People’s Tribunal---The Case of Mumia Abu-Jamaal*, Dec. 21, 1997, at [http://www.infoshop.org/gulag/news/rw\\_tribunal.html](http://www.infoshop.org/gulag/news/rw_tribunal.html).

movement because it complements more established forms of women's activism, such as grassroots organization, with the formal legitimacy of law.<sup>54</sup> A number of public hearings and tribunals have been initiated by women's organizations, becoming increasingly formalized and mirroring more closely the procedures employed in official judicial fora over time.

Tribunal formats were first employed by women activists at the International Tribunal on Crimes Against Women, held in Brussels in 1976 and the World Women's Congress for a Healthy Planet, held in Miami in 1991.<sup>55</sup> Later, as part of the campaign for recognition of women's rights during the buildup to the Vienna Conference, a series of public hearings and "speakouts" were held. These took place in a number of different countries, beginning in November 1992, and featured the testimony of women who had experienced human rights violations. These testimonies were recorded and sent to the U.N. Centre for Human Rights as evidence of the need for more attention on women's human rights.<sup>56</sup> No formal legal analysis or judgment, however, was produced on the basis of these testimonies.

The Global Tribunal on Violations of Women's Human Rights ("Vienna Tribunal"), held in Vienna on June 15, 1993 in parallel to the Vienna Conference's official activities, took a more formal approach. The Vienna Tribunal was intended to increase awareness of women's human rights issues among the official delegates and "mainstream" NGOs attending the Vienna Conference, and to capitalize on increased media visibility to raise awareness about the failure of human rights enforcement mechanisms to adequately protect women's

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<sup>54</sup> See Chinkin, *Tribunal*, *supra* note 28, at 340 (describing use of people's tribunal by women's groups as successful example of "devising strategies that combine traditional women's organizing methodologies...with procedural initiatives that have already acquired legitimacy within civil society"); cf. Carlin Meyer, Review Essay, *Crimes Against Humanity Women: The Uncomfortable Stories of "Comfort Women,"* 17 New York L. Sch. J. Hum. Rts. 1019, 1041-43 (2001) (reviewing *Comfort Women Speak: Testimony by Sex Slaves of the Japanese Military* (Sangmie Choi Schellstede ed., 2000)) (noting that women have engaged in "collective storytelling" in response to the discrediting of "women's 'truths'...by traditional methods of...arriving at 'truth,'" but have turned to the law for legitimation when these stories have been disregarded as biased or exaggerated).

<sup>55</sup> Bunch & Reilly, *supra* note 2, at 9.

<sup>56</sup> *Id.* at 7-8.

human rights.<sup>57</sup> The tribunal employed a panel of distinguished judges<sup>58</sup> who delivered a final statement applying international law to find violations of human rights and humanitarian law, identifying the failure of the human rights system to adequately protect women's rights, and making recommendations for improvement.<sup>59</sup> Among their findings, the judges concluded--- five years before the ICTR's landmark ruling in *Akayesu*---that rape, forced prostitution, and forced pregnancy constitute torture, and can amount to crimes against humanity when committed on a systematic basis.<sup>60</sup>

Despite the trial-like format described above, the substance and procedure of the Vienna Tribunal suggest that it was intended more as a consciousness-raising tool of activism than as an unofficial mechanism of accountability. For example, each woman who testified delivered prepared remarks, coordinated ahead of time by tribunal moderators.<sup>61</sup> This selective use of testimony would raise concerns about procedural fairness and substantive accuracy in a tribunal that sought to make legal determinations of criminal accountability. Indeed, the Vienna Tribunal organizers were careful to emphasize that it could issue no legally binding judgment, and that women should consider their participation as a political action.<sup>62</sup>

#### *D. Potential for continuing development and utility of people's tribunal format*

The Russell Tribunal justified its existence on the absence of an official forum for adjudicating violations of the laws of war. However, the establishment, since the early 1990s, of several official international mechanisms for accountability, including the ICC, has not lead to

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<sup>57</sup> *Id.* at 10.

<sup>58</sup> Bunch & Reilly, *supra* note 2, at 15-16.

<sup>59</sup> *Id.* at 84-87. The judges' recommendations were officially submitted to the Vienna Conference. *See Report of the Global Tribunal on Violations of Women's Human Rights*, in Bunch & Reilly, *supra* note 2, at 130.

<sup>60</sup> *Id.* at 87.

<sup>61</sup> *Id.* at 14-15.

<sup>62</sup> *Id.*

a corresponding decrease in the establishment and activity of people's tribunals.<sup>63</sup> The PPT alone has held eleven sessions since the ICTY was established in 1993, one of which specifically addressed the violence in the former Yugoslavia.<sup>64</sup> Beigbeder attributes the continuing use of people's tribunals to a growing need to express "a populist counter-power versus the power of governments," a need he links to the growing NGO movement.<sup>65</sup> The work of women's rights NGOs at the Vienna Tribunal demonstrates their recognition that the people's tribunal format holds promise as a tool of activism to pressure official institutions to increase recognition of violations committed against women. Seven years later, a group of Asian women's NGOs further developed the format to provide not only a means to raise awareness, but also to produce a full evidentiary and legal analysis of sexual violence committed by Japan during WWII, thereby adapting the people's tribunal into a mechanism for providing unofficial legal accountability.

## II. The Women's International War Crimes Tribunal

The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery ("Women's Tribunal") was established by a coalition of Asian women's NGOs to address Japan's system of military sexual slavery during WWII. The circumstances surrounding its creation are illustrative of the continuing inadequacy of official mechanisms of accountability, while the procedural measures its organizers took to maximize its credibility and impact, along with its focus on sexual violence, make it an informative case study for evaluating whether, and by what procedures, a people's tribunal can contribute to unofficial accountability for sexual violence in armed conflict.

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<sup>63</sup> See Beigbeder, *supra* note 30, at 144-45.

<sup>64</sup> PPT Sentences, *supra* note 47.

<sup>65</sup> Beigbeder, *supra* note 30, at 144-45.

A. *Japan's "comfort system"*<sup>66</sup>

Between 1932 and the end of WWII, over 200,000 women were forced into sexual slavery in military brothels established or supervised by the Japanese government,<sup>67</sup> apparently in an effort to minimize opposition arising from the rape of local women by occupying Japanese soldiers, protect troops from the spread of sexually transmitted disease, and minimize security risks from spies who might operate in privately-run brothels.<sup>68</sup> These women, euphemistically referred to as "comfort women," were "recruited" into sexual slavery by both private and military actors who used a variety of tactics, including deception, coercion, and abduction.<sup>69</sup> They were forced to "service" up to forty soldiers a day, subjected to beatings and torture, repeatedly made pregnant and forced to undergo abortion, and exposed to sexually transmitted disease and the risks of living in zones of intense military combat.<sup>70</sup> Of the roughly twenty-five percent who survived,<sup>71</sup> some were unable to make their way back to their country of origin, and even those who did return continued to suffer physical and emotional pain, infertility, humiliation, and social stigma as a result of their violation.

B. *Inadequate official accountability leads to creation of the Women's Tribunal*

The Women's Tribunal was established in response to these atrocities after a decade of activism and legal action in all available official fora---including the Japanese legislature,

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<sup>66</sup> The tragic history of the "comfort system" has been treated in depth elsewhere. *E.g.*, Yuki Tanaka, *Japan's Comfort Women: Sexual Slavery and Prostitution During World War II and the U.S. Occupation* (2003). For an analysis of Japan's legal liability for the "comfort system," see Gay J. McDougall, *Final Report on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 50<sup>th</sup> Sess., Provisional Agenda Item 6, app. 1, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) (analyzing Japan's legal liability for "comfort stations") [hereinafter McDougall Report].

<sup>67</sup> McDougall Report, *supra* note 66, app. 1, para. 1.

<sup>68</sup> *Note Verbale from the Permanent Mission of Japan to the United Nations Office at Geneva addressed to the Centre for Human Rights*, U.N. Commission on Human Rights, 52d Sess., Provisional Agenda Item 9(a), Annex 1, para. 2(1), U.N. Doc. E/CN.4/1996/137 (1996) [hereinafter Japan Report].

<sup>69</sup> See Carmen M. Argibay, *Sexual Slavery and the "Comfort Women" of World War I*, 21 *Berkeley J. Int'l L.* 375, 377-79 (2003).

<sup>70</sup> Tanaka, *Comfort Women*, *supra* note 66, at 50-60.

<sup>71</sup> McDougall Report, *supra* note 66, app. 1, para. 7.

domestic and foreign courts, and international organizations<sup>72</sup>---failed to result in official acknowledgement of legal liability by Japan, prosecution of those responsible for the “comfort system,” or an official grant of monetary or other reparations by the government.

At the conclusion of WWII, Allied prosecutors raised only a few instances of rape before the Tokyo Tribunal, and failed to bring any charges arising from Japan’s system of military sexual slavery, despite their knowledge of its existence.<sup>73</sup> Their failure to hold the perpetrators of the “comfort system” accountable for violation of the laws of war and international prohibitions on slavery and forced labor led to half a century of silence, during which survivors of Japan’s sexual slavery suffered in isolation. The issue did not resurface again until academic research on the subject prompted women’s groups to engage in activism, demanding that Japan pay reparations. Efforts by Japanese legislators to initiate investigations into the issue were, however, rebuffed by the government, which insisted that all brothels used by the military had been privately operated.<sup>74</sup> Subsequent efforts to pass legislation to provide official compensation for survivors have repeatedly been defeated.<sup>75</sup> In the absence of a satisfactory response from Japan’s executive and legislative bodies, women turned to the court system. In 1991, several survivors filed the first lawsuit in Japanese court seeking damages for injuries resulting from the “comfort system.”<sup>76</sup> Since then, of several other civil suits filed in Japanese courts by former comfort women, “nearly all” have been rejected on a variety of legal rationales, including: laches and statutes of limitation, determinations that no

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<sup>72</sup> The international criminal tribunals and ICC were not an option for achieving accountability in this instance of sexual violence, as will often be the case for violations in other past armed conflicts, because none of them had jurisdiction over violations committed during WWII in Japan.

<sup>73</sup> Yayori Matsui, *Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery: Memory, Identity, and Society*, in *Japanese War Crimes* 259, 274 (Peter Li ed., 2003) (describing rejection of application by Korean survivors by Prosecutor’s Office).

<sup>74</sup> Chunghee Sarah Soh, *The Korean “Comfort Women,”* 36 *Asian Survey* 1226 (1996).

<sup>75</sup> Christine Wawrynek, U.N. Reports, *World War I Comfort Women: Japan’s Sex Slaves or Hired Prostitutes?*, 19 *N.Y. L. Sch. J. Hum. Rts.* 913, 921 (2003).

<sup>76</sup> Soh, *supra* note 74.



private right of action exists for violations of international law, and the purported extinguishment of all residual claims by peace treaties signed at the end of WWII.<sup>77</sup> The one suit that did succeed in an judgment for the plaintiffs was reversed on appeal: a branch of the Yamaguchi District Court awarded 300,000 yen to each of three former “comfort women” in 1998, finding that the Japanese legislature’s failure to pass a compensation statute violated both statutory and constitutional law.<sup>78</sup> Unfortunately, the decision was overturned in 2001 by the Hiroshima High Court, which determined that the women’s abduction and sexual slavery were “not...serious constitutional violation[s].”<sup>79</sup> Efforts to initiate criminal prosecutions in Japan against the perpetrators of the “comfort system” have also failed,<sup>80</sup> as have efforts to obtain a civil judgment for violations of international law in U.S. courts.<sup>81</sup>

Women’s advocates also sought accountability for the “comfort system” in international fora, achieving some limited success. In March 1992, a Korean women’s group petitioned the U.N. Human Rights Commission for an investigation into the issue and assistance in pressing for compensation.<sup>82</sup> Several survivors testified before the Commission later that year, and the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities deemed the

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<sup>77</sup> Meyer, *supra* note 54, at 1029-30; *see also* Coomaraswamy, *Armed Conflict*, *supra* note 11, paras. 94 -95, (describing litigation by former “comfort women” in Japanese courts).

<sup>78</sup> Coomaraswamy, *Armed Conflict*, *supra* note 11, para. 94.

<sup>79</sup> Francine Pickup et al., *Ending Violence Against Women: A Challenge for Development and Humanitarian Work* 136 (2001).

<sup>80</sup> Matsui, *supra* note 73, at 274.

<sup>81</sup> Several former “comfort women” filed a claim under the Alien Tort Statute, 28 U.S.C. § 1350, which provides federal courts with jurisdiction over torts committed, in violation of international law, against noncitizens. Their claim was dismissed on a number of jurisdictional grounds, *Hwang Geum Joo v. Japan*, 172 F.Supp.2d 52 (D.D.C. 2001), and the dismissal upheld on several of these grounds, including that the 1976 statute granting an exception to sovereign immunity for “commercial activity” could not be applied retroactively, 332 F.3d 679, 687 (D.C.Cir. 2003). The Supreme Court vacated and remanded the appeals court’s decision on the basis of its holding in another case that the commercial activity exception *does* apply retroactively. 124 S.Ct. 2835 (2004). Nonetheless, on remand the appeals court resoundingly affirmed the claim’s dismissal, finding that it presented a nonjusticiable political question---whether peace treaties between Japan and the plaintiffs’ countries at the end of WWII extinguished all claims arising therefrom---the judicial resolution of which would adversely affect U.S. foreign relations. *Joo v. Japan*, No. 01-7169, 2005 WL 1513014 (D.C. Cir. Jun. 28, 2005).

<sup>82</sup> Soh, *supra* note 74.

“comfort system” a crime against humanity.<sup>83</sup> Subsequent reports by the International Commission of Jurists,<sup>84</sup> the U.N. Special Rapporteur on Violence Against Women,<sup>85</sup> and the U.N. Special Rapporteur on Systematic Rape and Sexual Slavery<sup>86</sup> have repeatedly called for Japan to accept legal responsibility for the system of sexual slavery, punish those responsible, and provide compensation to victims. In fact, growing awareness about the “comfort system” in the early 1990s was “[a] significant impetus for the creation of the mandate of the Special Rapporteur” on Systematic Rape and Sexual Slavery.<sup>87</sup> Despite this progress in international fora, no binding decision holding Japan accountable has been issued by an international tribunal or organization, and, as demonstrated by both Special Rapporteurs’ reports of Japan’s failure to comply with their recommendations, little real accountability has resulted.

Indeed, it was not until documentary evidence of governmental involvement was discovered in 1992 that Japan admitted its direct participation in the “comfort system,” acknowledging a year later that at least some women were coerced into sexual slavery.<sup>88</sup> In 1995, Japan sidestepped continued pressure to compensate victims of sexual slavery by establishing the Asian Women’s Fund (“AWF”) to provide “atonement money” to survivors.<sup>89</sup> The AWF, largely funded by private donations and unaccompanied by any official apology or acceptance of legal responsibility by the government, has been widely rejected by survivors, who perceive it as a means of perpetuating state impunity.<sup>90</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> Ustina Dolgopol & Snehal Paranjape, *Comfort Women: An Unfinished Ordeal* 105 (1994).

<sup>85</sup> Radhika Coomaraswamy, *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*, Commission on Human Rights, 52d Sess., Provisional Agenda Item 9(a), para. 137, U.N. Doc. E/CN.4/1996/53/Add.1 (1996); Coomaraswamy, *Armed Conflict*, *supra* note 77, para. 92.

<sup>86</sup> McDougall Report, *supra* note 66, paras. 22-23; McDougall Update, *supra* note 14, paras. 72, 78.

<sup>87</sup> McDougall, *Update*, *supra* note 14, at 71.

<sup>88</sup> Meyer, *supra* note 54, at 1030-31; *see* Japan Report, *supra* note 68, Annex 1, para. 2(7).

<sup>89</sup> Coomaraswamy, *Armed Conflict*, *supra* note 77, para. 93.

<sup>90</sup> Meyer, *supra* note 54, at 1031; Matsui, *supra* note 73, at 268. *But see* Coomaraswamy, *Armed Conflict*, *supra*

Consequently, Special Rapporteur McDougall reported in 2000 that the violations committed through Japan's military sexual slavery "remain largely unremedied" due to the lack of reparations, official compensation, official acceptance of legal responsibility, and prosecution of those responsible.<sup>91</sup>

It was this failure of governments and international organizations to provide accountability in any official venue that prompted the Violence Against Women in War Network, Japan ("VAWW-NET, Japan"), a coalition of Japanese women committed to ending impunity for sexual slavery during WWII, to propose the Women's Tribunal in 1998.<sup>92</sup> NGOs from China, Taiwan, the Philippines, Indonesia, and both Koreas---all countries from which women had been forced into sexual slavery by the Japanese military--joined VAWW-NET, Japan at preparatory conferences in 1998 and 1999 to research and draft the tribunal's Charter.<sup>93</sup> The Women's Tribunal aimed to achieve several objectives: to acknowledge the illegality of the "comfort system" and to encourage Japan to accept legal responsibility and provide reparations,<sup>94</sup> and to work toward the elimination of violence against women in armed conflict by ending impunity for Japan's military sexual slavery.<sup>95</sup>

### C. *Jurisdiction and proceedings*

The proceedings of the Women's Tribunal have been described as "(quasi-) criminal,"

note 11, para. 93 (observing that 170 women have received funds from AWF, and referring to its work as "laudable").

<sup>91</sup> McDougall, *Update*, *supra* note 14, para. 72.

<sup>92</sup> See Chinkin, *Tribunal*, *supra* note 28, at 336.

<sup>93</sup> *Id.*

<sup>94</sup> Matsui, *supra* note 73, at 259. The tribunal's Charter notes that the elderly survivors of the "comfort system" are passing away at a steady rate without having received "a word of acknowledgment of the crimes by the perpetrators," a "genuine apology," or reparations. Charter of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (Incorporating Modifications Agreed upon During the Hague Meeting, 26-27 October 2000), Preamble, at <http://www1.jca.apc.org/vaww-net-japan/english> (last visited Jul. 30, 2004) [hereinafter Women's Tribunal Charter].

<sup>95</sup> Matsui, *supra* note 73, at 259. One Dutch survivor testified at the tribunal that she felt obliged to speak out about her experience because she had heard that similar sex crimes were occurring in Bosnia. *Id.*, at 263.

since they involved criminal charges and maintained the high standards of fairness and credibility required of criminal adjudication, but also incorporated aspects of civil mechanisms of accountability, including the absence of the accused, lack of authority to issue custodial sentences, and, critically, the fact that the authority under which the accused were prosecuted stemmed from “civil society” itself.<sup>96</sup> Indeed, the jurisdiction and procedures of the Women’s Tribunal were very similar to those of the war crimes tribunals and ICC, adjusted in order to both minimize the drawbacks, and take advantage of the flexibility, of the tribunal’s unofficial nature.

1. *Jurisdiction.*---The proceedings of the Women’s Tribunal were framed as a continuation of the post-WWII Tokyo Tribunal, which, organizers emphasized, had failed to adequately address issues of rape and sexual slavery.<sup>97</sup> Its Charter confers jurisdiction over war crimes, crimes against humanity, and other crimes under international law committed against women in countries under Japanese control during WWII, explicitly including crimes of “sexual slavery, rape and other forms of sexual violence.”<sup>98</sup> This jurisdiction was unrestricted by any statute of limitations, on the rationale that there can be no limitation of accountability for crimes against humanity.<sup>99</sup> Like official war crimes tribunals and the ICC, the Women’s Tribunal had jurisdiction over individuals involved in planning, committing, or concealing violations either directly or via command responsibility.<sup>100</sup> But, the Women’s Tribunal was unique in that it also had jurisdiction to determine *state* responsibility for individual violations committed by state actors, and for states’ failure to investigate and

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<sup>96</sup> Dixon, *supra* note 23, at 707-08.

<sup>97</sup> See Chinkin, *supra* note 34, at 336-37.

<sup>98</sup> Women’s Tribunal Charter, *supra* note 94, Art. 2(1). Thus, *all* forms of sexual violence are more clearly identified with crimes against humanity and war crimes than they were in the statutes of the ICTY and ICTR.

<sup>99</sup> Women’s Tribunal Charter, *supra* note 94, Arts. 6, 71.

<sup>100</sup> *Id.*, Art. 3.

disclose the truth about such violations, prosecute those responsible, prevent their recurrence, protect human dignity, or prevent discrimination.<sup>101</sup> Thus, its mandate was more carefully tailored to address the full range of violations arising from the conflict in question than those of similar official fora.

2. *Procedure.*---Though the unofficial nature of the Women’s Tribunal left its creators free to adopt any procedure they chose, they were careful to “strictly observe[] procedural constraints” in order to ensure the tribunal’s “fairness and credibility.”<sup>102</sup>

A mixed-gender panel of five judges from Africa, North and South America, Europe and Southeast Asia was selected (though one ultimately was unable to participate) to include experts in a variety of relevant legal subjects with experience as practitioners, judges, and academics. They were aided by legal advisers, but for purposes of fairness and objectivity, were required to remain separate from prosecutors.<sup>103</sup>

Prosecution teams from countries whose citizens had been victims of sexual violence at the hands of the Japanese military prepared formal indictments. These were joined in a common indictment by two lead prosecutors---one a member of the ICTY Office of the Prosecutor, and the other a law professor.<sup>104</sup> The common indictment charged Japan’s Emperor Hirohito and eight other officials from the WWII period with crimes against humanity for the “comfort system,” and charged Hirohito and Yamashita Tomoyuki, Commander of Japan’s 14<sup>th</sup> Army in the Philippines, with crimes against humanity for rapes committed in Mapanique, the Philippines, on November 23-24, 1944.<sup>105</sup> Prosecutors also filed

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<sup>101</sup> *Id.*, Art. 4.

<sup>102</sup> Chinkin, *Tribunal*, *supra* note 28, at 337.

<sup>103</sup> *Id.*, at 338.

<sup>104</sup> *Id.*, 336 & nn. 7-8.

<sup>105</sup> Oral Judgment Delivered on 4 December 2001 by the Judges of the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, paras. 11-12, *available at* <http://www1.jca.apc.org/vaww-net-japan/english> (last visited Jul. 30, 2004) [hereinafter Oral Judgment].

an Application for Restitution and Reparations, arguing that Japan bore state responsibility, and owed reparations, for harm resulting from the crimes allegedly committed by Hirohito and his officials, and for “continuing harm” resulting from Japan’s failure to prosecute those responsible, or provide reparations.<sup>106</sup> To ensure fairness and legitimacy, the Women’s Tribunal served current Japanese officials with notice of the charges, and invited them to participate in the proceedings. When Japan declined to send an official representative, the Women’s Tribunal appointed a Japanese law firm to present the arguments against state responsibility as *amicus curiae*, and also considered the reasoning in Japanese court decisions rejecting claims of state responsibility.<sup>107</sup>

Another procedural safeguard was the formal entry of all evidence into an official registry,<sup>108</sup> though strict admissibility constraints, such as the prohibition on hearsay evidence, were not applied since the Charter requires the admissibility of all “relevant physical and material evidence.”<sup>109</sup> As Dixon has observed, even the category of “relevant” evidence was broader than it would have been in an official tribunal: since the Women’s Tribunal focused on acknowledging the harm done to victims of the “comfort system” and recommending reparations, it was able to investigate the circumstances and effects of the sexual violence in question more broadly than would be relevant to establishing criminal liability. Thus, the tribunal was could emphasize survivors’ “specific and context-dependent experiences of primary and secondary victimisation, and their suffering both then and now.”<sup>110</sup>

Over three days of formal proceedings, the Women’s Tribunal heard testimony from

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<sup>106</sup> *Id.*, para. 13.

<sup>107</sup> Chinkin, *Tribunal*, *supra* note 28, at 338.

<sup>108</sup> *Id.*, at 337.

<sup>109</sup> Women’s Tribunal Charter, *supra* note 94, Art. 9.

<sup>110</sup> Dixon, *supra* note 23, at 708.

thirty-five of the roughly seventy-five surviving “comfort women” who attended,<sup>111</sup> as well as testimony from two Japanese soldiers who had used “comfort stations,” four Japanese scholars in the fields of military and legal history, an legal expert on state responsibility, and the director of a Yugoslavian organization for the victims of sexual violence, who testified about post-traumatic stress disorder among victims. It also reviewed documentary evidence from government records and memoirs connecting the Japanese government to the “comfort system,” and *amicus* briefs concerning the status of litigation in Japanese courts and a draft of compensation legislation prepared by a Japanese lawyers’ association.<sup>112</sup> In order to process the voluminous factual and legal evidence, the tribunal recessed for a day while the judges deliberated, and reconvened on December 12, 2000 to hear their preliminary judgment. One year later, a final judgment was delivered in oral and written form at the Hague.

#### *D. Judgment*

1. *Law applied.*---The Women’s Tribunal judges applied only those laws that existed during the period when the crimes were committed.<sup>113</sup> These laws were, however, interpreted in light of subsequent legal understandings, advances in women’s human rights, and “evolving principles of state responsibility for past violations,”<sup>114</sup> thus permitting an interpretation at once progressive in its gender analysis and firmly grounded in established legal norms. The judges determined that rape was a violation of the laws and customs of war extant during the WWII period, and that sexual slavery was prohibited under the terms of several international agreements, including the 1907 Hague Convention and the 1926 Slavery

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<sup>111</sup> Oral Judgment, *supra* note 105, paras. 2, 5.

<sup>112</sup> See Chinkin, *Tribunal*, *supra* note 28, at 337; Meyer, *supra* note 54, at 1032; Matsui, *supra* note 73, at 263.

<sup>113</sup> Oral Judgment, *supra* note 105, para. 69.

<sup>114</sup> Women’s Tribunal Charter, *supra* note 94, Preamble.

Convention.<sup>115</sup> They also adopted a broad definition of “sexual slavery” to include “the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy.”<sup>116</sup> This definition avoids the implication, present in the ICC definition,<sup>117</sup> that a commercial transaction is a necessary element of the crime of sexual slavery.<sup>118</sup> Finally, the judges found, as a matter of general international law, that a state is responsible for violations of international law attributable to it, and that it is obliged to provide adequate reparations for any breach of its international duties.<sup>119</sup>

2. *Individual liability.*---Applying this law to the facts established before them regarding “the power and authority of the accused, their knowledge of the criminal nature of the ‘comfort system,’ and their continued participation in establishing, maintaining or facilitating the system,” the Women’s Tribunal judges found all of the accused guilty, beyond a reasonable doubt, of direct and command responsibility for rape and sexual slavery as crimes against humanity.<sup>120</sup> They also found Yamashita guilty of both direct and command responsibility for rape as a crime against humanity committed at Mananika, but convicted Hirohito only on the basis of command responsibility, acquitting him on the charge of direct responsibility for rape as a crime against humanity because there was insufficient evidence to indicate that he had specific knowledge of the mass rapes at Mananika, or participated in them in any way.<sup>121</sup>

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<sup>115</sup> Oral Judgment, *supra* note 105, paras. 76, 78.

<sup>116</sup> *Id.*, para. 79.

<sup>117</sup> *E.g.*, International Criminal Court, Elements of Crimes, Article 8(2)(b)(xxii)-2, U.N. Doc.

PCNICC/2000/1/Add.2 (2000) (defining elements of war crime of sexual slavery to include exercise of “powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”).

<sup>118</sup> *See* McDougall Update, *supra* note 14 (criticizing ICC definition and noting that commercial transactions are neither legally necessary for sexual slavery to exist, nor common in practice).

<sup>119</sup> Oral Judgment, *supra* note 105, para. 112.

<sup>120</sup> *Id.*, para. 97.

<sup>121</sup> *Id.*, paras. 100-09.



This willingness to acquit on the basis of insufficient evidence, in addition to the judges' careful consideration of various mitigating circumstances---such as the claim that Hirohito was a figurehead with no knowledge of the crimes committed by his troops, nor power to stop them, and consideration of whether the short tenure of another of the accused might indicate his ignorance of the "comfort system"---indicates that the judges functioned independently of the beliefs of the Women's Tribunal organizers, and of the prosecution teams who advanced the charges, despite the tribunal's unofficial, *ad hoc*, status.

3. *State responsibility*.---The Women's Tribunal exercised its unique jurisdiction over state responsibility to find that the individual crimes against humanity described above were attributable to the government of Japan because they were committed by government agents, and because of the government's failure to prevent or punish their commission.<sup>122</sup> The judges also found the government guilty of continuing violations arising from its concealment of documents regarding the crimes at issue; failure to issue a genuine apology, punish those responsible, or provide official compensation;<sup>123</sup> continued opposition to efforts to obtain reparations in its national courts; and failure to counteract revisionist claims that "comfort women" were voluntary prostitutes.<sup>124</sup>

The defenses against state responsibility presented on Japan's behalf were all considered and rejected. The judges found that individuals can exercise a right of action to seek compensation for violations of international humanitarian law, and that peace treaties concluded at the end of the war could not exhaust the legal rights of "comfort women" because of the *erga omnes* nature of crimes against humanity, and because the lack of effective representation for

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<sup>122</sup> *Id.*, para. 113.

<sup>123</sup> The judges deemed the AWF insufficient because it was privately funded and, consequently, discriminatory, insofar as victims of other Japanese war crimes have been compensated officially by the state.

<sup>124</sup> *Id.*, para. 123-33.

women at treaty negotiations undermined the resulting agreements' legitimacy.<sup>125</sup>

4. *Reparations.*---Finally, the judges recommended “comprehensive” reparations, including a “full and frank apology,” acceptance of legal responsibility for and acknowledgment of the criminal nature of the “comfort system,” establishment of memorial and educational initiatives, payment of monetary compensation to survivors, repatriation of willing survivors and the remains of deceased victims, and official identification and punishment of perpetrators of the “comfort system.”<sup>126</sup> They also recommended that the Allied powers declassify records concerning the “comfort system” and the decision not to prosecute Hirohito at the Tokyo Tribunal, and acknowledge their failure to address the crimes committed against comfort women.<sup>127</sup> At the international level, they recommended that the U.N. ensure Japan provide reparations, and request an advisory opinion from the ICJ on Japan’s legal liability for the “comfort system.”<sup>128</sup> The freedom to issue this diversity of recommendations, and to direct some of them to other governments and the U.N., even though these entities were not held directly responsible for the crimes in question, again demonstrates the benefits of flexibility enjoyed by unofficial people’s tribunals.

The preceding explication of the establishment, functioning, and judgment of the Women’s Tribunal has highlighted the means by which it took advantage of the adaptability of its unofficial status, while adhering to substantive and procedural standards that reinforced its legitimacy. In this way, it sought to maximize influence on survivors, society, and legal and political authorities. Part III will evaluate the effectiveness of these efforts, and the people’s tribunal format more generally, to demonstrate that a similarly-structured people’s tribunal on

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<sup>125</sup> *Id.*, paras 134-41.

<sup>126</sup> *Id.*, paras. 145-46.

<sup>127</sup> *Id.*, para. 147.

<sup>128</sup> *Id.*, para 148.

sexual violence in armed conflict could be a valuable compliment to existing official mechanisms of accountability.

### III. Effectiveness of people's tribunals as unofficial mechanisms of accountability

In a letter to Jean-Paul Sartre objecting to the Russell Tribunal, Charles De Gaulle wrote,

I have no need to tell you that justice of any sort, in principle as in execution, emanates from the State.... [T]o the extent that some of those allied with Lord Russell represent a moral value outside the public legal machinery, it does not seem to me that they add to that value or to the weight of their arguments by assuming robes borrowed for the occasion.<sup>129</sup>

Indeed, it may appear to one accustomed to the formal mechanisms of state-sponsored law that a people's tribunal is, as Chinkin puts it, "no more than a mock trial of little concern to serious international lawyers."<sup>130</sup> One might also fear that relegation of an issue such as sexual slavery to this type of "extra-legal" forum could undermine efforts to achieve accountability by implying that it does not merit serious consideration in an official forum. Consequently, the accuracy of De Gaulle's observation must be investigated before adopting a people's tribunal format as an unofficial means of achieving accountability for sexual violence in armed conflict.

#### A. *Potential limits on the effectiveness of people's tribunals*

1. *Legitimacy.*---People's tribunals are subject to stronger criticisms of illegitimacy than their government-authorized counterparts. Literally anyone can create a people's tribunal, for any reason, and purport to impose any legal standards---even newly created ones<sup>131</sup>---using any procedures, unfettered by external limitations. The fact that, historically, people's

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<sup>129</sup> Letter of April 19, 1967 from Charles DeGaulle to Jean-Paule Sartre, *reprinted in* Russell Proceedings, *supra* note 35, at 27, 28.

<sup>130</sup> Chinkin, *Tribunal*, *supra* note 28, at 338.

<sup>131</sup> For example, the PPT adjudicates "peoples rights" on the basis of, among other instruments, the Universal Declaration of the Rights of the Peoples, issued not by any government or international organization, but by the Lelio Basso Foundation. *See supra*, note 46.

tribunals have been initiated and run by activists in order to raise awareness about an issue or change relevant law or policy, raises concern about substantive bias that could undermine the legal legitimacy of their judgments.<sup>132</sup> Procedural bias can also be a problem: the Women's Tribunal represents a high mark on the spectrum of due process and procedural fairness employed by self-proclaimed people's tribunals. Finally, people's tribunals may stray into essentially political issues which undermine their legitimacy as mechanisms for legal accountability.<sup>133</sup>

These criticisms, however, do not suggest that the format itself is illegitimate. Instead, any individual people's tribunal, if created to address appropriate issues with adequate safeguards against bias or unfairness, can avoid being perceived as illegitimate. Moreover, even if greeted with skepticism at the outset, the judgments people's tribunals issue may result in *post facto* legitimacy on the strength of their evidence and procedures, as Russell Tribunal organizers hoped<sup>134</sup> and as the detailed and well-supported judgment of the Women's Tribunal demonstrates.<sup>135</sup> Further, lack of governmental control, while eliminating a potential check on the behavior of people's tribunals, may actually enhance their legitimacy, insofar as they are immune from accusations of imposing victors' justice and their members are not beholden to any political authority.<sup>136</sup>

Certainly, regardless of how fairly they operate or how carefully they investigate the

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<sup>132</sup> Beigbender notes that the Russell Tribunal was deemed a "kangaroo court" by critics, and that people's tribunals are often biased against "neo-colonialist" and "imperialist" governments and have consequently ignored abuses by nonwestern and noncapitalist regimes. Beigbender, *supra* note 30, at 140, 144. He has also criticizes the PPT for purporting to accept claims only from neutral or broadly representative groups while, in practice, most frequently considering complaints from human rights NGOs against their own governments. *Id.*, at 142.

<sup>133</sup> See, e.g., *Id.*, at 144 (arguing that people's tribunals have expanded their scope too far beyond humanitarian and human rights violation to "battle against an unfair world economic order").

<sup>134</sup> Sartre, *supra* note 37, at 4.

<sup>135</sup> See *supra*, Part II.D.

<sup>136</sup> See Sartre, *supra* note 37, at 42-43 (arguing by reference to criticisms of Nuremberg Tribunal that Russell Tribunal's "legitimacy derives equally from its total powerlessness, as from its universality").

evidence, people's tribunals will always lack the institutional legitimacy of government-authorized courts or tribunals.<sup>137</sup> Nevertheless, they can access the institutional legitimacy of the language and procedures of the law itself,<sup>138</sup> and may also be able to build up their own institutional legitimacy through a substantial record of fair and effective proceedings.

2. *Unenforceability*.---The second key criticism of people's tribunals is that they are ineffective due to their inability to enforce judgments. Effective steps toward accountability, however, can be achieved without the direct enforcement of criminal or civil judgments. For example, a U.S. court's unenforceable award of \$745 million to rape victims from the Bosnian conflict has been lauded as an important symbolic judgment, as was the Yamaguchi district court's award of compensation to former "comfort women," despite the fact that it was overturned on appeal.<sup>139</sup>

In addition to symbolic effect, people's tribunal judgments can help limit impunity by influencing official political and legal institutions.<sup>140</sup> The U.N.'s Special Rapporteur on Impunity, for example, recognized that the Russell Tribunal had "filled an institutional lacuna [the lack of an international criminal tribunal] in the face of rampant impunity" and listed it and other "courts of opinion," as having made "a particular contribution" to his work.<sup>141</sup> The judgment of the Women's Tribunal was noted in the Special Rapporteur on Violence Against

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<sup>137</sup> Even these official mechanisms, of course, may lack institutional legitimacy in some circumstances, due to corruption, ineffectiveness, or structural unfairness.

<sup>138</sup> See Chinkin, *Tribunal*, *supra* note 28, at 340 (noting Women's Tribunal combined traditional women's advocacy with "procedural initiatives that have already acquired legitimacy within civil society"); Merry, *supra* note 50, at 21 (describing Hawaiian people's tribunal as "an effort to harness the power and legitimacy of law in a movement of resistance").

<sup>139</sup> Dixon, *supra* note 23, at 706-07.

<sup>140</sup> *C.f. id.*, at 713-14 (arguing that "if rape, sexual enslavement and forced pregnancy are consistently pleaded and found...to be crimes...which amount *per se* to torture and enslavement of crimes against humanity" in proposed victim compensation tribunal, prosecutors and international criminal tribunals will eventually adopt similar interpretations).

<sup>141</sup> Joinet, *supra* note 17, para. 44.

Women's report on violence in armed conflict,<sup>142</sup> and has been deemed to have “undoubtedly contributed” to increased international attention to sexual violence in armed conflict and to increased prosecutions for rape in the ICTY.<sup>143</sup> It may even have influenced the ICTY's 2001 finding that sexual slavery constitutes a crime against humanity.<sup>144</sup>

Finally, the judgments of people's tribunals *could* be enforced if deemed sufficiently weighty by official authorities. The Women's Tribunal has called for the direct acceptance and enforcement of its recommendations by governments and international organizations.<sup>145</sup>

Although no such action has been forthcoming, the Women's Tribunal and other people's tribunals have nevertheless compiled historical records and legal analyses useful not only for acknowledgment of victims' experiences, but also for later prosecution of perpetrators in official fora.<sup>146</sup>

3. *Lack of state-based authority.*---Ultimately, skepticism about legitimacy and ineffectiveness derives from people's tribunals' lack of official authority. But, as several commentators have argued, “the continued grip of the state on the formal institutions of international law” may be waning.<sup>147</sup> One of the most important effects of the Women's Tribunal, according to Matsui, is that it “showed that international law is not an order created and implemented only by states; the people can and do play an increasingly important role in forcing

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<sup>142</sup> Coomaraswamy, *Armed Conflict*, *supra* note 11, para.96.

<sup>143</sup> Meyer, *supra* note 54, at 1045; *see also* Matsui, *supra* note 73, at 261 (noting that testimony at Women's Tribunal encouraged victims of sexual violence in other armed conflicts, including Yugoslavia, to come forward, leading to increased activism about violence against women in armed conflicts).

<sup>144</sup> Meyer, *supra* note 54, at 1032; *see generally* *Prosecutor v. Kunarac*, Judgment, No. IT -96-23T (Feb. 22, 2001).

<sup>145</sup> Women's Tribunal Charter, *supra* note 94, Preamble.

<sup>146</sup> *See, e.g.*, John Shamsey, Comment, *80 Years Too Late: The International Criminal Court and the 20<sup>th</sup> Century's First Genocide*, 11 J. Transnat'l L. & Pol'y 327 (2002) (describing PPT as “invaluable” forum for documenting “little known atrocities”). Chinkin argues that the “exhaustiveness” of the Women's Tribunal's analysis renders its decision “at least as relevant, if not more weighty, than those carried out by more regularly recognized forms of denunciation.” Chinkin, *Tribunal*, *supra* note 28, at 340.

<sup>147</sup> *See* Chinkin, *Tribunal*, *supra* note 28, at 339.

states to abide by international law.”<sup>148</sup> Not only will this trend diminish the legitimacy and enforceability problems discussed above, but the establishment of new people’s tribunals, if demonstrated to be legitimate and effective, will also speed this process of increasing individuals’ and NGOs’ power to directly ensure accountability under international law.

Thus, criticisms arising from people’s tribunals’ lack of official authorization are insufficient to undermine their potential utility as means of achieving accountability for sexual violence during armed conflict. Nevertheless, at least in the short term, decisions issued by a people’s tribunal will be perceived as *less* legitimate, and its recommendations will be *less* likely to be implemented, than similar findings and recommendations made by an official tribunal. Especially in light of the inception of the ICC, which has jurisdiction over sexual violence for many current and future conflicts, one must question whether the resources of advocacy organizations would not be better spent on lobbying for fuller accountability in official fora, rather than on adjudication in a people’s tribunal. The following analysis responds in the negative.

*B. Ability to compensate for limitations on official mechanisms of accountability*

The absence of official accountability for sexual violence in many past, present, and even future armed conflicts as a result of jurisdictional limitations and lack of political will, means that people’s tribunals’ ability to serve as “fallback” mechanisms is of critical importance. Indeed, lack of official accountability was the expressed motivation for the creation of the Women’s Tribunal.<sup>149</sup> Unless and until official mechanisms of accountability address all instances of sexual violence in armed conflict, people’s tribunals will have a role to play in holding perpetrators symbolically accountable and providing some measure of justice

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<sup>148</sup> Matsui, *supra* note 73, at 271.

<sup>149</sup> Women’s Tribunal Charter, *supra* note 94, Preamble.

to victims. But in addition, people's tribunals have the advantage of freedom to formulate their mandate and procedures in response to specific circumstances and the special needs of victims. Consequently, even when an instance of sexual violence is addressed in an official forum, people's tribunals can be a useful supplement because of their ability to correct for several of the limits on official mechanisms' effectiveness.<sup>150</sup>

1. *Gendered interpretation of the law.*---First, people's tribunals can adopt a progressive approach to international law that official fora have been reluctant to use. The Women's Tribunal, for example, not only applied existing legal norms to gender violence by determining that sexual slavery is a crime against humanity, but also explicitly recognized and rejected gender bias inherent in the peace treaties that ended WWII, and even altered the very language of the law by choosing the term "sexual slavery" over "forced prostitution" because the latter was considered to hide the "terrible gravity" of the offence, imply volition, and stigmatize victims.<sup>151</sup> Following this example, a people's tribunal on sexual violence can adopt an interpretation of international legal norms that better reflects gendered realities. Such an approach could not only influence legal interpretations adopted by official mechanisms, but also, via the "culturally productive role of law,"<sup>152</sup> serve as a form of resistance against the ongoing impunity of those who commit sexual violence during armed conflict, and the social stigma imposed on their victims.<sup>153</sup>

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<sup>150</sup> See *supra* notes 23-28 and accompanying text.

<sup>151</sup> Oral Judgment, *supra* note 105, para. 82.

<sup>152</sup> Merry, *supra* note 50, at 14 (describing how courts and the law, when perceived as legitimate, frame cultural understandings of past events).

<sup>153</sup> See *id.* (noting language of law can be used by social movements as a form of resistance); *c.f.*, Ariane Brunet & Stephanie Rousseau, *Acknowledging Violations, Struggling Against Impunity: Women's Rights, Human Rights, in Common Grounds: Women in War and Armed Conflict Situations* 33, 34 (Indai Lourdes Sajor ed., 1998) (arguing that ending impunity for violations against women requires more than strengthening traditional systems for assigning criminal responsibility, but also "greater government, community and individual responsibility for addressing the consequences and causes" of such violations); Matsui, *supra* note 73, at 274 (advocating use of Women's Tribunal judgment to reinforce and legitimate understanding of criminal nature of



2. *Social connection*.---A people’s tribunal can avoid the criticism, sometimes lodged against *ad hoc* tribunals and the ICC, of disjunction from the society it purports to serve. Although people’s tribunals have historically been established and run by outside intellectual or cultural elites, the Women’s Tribunal demonstrated the power of grassroots organizers to create a people’s tribunal that looks in on their own society.<sup>154</sup> People’s tribunals may thus be able to more effectively “bring justice to the people” and impact on local social norms than criminal adjudications by cultural outsiders in a physically distant setting. Such tribunals would also avoid draining the financial contributions made by donor countries in the wake of humanitarian disasters brought on by armed conflict.

3. *Focus on victim recognition*.---While both international and national mechanisms of formal adjudication are limited by the perpetrator-oriented nature of their inquiry, people’s tribunals can shift their focus to victims. The Women’s Tribunal has been praised for doing this by “reject[ing] the overriding imperatives of (re-) order,” and instead placing victims “at the centre of a legal discourse of ‘recognition.’”<sup>155</sup> Thus, people’s tribunals are a kind of hybrid forum,<sup>156</sup> capable of providing victims with the therapeutic benefits of telling, and receiving acknowledgment of, their experience,<sup>157</sup> while also retaining the formalized procedures and recognition of criminal liability that many victims find necessary to full

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“comfort system” in opposition by efforts by revisionist groups to frame it as a system of voluntary prostitution).

<sup>154</sup> See Chinkin, *Tribunal*, *supra* note 28, at 339.

<sup>155</sup> See Dixon, *supra* note 23, at 708.

<sup>156</sup> See Chinkin, *Tribunal*, *supra* note 28, at 339 (arguing that by both condemning violations and recommending reparations, and providing healing to survivors by recognizing abuses committed against them as crimes, “people’s tribunal[s] can...combine in a single process elements of both war crimes trials and truth commissions”).

<sup>157</sup> See Dixon, *supra* note 23, at 709 (citing findings that public recognition is most common reason victims of sexual violence in peacetime pursue claims in civil court); Pickup, *supra* note 79, at 185-87 (arguing that public testimony contributes to victims’ mental health by “allow[ing] women to recover the pieces of their personal and social identity...shattered” by violation, and describing use of public “naming” by women at the Vienna Tribunal as means to overcome violence).

justice.<sup>158</sup>

4. *Procedural flexibility*.---Because people’s tribunals are primarily victim-oriented, and do not issue directly enforceable penal sentences, they are not limited by the strict procedural constraints and evidentiary burden of official criminal tribunals.<sup>159</sup> While too great a departure from such protections of accuseds’ rights must be avoided, lest the legitimacy of the proceedings be undermined, some flexibility---such as permitting anonymous testimony, limiting intimidating adversarial cross examination, and adopting more lenient rules of admissibility---is an appropriate way to ensure that victims have an opportunity, and feel secure enough, to speak out about the full range of harms they have experienced.

C. *Value as a supplement to official mechanisms of accountability*

Beigbeder observed, correctly, that “Peoples’ Tribunals are not a legitimate substitute for *ad hoc* intergovernmental War Crimes Tribunals, nor for a permanent International Criminal Court [because t]hey do not have the legitimacy or the powers of a body created by governments...they do not create international law, and their judgments are not binding.”<sup>160</sup> Despite the increased involvement of nongovernmental entities in deploying the rule of law, as long as the power and legitimacy of international law lies primarily in the hands of States, the most effective mechanisms of accountability will be those established by governments. Consequently, advocates must continue to press for more and better treatment of sexual violence

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<sup>158</sup> Mani argues that “[v]ictims want above all a fair procedure where they can be heard by an impartial arbitrator, as this allows them to express their loss, and goes further towards restoring their sense of dignity and giving value to their suffering.” Mani, *supra* note 5, at 90 (citing study indicating that Holocaust victims are satisfied more by procedure of gaining justice than by substantive outcome of trials).

<sup>159</sup> See Oral Judgment, *supra* note 105, para. 70 (noting that due process is an obligation of those acting on legal authority, and that the specific process due is determined by the potential prejudice to the accused’s rights); Chinkin, *Tribunal*, *supra* note 28, at 339 (arguing that people’s tribunals’ limited due process guarantees “should not lessen their usefulness”).

<sup>160</sup> Beigbeder, *supra* note 30, at 144.

in armed conflict in official mechanisms of accountability.

However, a realistic appreciation of state dominance over the power of law does not conflict with the strategic use of people's tribunals to address inadequate official accountability.<sup>161</sup> The characteristics discussed above indicate that they can provide a valuable supplement to remedy official mechanisms' demonstrated inability to fully and effectively counteract impunity for sexual violence in armed conflict. Properly constructed and implemented, a people's tribunal can serve as an unofficial, but powerful, legal tool, surpassing the Russell Tribunal's goal of consciousness-raising by providing a real sense of justice to victims and influencing societies, international law, and official legal institutions to strengthen accountability for sexual violence in armed conflict.

#### **IV. The Permanent Women's Tribunal on Sexual Violence in Armed Conflict**

In order to pursue the goal of increased accountability for sexual violence in armed conflict, a Permanent Women's Tribunal for Sexual Violence in Armed Conflict ("PWT") should be established. The PWT should be modeled on the Women's Tribunal because of the latter's substantive similarity and success in tailoring the people's tribunal format to address the full range of harms that resulted from a specific instance of sexual violence during armed conflict. It should build upon this example, expanding its jurisdiction to incorporate crimes of sexual violence outside the narrow context of Japan's military sexual violence during WWII, and incorporating those elements of other people's tribunals and mechanisms of accountability that will maximize its legitimacy, enhance its ability to provide effective justice to victims, and heighten its influence on official forms of accountability.

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<sup>161</sup> See Beigbeder, *supra* note 30, at 145 (arguing that people's tribunals should "be included as one of several tools to combat impunity at the international level"); Chinkin, *Tribunal*, *supra* note 28, at 339 (arguing that people's tribunals are one in a set of procedural and institutional tools for providing justice appropriate to diverse contexts).

A. *Permanence*

Because of the number, diversity, and continuing incidence of armed conflicts in which sexual violence is committed, a single session would be wholly inadequate to provide any measure of justice or accountability. On the other hand, it would be financially and administratively prohibitive for the PWT to mimic national courts by establishing permanent physical facilities and exercising jurisdiction over all properly filed claims. Instead, it should imitate the PPT, holding regular sessions, each on a single, or group of related, instances of sexual violence in armed conflict. The subject matter of each session should be determined by a permanent administrative committee on the basis of recommendations from individuals or organizations, or their own observations. Permanency would increase the “visibility” of the PWT, both among victims of sexual violence who may opt to seek it out as a means of achieving justice, and among the legal institutions and broader society that the PWT aims to influence. In addition, it would permit the PWT, over time, to build institutional legitimacy through the format, content, and effect of its proceedings.

B. *Jurisdiction*

Noting the limited capacity of people’s tribunals, commentators have recommended that they restrict their jurisdiction to “the most serious and extensive crimes against humanity and their individual perpetrators.”<sup>162</sup> The jurisdiction of the PWT, however, is already constrained by its substantive focus on sexual violence occurring in armed conflict. Within that subset of offenses, the PWT should follow the Women’s Tribunal to have jurisdiction over both individual and state responsibility for violations of established international criminal, humanitarian, and human rights law. It should not, however, stray into applying national law

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<sup>162</sup> Beigbeder, *supra* note 30, at 145; *see also* Ratner & Abrams, *supra* note 16, at 301 (arguing that mechanisms of accountability for violations of international law must prioritize by ignoring “sporadic or otherwise less important violations”).

or regional instruments, where its legitimacy might be undermined by a lack of adequate legal expertise or respect for state sovereignty.<sup>163</sup>

Like the Women's Tribunal, the PWT must observe the principle of *nullem crimen sine lege*, applying only those legal norms binding upon the parties in question.<sup>164</sup> Although judges should be mindful of the impact that radical interpretation of existing law could have on the PWT's legitimacy, they should nevertheless adopt a gender-aware analysis of the law and consider evolving interpretations in other fora as guiding precedent in order to take full advantage of the PWT's ability to correct for official mechanisms' reticence to a gendered approach to sexual violence.

The PWT must, however, decline to exercise its jurisdiction when a competent official tribunal or court, whether national or international, has issued a judgment applying satisfactory accountability for the international violations complained of, or has become seized of the matter and can be expected to deliver such a judgment. To do otherwise would risk an inefficient use of PWT resources, threaten the PWT's perceived legitimacy, and undermine its ability to influence the tribunal in question on future issues. However, when the PWT deems that an official forum's treatment of instances of sexual violence has been inadequate, and can convincingly articulate the reasons for this conclusion, it should supplement that forum's judgment with its own, as the Women's Tribunal did with respect to the Tokyo Tribunal's failure to adequately address sexual violence committed by the Japanese military.

Finally, jurisdictional limitations such as statutes of limitations and amnesties should not be observed by the PWT, lest they exacerbate impunity.

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<sup>163</sup> The application of such laws would, in any case, be duplicative since international law fully prohibits sexual violence in armed conflict.

<sup>164</sup> PWT judges should, however, be free to identify gaps in the law and recommend the formulation of international instruments to address them. Such proposals must not, however, provide the basis for a finding of individual or state responsibility.

C. *Power to compensate victims*

One of the most striking features to set the PWT apart from other people's tribunals should be the ability to provide monetary compensation to the victims of sexual violence in armed conflict. Arguing that international criminal accountability fails to fully acknowledge and provide justice for women's experiences of sexual violence, Dixon has proposed the creation of an international victims' compensation tribunal to "connect international humanitarian law jurisprudence and compensation in an uninterrupted discourse of recognition"<sup>165</sup> by providing compensation from an established fund to individual victims of sexual violence. Dixon's proposed tribunal aims to provide compensation as a form of the recognition of violation that victims of sexual violence often need for healing,<sup>166</sup> while also permitting victims to express their full experiences of violation in a tribunal format. These aims are shared by the PWT. Furthermore, providing monetary compensation in addition to recommending that various forms of reparations be made by official entities would enhance the PWT's ability to fulfill the right to reparation, the third components of accountability described by Special Rapporteur Joinet.<sup>167</sup>

Borrowing from Dixon's proposal, the PWT should establish a fund based on voluntary contributions,<sup>168</sup> from which it would pay compensation to victims identified in its proceedings on "a needs basis rather than a harm basis, with the causative link between the harm of criminal victimization and need being treated as a matter of statutory

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<sup>165</sup> Dixon, *supra* note 23, at 711.

<sup>166</sup> *See id.*, at 709 (discussing victims' need for recognition); *see also* Mani, *supra* note 5, at 113-14 (describing reparations, including monetary compensation, as a key means of informal justice); Brunet & Rousseau, *supra* note 152, at 52 (emphasizing importance of meeting victims' needs via reparations).

<sup>167</sup> *See supra* note 17.

<sup>168</sup> Although the voluntarily-funded Asian Women's Fund met with criticism from victims' groups, voluntary funding of PWT compensation should be received more positively, since it does not purport to eliminate states' responsibilities to, themselves, accept legal liability and provide reparations.

presumption.”<sup>169</sup> Although funding such a mechanism would be a daunting task, and would render administration of the PWT more complex, it would also greatly enhance the PWT’s ability to provide practical assistance to victims suffering from the long-term consequences of sexual violence, to encourage additional victims of sexual violence to speak out in social and legal fora,<sup>170</sup> and to reinforce its legitimacy by directly “enforcing” at least one component of its rulings.

#### *D. Administration*

In addition to its structural framework, the PWT must be administered in a manner that will maximize its credibility and impact. Thus, in order to strengthen the connection between PWT’s proceedings and the societies for which they aim to provide justice, efforts should be made to hold sessions in the locality where the violations in question occurred or where the victims are located,<sup>171</sup> and to include local individuals and NGOs as active participants in organizing and operating each session. Grassroots involvement of this nature will also help eliminate any lingering concerns about imposition of elitist or culturally inappropriate legal interpretations.<sup>172</sup> In addition, the PWT should provide witnesses with adequate psychological and social support services to ensure their security when giving testimony about their experiences, which might expose them to stigma, retribution, or psychological re-

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<sup>169</sup> *Dixon, supra* note 23, at 716. Need-based compensation, Dixon argues, permits a tribunal to recognize not only the direct harms caused by sexual violence, such as physical or psychological suffering, but also the secondary harms, such as divorce and social stigma, without introducing patriarchal notions of loss of honor or disgrace into the elements of criminal violation. *Id.*, at 716-17.

<sup>170</sup> *See id.*, at 712.

<sup>171</sup> *C.f. Askin, Quest, supra* note 4, at 520-21 (advocating holding hybrid international/national war crimes tribunals in the locality where violations occurred in order to impact positively on the nation’s judicial system and increase awareness within society of the judicial redress being sought).

<sup>172</sup> *C.f. Dixon, supra* note 23, at 713 (arguing that permitting women to initiate their own claims for recognition of sexual violation, based on their own culturally-specific experience, will eliminate the “cultural-relativist ‘cringe’”).

traumatization.<sup>173</sup>

Special Rapporteur Joinet has cautioned that independence and impartiality are foundational principles that commissions inquiring into human rights abuses “must honour or lose credibility.”<sup>174</sup> Accordingly, these criteria should also be met by the PWT. To that end, measures to ensure the independence and objectivity of PWT judges, similar to those imposed by the Women’s Tribunal, should be implemented. A balance of legal expertise and opinion, gender, and national origin on the judging panel will also help ensure independence,<sup>175</sup> as will a willingness to consider violations committed by all parties to a conflict. Finally, the PWT must ensure transparency about the affiliations of its participants, and sources of its funding.<sup>176</sup>

#### *E. Procedure*

Following the example of the Women’s Tribunal, the PWT should maintain appropriate procedural safeguards to ensure legitimacy. Due process for accused parties, however, must be balanced against the needs of victims.<sup>177</sup> Because the PWT lacks the authority to enforce penal or other sanctions, and is primarily victim-oriented, it should be flexible in its procedures when necessary to fully meet the needs of victims.<sup>178</sup> It should be willing, for example, to hear oral testimony from all victims who wish to speak publicly, regardless of time constraints, to accept anonymous or confidential testimony from victims, and to utilize available media, such as

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<sup>173</sup> *C.f. id.*, para. 22.

<sup>174</sup> Joinet, *supra* note 17, paras. 20-21.

<sup>175</sup> *See id.*, para. 22 (“A wide range of opinions among commission members also makes for independence.”); Sartre, *supra* note 37, at 44 (noting that some Russell Tribunal judges were from nation whose actions were under scrutiny, enhancing the appearance of impartiality).

<sup>176</sup> *C.f. Joinet, supra* note 17, Annex II, Principle 10(a) (requiring commission of inquiry to have “transparent funding to keep them from coming under suspicion”).

<sup>177</sup> Chinkin, *International Law, supra* note 4, at 339.

<sup>178</sup> *See Brunet & Rousseau, supra* note 152, at 50 (noting difficulty of protecting victims and witnesses while also securing due process rights of accused).



videoconferencing, to facilitate testimony by victims who are unable to attend a PWT session.<sup>179</sup> At a minimum, however, the safeguards identified by Special Rapporteur Joinet to protect persons implicated in the investigations of extrajudicial commissions of inquiry should provide the baseline of procedural fairness granted those accused before the PWT. Consequently, states and individuals should be notified of charges against them and given an opportunity to respond in writing or in person, and the PWT must make efforts to corroborate accusations of sexual violence, where possible, from multiple sources.<sup>180</sup>

The evidentiary requirements observed by the PWT should be similarly flexible, since the availability of evidence will vary significantly from conflict to conflict. While the elements of each offense should remain fixed, the evidentiary burden and standards of admissibility can be adapted to fit each specific context. Although findings such as the Women’s Tribunal’s, made “beyond a reasonable doubt,” will be the most satisfying to victims and likely to encourage accountability in official mechanisms, a lower burden, such as a preponderance of the evidence, may be adequate for determining whether an individual is entitled to compensation for violations committed against her.<sup>181</sup> PWT judges can assure continued credibility of their judgments in spite of varying standards of proof by clearly articulating the standard used in each case, explaining the reasons for doing so, and evaluating the implications thereof for future reliance on their conclusions by official fora.

#### *F. Publicity*

As the Women’s Tribunal recognized, broad and strategic publication of judgments in

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<sup>179</sup> See Dixon, *supra* note 23, at 714, 715 (advocating similar means of procedural flexibility of victims’ compensation tribunal).

<sup>180</sup> See Joinet, *supra* note 17, at Annex II, Principle 8.

<sup>181</sup> Dixon, *supra* note 23, 711.

necessary to maximize a tribunal's impact on official mechanisms of accountability.<sup>182</sup> Vigorous publication in popular media, especially in the localities where violations occurred, is necessary to ensure that the PWT impacts positively on social understandings of sexual violence. It must, however, be explicitly stated in each judgment that the PWT does not purport to be a substitute for official mechanisms of accountability. This is necessary to ensure the victims do not misconstrue the enforceability of the PWT's decisions, and to ensure that it serves to encourage, rather than excuse, official mechanisms' responsibility to adequately address violations of international law arising from sexual violence in armed conflict. In addition to broadcast publication, judgments should be published directly to States responsible for violations or for failing to hold violators accountable, to relevant international organizations such as the U.N. Commission for Human Rights, and to legal or academic journals, in order to encourage the recognition of violations and implementation of the PWT's recommendations in official mechanisms of accountability, and the broader interpretation and enforcement of gender-based crimes in international law.

*G. Cooperation with official mechanisms of accountability*

Finally, the PWT should work with the ICC to take advantage of Article 15(2) of the ICC Statute, which permits the ICC Prosecutor to initiate an investigation based on information from NGO and other reliable sources. Via this provision, the PWT could help remedy the ICC's limited capacity by functioning as a filter, reviewing multiple instances of sexual violence in armed conflict and recommending to the ICC those most amenable to adjudication and most likely to have a strong impact against impunity. It could also make its legal analysis available to the ICC and its Prosecutors via Article 44(4) of the ICC Statute,

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<sup>182</sup> Women's Tribunal Charter, *supra* note 94, Art. 14(4); *see also* Joinet, *supra* note 17, para. 24 (arguing that commission of inquiry reports "should be published as widely as possible").

which permits them to make use of NGOs' expertise. Thus, the potential exists not only for PWT judgments to be used by advocates in lobbying for improved accountability in official fora, but also for the PWT to work *with* this most promising of the official mechanisms of accountability to enhance the ICC's ability to ensure accountability for sexual violence in armed conflict. Similarly, opportunities for cooperation with national fora, which may exist under some States' domestic law, should also be utilized by the PWT.

## V. Conclusion

Although they have existed and proliferated since the late 1960s, people's tribunals have been largely ignored by the international legal community because of their unofficial, and consequently unorthodox, nature. Since the dawn of international law, States have traditionally been its subjects, arbiters, and enforcers. But as globalization continues to bring individuals and social movements closer together across the world, international law is gradually being directed toward the individual rather than the nation-state, and the people's tribunal stands poised to gain increasing legitimacy and influence on global law and society.

To overlook the utility of the people's tribunal format because it lacks official authorization would be a cynical denial of the historic power of individuals to influence and enforce the rule of law in the face of government resistance, reluctance, or apathy. The foregoing analysis demonstrates that people's tribunals *can* serve as an effective mechanism of accountability, not only because they can maintain adequate legitimacy to serve as a last resort where official mechanisms are lacking, but also because they possess distinct and unique advantages that enable their use in tandem, and even in cooperation, with established official legal institutions.

The structure and function of the PWT laid out above are, of course, preliminary, and

it cannot be denied that significant obstacles would be faced in implementing its design. Nevertheless, the rampant commission of sexual atrocities against women in armed conflicts across centuries and continents demonstrates that enhanced accountability is desperately needed. The proposed PWT is one tool that women have the power to create today in order to begin meeting that need, with the ultimate goal of providing, and encouraging official mechanisms to provide, full, legitimate, and enforced accountability to eradicate the devastating effects of sexual violence in armed conflict.