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The Standardized Monitoring, Analysis and Reporting Arrangements (MARA): An Effective Tool for Ending Armed Conflict-Related Sexual Violence?

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THE STANDARDIZED MONITORING, ANALYSIS AND
REPORTING ARRANGEMENTS (MARA): AN EFFECTIVE TOOL
FOR ENDING ARMED CONFLICT-RELATED SEXUAL
VIOLENCE?*

*Francesco Seatzu***

Abstract

Prior to the development of standardized monitoring, analysis and reporting agreements (MARA) on conflict-related sexual violence (CRSV) in 2010, CRSV was a phenomenon mostly unknown in its real numbers. This situation was rightly perceived as unacceptable by several reports, including UN documents. However, the establishment of MARA led to the introduction of a number of criteria and rules for the gathering and reporting of information and data on CRSV crimes to the UN Security Council. It was widely believed that these innovations would enhance the fight against these crimes at United Nations level. This Article critically examines the various rules and criteria through which the MARA has contributed to the fight against sexual crimes and abuses in armed conflict and post-conflict scenarios. It asserts that due to the continued growth of CRSV incidents, the benefits anticipated to reduce these odious crimes under MARA have remained elusive throughout the ten years since the MARA was created. This Article makes suggestions for the improvement of the monitoring and reporting activities of MARA.

“Rape in war leaves many unseen scars that continue to haunt survivors long after the guns have fallen silent and the conflict has ended.”

Mrs. Zainab Hawa Bangura, former Special Representative
of the UN Secretary-General (SRSG-SVC)

* This work is dedicated to the loving memory of Professor Robert Cryer of Birmingham University.

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INTRODUCTION

This work proposes an alternative to the MARA process as it stands in its current form. The alternative aims at the dual objective of increasing the external accountability of state and non-state armed groups for sexual abuse and violence committed by them and of enhancing the coordination

of MARA with the International Criminal Court (ICC). Our proposal envisions, in particular, the transformation of MARA into a *de facto* though not *de jure* auxiliary organ of the ICC.¹ To say it more precisely, I propose its transformation into a fact-finding mechanism aimed at assisting the Office of the Prosecutor (OTP) of the ICC² in its investigations of sexual violence and abuses that occurred in armed conflict or quasi-armed conflict contexts.³ The rationale behind this proposal is clear and sound: to provide the UN Security Council a new opportunity to aid and support the ICC's work,⁴ namely a new chance for it to meet its responsibilities to cooperate with the ICC at every stage including the stages after the UN Security Council's referral of a situation to the ICC.⁵

My contribution is articulated and structured as follows. Part I discusses the origin, or the substantive and legal background behind, the establishment of the MARA process. Part II explains the MARA's architecture and procedure, as well as its enforcement. Part III sets forth the major criticisms of the MARA. Part IV sets forth my reform proposal. The contribution concludes with a discussion of why I claim that my proposal improves upon other reform proposals to MARA. These and my proposals would transform MARA into a *de facto* auxiliary organ of the ICC's OTP and therefore into a feasible tool for widening the narrow

1. The ICC is not a UN organ, despite being established by a UN conference. *See* Rome Statute of the International Criminal Court, art. 2, U.N. Doc. A/CONF.183/9 (July 17, 1998) (“The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.”).

2. *See* Richard Goldstone, *International Criminal Court and Ad Hoc Tribunals*, in *THE OXFORD HANDBOOK ON THE UNITED NATIONS* 463, 560 (Sam Daws & Thomas G. Weiss eds., 2018) (“Although the ICC is not a UN constituent body, its Statute provides for the establishment of a legal relationship between the two.”).

3. Under the Rome Statute of the International Criminal Court (ICC), “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” are recognized both as crimes against humanity and as war crimes. Rome Statute of the International Criminal Court, art. 7(1)(g), U.N. Doc. A/CONF.183/9 (July 17, 1998). *See also* S.C. Res. 1612 (July 26, 2005) (implementing a zero-tolerance policy for sexual abuse or misconduct by troops operating on behalf of the United Nations).

4. For information on the responsibilities of the Security Council, see Hemi Mistry & Deborah Ruiz Verdusco, *The UN Security Council and the International Criminal Court*, *PARLIAMENTARIANS FOR GLOBAL ACTION* (Mar. 16, 2012), <https://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf> [<https://perma.cc/2N5P-LT64>] (observing that “one of the greatest dangers to the effectiveness of the Court is the failure of the Council to provide . . . support to the ICC once it has referred to it a situation”).

5. *See generally* 5 ALEXANDRE SKANDER GALAND, *UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT* (Carsten Stahn et al. eds., 2018) (outlining the UN Security Council Referrals to the ICC).

perspective from which MARA currently looks at sexual violence and abuse against girls and women during armed conflicts.

I. THE ESTABLISHMENT OF THE MONITORING, ANALYSIS AND REPORTING AGREEMENTS

In December 2010, after conflict related sexual violence (CRSV) on women and girls had become a matter of increasing international concern⁶ and after the lack of reliable information and data about CRSV had become a thematic issue on the United Nations Security Agenda, the United Nations Security Council (the Security Council) established the development of standardized monitoring, analysis and reporting agreements (MARA) on CRSV incidents through its landmark resolution in 1960.⁷ The resolution, the fifth Security Council resolution on women, peace and security, was adopted by unanimous vote by the Council at its 6,453rd meeting.⁸

The creation of the MARA was the continuation of the post-Cold War trend in the international community of monitoring, reporting, and fact-finding (MRF) mechanisms to collect information on the vulnerabilities of civilian populations.⁹ At the same time, it was an unprecedented step to increase the UN Security Council's involvement and powers in the protection of women's and girls' rights in armed conflicts along the pathway provided by the UN Secretary-General's call for an "era of application" of international human rights norms,¹⁰ and of the pathway

6. In this work, the term "sexual violence" refers to the sexual element of crimes committed against a victim based on gender. For the same use of this term, see 20 ANNE-MARIE L. M. DE BROUWER, *SUPRANATIONAL PROSECUTION OF SEXUAL VIOLENCE* 12 (2005). For a similar but not identical definition, see Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INT'L L. 121, 121-41 (2007); Alison Cole, *Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape Under International Law*, 8 INT'L CRIM. L. REV. 55, 55-86 (2008); Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 625-75 (2001). See also the definition of sexual violence given by the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgement, International Criminal Tribunal for Rwanda [ICTR] (Sept. 2, 1998) (claiming that sexual violence shall be deemed as including "... any act of a sexual nature which is committed on a person under circumstances which are coercive").

7. See Gina Heathcote, *Naming and Shaming: Human Rights Accountability in Security Council Resolution 1960 (2010) on Women, Peace and Security*, 4 J. HUM. RTS. PRAC. 82, 82 (2012); see also John Braithwaite & Peter Drahos, *Zero Tolerance, Naming and Shaming: Is There a Case for it with Crimes of the Powerful?*, 35 AUSTL. N.Z. J. CRIMINOLOGY 269, 269-88 (2002).

8. S.C. Res. 1960 (Dec. 16, 2010).

9. See Rob Grace & Claude Bruderlein, *On Monitoring, Reporting, and Fact-finding Mechanisms*, 1 EUR. SOC'Y INT'L L. REFLECTIONS 1, 3 (2012).

10. Rep. to the Senior Management Grp. The Legal Counsel Chairman of the Inter-Departmental Grp., *Inter-Departmental Group to Implement the Action Plan: An Era of*

provided by the UN Women, Peace and Security Agenda (WPS).¹¹ Moreover, and equally worth noting, the creation of the MARA was the continuation of the monitoring and reporting mechanism (MRM)¹² adopted with the Security Council (SC) resolutions 1612 of 2005¹³ and 1882 of 2009 on children and armed conflict.¹⁴

Prior to and after the establishment of the MARA, the UN Security Council, like the UN General Assembly¹⁵ and the UN Secretary-General,¹⁶ engaged in a number of efforts and attempts to ameliorate the international protection of women's and girls' rights in armed conflict scenarios. Far from being surprising, these efforts and attempts, among which one can include the United Nations adoption of the UN Convention on the Elimination of All Forms of Discrimination against Women in 1979¹⁷ along with the 1982 Declaration on the Participation of Women in Promoting International Peace and Cooperation, are the obvious consequence of the fact that, for too many centuries, sexual violence has been considered collateral damage in time of war¹⁸ and a "reward" for fighting according to large segments of military forces.¹⁹ Of these efforts and attempts, that were, rightly we believe, perceived by the Security

Application of International Law, U.N. Doc. <https://www.un.org/law/technical/FinalReport.pdf> [<https://perma.cc/GD6V-EB6Y>].

11. The Women, Peace and Security (WPS) agenda was formally initiated by the landmark U.N. Security Council (SCOR) Resolution 1325 (2000). See generally United Nations Development Programme (UNDP), *Global Handbook: Parliaments as Partners Supporting the Women, Peace and Sec. Agenda*, https://www.undp.org/content/dam/undp/library/peace/conflict-prevention-peacebuilding/Parliament_as_partners_supporting_the_Women_Peace_and_Security_Agenda_-_A_Global_Handbook.pdf (discussing UN SCOR groundbreaking endorsement in S.C. Res. 1325 (Oct. 31, 2000)).

12. See, e.g., Francesco Seatzu, *The Monitoring & Reporting Mechanism (MRM) on Grave Children's Rights Violations: Promoting the Protection of Children's Rights in Armed Conflicts Through Adjudication?*, 24 MAX PLANCK Y.B. INT'L L. 362,398 (2020) (on file with author); Francesca Capone, *A Critical Overview of the United Nations Architecture on Children and Armed Conflict: What Role for Sanctions?* 27 ITALIAN Y.B. INT'L L. 115, 115–30 (2018).

13. S.C. Res. 1612 (July 26, 2005).

14. S.C. Res. 1882 (Aug. 1, 2009).

15. The last of these efforts was the adoption of Resolution 2467 (2019) by a vote of thirteen in favor to none against, with two abstentions (the People's Republic of China and the Russian Federation), during a wide-ranging debate on the prevention and implications of sexual violence. In this resolution, the Security Council reiterated its demand for the complete cessation of all acts of sexual violence by all parties to armed conflict. S.C. Res. 2467 (Apr. 23, 2019).

16. See Policy Committee Decision No. 2007/31, Violence against Women, 15 June 2007, also available at: <https://www.un.org/womenwatch/osaginew/oUnite.html> [<https://perma.cc/R8NU-K98F>].

17. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

18. See Ted Alcorn, *Responding to Sexual Violence in Armed Conflict*, 383 LANCET 2034, 2034 (2014) (stressing that "sexual violence in conflict remains a tenaciously difficult problem to study and therefore to address").

19. G.A. Res. 37/63 (Dec. 3, 1982).

Council as dictated by its primary institutional mandate to maintain international peace and security, the most significant has been the adoption of ten thematic resolutions on “Women, Peace and Security.”²⁰ Amongst these resolutions that reflect by their existence the reality that sexual violence is a frequently occurring deplorable abuse engaged in during armed conflict, it is worth recalling Resolution 1379 of 2001.²¹ Here the members of the UN Security Council acknowledged that women and a gender perspective are relevant to negotiating international peace treaties, planning refugee camps and peacekeeping operations, and reconstructing war-torn societies for sustainable peace.²² Again, one can also recall resolution 1820 of 2008 in which the Security Council, after having for the first time forbidden the use of sexual violence as a weapon and tactic of war (and as a tactic of terrorism),²³ acknowledged, in line with the Rome Statute of the ICC,²⁴ that rape and other forms of sexual violence can constitute a war crime, crime against humanity, or a constitutive act with respect to genocide.²⁵

After unrelenting pressure from the International Committee of the Red Cross (ICRC)²⁶ and from the academic world, both of which were disappointed by the lack of female inclusion in peace-making processes and by the lack of a systematic enforcement of past Security Council resolutions and other international legal provisions and standards on women and armed conflict, the Council established the MARA to enhance the external accountability of state and non-state armed groups for their sexual-related violations and abuses against girls and women.²⁷

Country-based task forces established in country-situations where parties to conflict have been listed in the annexes of an annual report of the Secretary-General on CRSV (the Annual Report) manage the MARA. The MARA is charged with the gathering of timely, accurate and reliable

20. S.C. Res. 1325 (Oct. 31, 2000); S.C. Res. 1820 (June 19, 2008); S.C. Res. 1888 (Sept. 30, 2009); S.C. Res. 1889 (Oct. 5, 2009); S.C. Res. 1960 (Dec. 16, 2010); S.C. Res. 2106 (June 24, 2013); S.C. Res. 2122 (Oct. 18, 2013); S.C. Res. 2242 (Oct. 13, 2015); S.C. Res. 2467 (Apr. 23, 2019); S.C. Res. 2493 (Oct. 29, 2019).

21. S.C. Res. 1379 (Nov. 20, 2001).

22. *Id.* at ¶ 8(a), (b), (e).

23. S.C. Res. 1820 (June 19, 2008); *see also* Global Justice Center, Rape as an Illegal Tactic of War, GLOBAL JUSTICE CENTER (June 2014), <https://globaljusticecenter.net/documents/Rape%20as%20Tactic%20of%20War%20QA%20.pdf> [<https://perma.cc/B6SA-MPSH>].

24. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

25. Fatou Bensouda, *Gender and Sexual Violence Under the Rome Statute*, in FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW 401, 416 (Emmanuel Decaux et al. eds., 2007).

26. Frederic de Mulinen, *Handbook on the Law of War for Armed Forces* (ICRC, Geneva, 1987), § 194.

27. *See, e.g.*, 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, 305–47 (2003).

information on patterns and trends of sexual violence in situations of conflict, post-conflict and other situations of concern for the UN Secretary-General such as political strife. And, in the view of its institutional architects, it is aimed to be a systematic and comprehensive reporting mechanism, capable of producing detailed information on parties to armed conflict that are credibly suspected of committing or being responsible for acts of rape or other forms of CRSV. For the purposes of reporting on the MARA, CRSV refers to incidents or (for SCR 1960 listing purposes) patterns of sexual violence in conflict or post-conflict settings or other situations of concern (e.g., political strife) and that have a direct or indirect nexus with the conflict or political strife itself, i.e., a temporal, geographical and/or causal link. Specifically, violations may encompass, apart from rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, against women, men, girls or boys.

The MARA's functions and procedures, including the basic elements for enforcing the MARA mechanism and its harmonization with the Gender-Based Violence Information Management System (GBVIMS), are outlined in *the Provisional Guidance Note on the Implementation of Resolution 1960* (the Provisional Guidance Note). This is revised and updated periodically according to lessons-learned from implementing resolution 1960.²⁸

Notwithstanding some positive outcomes such as the contribution given by the information and data gathered through MARA to the enhancement of the capacity of international peacekeepers in the prevention and response to incidents of CRSV, there are many critiques related to the MARA process and functioning. These critiques persist regardless of the adoption in 2015 of an instrument that has a positive effect on the operation and functioning of MARA—the UNPOL best-practices toolkit on policing and training curriculum for UN Police on preventing and investigating sexual and gender-based violence in post-conflict settings (the UN CRSV Policy);²⁹ and also notwithstanding the good results achieved so far by the MARA process through its collaborative activities with Non-Government Organizations (NGOs),

28. UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Provisional Guidance Note - Implementation of Security Council Resolution 1960 (2010) On Women, Peace and Security (conflict-related sexual violence)*, July 2011, available at: <https://www.refworld.org/docid/4e23ed5d2.html> [<https://perma.cc/SZ6Y-V364>].

29. UN Department of Peace Operations, United Nations Police Gender Toolkit: Standardized Best Practices on Gender Mainstreaming in Peacekeeping – Handbook (2015), https://police.un.org/sites/default/files/united_nations_police_gender_toolkit_handbook1.pdf [<https://perma.cc/EFW3-5MZB>].

other civil society groups, UN entities and in particular the United Nations High Commissioner for Refugees (UNHCR).

Critics often contest that MARA effectively increases the external accountability of state and of non-state armed groups—that incidentally are generally responsible for the majority of sexual abuses and violence³⁰—as well as often contesting the accuracy, completeness and objectivity of the information gathered through the MARA Working Group on conflict-related sexual violence, the first of the two main bodies that currently compose MARA.³¹ The development of public accountability mechanisms for non-state actors aimed at operating in isolation from strategies to prevent sexual violence in armed conflicts has also been criticized.³² And this, together with the traditional reductive perspective that considers women only as victims of armed conflicts, and not also as active players in peacemaking and conflict resolution. Exemplary in this sense is the allegation contained in the UNICEF's Central African Evaluation Report of 2016 that states that linkages between the MRM, MARA and GBV prevention, response and coordination are in need of reformulation.³³ Equally exemplary is the allegation that monitoring through the MARA process would need to be extended to encompass strategies and actions for increasing women's participation in the delivery of justice mechanisms locally and globally.³⁴ Another criticism that has been voiced is that MARA fails to give assistance to women and girls who have suffered sexual violence. Surprisingly this is—although the intention of the MARA—is to use the information gathered to inform the development of comprehensive strategies to address conflict related sexual violence, including programmatic responses for survivors at the country-level.³⁵ There is also the other criticism concerning the lack of direct women's participation in

30. See, e.g., INT'L COMM. OF THE RED CROSS, *ENGAGING WITH STATE ARMED FORCES TO PREVENT SEXUAL VIOLENCE* (2019).

31. See, e.g., MEGAN BASTICK ET AL., *SEXUAL VIOLENCE IN ARMED CONFLICT - GLOBAL OVERVIEW AND IMPLICATIONS FOR THE SECURITY SECTOR* (2007).

32. See, e.g., Manuela Colombini, *Gender-based and Sexual Violence Against Women During Armed Conflict* (2002), 4 J. HEALTH MGMT. 167, 177 (2002).

33. See UNITED NATIONS CHILDREN'S FUND, *MULTI-COUNTRY EVALUATION OF GENDER-BASED VIOLENCE IN EMERGENCIES* (2016).

34. See INTERNATIONAL DEVELOPMENT LAW ORGANIZATION, *STRENGTHENING WOMEN'S ACCESS TO JUSTICE: MAKING RIGHTS A REALITY FOR WOMEN AND GIRLS* (2017), <https://www.idlo.int/system/files/event-documents/IDLO%20CN%20-%20Access%20to%20Justice%20for%20Women%20and%20Girls%20NO%20CONTACTS.PDF> [<https://perma.cc/J28P-EVJL>].

35. See U.N. Women, *Violence against Women in Conflict, Post-conflict and Emergency Settings*, at 145 (2013), <https://www.alnap.org/system/files/content/resource/files/main/1405612658.pdf> [<https://perma.cc/HL6Q-C5C4>]; Doris Schopper, *Responding to the Needs of Survivors of Sexual Violence: Do We Know What Works?*, 9 INT'L REV. OF THE RED CROSS 585, 594 (2014).

the MARA process and in the reporting of sexual violence.³⁶ It is my view that to this list of criticisms one may add the narrow subject matter scope of application of MARA according to its establishing resolution that, unlike the African Union Protocol on the Rights of Women in Africa,³⁷ does not deal with ‘violence against women’ in general terms but only with sexual crimes and abuse.³⁸ Also the lack of effective coordination of MARA with the GBVIMS has been criticised, and this regardless of the efforts and attempts made in the Provisional Guidance Note on the Implementation of Resolution 1960. One may further recall the lack of consideration by the MARA process of trauma and suffering related to sexual violence and war, together with the lack of consideration of “opportunistic sexual violence” committed in post-conflict settings³⁹ as well with the lack of consideration of CRSV when committed by civilians. Again this is regardless of the existence of findings pointing to a clustering of interventions in post-conflict settings, predominantly addressing opportunistic sexual violence,⁴⁰ and also notwithstanding the fact that civilians may be responsible for war crimes according to the Rome Statute of the ICC.⁴¹

II. DEVELOPMENT OF THE MARA PROCESS

The MRM on grave violations against children in situations of armed conflict was the real impetus behind the establishment of MARA, and

36. See generally Karen Engle, *The Grip of Sexual Violence: Reading UN Security Council Resolutions on Human Security*, in FORTHCOMING IN RETHINKING PEACEKEEPING, GENDER EQUALITY AND COLLECTIVE SECURITY 23–47 (Gina Heathcote & Dianne Otto eds., 2014); see also U.N. WOMEN, WOMEN AND PEACE AND SECURITY: GUIDELINES FOR NATIONAL IMPLEMENTATION.

37. See generally African Union, Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (July 11, 2003), <https://www.refworld.org/docid/3f4b139d4.html> [<https://perma.cc/SL7C-Q9ZP>].

38. The African Union Protocol on the Rights of Women in Africa, defines “violence against women” to include:

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time or during situations of armed conflict[] or war.

See Karima Bennoune, *Do We Need New International Law to Protect Women in Armed Conflict?*, 38 CASE W. RES. J. INT’L L. 363, 367 (2007).

39. See Alcorn, *supra* note 18, at 2037 (explaining the phenomenon of ‘opportunistic sexual violence’).

40. See Jo Spangaro et al., *What Evidence Exists for Initiatives to Reduce Risk and Incidence of Sexual Violence in Armed Conflict and Other Humanitarian Crises? A Systematic Review*, PLOS ONE, May 2013, at 1.

41. Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 3.

this, together with the statements delivered by Margot Wallström⁴² and shared by several prominent feminist legal scholars like Rhonda Copelon,⁴³ Bridget Byrne⁴⁴ and Christine Chinkin⁴⁵ on the necessity not to see sexual violence in armed conflicts exclusively through a reproductive health and development lens.⁴⁶ As requested by the Report of the UN Secretary General on the implementation of resolutions 1820 and 1888 to develop a monitoring and reporting mechanism addressing CRSV, the Security Council created it in its resolution 1960 of 2010. Among the issues requested for consideration by the Secretary General in his Report were, in particular, the protection of the victims of trafficking and sexual violence committed by terrorist groups, the enhancement of information sharing and judicial cooperation amongst members of the UN family.⁴⁷

The reasons supporting the above-mentioned claim on the influence of the MRM process on MARA are indeed not hard to spot, namely the structural and procedural similarities between the MRM and the MARA process that largely outweigh their differences as better explained below. Apart from this, they are also reasons that are quite easy to understand, given in particular the fact that coordination of MARA with MRM is (rightly) deemed as essential in the *Provisional Guidance Note*.⁴⁸

Another important, though only indirect, impetus for the establishment of MARA were the statutes of the ICTY and ICTR and their judicial decisions that had a pivotal role in the identification of sexual violence as a war weapon instead of a natural consequence of

42. Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict Margot Wallström (Feb. 23, 2012), <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2012/07/SRSG-Statement-on-Women-Peace-Security-23-February-2012.pdf>. [https://perma.cc/Z3X9-YTR6]

43. See Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 248 (1994).

44. See Bridget Byrne, *Towards a Gendered Understanding of Conflict*, in GENDER AND PEACE SUPPORT OPERATIONS 30, 32 (2002); See also Catherine MacKinnon, *Rape, Genocide, and Women's Human Rights*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 183, 193 (Alexandra Stiglmayer ed., Marion J. Faber trans., University of Nebraska Press 1994) (1993).

45. See Christine Chinkin, *Gender-Related Crimes: A Feminist Perspective*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 116, 122 (Ramesh Thakur & Peter Malcontent eds., 2004).

46. See Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EJIL 326, 326 (1994).

47. U.N. GAOR, 65th Sess., U.N. Doc. A/65/592 (Nov. 24, 2010).

48. U.N. Off. of the Special Representative of the Secretary-General, *Provisional Guidance Note: Implementation of Security Council Resolution 1960 (2010) On Women, Peace and Security (Conflict-Related Sexual Violence)* (June 2011), <https://www.refworld.org/docid/4e23ed5d2.html> [https://perma.cc/7DC8-74W5].

war⁴⁹ and in the development of contestations of the protection that the 1949 Geneva Conventions and their Additional Protocols have provided and continue to provide against sexual violence in armed conflict scenarios.⁵⁰ The statutes also had an equally crucial role in the consideration of rape and other forms of sexual violence as crimes in their own right under the Rome Statute. In this last respect, it should be noted that “rape” has been interpreted by the ICC as constituting genocide when it was “committed with intent to destroy, in whole or in part, national, ethnical, racial or religious groups,” (Rome Statute Article 6); a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” (Article 7),⁵¹ and a war crime “when committed as part of a plan or policy or as part of a large-scale commission of such crimes” (Article 8). The Rome Statute in reality goes even further than that. And in fact, unlike the ICTY and ICTR, it does not identify sexual violence with rape⁵² so as to also criminalize sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and any other sexual violence of comparable gravity (Article 7(1)(g)).⁵³ Moreover, persecution is also

49. Katie O’Byrne, *Beyond Consent: Conceptualising Sexual Assault in International Criminal Law*, 11 INT’L CRIMINAL L. REV. 495, 500 (2001); Alex Obote Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT’L & COMP. L. 135–63 (2005).

50. Among those criticisms, it is worth mentioning those concerning the narrow scope of the legal interest protected by these provisions that seems to refer exclusively to the honour and dignity of women within a patriarchal and phallographic view. Amplius, see Magdalena M. Martin & Isabel Lirola, *Sexual crimes in International Humanitarian Law* (Institut Catala international per la pau, 2013), p. 12, at p. 13, who also recalls that: ‘This outlook would also be confirmed by the fact that even the Geneva Convention provisions that consider a more active position of women are centred almost exclusively on their role as mothers’. See also Women Facing War, ‘ICRC Study on the Impact of Armed Conflict on Women - Executive Summary’, available at: <https://www.refworld.org/pdfid/46e943750.pdf> [<https://perma.cc/SE4Z-9YN4>]; Kelly Askin, *Comfort Women: Shifting Shame and Stigma from Victims to Victimizers*, 13 INT’L CRIMINAL L. REV. 5–32 (2001); Judith Gardam, *Women, Human Rights and International Humanitarian Law*, 324 INT’L REV. OF THE RED CROSS, 421–32 (1998).

51. UN Security Council Resolution S/RES/2106 (2013), on sexual violence in conflict, states that sexual violence can constitute a crime against humanity and a constitutive act of genocide, and that other forms of serious sexual violence in armed conflicts are war crimes.

52. The ‘Elements of Crimes’ of the ICC Statute, adopted in 2002 and revised in 2010, define rape as ‘invasion’ or ‘penetration’ that is “committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment.”

53. According to the World Health Organization (WHO), sexual violence may be defined as: ‘any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work’ See WHO, *World Report on Violence and Health*, at 147, ed. Etienne G. Krug (2002).

included in the Rome Statute as a crime against humanity and the Rome Statute explicitly recognized the gender basis of persecution.⁵⁴

Especially given these and other developments in the area of international criminal law and policy, the public debate within civil society and the United Nations at that time was not whether or not the UN Security Council should institute a supervisory mechanism that addresses sexual violence against civilians in armed conflict, but rather what type of supervisory mechanism the Security Council should establish. Generally, the proposals for a monitoring and reporting mechanism fell into two broad categories: (1) proposals calling for a unit competent to examine exclusively rape and other forms of sexual violence against women and girls in armed conflict scenarios identified in resolution 1960 and (2) proposals calling for a mechanism that was also competent to consider sexual violence against boys and men committed in times of armed conflict.⁵⁵ In 2009, just one year after the adoption of its landmark resolution 1820 that recognizes physical and sexual violence and abuses against female civilians as security issues,⁵⁶ the Security Council requested, in its resolution 1888, the UN Secretary-General to develop a proposal to ensure monitoring and reporting of sexual violence in conflict and post-conflict situations against women and girls, and to appoint a special representative for sexual violence.

Conversely, the UN Secretary General, in his report on children and armed conflict in Afghanistan (S/2008/695), advocated for a monitoring mechanism with a mandate that also encompasses sexual violence against men and boys.⁵⁷ Other outside observers also presented proposals for monitoring and reporting mechanisms. For instance, Dr. Noëlle Quénivet, advocated for the use of the reporting system established by the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) to assess States' compliance with General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations.⁵⁸ This proposal, and especially the inherent

54. See Silahlı Çatışmalar ve Kadınlara Yönelik Cinsel Şiddet, *Önlenemez Bir İkili Mi, Armed Conflicts and Sexual Violence Against Women: An Inevitable Accompaniment?*, 28 KOSBED 1, 1–20 (2014).

55. See Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT'L L. 253 (2007).

56. See Rep. Of the S.C., U.N. Doc. S/2002/1154 (Oct. 16, 2002) (“[s]ustainable peace and security will not be achieved without women’s full and equal participation”).

57. Rep. of the S.C., U.N. Doc. S/2008/695 (Nov. 10, 2008).

58. See Amnesty Int’l, *Combating sexual violence in conflict: Recommendations to states at the Global Summit to End Sexual Violence in Conflict* (May 30, 2014) <https://www.amnesty.org.uk/files/ior530062014en.pdf> [<https://perma.cc/AUH2-TRYG>] (The General Recommendation provides authoritative guidance to States parties on legislative, policy and other appropriate measures to ensure full compliance with their obligations under the

criticisms of the MARA process as currently designed, are also implicitly shared by Gina Heathcote, the author of one of the very few contributions on MARA from an international human rights perspective. Heathcote indicates that:

Without a renewed Security Council effort to respond to the need for recognition and support of women's participation at all stages of conflict resolution (including in the Council itself), the approach of resolution 1960 remains one that tilts the Council's agenda towards subordination feminism, that denies the intersection of race, class and gender in contemporary institutional approaches, and that does little to encourage the participation of non state actors, particularly armed groups, in conflict resolution processes that build communities representative of all.⁵⁹

III. THE MARA'S PROCEDURE AND ENFORCEMENT

Since its inception, the MARA's dual role has been to monitor, analyse and report arrangements on conflict-related sexual violence against civilian personnel and to monitor commitments by parties of conflict to prevent and address sexual violence against civilians. In theory, the MARA fills its double-articulated role by providing timely and objective information on sexual crimes during wartime to the UN Security Council. Along with the aim of helping the Council in its action of reducing the risk of sexual violence in armed conflict scenarios, providing assistance to survivors, and maintaining security and peace. Resolution 1960 clarifies that the Special Representative of the Secretary General on conflict related sexual violence is the entity in charge of MARA's implementation that, as better specified in the Provisional Guidance Note on the implementation of Resolution 1960, is to be carried out in accordance with the Secretary-General's Policy Committee Decision No. 2010/30 on Sexual Violence in Conflict and the Report of the Secretary-General (A/65/592-S/2010/604) on the implementation of resolutions 1820 (2008) and 1888 (2009). That is indeed important, as it means that the implementation of MARA shall always be in conformity with the criteria indicated therein for dialogue with parties to conflict and with the conceptual and analytical framing of "conflict-related sexual violence" for the purpose of facilitating the analysis on what may be reported as conflict-related sexual violence.

Gina Heathcote has considered MARA as a step beyond the so called "1325 framework" (Security Council resolution 1325 (2000), and currently also as the most prominent institutional framework protecting

Convention to protect, respect and fulfil women's human rights, including with regard to preventing and addressing sexual violence).

59. Heathcote, *supra* note 7, at 103.

women and girls from sexual violence in armed conflict. In her view, the MARA process has the potential for a systematic engagement of state armed groups on women's and girls' protection, in particular given its "naming and shaming" approach.⁶⁰ Undoubtedly, though the "naming and shaming" approach that the MARA champions constitutes a reputational disincentive for violators,⁶¹ in particular for state armed groups, critics have pointed out various flaws that hinder the MARA's operativeness and effectiveness (as also acknowledged by Heathcote herself).

A. *UN Security Council Resolution 1960 (2010) on Women, Peace, and Security*

Pursuant to UN Security Council resolution 1960, MARA Taskforces shall be established in countries where conflict-related sexual violence is documented or suspected to have occurred. The Provisional Guidance Note makes clear that beyond situations on the UN Security Council's security agenda, the Secretary-General through Special Representative on Sexual Violence in Conflict (SRSG-SVC) is allowed to indicate—in consultation with UN Action—which countries must be regarded as situations of concern.⁶² The Provisional Guidance Note goes further than that and clarifies, amongst other things, that the emphasis of MARA should not change, but may do so depending on context, especially in regards to conflict as opposed to post-conflict situations.⁶³ The reason is easy to identify, and it has been fully brought out in the Provisional Guidance Note where it is stated that those aspects of MARA related to identifying parties to conflict and perpetrators, or the engagement with such parties for protection commitments, is generally more relevant in situations of conflict than in post-conflict situations. But this, of course, does not mean that in post-conflict situations there is little need for reliable and timely analysis of patterns and trends of sexual violence. In fact, it is explicitly understood that in any of these contexts MARA should supervise and seek to influence the conduct of both State and non-State parties.⁶⁴

60. *Id.* at 103.

61. See Peace Women, Sexual Violence Monitoring, <http://www.peacewomen.org/security-council/sexual-violence-indicators-and-monitoring> [<https://perma.cc/P66K-F3KF>] (last visited Oct. 31, 2021) (A mandated "naming and shaming" listing mechanism requires the Secretary-General's Annual Report on Sexual Violence to name parties credibly suspected of committing or being responsible for rape and other forms of sexual violence. Parties in armed conflict are also called upon to make specific, time-bound commitments to prohibit and punish sexual violence, and the Secretary-General is asked to monitor those commitments.).

62. Bensouda, *supra* note 25.

63. *Id.*

64. S.C. Res. 1960 (Dec. 16, 2010).

Information is gathered in a strictly confidential manner, as well as in conformity with the World Health Organization's 2007 Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies. Clearly this is to avoid, or at least reduce, the risk for the safety of civilians and reporting entities. It is envisaged that MARA will rely on information gathered from a large number of sources in a given country context, including local government authorities, health and psychosocial service providers, UN Civilian, Police and Military Peacekeeping presence, UNCT actors, local and international NGOs, civil society entities, religious institutions and faith-based networks.⁶⁵

Information is then reported to the SRSG-SVC on behalf of the Secretary-General, responsible for promoting the implementation of Security Council resolutions about CRSV. The SRSG-SVC, which works with the technical support and assistance of UN entities under the umbrella of UN Action Against Sexual Violence in Conflict (UN Action), has the duty through the established country-level arrangements to report to the UN Secretary General and the Working Group on Conflict Related Sexual Violence.⁶⁶ This is, indeed, a task of practical relevance since it allows the UN Secretary General to have all the information he might need for the elaboration of its Annual Report on Sexual Violence in Armed Conflict and of its annexes, namely the main sources of knowledge of the UN Security Council about sexual violence in armed and post-conflict situations.⁶⁷ Documented evidence of a distinguishable pattern of sexual crimes and abuses being committed with intention by known or named armed groups or forces justifies the formal investigation or mandating of MARA and the establishment of country-level arrangements, as well as the inclusion of parties to conflict in the annexes to the UN Secretary General's annual report.

It is submitted that information gathered by humanitarian agencies on the ground through the MARA process constitutes direct advocacy material with governments at the national and international level and with parties to conflict. At a national level, these parties to conflict and

65. *Id.*

66. Bensouda, *supra* note 25, indicating that:

The arrangements should take into account the specificity of each country and ensure a coherent and coordinated approach at the field-level, and must be coordinated with and implemented in respect of the integrity and specificity of the monitoring and reporting mechanism under resolutions 1612 (2005) and 1882 (2009) on children and armed conflict.

67. According to Article 99 of the Charter of the United Nations: "The Secretary-General may bring to the attention of the Security-Council any matter which in his opinion may threaten the maintenance of international peace and security."

governments are demanded, on the basis of this information, to develop time-bound and agreed action plans with UN Country Team (UNCT) actors, and the United Nations to terminate and to prevent additional sexual violence. Usual activities within these action plans include the training of military personnel in preventing sexual crimes and concrete commitments to hold offenders accountable through internal justice systems.⁶⁸ At the international level, governments are demanded to respond to the UN Secretary-General's annual report. Additionally, in some circumstances, specific targeted actions such as sanctions set and agreed by the Security Council, as previously instructed by the Security Council Working Group on Sexual Violence in Armed Conflict, may be approved against specific parties to conflict, especially those that are deemed to be persistent offenders. The Security Council may also give mandate to the Secretary General to include in the Annual Report through an annex, a list of parties to a conflict that are credibly suspected of committing or being responsible for acts of rape and other forms of sexual violence. This operative provision has been described as a "naming and shaming" process unique to resolution 1960.⁶⁹

B. *The Subject Matter of Monitoring and Reporting*

There are limitations on the subject matter of the MARA, namely, on the types of crimes and abuses against civilians that may be considered under the scope of this monitoring and reporting procedure. Resolution 1960 and the Provisional Guidance Note only empower the MARA to review conflict-related sexual crimes, which clearly do not represent an exhaustive list of crimes against civilians during armed conflict. The MARA is not authorized to monitor and respond to crimes other than sexual offenses, crimes in armed conflicts, and post-armed conflict situations.

Things are different when the conduct of the parties to conflict is concerned. Under the Provisional Guidance Note, the conduct of all parties to conflict may be investigated and monitored by the MARA process. And this includes both state and non-state parties.

In regards to non-state parties, the MARA is focused especially on sexual crimes committed by organized armed entities or groups. This focus demands drawing a distinction, case by case, between armed groups and civilian criminal gangs that MARA shall make according to international humanitarian law rules and standards.⁷⁰ When armed

68. The Security Council has repeatedly emphasized in resolutions 1820, 1888 and 1960 the need for better information on trends, patterns and early warning indicators of sexual violence.

69. See Heathcote, *supra* note 7, at 103.

70. The test for distinguishing armed groups from civilian criminal gangs is articulated in international humanitarian law and revolves around the notion of a minimum level of organization reflected in some form of responsible command. See *U. N. Office for the Coordination of*

elements are directly involved in criminal activities and also have political motivations they may be reported under the MARA process—and this is with the condition that there is a preliminary verification of the information that such armed entities are effectively committing conflict-related sexual violence according to the “Analytical and Conceptual Framing of Conflict-Related Sexual Violence.”

C. *The Governing Law of the Monitoring and Reporting Process*

Another issue worthy of consideration is the law applicable to the MARA process. According to the Provisional Guidance Note, the MARA monitors the conduct of the parties to conflict for the protection of women and girls (but also of men and boys) against sexual violence and abuse through the prism of the legal duties and obligations of the UN as regards to monitoring and reporting on sexual violence. These duties and obligations have been articulated in the landmark resolution of the UN General Assembly on assistance and support to victims of sexual exploitation and abuse by United Nations staff and related personnel⁷¹ and implicitly recalled in the UN Action Against Sexual Violence in Conflict (UN Action).

Further clarifying this point in relation specifically to the operation and functioning of the Working Group on conflict-related sexual violence, the Provisional Guidance Note emphasizes that human rights monitoring principles developed by the Office of the High Commissioner for Human Rights (OHCHR) like the principles of doing no harm, respect for the mandate and knowledge of the standards, credibility, impartiality, objectivity, confidentiality and security should be the primary consideration in the enforcement of MARA.⁷² What remains less clear is whether general international law also constitutes a standard of review. The absence of any explicit reference to customary international law amongst the standards of review suggests a negative answer. Arguably, the compliance of the conduct of the parties to conflict with norms of international law should be considered beyond the MARA’s current scope of materially collecting information and data on sexual crimes and abuses in armed conflict and post-conflict scenarios. Notwithstanding the fact that the MARA is based on international legal rules and provisions that are in place for the protection of civilian persons against sexual

Humanitarian Affairs, Analytical and Conceptual Framing of Conflict-Related Sexual Violence (Nov. 8, 2011), <https://www.humanitarianresponse.info/fr/operations/pakistan/document/analytical-and-conceptual-framing-conflict-related-sexual-violence> [<https://perma.cc/C8WG-RCDP>].

71. G.A. Res. 62/214, ¶¶ 6–14 (Mar. 7, 2008).

72. See U.N. Secretary General, *Provisional Guidance Note: Implementation of Security Council Resolution 1960 (2010) on Women, Peace and Security* (Conflict-related Sexual Violence) (June 2011), <https://www.refworld.org/pdfid/4e23ed5d2.pdf>.provisional [<https://perma.cc/XUB8-CFFH>].

violence and abuse might eventually lead to a different conclusion. As the MARA is deemed to be classified as a “fact-finding” mechanism that operates under the governance of the UN Security Council, it then follows that it would be reasonable to eventually allow it to gather its information and data on conflict-related sexual abuses and violences with no specific regard to general international law.

D. *How the Monitoring & Reporting Mechanism (MARA) Works*

The MARA was established mainly to hold state and non-state armed groups publicly accountable for their sexual and gender-based violence⁷³ in armed conflicts, post-conflict situations and other situations of concern. Regarding its work and functioning, the MARA process operates at three separate but closely interrelated levels: (1) country-level coordination; (2) UN Headquarters-level coordination; and (3) the UN Security Council level.

Information gathering is a prerogative of the bodies in charge of the country-level coordination, namely of the UN Special Representative of the Secretary-General (SRSG) (where there are peacekeeping or political missions) or alternatively of the Resident Coordinator/Humanitarian Coordinator (RC/HC) (where there are no peacekeeping or political missions). These bodies enjoy broad investigatory powers, as indirectly confirmed by the Provisional Guidance Note which indicates that the SRSG and the RC/HC may gather information from a large variety of sources including local government authorities and institutions, UN Civilian, Police and Military Peacekeeping presence, local and international NGOs, civil society organisations, religious institutions and faith-based networks. Upon receiving information on the occurrence of conflict-related sexual crimes from the SRSG or RC/HC⁷⁴ the Working Group on CRSV technically reviews it. This is in order to provide objective and reliable information on these crimes to the UN Secretary-General for the drafting of its country reports on sexual violence. This review also serves giving some objective and reliable information and

73. According to the CEDAW Recommendation No. 19, gender-based violence is “violence that is directed against a woman because she is a woman or that affects women disproportionately” and it includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. *U.N. Comm. On the Elimination of Discrimination Against Women, Report of the Committee on the Elimination of Discrimination Against Women, 11th session*, ¶ 6 U.N. Doc. A/47/38 (June 24, 1992), <https://digitallibrary.un.org/record/148001?ln=en> [<https://perma.cc/54AR-7QXC>]; see also *Inter-Agency Standing Comm., Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies* (Sept. 1, 2005), https://interagencystandingcommittee.org/system/files/legacy_files/guidelines_for_gender_based_violence_interventions_in_humanitarian_settings_english.pdf [<https://perma.cc/K652-3N45>].

74. SRSG or RC/HC should ensure that a technical-level Working Group on Conflict Related Sexual Violence is established for implementation of resolution 1960.

data to the UN Security Council for triggering its future actions towards their perpetrators, including for the use of the information provided by the MARA process as the basis for recommending investigations on these crimes by the ICC.⁷⁵

E. *An Analysis of the Criticisms of the MARA Mechanism*

The MARA has been increasingly used as an institutional tool for the engagement of parties in conflict and advocacy with themselves and other political actors in a position to exercise influence on the parties.⁷⁶ And this is mainly in order to secure time-bound commitments to end CRSV and to support Security Sector Reform (SSR) efforts to build capacity to address this form of violence.⁷⁷

Despite these and other successes facilitated by the participation and engagement of the Women Protection Advisors (WPAs) in the daily work and functioning of MARA, there are also various aspects of the MARA process that are or may be criticised in public debates and writings. One of the major and most common criticisms is that the MARA process would be clearly designed to work in retrospect.⁷⁸ This is notwithstanding it might also function to indirectly prevent new SVC occurrences. Another, and more general, criticism that has recently been voiced by Catherine O'Rourke has to do with the fragmented protection of women's rights in conflict of which MARA is partially indirectly responsible.⁷⁹ A further possible criticism worthy of being recalled could be the lack of consideration in MARA of the fact that women experience armed conflict in a different way than men. This is a criticism that could be easily motivated by reference to the subject-matter scope of application of MARA that encompasses sexual crimes and abuses committed either against women or men.

75. Working Groups should prepare Terms of Reference to guide their work, tailored to the specific country context. The Terms of Reference should specify division of labour i.e. UN entity leads in execution of particular functions such as monitoring and verification, etc.

76. By 2018, all peacekeeping operations with protection of civilians mandates had also established monitoring arrangements and incorporated early warning indicators for CRSV into their protection structures. See Louise Olsson et al., *Peacekeeping Prevention: Strengthening Efforts to Preempt Conflict-related Sexual Violence*, TAYLOR & FRANCIS ONLINE (July 13, 2020), <https://www.tandfonline.com/doi/full/10.1080/13533312.2020.1782752> [<https://perma.cc/F3U6-2NS7>].

77. *Id.*

78. See Crawford Jamieson, *Student Reflections on the 20th Anniversary of the Women Peace and Security Agenda*, UNIV. OF PA. SCH. OF LAW (Dec. 9, 2019), <https://www.law.upenn.edu/live/files/10043-wps-report> [<https://perma.cc/TM5F-XQ8V>].

79. See CATHERINE O' ROURKE, WOMEN'S RIGHTS IN ARMED CONFLICT UNDER INTERNATIONAL LAW 29–33 (2020). See also Gloria Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*, INT'L REVIEW OF THE RED CROSS (Sept. 2015), <https://international-review.icrc.org/articles/sexual-violence-armed-conflicts-violation-international-humanitarian-law-and-human-rights> [<https://perma.cc/ULW6-F4ZL>].

F. *The MARA's Structural Inability to Monitor Violence in Armed Conflict Situations Other than Sexual Violence*

The MARA's inability to monitor and report on forms of violence other than sexual violence and abuse is one of the most evident problems connected with the work and functioning of the MARA process.⁸⁰ First, the MARA has very limited authority, if any, to monitor any human rights violation against civilian personnel even if committed in an armed conflict or post-conflict situation. In fact, MARA is not an independent human rights monitoring body, and under its operating rules and procedures it is essentially expected to gather information and data on sexual violence and abuse in armed conflict as well as data on the perpetrators. It also follows, then, that the MARA has a weak capacity to prevent sexual violences and abuses from taking place in armed conflict settings.

The MARA is unable to prevent gender-based violence, however, this is a task that is often accomplished by the Women Protection Advisors (WPAs) on missions. For example, this happened in the case of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC),⁸¹ as documented by the Inter Press Service News Agency and also by a Stop Rape Now lengthy report on the implementation of the MARA in the Democratic Republic of Congo (DRC).⁸² In the latter, it was found, in particular, that: "the presence of a WPA/Human Rights Officer facilitated coordination of the work of the MARA Working Group; brought relevant actors together to analyse the information; and, facilitated the analysis of trends and patterns to inform UN responses to sexual violence on the ground."⁸³ Although helpful, the WPAs cannot be the only modality to be used for preventing sexual violence and abuse in armed conflict and post-conflict scenarios. Indeed, that this cannot be so is indirectly confirmed by the recent chronicle of armed conflicts that witnesses a growing and unprecedented escalation of sexual violences and abuses against women and girls in particular, and this includes those conflicts that are or were characterized by the presence

80. See, e.g., KATY BARNETT & ANNA JEFFERYS, *FULL OF PROMISE: HOW THE UN'S MONITORING AND REPORTING MECHANISM CAN BETTER PROTECT CHILDREN* 14 (2008) (stressing that in Nepal the single most common frustration for MRM Task Force members—including international and national NGOs—was the lack of adequate programmatic follow-up for children reporting violations).

81. In accordance with Security Council resolution 1925 of 28 May 2010, MONUC was renamed as of 1 July the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) to reflect the new phase reached in the country. See *MONUC U.N. Org. Mission in the Dem. Rep. Congo*, U.N. PEACEKEEPING, <https://peacekeeping.un.org/mission/past/monuc/> [<https://perma.cc/8AFR-FDPH>] (last visited Sept. 6, 2021).

82. According to the United Nations (UN), over 200,000 women have suffered sexual violence in the DRC since the armed conflict began. See Gaggioli, *supra* note 79, at 504.

83. *Id.*

of WPAs.⁸⁴ Moreover, that this cannot be so is also accepted and authoritatively acknowledged by the UN Secretary-General, António Guterres, in a well-known speech of 2019 dealing with the implementation of the Women Peace and Security Agenda and its current needs.⁸⁵

IV. THE MARA'S INABILITY TO ENHANCE THE PUBLIC ACCOUNTABILITY OF THE SEXUAL VIOLENCE PERPETRATORS

A further criticism of the existing process of monitoring and reporting on sexual violence and assaults in armed conflicts and post conflict situations is that MARA is not able to improve the external accountability of the perpetrators of these crimes. First, in relation to MARA's role of enhancing public accountability, some critics have claimed that MARA lacks the power to directly refer the perpetrators of sexual violence to international justice mechanisms.⁸⁶

The main fact corroborating this claim is that, ten years and more after the implementation of MARA, there is still a lack of timely and comprehensive data and information on CRSV in the UN Reports.⁸⁷ The UN Secretary-General has attempted to explain this underreporting situation by referring to the intimidation and stigmatization that is generally suffered by the survivors of sexual violence and abuse⁸⁸ and also by referring to the restrictions on access to the pertinent data items for the competent UN authorities.⁸⁹

In addition, some critics have rightly argued that the lack of adequate financial resources for MARA,⁹⁰ and the lack of its integration in the

84. See also Louise Bosetti & Hannah Cooper, *Where are the Women? How the UN is Falling Short on Gender and Conflict*, U.N. UNIV. CTR. FOR POL'Y RSCH. (Nov. 17, 2015), <https://cpr.unu.edu/where-are-the-women-how-the-un-is-falling-short-on-gender-and-conflict.html> [<https://perma.cc/82AT-97P2>].

85. See U.N. News, 'Real change' involving women in peace and security, still too slow, Guterres tells Security Council (Oct. 29, 2019), <https://news.un.org/en/story/2019/10/1050151> [<https://perma.cc/GJB5-3PBL>].

86. See Jameison, *supra* note 78, at 19.

87. See U.N., *Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence* (2020), <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/2020.08-UN-CRSV-Handbook.pdf> [<https://perma.cc/9JY2-AU5X>].

88. U.N. GAOR, 65th Sess., 33d mtg. at 10, U.N. Doc. S/PV.33 (Nov. 24, 2010).

89. Rep. of the S.C., at 86, 91, 92, 108, U.N. Doc. S/2019/280 (2019), https://reliefweb.int/sites/reliefweb.int/files/resources/S_2019_280_E.pdf [<https://perma.cc/PN9G-9NDU>].

90. See Pramila Patten, *Statement of SRSRG-SVC Pramila Patten, Security Council Open Debate on Conflict-Related Sexual Violence, "Turning Commitments into Compliance," OCHA Services* (July 17, 2020), <https://reliefweb.int/report/world/statement-srsg-svc-pramila-patten-security-council-open-debate-conflict-related-sexual> [<https://perma.cc/HJA2-2PZJ>] (statement of SRSRG-SVC Pramila Patten according to which: "the MARA is only as effective as the resources and capacity behind it."). But see *UN Action against Sexual Violence in Conflict*, UN <https://www.un.org/sexualviolenceinconflict/about-us/un-action/> [<https://perma.cc/RDV5-89GN>].

structure and functioning of the UN peace missions, also compromises the capacity of the MARA process to boost the external accountability of sexual violence perpetrators.⁹¹ Rather than an accountability-based argument, this criticism focuses on MARA's operation and functioning. Because the monitoring activities of MARA are usually carried out in concreto by local NGOs that often are not sufficiently trained and/or by UN interim personnel that change frequently, any data and information gathered by them remains potentially incomplete and thus questionable. Perhaps the best example that may and was put forward to support this claim are the monitoring activities of MARA in South Sudan.⁹² This is because these activities were carried out in the Protection of Civilians (PoC) sites⁹³ but not also in outside areas of the country like the Southern Unity, regardless of sexual violence and abuse in those areas being at that time widespread and systematic.⁹⁴ Another supporting example that can be brought here is Libya, where CRSV perpetrated against both female and male asylum seekers has remained largely unreported by MARA officers—and this, again, regardless of the fact that numerous CRSV incidents in Libya were denounced by various parties including leading humanitarian organizations⁹⁵ and the ICC Prosecutor.⁹⁶

These and other examples are also useful for indicating another common reason for criticism of MARA: namely its attitude of limiting the monitoring activities to the escalating acts of CRSV, leaving aside any intervention upon early warnings on situations that might lead to new

(last visited Nov. 2, 2021) (in January 2020 a successor fund was developed, the Conflict-Related Sexual Violence MPTF, or “CRSV-MPTF.” The CRSV-MPTF focuses on a survivor-centred prevention and response, the root causes of CRSV, greater justice and accountability, as well as joint impact including through strengthened coordination and information-sharing. The CRSV-MPTF focuses on a survivor-centred prevention and response, the root causes of CRSV, greater justice and accountability, as well as joint impact including through strengthened coordination and information-sharing.)

91. See, e.g., S. Davies et al., *What Works (and Fails) in Protection*, in THE OXFORD HANDBOOK OF WOMEN, PEACE, AND SECURITY 170 (2018).

92. Ninth Consolidated Annual Progress Report on Activities Implemented under the UN Action Against Sexual Violence in Conflict Fund (June 11, 2018), <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/report/un-action-progress-report-2017/UN-Action-Progress-Report-2017.pdf> [<https://perma.cc/Q5JQ-BDZV>].

93. See Damian Lilly, *Protection of Civilians sites: a new type of displacement settlement?*, HUM. PRAC. NETWORK (Sept. 2014), <https://odihpn.org/magazine/protection-of-civilians-sites-a-new-type-of-displacement-settlement/> [<https://perma.cc/K5PT-HY63>].

94. Ninth Consolidated Annual Progress Report, *supra* note 92.

95. UNSMIL, UN in Libya Statement on “International Day for the Elimination of Sexual Violence in Conflict Zones” (June 19, 2020), <https://unsmil.unmissions.org/un-libya-statement-international-day-elimination-sexual-violence-conflict-zones/>.

96. Prosecutor of the International Criminal Court, Nineteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (May 5, 2020), <https://www.icc-cpi.int/itemsDocuments/19th-report-icc-otp-UNSC-libya-ENG.pdf> [<https://perma.cc/8V6P-ZWV>].

atrocities. Davis and Swaine have commented on this attitude when they argued that the reason behind it shall be found in the political propension of the UN Security Council to restrict its action to armed conflict and post conflict situations that are already in the UN Security Council's peace and security agenda.⁹⁷

A. The Abolition of the Distinction Between Men and Women in the Operation and Functioning of the MARA's Process and Reporting of Sexual Violence

Not only is MARA unable to enhance the public accountability of the perpetrators of CRSV incidents, it is also unable to distinguish between the harmful effects caused by CRSV respectively to men and on women. This is surprising, considering that the diversity of the effects produced by CRSV on women and men has been theorized by scholars from legal and social sciences since long before the establishment of the MARA.⁹⁸ Professor Sandesh Sivakumaran's lengthy article in the *European Journal of International Law* offers a vivid example in this respect when he claims the existence of particular forms of male sexual violence such as enforced nudity, enforced masturbation and genital violence.⁹⁹ And also when he insisted on the necessity of providing different forms of protection for men and women victims of violence and abuses in armed conflicts.¹⁰⁰

Less surprising, though equally unfortunate, is that MARA embodies the distinction between sexual violence committed in armed conflict settings and sexual violence suffered but not related to armed or post conflict scenarios. As a result of this distinction, only the first type of violence is monitored by the MARA. Rightly, this distinction too has been contested by scholars and opinionists as being meaningless, and this is mainly because it determines the inability for the UN Security Council to regularly receive information and data on sexual violence and abuse that is only indirectly related to an armed conflict.¹⁰¹ The MARA's monitoring activities in Nigeria perfectly illustrate this point. Here, in

97. Aisling Swaine, *Practicing Women Peace and Security in Post-Conflict Reconstruction*, in INT'L LAW AND POST-CONFLICT RECONSTRUCTION POL'Y 66, 91 (James Sweeny & Matthew Saul eds., 2016).

98. See generally Nicola Henry, *Theorizing Wartime Rape: Deconstructing Gender, Sexuality, and Violence*, 30 GENDER & SOC'Y 44 (2016); Malaika Rajandran, *Conference Papers: I. New Forms of Conflict and Violence Sexual Violence and International Law*, 23 REFUG. SURV. Q. 58 (2004).

99. See Sivakumaran, *supra* note 55, at 253.

100. See Sivakumaran, *supra* note 55, at 275–76.

101. See, e.g., Alcorn, *supra* note 18, at 2035 (“Some doubt that meaningful measurements of sexual violence are even possible.”); Carlo Koos, *What Do We Know About Sexual Violence in Armed Conflicts?* (Ger. Inst. of Glob. & Area Studies, Working Paper No. 275, 2015), https://www.files.ethz.ch/isn/191737/wp275_koos.pdf [<https://perma.cc/TR8T-CE6R>].

fact, the monitoring and reporting activities were restricted to the northern part of the country where the terroristic group, Boko Haram was active in committing sexual crimes.¹⁰² This is regardless of the fact that grave sexual violence and abuse was also taking place in southern Nigeria, including the capital city, where thousands of women were forcibly hired by human traffickers for sexual exploitation. The reason for this was precisely that in the south of Nigeria there was no armed conflict going on and thus no possibility for the MARA to be established and operate.

B. Possible Alternatives to the MARA

Notwithstanding various recurring difficulties and problems with the MARA, scholars and practitioners have indicated few alternatives. This is far from surprising: MARA has not received much attention from scholars and practitioners so far. Those few who have addressed the subject have explored the option of fixing the MARA's shortcomings by working within its current institutional framework. One approach has focused on improving the MARA's capacity of gathering information on CRSV by allowing its components to get better training on sexual crimes and on their investigation techniques. Exemplary of this approach is the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict.¹⁰³ Introduced in 2017, the Protocol aims to help overcome the obstacles to prosecution of sexual crimes and abuses, by setting out clearly and comprehensively the basic principles of documenting sexual violence as a serious breach of international law.¹⁰⁴ Related to this option is the proposal of a UN-Action for sharing information and data and providing responses to sexual- and gender-based violence.¹⁰⁵ Another and more sophisticated approach has focused on widening the MARA's mandate by allowing the body to monitor and report on sexual violence incidents other than those that are directly associated with armed conflict or post conflict settings. Other proposals have concentrated on the need for better problem-solving by ensuring that the MARA has the capacity to supervise fundamental follow-up actions

102. Joe Read, 'Sexual violence and the Boko Haram crisis in north-east Nigeria', HUM. EXCH., Oct. 2017, at 24.

103. See Sara Ferro Ribeiro & Danaé van der Straten Ponthoz, *Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*, Mar. 2017, at 11; see also Diane Lupig, *Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court*, 17 AM. U. J. GENDER, SOC. POL'Y & THE LAW 431 (2009).

104. See Lupig, *supra* note 103, at 457; see also Chile Eboe-Osuji, *Grave Breaches as War Crimes: Much Ado About Serious Violations?*, <https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf> [<https://perma.cc/7U5S-932J>] (last visited Sept. 3, 2021).

105. See House of Lords Select Committee on Sexual Violence in Conflict, Report, 2015-2016, HL 123 (UK).

and measures taken in regard to the victims of sexual violence for the enhancement and implementation of their rights.¹⁰⁶

C. *Widening the MARA's Mandate*

One set of suggested modifications to the present MARA deals with the enlargement of its institutional mandate to cover any type of sexual violence and abuse; which would essentially transform the MARA process into a holistic compliance mechanism of the international legal framework of sexual violence.¹⁰⁷ Dr Noëlle Quénivet implicitly advocates this evolution when she claims that the reporting system under the Convention on the Elimination of all Forms of Discriminations Against Women (CEDAW) might be used in accordance with the CEDAW Committee's General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict, and also when she encourages the CEDAW Committee to include the consideration of the human rights of women in conflict situations in its monitoring process, in accordance with CEDAW General Recommendation No. 30.¹⁰⁸ Dr. Quénivet as well as the House of Lords, in its thematic report on sexual violence in armed conflict, calls for an enlargement of the MARA's mandate that, seen from their perspective, would need to be accompanied by renewed attention to and better focus on the prevention of sexual violence in conflict.¹⁰⁹ Having said that, it is worth recalling that the 11th report of the United Nations Secretary General on CRSV contains critical remarks on the MARA's mandate, in particular when it indirectly deplored the lack of good evidence that the MARA process has produced regarding rape and other forms of sexual violence and abuse and also when it recalls that sexual violence and abuse is rampant in most armed conflict and post conflict scenarios.¹¹⁰

106. See G.A. Res. 60/47, ¶ 11, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005) (describing victims' rights in general and on the victim's right to remedies in particular).

107. See SELECT COMMITTEE ON SEXUAL VIOLENCE IN CONFLICT, REPORT OF SESSION, 2015–16, HL 180, at 78 (UK).

108. See also SELECT COMMITTEE ON SEXUAL VIOLENCE IN CONFLICT, REPORT OF SESSION, 2015–16, HL 180, at 7 (UK).

109. See Noëlle Quénivet, *Sexual Violence in Armed Conflict* (Feb. 2017), https://www.researchgate.net/publication/313528275_Sexual_Violence_in_Armed_Conflict [<https://perma.cc/3QZF-K4BK>]; see also NOËLLE N. R. QUÉNIVET, SEXUAL OFFENSES IN ARMED CONFLICT AND INTERNATIONAL LAW 10 (2005).

110. See Save the Children, *The UN Monitoring and Reporting Mechanism on Children's Rights in Armed Conflict*, SOMALI FAM. SERV. (July 2009), <http://ussfs.org/sfs/wp-content/uploads/2012/07/STC-Policy-Brief-on-MRM-July-2009.pdf> [<https://perma.cc/CZZ9-G7CK>].

D. *Encouraging a MARA Follow-Up Approach to Sexual Violence in Armed Conflict*

Similarly to Dr. Noëlle Quénivet, the drafters of the Provisional Guidance Note on the Intersections Between the Monitoring, Analysis and Reporting Arrangements (MARA) & the Gender-Based Violence Information Management System (GBVIMS) of 2016 (the Provisional Guidance Note on the Intersections between MARA and GBVIMS), also discuss the need for the MARA to develop a broader “follow-up” approach to the implementation of its activities.¹¹¹ In essence, the drafters of the Provisional Guidance Note on the Intersections between MARA and GBVIMS see benefits in expanding the role of the MARA from a mainly crime monitoring role to that (wider role) of an active and effective supervisor of follow-up issues and programmes as well.¹¹²

To highlight some of these benefits, these drafters use the experience of the MARA country task forces in Côte d’Ivoire, Mali and South Sudan as case studies.¹¹³ A common finding in such cases is that, although there are some positive examples of use of the information and data gathered through the MARA process to push for improvements at the national level, the potential of the MARA might be used to greater effect in each context to press for the elaboration of national solutions to support the victims/survivors of sexual violence.¹¹⁴ Following a similar approach and line of reasoning, Siân Natasha Thomas, Hoayda Darkal and Lisa Jane Goodson lament that the MARA reports and findings might have been used more strategically to go beyond the mere monitoring and reporting of the CRSV incidents to the UN Security Council and UN General-Secretary.¹¹⁵

111. See also Quénivet, *Sexual Offenses in Armed Conflict & International Law*, *supra* note 109.

112. UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *supra* note 28, at 4–5.

113. Five countries were selected for an “accelerated rollout” of the MARA: Central African Republic, Democratic Republic of Congo, Côte d’Ivoire, Mali, and South Sudan. MARA working groups are operational in three out of these five countries.

114. See Christine Evans, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 128 (2012) (discussing the right to reparation of the victims of sexual violence and abuses at armed conflicts); see also Sofia Levy Nilsson, *Extending the law: An analysis of the ICC and sexual violence in armed conflict* (2018) (M.A. thesis, Uppsala University) (<http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1218567&dsid=6311> [<https://perma.cc/MP3R-SVJ7>]) (writing on the notions of “victims of sexual violence in armed conflict” within the framework of international criminal law).

115. See Siân Natasha Thomas et al., *Monitoring and reporting incidents of sexual and gender-based violence across the refugee journey*, 16–17 (Univ. of Birmingham Inst. for Rsch. into Superdiversity, Working Paper No. 29, 2019), https://www.researchgate.net/publication/331647108_Monitoring_and_reporting_incidents_of_sexual_and_gender-based_violence_across_the_refugee_journey [<https://perma.cc/9J8V-FZY4>].

E. *The Transformation of MARA Into A De Facto Though Not De Jure Auxiliary Organ of the ICC as an Alternative*

Predictably, the MARA process—while advanced and sophisticated when it was established in 2010—has become the object of rethinking during the subsequent years of its operation and functioning. It is because the present MARA has largely failed to stop the advancement of CRSV incidents,¹¹⁶ notwithstanding the fact that it has gathered evidence in several armed conflict and post-conflict scenarios. I propose its transformation into a new mechanism aimed at materially supporting the Office of the Prosecutor (OTP) of the ICC in the investigations of rapes and other forms of sexual violence and abuses occurring in armed conflict settings.

My proposal is in tune with the function of the ICC as a “security court” employed by the UN Security Council with the mandate to help restore international security and peace with regard to ongoing armed conflicts.¹¹⁷ This is based upon six fundamental assumptions. First, in today’s era where rape and other forms of sexual violence are tragically prevalent in several modern conflicts it is axiomatic that the duty to prosecute and criminalize these acts constitutes one of the foundations and objectives of contemporary international criminal law and justice.¹¹⁸ This is so regardless of the fact that the concept of “rape” as an international crime is relatively new and recent.¹¹⁹ In fact, rape was

116. An “incident” is broadly speaking any event, situation, or set of circumstances that has the potential to require an investigation because it raises concern about a possible violation of international humanitarian law. See NOAM LUBELL, JELENA PEJIC & CLAIRE SIMMONS, GENEVA ACADEMY, GUIDELINES ON INVESTIGATING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: LAW, POLICY, AND GOOD PRACTICE 10 (2019).

117. See Florian Jessberger & Julia Geneuss, *The Many Faces of the International Criminal Court*, 10 J. INT’L CRIM. JUST. 1081, 1081 (2012) (suggesting that the ICC is more than just a criminal court proper adjudicating individual criminal responsibility). See also Melanie O’Brien, *Where Security Meets Justice: Prosecuting Maritime Piracy in the International Criminal Court*, 4 ASIAN J. INT’L L. 81 (2014); 3 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW 263 (2016) (also recalling that the ICC as a security court is “not subject to the usual constraints of complementarity”).

118. See, e.g., Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes* (2015) 48 CORNELL INT’L L. J. 640 (2015); PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 5 (Serge Brammertz & Michelle Jarvis eds., 2018). See also Helen Durham, *Women, Armed Conflict and International Law* (2002), 84 INT’L REV. OF THE RED CROSS 655, 655–59 (2002); Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation* (unpublished manuscript, 2018) (on file with Office of the United Nations High Commissioner for Human Rights) (recalling that: “Parallel to the post World War II developments of IHL, rape also incrementally gained recognition as an international crime, including as a crime against humanity”).

119. See Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT’L L. 225, 227 (2007); Maria Eriksson, *DEFINING RAPE: EMERGING OBLIGATIONS FOR STATES UNDER INTERNATIONAL LAW* 75 (2011); see also David Mitchell, *The Prohibition of Rape in*

accepted as an express form of crime against humanity via the incorporation of international crimes into domestic military codes and national legislations,¹²⁰ together with the other fact that there is a well consolidated consensus on the definition of rape, both in terms of the *actus reus* and *mens rea*, provide a confirmation for the above conclusion.¹²¹ And the same does the listing of rape as an international crime in the statutes of international criminal courts and tribunals of the 1990s and early years of the twenty-first century¹²² as well as the wide range of offenses under which SGBC may be investigated and prosecuted.¹²³ The list of sexual assault crimes within the subject matter jurisdiction of the international and mixed international forum has gradually expanded after the drafting of the ICC Statute and of the ICC's Rules of Evidence and Procedure offers further corroborating evidence in this sense if needed.¹²⁴ With things being as such, it is clear that it would be both desirable and useful for the MARA to transform into a *de facto* auxiliary organ of the ICC or, to say it more precisely, into a fact-finding mechanism aimed at assisting the OTP of the ICC (its Gender and Children's Unit in particular)¹²⁵ in its preliminary examinations¹²⁶ and investigations of rape and other forms of sexual violence and abuse occurring in armed conflict.¹²⁷ This is also especially evident if one

International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine, 15 DUKE J. COMP. INT'L L. 219, 224 (2006).

120. See 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 2193 (Jean-Marie Henkaerts & Louise Doswald-Beck eds., 2005).

121. See Henkaerts et al., *supra* note 120, at 2193

122. *Id.* at 2193.

123. *Id.*

124. See also Rosemary Grey & Louise Chappell, *Prosecuting Sexual and Gender-Based Crimes in the International Criminal Court: Inching Towards Gender Justice* in Solange Mouthaan & Olga Jurasz (eds.), *Gender and War International and Transitional Justice Perspectives* (2019), at 209 (recalling that: “[t]he Statute gives the ICC power to prosecute a broad range of sexual and gender-based crimes in situations of war, conflict and genocide”); see also María del Rosario Ojinaga Ruiz, *La prohibición y criminalización en Derecho Internacional de las violencias sexuales contra mujeres civiles en conflictos armados*, 19 BOLETÍN DE LA FACULTAD DE DERECHO DE LA UNED, 199 (2002).

125. The Gender and Children's Unit was established to give help, advice and assistance to the OTP divisions, including for sexual and gender-based crimes, during all phases (from the pre-analysis phase onwards). See Diane Lupig, *Investigation and Prosecution of Sexual and Gender-Based before the International Criminal Court*, 17 AM. J. OF GEND. SOC. POL'Y L. 1, 4 (2009).

126. According to the Rome Statute, the OTP can launch preliminary examinations in countries where there is a reasonable basis to believe that crimes under the Statute have been committed. See Carsten Stahn, *Damned If You Do, Damned If You Don't*, 15 J. OF INT'L CRIM. JUST. 413 (2017). See also Erla Ylfa Oskarsdottir, *The Gendered Politics Behind the International Criminal Court*, 14 E-INT'L RELATIONS (2020), <https://www.e-ir.info/2020/07/30/the-gendered-politics-behind-the-international-criminal-court/> [<https://perma.cc/VNW9-LVZ4>].

127. According to the Rome Statute, appropriate measures should be taken to ensure the effective investigation and prosecution of any crime within the jurisdiction of the Court “in

considers the failures and difficulties of the OTP¹²⁸ in investigating and prosecuting CRSV and gender-based crimes,¹²⁹ notwithstanding some important exceptions such as the notable charges in the Darfur case of rape as a form of genocide.¹³⁰ These failures and difficulties are well illustrated and exemplified by the well-known *Lubanga* case concerning the first person arrested by the ICC, where the Court (the OTP) did not recognize and integrate the gender-based nature of crimes committed against girl child soldiers into making their case during the trial.¹³¹ Surprisingly, this was despite several allegations of girls being kidnapped into the Lubangas' militia and being raped and/or kept as sex slaves.¹³²

The second fundamental assertion relates to the implementation of Article 54(1)(b) of the Rome Statute directing the ICC Prosecution to investigate and prosecute crimes in a gender-sensitive way, as well as to the implementation and enforcement of the *ICC Policy Paper on Sexual*

particular where it involves sexual violence, gender violence or violence against children.” (Art. 54(1)(b)). See Lupig, *supra* note 125, at 433.

128. See, e.g., *Recent Policy Paper, International Criminal Law—Sexual and Gender-Based Crimes—ICC Outlines Policies to Help Improve Prosecutorial Outcomes—The Office of the Prosecutor of the ICC, Policy Paper on Sexual and Gender-Based Crimes*, 128 HARV. L. REV. 793, 797–800 (2014); Fatou Bensouda, *Looking Back, Looking Ahead - Reflections from the Office of the Prosecutor of the ICC*, 11 WASH. U. GLOBAL STUD. L. REV. 437, 443 (2012); Olga Jurasz, *Gender-Based Crimes at the ICC: Where is the Future?*, 108 AM. SOC'Y INT'L L. 429, 432 (2015).

129. Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* xiv (1997); Maria Eriksson Baaz, & Maria Stern, *Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)*, 53 INT'L STUDIES Q. 495, 503 (2009); Susana Sacouto & Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court Symposium: Prosecuting Sexual and Gender-Based Crimes Before International/ized Criminal Courts*, 2 17 AM. J. OF GEN. SOC. POL'Y LAW 337 (2009); see also Erla Ylfa Oskarsdottir, *The Gendered Politics Behind the International Criminal Court*, E-INT'L RELATIONS (2020), <https://www.e-ir.info/2020/07/30/the-gendered-politics-behind-the-international-criminal-court/> [<https://perma.cc/YBZ3-PT5D>] (focusing on the difficulties of the OTP in adopting a gender analysis approach to its investigation and prosecution of sexual and gender-based crimes). See generally, Binaifer Nowrojee, *We Can Do Better Investigating and Prosecuting International Crimes of Sexual Violence*, DOCPLAYER, <http://docplayer.net/5822787-We-can-do-better-investigating-and-prosecuting-international-crimes-of-sexual-violence-by-binaifer-nowrojee-1-nowrojee-fas-harvard.html> [<https://perma.cc/X7DJ-AEMG>] (discussing the difficulties of investigating sexual crimes *ex multis*).

130. See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF [<https://perma.cc/97GL-SM23>]; Lupig, *supra* note 103, at 322.

131. *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, ICC (Mar. 14, 2012), <https://www.refworld.org/cases/ICC,4f69a2db2.html> [<https://perma.cc/7B9L-GFNE>].

132. Jurasz, *supra* note 128, at 430; Susana Sacouto & Katherine Cleary, *supra* n. 129, at 341; see generally Alex Whiting, *Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case*, 14 UCLA J. OF INT'L L. AND FOREIGN AFFAIRS 227 (2009).

and Gender-Based Crimes that was adopted by the OTP in 2014.¹³³ Although the implementation of the *ICC Policy Paper* has yielded important results,¹³⁴ it would be hard to deny that it would improve further if the OTP, that currently suffers from “overall basic size and capacity constraints,”¹³⁵ was systematically assisted and helped by the MARA process in its preliminary examinations and investigations of sexual crimes.¹³⁶

Third, the above-indicated reform of the MARA seems to be suggested and largely justified by the language of the UN Security Council resolutions concerning sexual violence against girls and women in situations of armed and post-armed conflict, including in resolutions 1960 of 2010 and 2106 of 2013. Given that the language that was used in these Security Council resolutions is a language that explicitly recalls and explicitly refers to the range of sexual violence offenses as addressed in the Rome Statute.¹³⁷

Fourth, the above-mentioned reform of MARA, if adopted, would help the OTP through the fact-finding evidence provided to it by MARA in looking more closely and thoroughly at the victims of sexualised violence and at the conflict wherein that violence was committed. Moreover (and strictly connected with this) the above-mentioned reform would also support the OTP in collecting the evidence necessary to meet the “reasonable basis” criteria to proceed with an investigation as requested by Article 15(3) of the Rome Statute.¹³⁸

133. See Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, (2018) 24 WM. & MARY J. WOMEN & L. 443, <https://scholarship.law.wm.edu/wmjowl/vol24/iss3/2> [<https://perma.cc/L8WS-6JRY>]; Dienneke de Vos, *Prosecuting sexual and gender-based violence at the International Criminal Court*, in Laura J. Shepherd (ed.), *Handbook on Gender and Violence* (2019), at 353; Erla Ylfa Oskarsdottir, *supra* note 125.

134. Jurasz, *supra* note 128, at 430.

135. See Kai Ambos, *Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation* (Int'l Crim. Ct.) 57 INT'L LEGAL MATERIALS, 1131 (2018).

136. Ambos, *supra* note 135, at 1131.

137. See Françoise Krill, *The Protection of Women in International Humanitarian Law*, 249 INT'L REV. RED CROSS 337, 359 (1985); Hilmi Zawati, *Review Essay of Rethinking Rape Law: International and Comparative Perspectives Edited by Clare McGlynn and Vanessa Munro* (New York, N.Y.: Routledge, 2010), 10 J. OF INT'L LAW & INT'L RELATIONS 31-43; See Alain-Guy Tachou-Sipowo, *The Security Council on Women in War: Between Peacebuilding and Humanitarian Protection*, 92 INT'L REV. RED CROSS, 199 (2010).

138. “Article 15(3) of the Rome Statute sets the threshold for determining whether the available evidence is sufficient, requiring a ‘reasonable basis’ to advance to investigation.” See Alexa Koenig et al., *Open Source Fact-Finding in Preliminary Examinations*, in *QUALITY CONTROL IN PRELIMINARY EXAMINATION*: 2, 681–82 (Morten Bergsmo & Carsten Stahn eds., 2018), <https://www.law.berkeley.edu/wp-content/uploads/2018/09/Preliminary-Examinations.-Chapter-34-Koenig-McMahon-Mehandru-and-Bhattacharjee.pdf> [<https://perma.cc/9X2C-GS8P>] (stressing that: “In making this determination” whether the available evidence is sufficient to advance an

Fifth, the above-mentioned reform would also help the OTP in minimizing, if not eliminating, the necessity for this body to make recourse to human rights reports produced by NGOs. A recourse that, though allowed by *OTP Policy Paper on Preliminary Examinations*,¹³⁹ is difficult and highly problematic,¹⁴⁰ as it can lead amongst other things to the risks of overly simplistic narratives of the sexual violences and abuses as explained in particular by Dov Jacobs and Catherine Harwood.¹⁴¹

Lastly, the suggested reform of MARA would enlarge and enrich the UN Security Council's interaction with the ICC, which is currently restricted solely to the Council's recourse to the referral procedure to the ICC. Indeed this is another effect of the suggested reform whose utility cannot be underestimated, in particular when the many problems and criticisms connected to the above-mentioned referral procedure are taken into consideration.¹⁴²

investigation, "the OTP must grapple with all of the information at its disposal, including both traditional and newer forms of evidence").

139. ICC OTP, *Policy Paper on Preliminary Examinations*, at 31, (Nov. 1, 2013), <https://www.legal-tools.org/en/doc/acb906/> [<https://perma.cc/HSB5-2CMN>].

140. See Morten Bergsmo & William H. Wiley, "Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes," ¶ 3, in *MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS* (Siri Skåre, Ingvild Burkey & Hege Mørk, eds. 2008), <https://www.legal-tools.org/doc/8362d5/> [<https://perma.cc/38J6-2VTQ>].

141. See Dov Jacobs & Catherine Harwood, *International Criminal Law Outside The Courtroom: The Impact of Focusing on International Crimes for the Quality of Fact-Finding by International Commissions of Inquiry*, in *QUALITY CONTROL IN FACT-FINDING*, 325, 325–57 (Morten Bergsmo ed., 2013), <https://www.toaep.org/ps-pdf/19-bergsmo> [<https://perma.cc/JB4T-N69Y>] (stressing that "[t]echnically, ... human rights reports are to be considered as one of the weakest possible sources of criminal evidence, namely anonymous hearsay[.]"); see also Carsten Stahn & Dov Jacobs, *The Interaction Between Human Rights Fact-Finding and International Criminal Proceedings: Towards a (New) Typology*, in *THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING* 255 (2016); Stephen Wilkinson, *Finding the facts: Standards of proof and information handling in monitoring, reporting, and fact-finding missions*, *HARV. PROGRAM ON HUM. POL'Y & CONFLICT RSCH.*, 14, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400927 [<https://perma.cc/R52N-8DF6>] (Feb. 2014); Micaela Frulli, *Fact-Finding or Paving the Road to Criminal Justice?: Some Reflections on United Nations Commissions of Inquiry*, 10 *J. OF INT'L CRIM. JUST.* 1323, 1323–38 (2012); Human Rights First, *The Role of Human Rights NGOs in Relations to ICC Investigations: Discussion Paper*, The Hague, Sept. 2004; Eva Buzo, *Capturing a Crisis: What Lessons Can We Learn from the 'Overdocumentation' of the Rohingya Crisis?*, *JUST. IN CONFLICT* (May 20, 2020), <https://justiceinconflict.org/2020/05/20/capturing-a-crisis-what-lessons-can-we-learn-from-the-overdocumentation-of-the-rohingya-crisis/> [<https://perma.cc/TX63-DKW6>].

142. For some critical views on the referral mechanism to the ICC, see, e.g., Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 *J. OF INT'L CRIM. JUST.* 333, 333–52 (2009); Gabriel M. Lentner, *Why the ICC won't get it right – The Legal Nature of UN Security Council Referrals and Al-Bashir Immunities*, <https://www.ejiltalk.org/why-the-icc-wont-get-it-right-the-legal-nature-of-un-security-council-referrals-and-al-bashir-immunities/> [<https://perma.cc/LZ4D-GNJQ>]; John-Mark Iyi, *Re-thinking the Authority of the UN Security Council to Refer Nationals of Non-party States to the ICC*, 66

CONCLUDING OBSERVATIONS

The current proposal would contribute to better accountability on the part of the perpetrators of sexual crimes and abuses in armed conflict. This is for the simple reason that it would lead to a more effective, efficient and systematic use of the gathered data and information on CRSV by the OTP of the ICC, namely by the body that more than any other is competent to investigate and prosecute CRSV incidents.

Given today's awareness of the major difficulties and failures encountered so far by the OTP in delivering real and not "distant justice"¹⁴³ and that the "success or failure of a criminal case is always built upon the quality of investigation,"¹⁴⁴ restrictions to direct (not filtered) communications between the MARA and OTP are both inappropriate and contrary to the international community's intent to act jointly in fighting rapes and other forms of sexual violence and abuses in armed conflict settings.

Accordingly, there is no reason why the MARA should not become and operate as a mechanism working *de facto* in close cooperation with the OTP of the ICC. In other words, there is no compelling reason why, though not replacing the OTP's Gender and Children's Unit, the MARA process could not become and operate as an additional form of gathering information and data on CRSV incidents.

While the present proposal seeks to bring about effective accountability on the part of state and non-armed state actors for their sexual crimes in armed conflict and post-conflict situations, it is also consistent with the legal doctrine of functional necessity.¹⁴⁵ This is given that the present proposal does not enlarge the current mandate of the MARA process. In fact, though under this proposal the UN Security Council would no longer have the last word on the use of the data and information concerning CRSV incidents collected by MARA task forces,

NETHERLANDS INT'L L. REV. 391, 391 (stressing the fact that the ICC cannot be deemed to be obliged to exercise the jurisdictional powers over nationals of non-party states conferred to it by the Security Council). See also, Marie-Claude Roberge, *The ICRC and the International Criminal Court* (2019), <https://odihpn.org/magazine/the-icrc-and-the-international-criminal-court/> [<https://perma.cc/GH2D-BAMD>] (stressing the "[p]rosecutor should be empowered to initiate investigations and institute proceedings *ex officio*, on her or his own initiative").

143. For these difficulties, see Philip Clark, *Distant Justice - The Impact Of The International Criminal Court On African Politics* 1 (2018).

144. Douglas Guilfoyle, *A Tale of Two Cases: Lessons for the Prosecutor of the International Criminal Court (Part III)*, EJIL:TALK! (Aug. 30, 2019), <https://www.ejiltalk.org/a-tale-of-two-cases-lessons-for-the-prosecutor-of-the-international-criminal-court-part-iii/> [<https://perma.cc/NN88-YEJH>].

145. See Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 65-67 (1996); Pieter H. F. Bekker, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS: A FUNCTIONAL NECESSITY ANALYSIS OF THEIR LEGAL STATUS AND IMMUNITIES* (1994).

the UN Security Council could always decide to rely, and most likely it will do so in various circumstances, in the implementation of its Women Peace and Security Agenda and in its future referrals to the ICC.

