SEXUAL CRIMES AND INTERNATIONAL LAW

A Thesis

Presented to the

Faculty of

San Diego State University

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

in

Political Science

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by

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Summer 2011

SAN DIEGO STATE UNIVERSITY

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ABSTRACT OF THE THESIS

Sexual Crimes and International Law
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Master of Arts in Political Science
San Diego State University, 2011

The International Criminal Tribunal for Yugoslavia (ICTY) and Rwanda (ICTR) have yet to reach their goal of reconciliation and the prosecution of rape. The failure of both tribunals stem from a misconception of conflict-related rape. The ICTY and the ICTR are confused on how to properly define rape to capture both the broader consequences and particularities associated with this war crime. It may be that international tribunals are not designed to deal with the societal causes of war in post- conflict societies. To effectively address rape and other sexual atrocities that characterize conventional warfare, international tribunals must change their current *modus operandi*. International tribunals must embrace local alternative routes to justice that have the potential of dealing with the societal causes of rape by putting a dent on rape as a popular weapon of war in conflict and post-conflict societies.

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CHAPTER I

INTRODUCTION

Every day, scores of women around the world experience some form of sexual violence, including rape, forced impregnation, sexual slavery, and enforced prostitution. In times of combat, civilian women are raped with impunity, making sexual violence an urgent moral issue when addressing conflict and post-conflict reconciliation. This paper addresses how international law and global legal institutions deal with conflict-related rape. The International Criminal Tribunal for Yugoslavia (ICTY), and Rwanda (ICTR), and the International Criminal Court (ICC) have made tremendous contributions in conceptualizing the crime of rape. Most notably, they have expanded the definition of war crimes and crimes against humanity to include gender crimes.

The proliferation of rape in conflict and post-conflict societies cannot be over emphasized in an international community prone to war and aggression. Recent breakthroughs in international law such as the ICTY, ICTR, and ICC demonstrate that State actors can hold perpetrators accountable for crimes of rape and other sexual crimes. Yet, the topic of rape as an international crime has been continuously tabled at closed door meetings. Moreover, most international debates fail to address the direct consequences of rape as a weapon of war.

After the sexual atrocities namely, the rape of Nanjing by the Japanese military and the sexual slavery of women committed by Germany during World War II, the United Nations Security Council (UNSC) with a wide mandate to enforce peace and deter violence has still failed to make consistent efforts to limit the increasing use of rape as a weapon of

war. All the UNSC has done is to endorse deficient tribunals to administer justice in conflict areas. International tribunals occasionally lack the technical expertise and resources to efficiently hold perpetrators responsible for their actions and have a double standard nature prone to discretion and lack of clarity.

Chapter 1 discusses why rape has been constantly employed during war. It describes rape as a central and distinct war crime of belligerents, not just mayhem caused by soldiers with weapons. More so, rape in conflict echoes a broader social and structural problem of conflict; one that disproportionately affects women and children. The second part of chapter 1 argues that the reason global tribunals and the international community fail to understand this problem is two-fold. One is the lack of women's voices in global and national policy forums. Two and more broadly, is the dominant patriarchal cultures within conflict-dominated societies. Most women are imprisoned in societies where men use cultural rhetoric to their advantage. When such societies engage in conflict, rape is comfortably employed as a weapon of war. In turn, domestic legal norms inappropriately address rape. Consequently, international legal instruments are prone to overlook this war crime. The last section of chapter 1 shows that the failure of global tribunals to address the true nature and consequences of conflict-related rape are severe. These failures enable rape to remain an enduring consequence of conflict.

Chapter 2 presents an overview of how nongovernmental organizations (NGOs) have sought to give conceptual clarity and greater global attention to rape and other sexual crimes. NGOs have managed to prod state actors to keep their commitments to international treaties and resolutions. For instance, NGOs lobbied State actors to adopt The Convention to End All

Forms of Discrimination Against Women (CEDAW), a blueprint for the realization of women's rights as human right.

Chapter 3 summarizes international developments on sexual violence including how each tribunal has responded to conflict-related rape. The ICTY, ICTR and the ICC are the first war crimes court created by the United Nations (UN) since the International Military Tribunal in Nuremberg (IMT) of 1945 and the 1946 International Military Tribunal for the Far East in Tokyo (IMTFE) otherwise known as the Nuremberg and Tokyo tribunals. The ICTY and the ICTR were created in the early 1990's to investigate individuals that committed war crimes and crimes against humanity during the conflicts in Former Yugoslavia and Rwanda. Both tribunals have made significant changes to international criminal law by giving some status to rape, yet trends on the ground reveal that conceptual problems exist. The second part of chapter 3 highlights some concerns encountered by global tribunals. They have reflexively applied rape-related domestic legal methods and standards for addressing conflict-related rape. As a result, these tribunals have been confused on how to understand the mixture of individual and collective culpability at play. Overall, they have failed to appreciate the severity and long-lasting harm of conflict-related rape.

In chapter 4, the Former Yugoslavia and Rwanda serve as relevant cases studies to prove the systematic use of rape in warfare. Both conflicts affected women in gender-specific ways revealing rape amongst other sexual atrocities as a deliberate policy of war. This policy in part, was masterminded by elites who used pre-existing ancient hatreds to craft a distorted cultural rhetoric. This cultural rhetoric fomented ethnic violence between groups which ensured that elites remained in power. The second part of chapter 4 looks at landmark cases

from the ICTR and the ICTY related to rape. Here, I illustrate how the tribunal's confusion over how to define rape has essentially stalled the legal process.

In chapter 5, I explore realistic reforms that can allow global tribunals to achieve some parts of their mandates before they go into extinction. Global tribunals must strive to decouple themselves from global politics and focus on working with local justice institutions in post-conflict areas to ensure equitable justice. To attain this goal, global tribunals must change their operational procedures and invite local NGOs with the expertise to participate in the process. Perhaps, it will be necessary to incorporate truth commissions and indigenous institutions that provide other alternatives for rape victims who want to skip the legal approach. Until their standard operational procedures are changed, extensive hope cannot be placed in global tribunals who in alliance with State actors attempt to control the direction of international justice.

CHAPTER 2

WHY RAPE?

The global community has exhibited a poor understanding of conflict-related rape. A poor understanding of rape is evidenced in fluctuations of when and how to classify rape as a war crime, crime against humanity, torture, and genocide amongst other atrocities. What is needed is an understanding that rape is a central war crime and one notably distinct from other war crimes. Without a proper recognition, rape will continue to be a central feature of conflict; thus reducing the possibility of reconciliation and enhancing the likelihood of new outbreaks of war. Unfortunately, international tribunals and legal mechanisms have failed to understand that rape is a distinct war on the bodies of civilian women and children (Giles and Hyndman 2004, 3). Therefore, they have struggled, often unsuccessfully, to properly conceptualize rape as an international crime.

Larry May (2005, 98) argues that before the advent of international prosecutions of rape in the 1990's, rape was ignored and perceived as "an ancillary crime" incident to war. May (2005, 98) explains that initially, international tribunals were more concerned with crimes that "shocked the conscience of mankind" and violated international peace and security. Put in another way, international tribunals such as the IMT and IMTFE used rape as a leverage to prosecute other crimes (Dolgopol 1998, 123). The tribunals did not view rape on the same level as genocide and other grave crimes. Also, rape was not seen as a violation of international peace and security and thus was not a crime that "shocked the conscience of humanity" perhaps because of its domestic nature (May 2005, 98).

LEGAL CONSTRAINTS

With rape as a significant part of the mandates of international tribunals, it became apparent that the UN and its subsidiaries display a weakness when conceptualizing violence against woman in their "failure until recently to declare all women's human rights concerns as part of international human rights law" (Stamatopoulou 1995, 36). By embracing a weak interpretation of rape, international tribunals and conventions are still applying a construction of violence highly sympathetic to men. Most crimes of rape that happen to women are framed so that women remain secondary even though they are the primary victims. In fact, this perspective emphasizes discrimination and widens the violence that victims of sexual violence experience. Wenona Giles and Jennifer Hyndman (2004, 13) emphasize that "testimony by women raped or sexually assaulted [are] used by political leaders [predominantly men] to fuel nationalist fervor and hatred…" In other words, rape brings more disgrace to men than women who experience this crime.

The current judicial system in the global international community seems to be more familiar with rape that occurs in a domestic setting and thus applies the same procedure to rape that happens *en mass* during internal and external armed conflict. This approach has resulted in an inefficient way of dealing with the victimization of victims that are a result of this international phenomenon. Rhonda Copelon (1994, 213) maintains that global tribunals signify a biased judicial system that assesses rape as a non-systematic, and non- deliberate war crime during conflict and hence escapes serious sanctions. In addition, decision makers and judges refuse to acknowledge rape as a violence not restricted to the domestic setting, but one that can be modified and employed as an effective tactic of war. Moreover, the inconsistencies in how international tribunals define rape in various cases signify that they

might remain incapable of dealing with rape and its consequences as it evolves in conventional warfare.

International tribunals currently struggle to reach a universal consensus on the acceptable criteria of how to define rape. The primary criteria are the ability of the prosecutor to provide evidence that establishes coercion and non-consent. Yet, both criteria are very generic and miss the unique nature of rape and its consequences that extend into post-conflict areas. International tribunals tend to adopt a definition of the following sought; "an invasion of a woman's body by force, an attack on her physical and emotional integrity" (Brunet and Rousseau 1998, 37).

RAPE AS A WAR CRIME

Article 27 of the 1949 Fourth *Geneva Conventions* states that women "should be protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault" (Brunet and Rousseau 1998, 43). However, this article generally describes rape as a crime of honor and dignity of women and not a form of violence (Brunet and Rousseau 1998, 43). More so, rape is not specified in article 147 which lists crimes considered as grave breaches and thus not subject to universal jurisdiction (Copelon 1995, 201). In addition, "under [article 27], women remain vulnerable to activities of their own nation because it is silent on the actions of the state against its own actors" (Lefing 2010, 4).

When rape occurs during warfare, by default it qualifies to be designated a war crime and simply not a domestic crime because in war, it is primarily a group-based act of violence with a clear goal of destruction and discriminatory intent (May 2005, 98). May (2005, 99) explains this distinction when he proposes an illustration of a male soldier who rapes a

"civilian woman in a town just captured by his army is significantly different from a male assailant who rapes a woman whom he follows home from work". The soldier's scenario, May argues is different from the normal act of rape since his act "is facilitated by the larger organized use of force against a whole civilian population" (2005, 99). Here, the soldier's crime does not fall under domestic law because it occurs with the guidance of a discriminatory intent. The soldier's crime can be prosecuted by an international court for reasons that "wartime conditions are very often damaging to the internal legal institutions" and possesses the potential of disrupting international peace and security (May 2005, 99). In an individual scenario, rape is not carried out towards a group and so does not merit international attention.

Nonetheless, Cynthia Cockburn (2004, 24) makes an important contribution that generally puts forth that individualized rape can be considered a war crime in what she terms "a continuum of violence". This proposal reveals that violence against women is a cycle in its simplest form. The idea is that "…violence runs through the social, economic, and political with gender relations penetrating all these forms of relations" (Cockburn 2004, 43). Put in another way, sexual violence most specifically rape can be a tool of violence employed during conflict and at war for various reasons (Cockburn 2004, 43). Because of the constant visibility of rape in times of war, rape immediately merits nothing short of a war crime and should be treated as such during peace. The recognition of rape as a war crime serves as a foundational framework in the comprehension of rape as violence (Copelon 1994, 200).

I argue that rape during peace has been hardly contained. Obviously, domestic norms and laws in place that prosecute rape are lacking in the administration of justice because they disregard the individual experiences involved and the potential harm rape can bring when

conflict erupts. When this sort of attention or lack of attention is given to rape during peace, for soldiers of war, rape becomes a convenient weapon used against women because laws available inadequately deal with the crime of rape in the domestic arena. Jaime Mayerfeld (2006, 364) agrees that "where states fail systematically to combat sexual violence against women, such violence ought to come under the purview of international criminal law".

RAPE: A CRIME AGAINST HUMANITY

A very broad measuring scale seems to be used to determine what constitutes and qualifies to be termed a crime against humanity. If the prosecutor can prove either of the two criteria mentioned below, then the crime can be considered a crime against humanity. They are: did the crime shock the conscience of humanity and or violate the laws of humanity? May (2006, 349), argues that "crimes against humanity must involve an intent to participate in a widespread and systematic attack on a population…making it difficult for minor players to be successfully prosecuted for crimes against humanity". Rape can be considered a crime against humanity using the previous illustration of a soldier since it is more likely for a soldier to have raped a woman that belonged to a particular group as part of "a widespread and systematic plan directed towards a civilian population"(May 2005, 100). Therefore, emphasis is placed on the group-based nature of the crime.

May (2005) argues that State actors lose their authority over rape that occurs during conflict because rape violates concepts of 'security principle' and the 'international harm principle'. Rape violates the security principle when "[S]tate [actors] assault their inhabitants or do not or cannot protect them from assault, forfeit their sovereignty and have no standing to protest foreign interventions [such as international tribunals]…" (Mayerfeld 2006, 361-362). Rape also defies the international harm principle which argues that "international

community should prosecute only…individuals whose deeds so greatly transcend the gravity of ordinary domestic crime" (Mayerfeld 2006, 362). It is obvious that rape crimes in conflict pose a tremendous threat that State actors are unable to contain, thus rape cannot be handled by a domestic court.

At this point, a tension exists in an attempt to define rape as a crime against humanity that surfaces irrespective of other factors. For this reason, the criteria used in rape cases, should be relaxed and broadly interpreted so that rape can be given an equal footing with torture and murder. International norms expose a double standard nature of defining sexual atrocities especially in a century where numerous evidence by female victims reveal that " testimonies of women tortured during dictatorial regimes…make clear that rape is one of the most common terrible, and effective forms of torture used against women (Copelon 1995, 202). Moreover, genocidal rape took center stage in the wars of the early 1990's in the Former Yugoslavia and Rwanda where "it was designed and [used] to drive women from their homes or destroy their possibility of reproducing within and for their community" (Copelon 1995, 205).

Mayerfeld (2006, 363) insists that May's argument projects that the focus of international prosecution should be on group leaders where intent can be proved which in part lets ordinary soldiers go free or deferred to domestic courts. Mayerfeld (2006, 364) highlights "that peace time rape meets May's definition of a group-based harm". For Mayerfeld (2006, 364) "in much of the world, [there are] laws that excuse rape or hinder its prosecution [which] reflect[s] and reinforce[s] a widespread tendency to place the shame of rape on the victim rather than on the perpetrator."

CATEGORIZATION

The categorization of rape based into situations of conflict and peace sheds light on the unique and multidimensional nature of rape and the difficulty in addressing this specific violence (Copelon 1995, 208). Although, Nicole Hallet (2009, 192) notes that the classification of rape into different sub groups like genocide and torture allows for easier comprehension and prosecution, it is important not to lose sight of the blatant consequences rape leaves on its victim and their communities at large. While it cannot be denied that rape occurs quite frequently in peace times, the extent of its occurrence is magnified beyond imagination during conflict partially due to the lack of order and security in society (Copelon 1995). Apart from the intensity, momentum, and speed at which rape spreads during conflict, the rationale for its widespread and systematic nature demands attention (Copelon 1995, 208).

COST OF RAPE IN POST-CONFLICT SOCIETIES

The inability of the international community to address rape reflects a broader failure to address long-term social consequences of war that disproportionately affects women and children. Some of these consequences include but are not limited to poverty, diseases, forced migration, displacement, and sexual violence amongst other political, economic, and social implications (Cockburn 2004, 43).Unfortunately, the minds of those engaged in conflict are normally set on short-term goals most especially successful victory with little and insufficient considerations to the human and material costs involved to non-combatants who are predominantly, women and children (Cockburn 2004, 34). It should be noted that women and children are not the primary enemy, but reality reveals that they continue to experience the worst consequences of war. Copelon (1994, 207) affirms that women are targets" because

they too are the enemy…because of hatred of their power as women; [and] because of [the] endemic objectification of women".

Even in the aftermath of a conflict, women and children remain vulnerable to attacks such as "losing limbs from uncleared land mines, birth defects, and displacement" (Cockburn 2004, 39). In addition, most women also experience different forms of sexual violence during armed conflict such as rape, forced impregnation, sexual slavery, and a host of other sexual atrocities. Rape possesses the primary characteristics of other man- made weapons, such as the ability to destroy the physical and internal components of an individual. Therefore, addressing rape in a proper structural manner has better payoffs of more fully addressing the causes and consequences of conflict in general.

Another important dimension to the problem of rape overlooked by global tribunals resonates in the fact they fail to take into consideration the extent of societal harm suffered by rape victims in the community at large. To understand and capture the lasting and profound damage rape leaves on women, rape has to be equated with other technological weapons that ranges from guns to nuclear warheads employed in warfare (Merry 2009, 166). Ariane Brunet and Stephanie Rousseau (1998, 37) describe that "rape dehumanizes a woman and breaks down her sense of personal identity". Moreover, rape has become an integral part of violent group conflict (Brunet and Rousseau 1998, 37). Rape can be counted as one of the greatest humiliations a victim can receive leaving lifelong scars in most cases cannot be erased. In particular, it is important to stress the psychological effect of rape on victims over and beyond the physical damage to the victim's reproductive organs (Merry 2009, 170). In addition, rape victims retain feelings of disgrace that they fail to seek proper medical and psychological help which have led to a huge number of them prone to suicide (Merry 2009,

170). In many traditional societies, rape victims are driven from their homes and experience discrimination from family members and society (Merry 2009, 170).

This treatment suggests that the society at large seems to treat rape victims like individuals volunteering to be raped during conflict. The victim's community tends to forget that perpetrators do not afford these victims a plethora of choices. If rape victims continue to be ostracized from their local community, how can the international community be expected to treat them any better? Therefore, rape needs to be evaluated as a broader social crime with long-term consequences, not a crime limited to war. An increase in rape crimes reveals a more sophisticated level of impunity and the systematic manner in which sexual violence has been institutionalized and given a normative status. In other words, the problem of conflict-related rape has gotten worse because perpetrators and their cohorts tend to get away with the crime because current judicial systems are hung up on dealing with this crime as a domestic crime, thereby implementing laws that cannot effectively deter rape occurring on an international scale.

A Culture of Rape

The context of culture is imperative to understanding how women have to deal with rape in post-conflict areas. Arati Rao (1995, 167) highlights the place of gender and culture within the human rights discourse and refers to how often 'cultural justifications' are invoked by some countries in the South when confronted on issues like sexual violence. Rao proposes that culture should never be taken as a given, but must be questioned to properly understand who its beneficiaries are. For instance, the human rights framework partially represents a culture that "privileges men and marginalizes women" (Rao 1995, 170).

Most men in traditional societies use the 'cultural rhetoric' to their advantage to marginalize women. For instance, leaders such as "Yasser Arafat explicitly invoke[d] the rhetoric of women's equality to encourage women to participate in violence, this perspective, Kelly Oliver terms 'selective feminism' (2007, 38). Put in another way, Oliver presents the notion that male leaders can distort theories such as equality and freedom to advance their particular agenda as evidenced with Arafat (Oliver 2007, 38). Albeit, some women are encouraged to participate in State functions only when they reflect the ideas of their male-counterparts, others such as feminist groups that question women's sudden acceptance into the public sphere mainly dominated by men are not given equal opportunities (Bunch 1995, 17).

A harmful cultural practice such as rape is a popular strategy of war and thus should not escape manipulations and distorted perspectives of culture. Rape destroys the opponents and or victim's culture because "women are prime targets because of their cultural position and their importance in the family structure" (Seifert 1994, 62). Copelon (1994, 207) asserts that women "keep the civilian population functioning and are essential to its continuity". In actuality, "many who write about women's right to protection from violence identify culture and tradition as the problem" (Merry 2006, 13). Advocates of women's rights are correct because "extreme…human rights violations by both governments and extra-constitutional groups have continued to be defended and even justified on the grounds of cultural difference" (Rao 1995, 167).

In conventional warfare, rape can be said to have a universal status because it is employed in most conflicts across the globe. While the culture of a given people, their social experiences, and inequalities are unique to that specific group and can be dealt with and

analyzed through many lenses, rape is a familiar language spoken by soldiers of war in spite of their differences (Copelon 1995). In this discussion, culture should be understood as a propeller and one of the many reasons behind the increase in violence and conflicts in certain areas of the world. Cockburn (2004, 43) posits that culture represents only a fraction of the equation that thrives on a much broader agenda, the control of resources at a convenient price for the stronger party to a conflict.

A biased cultural rhetoric can provide the container that conceals the main agenda and gives parties to a conflict reasons to attack their enemy and apply violence towards women. State actors and or individuals use negative cultural norms to foment ethnic hatred through propaganda and incite violence while they solidify their purposes which include and are not limited to power, domination, and the acquisition of resources (Giles and Hyndman 2004, 12).

CONFLICT-RELATED RAPE

For most women situated in sites of violence, rape must be identified as a central war crime in order to merit adequate attention. War tends to "intensify the brutality, repetition,…and likelihood of rape. War diminishes sensitivity to human suffering and intensifies men's sense of entitlement…and social license to rape" (Copelon 1995, 208). Brunet and Rousseau (1998, 37) suggest that rape is not only a policy of male power but an official policy for ethnic cleansing as seen in Bosnia-Herzegovina. More importantly, rape must be viewed as a deliberate act of war, not just soldiers choosing to rape women at random. Moreover, in Rwanda, through the radio, soldiers and militia groups were informed of how to locate their victims which signified a plan well formalized (Merry 2009, 167).

Contemporary warfare occurs on two levels. The familiarity of the first type of warfare is common which comprises of a battle between soldiers of different armies. Ruth Seifert (1994, 58) explains "in war, well defined armies are present; the enemy is clearly identifiable...with a clear order of command". The second war which is generally not recognized involves civilians and or non-combatants. In this war, rape is a major weapon and the victims are mostly women and children. Victims of rape generally have no weapon to retaliate and are subdued and humiliated in front of their families and their communities (Merry 2009, 170). In addition, the weapon of rape is wielded predominantly towards a particular population even though in contemporary times it has expanded to include some male populations (Giles and Hyndman 2004, 310).

THE WIDESPREAD USE OF RAPE

Seifert provides three explanations for the widespread rape in war. They are (a) 'booty principle' which identifies that violence against women in the conquered territory can be perceived as victory, "rape maintains the morale of soldiers, feeds their hatred, and sense of superiority" (Copelon 1995, 204), (b) rape reveals that "the men around the women in question are not able to protect their women," and (c) rape promotes soldierly solidarity through male bonding (Cockburn 2004, 36). Seifert's explanations for rape might sound simplistic, but they capture the core reasons and set the framework for why men continue to employ rape as an efficient means of violence against women and children. In battle, women as a population are internalized as the 'other' and rape serves to maintain dominance while intensifying aggression. This mentality and or perspective is absent in peace times, yet rape occurs and is permitted under various justifiable reason consistent with a patriarchal framework.

PATRIARCHY AND LACK OF VOICE

Within a patriarchal framework, women in most communities are perceived as second-class citizens with primary functions of procreation and domestic duties. This biased perception of women accelerates during conflict where women again are further humiliated through acts of rape and other forms of sexual violence. The origin of sexual violence begins in the family, the smallest unit of a society. Jutta Joachim (2007, 104) asserts ...the home is by far the most dangerous place for women and frequently the site of cruelty and torture". Charlotte Bunch (1995, 14) argues that "when women are denied…human rights in private, their human rights in the public sphere will suffer". During conflicts, the strict inequality and discrimination of gender roles are emphasized through an expression of violence. For example, "women and adolescent girls are used as sexual slaves for militia commanders in the Democratic Republic of Congo and Angola" (Oosterveld 2009, 5).

The global international community has a pathetic performance on the issue of sexual violence. The international community is largely patriarchal with a little sprinkle of satellite communities governed by women who lack an adequate voice in important policy circles. Most women generally have an insufficient voice in the governing agenda at both the State and global level. As Elizabeth Friedman (1995, 31) argues, until women are viewed as equal members of any given community who deserve avenues and forums to influence and participate in the decision making process, the global community will have a distorted comprehension of how to deal with conflict-related rape. Needed is a normative break that begins with the recognition of women's voices. Doing so is an important part of maintaining peace and security in an unstable global community (Friedman 1995, 26).

The failure of global tribunals to deal with the true nature and consequences of conflict- related- rape is severe. Rape as a systematic problem that is not addressed means

that the physical wounds and psychological trauma of victims might linger into post-conflict societies making conflict more likely to reoccur. An analysis of international women's movement efforts to put violence against women on the international agenda sets the foundation for a stronger recognition by the UNSC and the global community.

CHAPTER 3

THE ROLE OF ADVOCAY NETWORKS (NGOS)

The effort of women's rights nongovernmental organizations (NGOs) to convince the global community to adequately deal with the issue of conflict-related rape demands recognition. NGOs[1] efforts have created awareness and a wealth of knowledge and resources for State actors to employ. NGOs research informed the global community of the widespread use of rape as a strategy of war by emphasizing the need to treat rape as a war crime and crime against humanity. In addition, NGOs have lobbied international tribunals to clarify the distinctions between war crimes, crimes against humanity, conflict-related rape and individual rape in peace times. Nevertheless, these groups have experienced shortcomings in their lobbying. Notably, they have not persuaded international tribunals to adopt, a clear and systematic understanding of conflict- related rape.

The international women's movement against violence masterminded by NGOs was the one of the first mediums dedicated to a comprehensive analysis of the nature of gender violence before, during, and after armed conflict. A group of women entrepreneurs in Brussels organized an International Tribunal on Crimes that aimed to define the problem of gender violence (Joachim 2007, 105). It was modeled after the Nuremberg-Tokyo trials, in an effort to move away "from definitions of crimes that have been created by [the] oppressor" (Joachim 2007, 105). Jutta Joachim (2007, 105) notes, the tribunal "highlighted the strength

[1] By NGOs, I mean local and international advocacy networks that fight for the rights of women and children such as the International Federation of Women Lawyers (FIDA).

of testimonial knowledge and the problems associated with organizing outside established institutional frameworks". The tribunal succeeded in creating solidarity and a sense of identity between participants. NGOs latter came to understand a similarity of problems such as pornography being used for "sexual exploitation of women and patriarchal power structures that institutionalized domination by… [men] were similar across the globe" (Joachim 2007, 111).

Under pressure from numerous NGOs, the International Tribunal on Crimes marked the beginning of women's resistance towards gender violence. It also set the foundation for more international women's conferences such as the 1995 Fourth Women's Conference in Beijing. The Beijing Platform for Action was the first international document that emphasized the widespread use of violence against women in many places around the world (Keck and Sikkink 1998). More so, the Organization of American States (OAS) adopted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. This convention recommends that States refrain from engaging in violence against women (Keck and Sikkink 1998, 193).

The UN Decade for women spanning from 1975 to 1985 with three major conferences in Mexico City, Copenhagen, and Nairobi created sites for women to exchange the various kinds of violence they suffered in peace and in conflict (Keck and Sikkink 1998, 169). These conferences provided legitimacy for confronting violence against women and formed venues to debate how to define and categorize gender violence in contemporary times (Keck and Sikkink 1998, 21). The rape of women in the wars in the Former Yugoslavia, and Rwanda increased attention towards conflict-related rape. This recognition was made possible by local NGOs working on gender violence who brought these atrocities to light

(Copelon 1995, 198). It is important to note that while rape was used as a weapon of war in the Former Yugoslavia, the 1993 World Conference on Human Rights in Vienna was in session and immediately condemned the act which eventually led the ICTY to include widespread and systematic rape in its mandate (Copelon 1995, 198).

The contributions of NGOs and women's networks have created models that have been adopted at the national level in some countries. For example, in Bolivia, a sub-secretariat was set up as part of the Ministry of Human Development that specifically targeted gender issues (Keck and Sikkink 1998, 193). The 1993 Vienna Conference was a remarkable avenue that integrated women's concerns into the human rights agenda. The Vienna Program of Action recognized rape and other forms of sexual harassments as a human's rights issue. It bridged the normative gap between women's right and human rights that was the status quo at the UN. The fact that gender violence occurred in the private area made it immune to sanctions (Joachim 2007, 122). Bunch argued that "arbitrary definitions of what constitutes the 'private' are subject to interpretation and are often used to justify female subordination at home" (Joachim 2007, 123). Women's rights movement recognized that "the power of the international human rights framework…lends legitimacy to political demands since it is already accepted by most governments…" (Friedman 1995, 19). These movements urged "governments to turn their rhetoric into reality by promoting women's involvement in national concerns" (Friedman 1995, 23).

The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) represents an influential human rights treaty realized by the efforts of advocacy networks. CEDAW developed by the Commission on the Status of Women, is an influential treaty that elevates the reproductive rights of women and targets culture as influential forces

shaping gender roles and family relations (Merry 2006, 75). Regrettably, despite the rigorous process involved in its formation, CEDAW lacks an enforcement mechanism in place. It does however remain a powerful tool to name and shame member nations who do not fulfill their commitment (Merry 2006, 72).

The conferences held in Vienna and Beijing remain imperative in setting the framework that directly inserted women's right into the international agenda of peace and stability. They provided foundational dispensaries of particularities, knowledge, and resources that global tribunals would solicit to for seeking to attain greater justice for victims of sexual violence. Both conferences and a host of others were made possible by the hard work of NGOs. The influence of NGOs at the 1998 Rome Diplomatic Conference cannot be overlooked. These advocacy groups ensured that the Rome treaty incorporated proper definitions of rape into its mandate. This will hopefully ensure that the ICC will place victims and witness at the center of its procedures. For instance, the term 'gender crimes' was embraced at the conference as opposed to sexual crimes because this category is more capacious (Dallman 2009, 5). In a short period of time, NGOs took an issue formerly secluded in the privacy of a home and transformed it into an international concern.

The NGO Working Group on Women, Peace, and Security has been on a campaign to prod the UNSC to acknowledge and consider the contributions of women who are building and maintaining peace within war-torn countries. Along with other women's human rights advocates and peace organizations, they successfully contributed to the passage of the landmark Security Council Resolution (SCR) 1325 on women, peace, and security. SCR 1325 endorses the key role of women in the prevention and resolution of conflicts, peace negotiations and peace-building in post-conflict societies.

Additionally, in 2008, NGOs lobbied for UNSCR 1820, which advances efforts to prevent and respond to the use of sexual violence. According to the Women's Refugee Commission (2011), UNSCR 1820 states that "rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide". This resolution outlines that the prevention of sexual violence is inseparable from the empowerment of women. In other words, women must be consulted and closely involved in all measures taken on their behalf. NGOs' lobbyists succeeded in convincing a significant number of leaders at the international and national levels to address their commitments highlighted in UNSCR 1325 and 1820.

Although, women's issue were included in the human rights framework, Marsha Freeman argues that "human rights methodology works well where you can do fact finding, but breaks down when …[the issue concerns] systematic oppression in patriarchal societies" (Keck and Sikkink 1998, 184). For Freeman and other activists, the human rights framework can be "limited when dealing with cases of sexual violence and essentially excludes other important dimensions namely the structural inequalities among classes…since it places emphasis on the individual" (Keck and Sikkink 1998, 184). Notwithstanding this concern, at the Human Rights Conference in Vienna, the UN General Assembly was persuaded by government's representatives and NGO network groups to appoint a special rapporteur on violence against women (Keck and Sikkink 1998, 187).

While NGOs groups and feminists continue their battle of enlightenment on sexual violence, "there is no escaping the danger of dependency on (and influence by) established governments as long as the bulk of human rights dialogue is based on intergovernmental arrangements"(Rao 1995, 171). For example, before the Vienna Conference, the CEDAW

document was “saddled with reservations, the majority of which undermined its very purpose” (Stamatopoulou 1995, 38).

The hope remains that the majority of global and local NGOs do not fall prey to the advances of supra bodies with the resources and manpower to realize their goals. Local NGOs in some instances succumb to corruption and can advance the interest of powerful States and or International NGOs (INGOs) because in actuality, there are no financial incentives for them to perform their job. However, stronger evidence proves that, in a more pragmatic sense, they remain a very feasible route to ensuring justice.

The non-tribunal contribution to sexual violence in conflict strengthened an awareness that gave momentum to a movement easily transported across the globe. It alerted the UN and State actors through the endorsement of different resolutions and eventually international tribunals to pay a closer attention to sexual violence and how it deters relative peace in the global community.

CHAPTER 4

INTERNATIONAL LAW DEVELOPMENTS AND RAPE

International criminal law has made ground breaking achievements in dealing with sexual violence. Global tribunals no longer overlook rape. The ICTY and the ICTR have provided the ICC and other ad-hoc tribunals with a considerable body of precedent which can be followed. The *Akayesu* judgment by the ICTR reached the most appropriate definition of rape. Yet tribunals have experienced problems in their implementational phase which is the focus of chapter 4. Although recent decisions by global tribunals partly capture the complex nature of rape, tribunals manifest some ambiguities when describing rape as an individual and or a collective crime.

THE IMT AND IMTFE CHARTER

In the aftermath of World War II and in an attempt to administer justice to those most responsible for the Holocaust and the 'Final Solution' to the Jewish problem, an international military tribunal was set up by the four principal Allied countries: the United States, Great Britain, France, and Russia. The indictments included the following: crimes against peace, war crimes, crimes against humanity, and conspiracy to commit these crimes. The Nuremberg trials of major war criminals signified to the global community that individuals were capable of inhumane atrocities on fellow beings (Dolgopol 1998, 127). It introduced "individual criminal responsibility for war crimes and individualized the guilt for Nazi leaders" (Goldstone 2000, 76). The Nuremberg charter excluded rape in its definition of crimes against humanity (Dolgopol 1998, 136).

The Tokyo trials prosecuted military officials for crimes against humanity and war crimes. Its jurisdiction was based on the Tokyo charter. The Tokyo trials indicted twenty-eight persons who were mostly military and political leaders (Drumbl 2007, 49). Similar to the Nuremberg Charter of 1945, rape was mentioned during the proceedings, but was not taken seriously as a crime warranting prosecution in and of itself (Dolgopol 1998, 124). Furthermore, the Tokyo tribunal overlooked the crime of enforced prostitution carried out by the Japanese on women from weaker nations otherwise known as the plight of Asian comfort women (Dolgopol 1998, 125). Nonetheless, the Nuremberg-Tokyo tribunals paved the way for more advocacy and responsiveness to sexual violence during conflict. By the use of existing documents on the conduct of war, NGOs showed that non- military women should be protected during war.

GENEVA CONVENTIONS

The 1949 *Geneva Conventions* and its 1977 additional protocols aimed at providing a very detailed definition of war crimes, crimes against humanity, and its consequences. Only article 27 establishes protection against women (Nianchos 1995, 672). Article 4(2)(e) of the Additional Protocol II to the *Geneva Conventions* enumerate rape "as a war crime under the rubric of outages upon personal dignity"(Goldstone and Dehon 2003, 126). Article 76 of Additional Protocol I states "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution, and any other form of indecent assault" (Oosterveld 2009, 68).

The 1977 Additional Protocol I to the *Geneva Conventions* is the first international treaty to codify the doctrine of command responsibility. This is the first provision that addresses the knowledge factor of command responsibility (Levine 2005).

> Article 86(2) notes the fact that "a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." (Levine 2005, 2-3)

Article 87 requires a commander to "prevent and where necessary to suppress and report to competent authorities any breach of the conventions and of Additional Protocol I" (Levine 2005, 3). The Tokyo tribunal found several "defendants guilty of rape on the basis of command responsibility particularly for the widespread rapes committed in Nanking" (Oosterveld 2009, 68). In the Former Yugoslavia, many of the rapes were "clearly a result of command direction" (Oosterveld 2009, 71).Currently, a debate exists on how to apply stricter versions of command responsibility that stipulates in detail 'the should have' known standard (Levine 2005, 4).

INTERNATIONAL TRIBUNALS

The arrival of the ICTY and ICTR opened a new era in the discourse of war crimes and crimes against humanity more specifically to prosecute perpetrators of sexual assault (Goldstone and Dehon 2003, 122). The ICTY and ICTR were set up by the UNSC to deal with crimes that took place during the conflicts in the Former Yugoslavia and Rwanda. Both mandates reinforced the Nuremberg precedent grounded on individual responsibility and an assurance that prosecutions for gender crimes would occur (Goldstone and Dehon 2003, 122). These tribunals advanced the substance of international humanitarian law through a more thorough definition of rape, sexual crimes, and violence. Furthermore, they advanced procedures in terms of evidence (Goldstone and Dehon 2003, 123).

UNSC Resolution 798 set the stage for the establishment of the ICTY in the Former Yugoslavia with an objective to administer justice to those mostly affected by the conflict

and prosecute individuals responsible for violations of international humanitarian law (Fletcher and Weinstein 2004, 31). Resolution 798 includes an explicit criticism of rape during war which provided a powerful inducement for the creation of the tribunal (Fletcher and Weinstein 2004, 36). In accordance with its Statute, the ICTY has jurisdiction over the territory of the Former Yugoslavia. The tribunal has the authority to prosecute individuals on four categories of offences: grave breaches of the 1949 *Geneva Conventions*, violations of the laws or customs of war, genocide, and crimes against humanity.

In accordance with Resolution 955, the ICTR based in Arusha, Tanzania, was created under Chapter VII powers of the UNSC (Des Forges and Longman 2004, 52). The ICTR emerged to prosecute crimes against humanity, war crimes, and genocide perpetrated by citizens and non- citizens during the 1994 genocide. The ICTR's mandate rests on the idea of restoring national reconciliation and peace in Rwanda (Des Forges and Longman 2004, 52). This tribunal represented the first time rape was seen and convicted as an international crime and as a constituent part of genocide (Oosterveld 2009, 207). The ICTR and ICTY set the platform for the codification of the Rome Statue of the International Criminal Court (ICC).

The ICC governed by the Rome Statute, is the first permanent international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community (Dallman 2009, 1). The ICC, an independent international organization, is not part of the United Nations system. The overarching objective of the ICC is to provide justice for the most severe human rights abuses. The ICC has jurisdiction over genocide, crimes against humanity, and war crimes (Drumbl 2007, 215). Article 17 of the Rome Statute "which governs the admissibility of cases, operationalizes the complementarity principle" (Drumbl 2007, 141). Therefore, the ICC only intervenes when

State actors are unwilling to act and when situations are referred to the prosecutor by the UNSC acting under chapter VII of the UN Charter (Drumbl 2007, 141). The ICC is crafted as victims' based court and reflects a conscious effort to move away from victor's justice (Drumbl 2007, 136). A look at how particular tribunals have defined rape allows for a critical assessment of their mandate on sexual violence and if indeed substantial justice can be afforded victims of rape.

INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA AND RAPE

The ICTY adopted a definition that incorporates an explicit requirement of non-consent and includes a detailed list of acts constituting rape. The ICTY's use of non-consent assumes that consent to sexual penetration is always possible (Hansen-Young 2005, 486). The court's rationale is that both prosecutor and defendant will have an opportunity to demonstrate consent or lack thereof on the part of the victim (Hansen-Young 2005, 486). Article 5(g) of the ICTY Statute list rape as a crime against humanity, but fails to include this crime as a 'grave breach' subject to universal jurisdiction (Hallet 2009, 188). In addition, the ICTY would consider the appointment of qualified women in the Office of the Prosecutor equipped with proper mechanisms to deal with gender oriented crimes (Goldstone and Dehon 2003, 122).

Rape as defined in the appeals chamber judgment in the 2002 *Foca* case is "[t]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) [of] the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim" (*Prosecutor* v. *Kunarac, Kovac, and Vukovic* 2001, 146). For the ICTY, consent must be given voluntarily, as a result of the victim's free will, assessed in the context of the

surrounding circumstances (MacKinnon 2006, 951). The Trial Chamber did note the formulation of rape in the *Akayesu* and *Celebici judgment.* In these judgments, rape was defined as "... a physical invasion of a sexual nature, committed on a person under circumstances which are coercive" (*Prosecutor* v. *Akayesu* 1998). In *Prosecutor* v. *Kunarac,* the trial pronounced the first conviction of rape and enslavement as a crime against humanity. In addition, article 7(3) of the ICTY Statute was the first to consider the scope of command responsibility in the *Celebici* case (Levine 2005, 3).

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND RAPE

Article 3(g) of the ICTR Statute lists rape as a crime against humanity and recognizes rape as a form of torture and genocide. The *Akeyasu* trial set the framework for defining rape in a specific way. There, the ICTR defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive" (*Prosecutor* v. *Akayesu* 1998). The court enumerated rape as a war crime and as a violation of common article 3 of the 1949 *Geneva Conventions* (Goldstone and Dehon 2003, 122).

An important aspect of the *Akayesu* decision was the recognition of rape as a form of genocide prohibited under article 2 of the ICTR Statute. The ICTR Statute states that genocide is (a) killing members of a group (b) causing bodily harm or mental harm to members of a group (MacKinnon 2006, 944). The ICTR explained that the rape of Tutsi women was systematic and was perpetrated solely on them. Article 6(3) of the ICTR Statute confirms the inclusion of command responsibility within its jurisdiction (*Prosecutor* v. *Musema* 2000).

Valerie Oosterveld (2009, 72) observes that the definition of rape adopted by the ICTR "reflects the actual experience of women in war that objects such as guns, bayonets,

and bottles have been used to rape and mutilate women." The ICTR must be commended for creating a definition quite broad that captures rape in a way it should be understood. The ICTR took measures to ensure it did not replicate domestic laws. The ICTR also held that rape can constitute torture under article 3(f) of its Statute. The ICTR embraced a broad consent paradigm which focused on coercion as opposed to consent (Hansen-Young 2005, 484). For example, the *Akayesu* judgment characterized rape as a violation rather than an act of penetration. For the ICTR, domestic laws did not capture the kinds of atrocities committed in an international level and failed to fully take into account the "circumstances surrounding rape during war" (Hansen-Young 2005, 485). Furthermore, the notion of victim's consent has little or no place when rape is used as a form of torture. Thus, the ICTR included a "coercive circumstances" paradigm in its definition of rape to place emphasis on situation created by armed conflict (Hansen-Young 2005, 485).

INTERNATIONAL CRIMINAL COURT AND RAPE

With a statutory authority to adjudicate rape cases, the ICC is strengthened by numerous articles that specifically tackle particular kinds of sexual violence such as article 7(1)(g) and article 8(2)(b). Both articles mark the first time that sexual slavery is recognized as an international crime (Hallet 2009, 190). Most importantly, the Rome Statute departs "from the traditional classification of rape as a crime of honor and clearly defines it as a crime of violence and violation of the victim's agency" (Hallet 2009, 191). The ICC's definition of rape resembles that of the ICTY. Under the ICC Statute, rape requires proof of (a) penetration of any part of the body by a sexual organ or of the anal or genital opening with any object or part of the body, and (b) concept of invasion by force or threat of force (Hallet 2009, 191).

Similar to the ICTY, the ICC sets forth detailed specifications concerning the use of a consent defense (Hansen-Young 2005, 488). The Rome Statute for the ICC expands gender crimes by making rape an individual crime, including other forms of sexual violence and defines rape as a war crime and a crime against humanity (Dallman 2009, 6). The ICC language is "gender neutral" (Hansen-Young 2005, 488). For instance, the ICC uses 'invasion' instead of 'penetration' to describe rape. Article 8(2)(b) (xxii) and Article (2)(e)(vi) of the Rome Statute states "rape and forced prostitution amongst other crimes constitute a grave breach of *Geneva Conventions*" (Goldstone and Dehon 2003, 135). The definition of rape according to the *Akayesu* judgment is yet to be adopted by the ICC on the basis that it is too broad (Taylor 2003, 62). Article 28 of the Rome Statute of the ICC recognizes the principle of command responsibility and adopts a stricter 'should have known' standard (Levine 2005, 4).

PUNISHMENT

The ICTY and the ICTR impose judgments and penalties after the conviction of the accused. Both article 24(1) of the ICTY and article 23(1) of the ICTR Statute limit penalties to imprisonment while referring to the appropriate domestic courts in Former Yugoslavia and Rwanda. An equal scale of sentences applies to each of the crimes, with the greatest penalty being life imprisonment. The ICTR and ICTY Rules of Procedure and Evidence "supplement the very broad sentencing provisions" (Drumbl 2007, 51). The ICTY and ICTR judges may sentence an accused who pleads guilty or is convicted to imprisonment for a fixed term or the remainder of his/her life. The Statute of both tribunals does not allow for other forms of punishment, such as the death penalty (Drumbl 2007).

International tribunals are usually praised for their ability to intervene in situations not properly contained by State parties as observed in conflicts in Rwanda and Former Yugoslavia. May (2006, 351) asserts that some justifications for the interventions of tribunals converge to protect international security and prevent global harm on specific populations and or groups of people. For State actors, international tribunals may assist in the settlement of disputes between States by providing interpretation of treaty agreements. For individuals, they can provide alternative avenues to seek justice in areas where domestic courts have been dismantled by conflict. By prosecuting gender crimes, these tribunals have added a gender aspect not formally known (Goldstone and Dehon 2003, 132).

INDIVIDUAL ACCOUNTABILITY AND COLLECTIVE RESPONSIBILITY

The conceptual limitations of how international tribunals deal with rape can be better understood within the structure versus agency framework. The idea of individual responsibility intertwined with collective guilt has posed some problems. Global courts adopt methods and procedures used in domestic courts when dealing with perpetrators of rape and this methodology has proven inadequate in dealing with conflict-related rape. While it may seem feasible to go after the leaders and or high level commanders that allow rape as a war crime to linger, it is unwise to defer and place domestic courts in charge of prosecuting low level officials. Gerry Simpson (2007, 67) relays that "international criminal law's instruments are concerned to advertise the centrality of individualized justice". This is seen in the way the ICTY and ICTR handle their business which in part is not wrong, but overlooks the power of the collective nature of rape.

By holding individual guilt above collective responsibility, global tribunals are providing half measures of justice. Rape as a war crime can both be an individual and

collective act against a certain group of people. Mark Drumbl (2007, 197) asserts "whereas many individuals are responsible for atrocity, a much smaller number are criminally guilty". When rape occurs in a domestic setting, usually with some stability, the individual acts in most cases alone or with some cohorts. When apprehended, they are prosecuted in a law court and can be held individually accountable. But in the case of conflict-related rape, the domestic analogy is insufficient because it tends to alienate victims and affect how they perceive the legal procedure. Moreover, the domestic analogy does not account for bystanders, perpetrators, and beneficiaries (Drumbl 2007).

Although Drumbl (2007, 196) remarks that by assigning collective responsibility, it is possible to include individuals who "were not personally responsible…, incompetent, and unable to do anything," collective punishment such as sanctions might prevent the widespread perpetration of rape in conflict. Therefore, it becomes necessary and imperative that tribunals pay close attention to the collective nature of rape while reaching a judgment. It is important to pay attention to structures and institutions in order to facilitate an overarching change that reflects the problems that exist. An effort in this direction has been made and it is interesting to note the emergence of a new paradigm of global justice popularly known as the 'joint criminal enterprise' (Simpson 2007, 71). This theory could prove effective when dealing with sexual violence and used systematically by global tribunals. For example, the ICTY invoked this notion in the case of Dusko Tadic found guilty of "many crimes committed in war rather than being individual acts of wrong doing, constitutes a manifestation of collective criminality" (Simpson 2007, 71).

Simpson (2007, 72) correctly notes a problem with collective guilt in the fact that "[it] might result in a situation where everyone is guilty and, therefore no one is". This

reminder can cause a stalemate in the prosecution process because it questions how punishment will be determined. It should not however deter tribunals from looking at the collective action that takes place during rape because it is this factor that removes conflict-related rape from the domestic setting and puts it in the international agenda.

Currently, global tribunals are not paying sufficient attention to conflict- related rape especially how it plays out as a broader social and deliberate policy. Rather tribunals are applying a common standard used to prosecute other crimes. International tribunals are hung up on the idea of individual responsibility transmitted from the Nuremberg protocols. But rape, is rarely a "bad apple" crime committed by some bored soldiers, but rather a deliberate and systematic collective crime committed by soldiers of war. Consequently, rape must be addressed carefully to ensure that the experiences of the victims are taken into consideration. This approach will help avoid repeat offenses and prevent grave consequences of rape that emerge in post- conflict societies. Understanding rape as a deliberate policy of State actors show the possibility that the State can be criminalized which puts its sovereignty and dignity in jeopardy. Simpson (2007, 61) suggests that an attempt to punish a State can result in setting the stage for violence and war since it has been difficult for tribunals to prove that all perpetrators of rape during conflict are equally responsible for the crime. However, this limitation should not prevent a proper investigation at both the command and individual levels to make sure that no one is left unpunished.

CHAPTER 5

TRIAL CASES AND RAPE

The conflicts in the Former Yugoslavia and Rwanda featured rape as a deliberate weapon of war. Some cases prosecuted by the ICTY and ICTR reveal the inconsistencies entrenched with the use of coercion and consent as the basis for defining conflict-related rape. These inconsistencies have delayed the legal process so that very few cases of sexual violence have been pursued. There is no doubt that conflict-related rape is not of an ordinary nature and must be "charged as [war crime] an act of war, genocide or crime against humanity" (MacKinnon 2006, 942). Yet international tribunals struggle to determine when and how both criteria can be applied in a regular fashion.

While the statutory provisions of international tribunals elevate sexual violence in order of priority, in practice they seem to be more channeled towards other objectives namely deterrence and accountability thereby paying less attention to sexual violence. This attitude brings global tribunals closer to the expectation of great powers who are more concerned with preventing conflicts as a whole rather than dealing with societal particularities. In order to achieve significant success in addressing sexual violence in conflict, international tribunal must strive to decouple itself from the grips of global politics.

THE RWANDAN EXPERIENCE

In a description of the fate of raped women in Rwanda, I focus on Hutu atrocities in part because the ICTR has only addressed this side of the conflict. However, I do not

disregard the well-documented atrocities against Hutu perpetrated by the Tutsi-led militia and government.

Sally Merry (2009, 166) articulates that rape was so widespread during the 1994 Rwandan genocide because of a "particular historical context and the ideology of racial purity." Merry (2009, 166) argues, explanations that claim war rape as a product of over aggressive males terrorizing women or part of ancient hatreds fail to take into account the specific factors behind conflict-related rape. In fact, the Rwandan civil war did not arise from primordial hatreds, but from "the unrestrained distortion and exploitation of differences as an instrument of retaining power" (Akhavan 1998, 763).

The withdrawal of Belgian colonial occupation in 1962 and the transfer of power to the Tutsi set the stage for the 1994 Rwandan genocide. The Hutus seized power after independence and engineered massive killings of Tutsi making ethnic violence inevitable. This violence resulted in a 1973 coup, where Juvenal Habyarimana, a Hutu took over the Rwandan government. As president, Habyarimana monopolized power and engaged in massive corruption leading to an economic decline (Jones 2006, 236). The Hutu leadership knew that it was about to lose the civil war to the Rwandan Patriotic Front (RPF), an armed opposition made up of Tutsi exiles, making the genocide an act of ugly desperate bitterness (Jones 2006, 236).The civil war started in 1990 and by 1994 it was clear that the RPF was winning the war. "The shooting down of Habyarimana's plane on April 6, 1994 triggered the beginning of the killing" (Totten 2009, 110).

The widespread use of rape during the 1994 Rwandan genocide was one of the means used to eradicate and destroy female members of the Tutsi ethnic group. Rape was motivated by various factors but most importantly by the control of power and land. Put in another way,

rape was a tool to achieve genocide, ethnic cleansing, and other war crimes. The Rwandan genocide claimed "the lives of 800,000 individuals and left over 130,000 in prison suspected for committing crimes against humanity and genocide" (Tiemessen 2004, 57). The 1994 genocide dismantled the national judicial system leaving the country in total chaos and anarchy (Gahima 2007, 161). With the judicial infrastructure destroyed and a majority of lawyers and judges murdered during the conflict, there is little chance that the Rwandan national courts could adequately handle the thousands of cases after the conflict (Tiemessen 2004, 58). In response to the ineffectiveness of the national court system, the international community endorsed the ICTR, with a jurisdiction to try various crimes committed during the genocide (Gahima 2007, 161).

One of the explanations for the origin of rape in the Rwandan genocide point to the "longstanding rivalry between the Hutus and Tutsi exacerbated by German and Belgian colonizers [that ruled from 1894 to1962]" (Merry 2009, 168). This strategy of holding Tutsi above Hutus and Twa, other ethnic groups in Rwanda served specific purposes for colonial administration. The German and Belgian administration chose Tutsis over Hutus because of their European features (Tiemessen 2004). Colonial rule aimed at maintaining power without taking into account the gravity and impact of a 'divide and conquer' approach on the local people. With regards to sexual violence, the eruption of the violence revealed that "killings and rapes …were historically conditioned, politically motivated, state generated, and carefully planned" (Merry 2009, 169). Merry notes, "most women in the genocide were targeted not because they were women, but because they were Tutsi women" (2009, 169). Thus, rape was aimed at the ethnic group not so much against the individual woman. More so, sexual violence was facilitated by the patriarchal and social structure in Rwanda.

Despite the fact that it seems like preexisting ethnic divisions in Rwanda created the primary and secondary causes of war, this argument downplays elite incentives for violence, war, and genocide as a regime-saving strategy (Kaufman 2006, 85). Payam Akhavan (1998, 755) notes that ethnic identity can be manipulated "to increase internal cohesion and to more effectively assert demands against other groups [and] elites stress the variety of ways in which members of a groups are similar and different."

During the genocide, rape and sexual assault of women did not appear as a coincidence, they were a central component of war (Nowrojee 1996). For example, "the interahamwe purposely had those who were HIV-positive in their ranks rape the Tutsi woman" (Totten 2009, 111). Mainly Tutsi women and some Hutu women were raped as a strategic, deliberate, and carefully planned military tactic to destroy, eradicate, and humiliate the Tutsi.

THE FORMER YUGOSLAVIA

At the beginning of the 1990s, the Federal Republic of Yugoslavia was one of the largest countries in the Balkan Peninsula. It comprised of six republics namely Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. However, the Former Yugoslavia experienced a period of intense political, religious, and economic crisis.

In the Former Yugoslavia, I address Serbian atrocities because they have received the bulk of the focus from the ICTY. This position does not disregard the well-documented violence perpetuated by Croats, Bosnian Muslims, and Kosovars. Rape was a calculated decision and a mechanism used by the Serbian government to ensure that certain ethnic groups stayed out of power (Vadenberg 2000). Through mechanisms of rape, forced impregnation, sexual enslavement, and the murder of young men in certain age groups,

Serbian soldiers and paramilitaries encouraged the forced migration of women and children (Stiglmayer 1994, 19).

Throughout 1998 and early 1999, there was constant hostility between Kosovo Liberation Army (KLA), Yugoslav, and Serbian forces that involved violations of international humanitarian law by both sides (Vadenberg 2000). Following the NATO's 1999 air bombings, the violence between Serbian forces and the KLA increased and led to the outbreak of mass killings. Similar to the Rwandan experience, women were violated in gender specific ways through the tool of rape. Rape and other forms of sexual violence were used as weapons of war and instruments of systematic ethnic cleansing (Vadenberg 2000). During the conflict, rape was not an isolated act committed by individual Serbian or Yugoslav forces, but rather was used deliberately as an instrument to terrorize the civilian population, extort money from families, and push people to flee their homes (Vadenberg 2000).

During the armed conflict, rape occurred in three categories namely; rapes in women's homes, rapes during flight, and rapes in detention. In the first type, soldiers forced their way into private homes and raped women either in the yard or in front of family members. In the second category, female civilian in search of safe havens were stopped, robbed, and threatened by soldiers. If families could not produce cash, security forces emphasized their daughters would be taken away and raped. The third category of rapes took place in temporary detention centers, such as abandoned homes or barns (Vadenberg 2000).

THE CONSEQUENCES OF RAPE IN THE FORMER YUGOSLAVIA AND RWANDA

Ivana Macek (2009, 93) boldly asserts "the horror suffered by females, both during the egregious act, as well as in the aftermath, is often overlooked". In both post-conflict

societies, women suffer the consequences of sexual violence imposed on them by their home communities. Some of the tragedies women faced during the conflict include the murder of family members, rape, and other forms of sexual violence such as forced impregnation and sexual slavery. More specifically, rape brought more problems for victims such as "shame, unwanted pregnancies, and HIV infection" (Merry 2009, 170).

More so, massive societal stigma seems to be associated with incidents of rape in Rwandan society. For example, a woman who reveals she was raped "faces the likelihood of being shunned by her family members and her community" (Merry 2009, 170). Abortion is illegal in Rwanda leaving pregnant rape victims with only two choices (a) carrying out an illegal abortion that may endanger the lives of both mother and child, (b) being ostracized from the community due to the presence of rape babies (Totten 2009, 112). Thus, many rape victims choose to suffer in silence. Raped women in the Former Yugoslavia "face significant obstacles to securing redress in the forms of justice, medical attention, and psycho-social support (Vadenberg 2000). In addition, raped women in the Former Yugoslavia interviewed by Human Rights Watch appeared to be suffering from very high levels of trauma, intensified by cultural taboos associated with rape (Vandenberg 2000).

Fiona Ross (2010) argues that there is a rationale for victims who adopt silence rather than speaking about their experiences. Ross showed this phenomenon at work with the South African Truth and Reconciliation Commission where women chose silence because it prevented them and their families from physical attack. For the above mentioned reasons and many more, victims in the Former Yugoslavia and Rwanda were less likely to report incidents of rape and other sexual crimes for fear that they might be banished from their

home communities "since acts of rape violate the ideology of family….placing [victims] in danger of social death and further physical abuse" (Shaw and Waldorf 2010, 12).

CASE STUDIES FROM THE FORMER YUGOSLAVIA AND RWANDA

In this section, I discuss significant criminal cases by the ICTY and the ICTR that reflect attempts to prosecute rape in conflict and install changes in rape laws. They include *Prosecutor* v Jean Paul *Akayesu, Prosecutor* v Laurent *Semanza*, Celebici Case, *Prosecutor* v Anto *Furundzija* and the *Foca* Trials. These cases reveal that international law has failed to contain rape during war and the legal system remains slow in bringing wartime rapists to justice. The problem is manifested in the numerous instances of inadequate conceptualization and a lack of consistency from case to case.

INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA

Case 1: *Celebici* Case. The ICTY prosecuted some landmark cases that embraced precedence and created stricter avenues for prosecuting rape, driving rape victims far from the legal process. The *Celebici* case, otherwise known as *Prosecutor v Delalic et al* concerned the prosecution of four individuals who worked as guards in the *Celebici* prison-camp. The *Celebici* camp was used to detain thousands of Bosnian Serbs who were subject to torture and other forms of inhumane atrocities (*Prosecutor* v. *Delalic, Mucic, Delic, and Landzo* 1998). The court charged them with grave breaches of the 1949 *Geneva Conventions* under article 2 of the governing Statute of the ICTY, and with violations of the laws or customs of war under Article 3 of the Statute (*Prosecutor* v. *Delalic, Mucic, Delic, and Landzo* 1998). The ICTY embraced *Akayesu'*s definition of rape. The ICTY further held that rape could be prosecuted as a form of torture as defined by the Torture Convention (Hallet

2009, 192).The case was also the first time since World War II that command responsibility was handled by an international court. The court expanded the notion of command responsibility to include civilians holding position of authority (*Prosecutor* v. *Delalic, Mucic, Delic, and Landzo* 1998).

Case 2*: Prosecutor v* Anto *Furundzija.* The ICTY decision on Anto *Furundzija* signifies a turn for the worse and an example of an inconsistent treatment of rape. He was a commander of a special unit of the Croatian Defense Council (HVO). The ICTY charged Anto *Furundzija* with violations of international humanitarian law such as torture as a Violation of the Laws or Customs of War, and outrages upon personal dignity, including rape, as a Violation of the Laws or Customs of War (*Prosecutor* v. *Furundzija* 1998). In the *Anto Furundzija* trial, the court shifted emphasis away from the *Akayesu* focus on coercion. While the *Furundzija* court agreed that rape may amount to torture under international law as noted in *Prosecutor v Delalic*, the court emphasized and required an overt act of penetration "without consent of the victim (*Prosecutor* v. *Furundzija* 1998). The court's reasoning was that some concentration camps guards may not be sufficiently clear that their actions were a crime.

Case 3: *Foca* Trials. The *Foca* trials represented the first time in history, an international court prosecuted exclusively sexual crimes aganist women. The *Foca* trials held by the ICTY began in March, 2000 and focused on sexual crimes against women by hearing the testimonies of victims. Tribunal judges found three men *Dragoljub Kunarac, Rodomir Kovac, and Zoran Vukovic* guilty of crimes against humanity (*Prosecutor* v. *Kunarac, Kovac, and Vukovic* 2001). Serb forces captured a town called *Foca* separating men from women and children. Bosniaks Muslims in *Foca* were held for several months in homes and

detention. Women and young girls were regularly and systematically raped in these houses which became known as 'rape camps' (Macek 2009, 93). The court decided that rape occurring in a brothel setting like *Foca* was a form of enslavement. The court concluded that "sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim" (MacKinnon 2006, 950).

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Case 1: *Prosecutor v* Jean Paul *Akayesu.* The ICTR conviction of Jean-Paul *Akayesu* represents one of the best legal interpretations of conflict related-rape. *Akayesu* was a prior bourgmestre/mayor of Taba commune, in the prefecture of Gitarama, in Rwanda. The bourgmestre was traditionally treated with a lot of respect by the people and had extensive powers (*Prosecutor* v. *Akayesu* 1998). During the genocide, evidence showed that *Akayesu* had the power to prevent war crimes, but did not do so. His defense argued that *Akayesu* was helpless to prevent atrocities, because soldiers in the community were in favor of the Hutu militia group otherwise known as Interahamwe (*Prosecutor* v. *Akayesu* 1998). The Defense argued further that *Akayesu* was allegedly harassed by the Interahamwe and had to flee Taba temporarily.

Yet substantial evidence put before the Trial Chamber I of the ICTR found "Mr. *Akayesu* individually criminally responsible for crimes against humanity, for ordering, instigating, and aiding, and abetting sexual violence under his aegis…as a widespread attack…on civilians" (MacKinnon 2006, 944). The definition adopted for rape in *Akayesu* is "a physical invasion of a sexual nature committed on a person under circumstances which are coercive" (MacKinnon 2006, 942). The chamber decided that central elements of rape cannot be captured in a mechanical description of objects and body parts (MacKinnon 2006, 945).

The court found that rape and sexual violence were also acts of genocide when committed as part of an intentional campaign to destroy a group based on their ethnicity. In another judgment by the ICTR namely *Prosecutor v Musema*, the court also adopted the *Akayesu* definition of rape set forth in the *Akayesu* judgment (*Prosecutor* v. *Musema* 2000).

Case 2: ***Prosecutor*** **v Laurent** ***Semanza.*** Regrettably, the ICTR partially undercut the value of its *Akayesu* precedent and introduced a pattern of inconsistent rulings in its decision on *Semanza*. *Semanza* was a former bourgmestre/mayor of Bicumbi commune in Rwanda who was arrested and convicted for rape, genocide, and other war crimes (*Prosecutor* v. *Semanza* 2003). The *Semanza* ruling in 2003 found the *Akayesu* definition overly broad and gave priority to non-consent over coercion (MacKinnon 2006, 951). This ruling by the ICTR found the ICTY definition of rape more favorable because of its narrow nature (*Prosecutor* v. *Semanza* 2003). The ruling in *Semanza* held that "mental element for rape as a crime against humanity [has] the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim" (*Prosecutor* v. *Semanza* 2003). Put in another way, rape transcended from being a physical act committed on the body to a psychic act committed in the mind of the perpetrator (MacKinnon 2006, 952). Although, the interpretation of rape adopted by *Semanza* ruling "narrowed the scope of the crime to include only isolated incidents of a very specific and identifiable act of penetration in which the lack of consent of victim is demonstrated by the perpetrator" (Haffajee 2006, 210), the *Semanza* ruling is less desirable because on face value its only adds more complications to the already complicated nature of rape.

The cases cited above are very telling of the way international tribunals deal with conflict- related rape in their adjudication of cases. Between *Akayesu* ruling by the ICTR and

the *Celebici* decision by the ICTY, the definition of rape has fluctuated between coercion and consent as primary criteria. Furthermore, the *Furundzjia* ruling that made room to entertain the excesses of prison camp guards treated rape victims unfairly. It is absurd for the court to allow room for such reasons when during peace; rape is fully recognized as a crime. The *Furundzija* decision essentially created flexibility in the conceptualization of rape as opposed to specificity in this particular case. The chambers in the *Furundzija* preferred a "conceptual definition of rape to a mechanical definition" (Goldstone and Dehon 2003, 129).

With a plethora of cases to pass judgment on, both courts have succeeded in settling upon different interpretation of rape but the primary definition of rape remains the grounding for new add-ons. Catherine MacKinnon (2006) asserts that in some genocide rape cases, international tribunals have entertained scenarios where the defense argued that victims volunteered to be raped within the rhetoric of consent. But MacKinnon (2006) rightly points out that consent is not relevant in prosecuting rape because the crime takes place during armed conflict rendering sexual autonomy extinct. Moreover, MacKinnon (2006) notes that the *Akayesu* framework is sufficient in regards to the burden of proof needed to show that rape occurred when compared to the definition arrived at by *Semanza.*

These tribunals in spite of their ambitious mandates present a big problem of legal definitions. It is apparent that an inconsistent method governs their behavior and how they prosecute leaders and low-ranking officials responsible for crimes. This is characterized in their style of defining sexual violence particularly rape. Currently, there is no acceptable universal definition of rape in international law. It seems that tribunal judges retain ample power and authority to arrive at a definition that the court feels fits the crime. For instance, the definition for rape employed at the ICTR *Akayesu* decision was "as a physical invasion of

a sexual nature committed on a person under circumstances which are coercive" (MacKinnon 2006, 942) is quite distinct from that used at the ICTY *Furundzija* case. The latter reintroduces the relevance of non-consent. This style of inconsistency can be attributed to why the courts judgments are limited because considerable time is spent debating on new definitions for each crime. It is obvious that standards of prosecution exist; the matter is that they are not far-reaching because international criminal law does not feel obligated to aggressively tackle conflict- related rape.

Instead of investing valuable time and resources in reaching distinct definitions for each case, international courts can adopt a 'fast track approach' which applies a broad and capacious definition of rape. Current approaches stall the judicial process. Time should be given priority so that victims are not re-traumatized eventually when the courts get to their cases and their belief in the judicial system is not damaged. The court's search for distinct definitions in each case not only creates a problem of inconsistency and confusion but also delays the rendering of justice.

With global tribunals, emphasis needs to be placed on the creation of speedy trials for reasons such as (a) tribunals are not set up immediately after the conflict, (b) the accused are more likely to flee the country allowing more time to be wasted in looking for them, and (c) victim's memories have the potential to be eroded especially when ample time has elapsed before trials begin. Hence there is an imperative need to take the time factor into consideration in the administration of justice in order to guarantee some equitability across the board. For instance, the ICTR is on the verge of closing its doors with an achievement of less than thirty completed cases over a decade (Nowrojee 1996).

In fact, courts could make their task far easier and amenable to timely justice by realizing that the act of rape and their strategies have broad similarities. To be clear, the act of rape can take many forms and can be achieved through human means and the use of objects (Oosterveld 2009, 72). Yet in all cases, non-consent and force are necessary factors that must be incorporated in the definition. As long as these two elements are established, the crafting of words to capture every particular case is unnecessary.

Although, Goldstone (2000) states that it is unfair to gauge the success of these tribunals by the amount of suspects they have indicted, approximately, ten years after the genocide, the ICTR has handed down 21 sentences: 18 convictions and 3 acquittals. An overwhelming 90 percent of those judgments contain no rape convictions (Nowrojee 2011). More so, both courts have completed what can be called a handful of cases far from an achievement for a court with a relatively long life span. With such a track record, how can the global community expect that individuals will take these courts seriously?

COMMAND RESPONSIBILITY

Along with adapting a more consistent and clear definition of rape, global tribunals need to give more weight to the problem of command responsibility. Rape as a central war crime thrives in contemporary warfare despite the deterrence effect of international tribunals. For instance, in spite of the creation of the ICTY in 1993 to address war crimes and crimes against humanity, grave atrocities continued to occur such as the Srebrenica massacre and the Kosovo ethnic cleansing (Drumbl 2007, 169). This example depicts that international tribunals are yet to deter sexual violence in conflict. Thus, a different approach to limit the use of rape as a weapon of war can be seen in the theory of command responsibility. This

doctrine conveys that the commanding officer is responsible for sexual crimes committed by his subordinates and or for failing to prevent or punish.

On command responsibility charges, the ICTR Trial Chamber found "it impossible [in the absence of a direct order to rape] to infer the [a]ccused knew or had a reason to know rapes or other inhumane acts were based on general orders to kill or exterminate" (Haffajee 2006, 209). For instance, In *Prosecutor* v *Muesema* case*,* the court required a "high burden of proof on the prosecution to prove rape under the command responsibility provisions of the ICTR Statute" (Haffajee 2006, 209). Until the ICTY *Celebici* case, the ICTY and ICTR did not prosecute criminals on the basis of command responsibility (Bantekas 1999, 575). Rather, both courts "brought charges for direct participation because convictions were considered easier to obtain than charges based on omission" (Bantekas 1999, 575). The ICTR court later found that "according to Rwandese law, *Akayesu* position as burgomaster…was sufficient to establish *Akayesu* de jure authority as a necessary element of his conviction for the crime of genocide" (Bantekas 1999, 578).

The ICTY in the *Celebici* case maintained that certain requirements had to be met to prove a criminal can be prosecuted under the command responsibility doctrine. They are (a) the existence of a superior- subordinate relationship, (b) 'Knew of Had reason to know' standard, and (c) Duty to act (Bantekas 1999, 577). The ICTY in the *Celebici* case concluded that the "had reason to know under article 7(3) requires the commander to have in his possession information of a nature, which at least, would put him on notice of the risks of offenses" (Levine 2005, 3). The ICTY successfully convicted "Zdravko Mucic, a Bosnian Serb administrator of the *Celebici* prison for the systematic rape of women and other crimes by his subordinates" (Rockwood 2007, 172). The ICTR has also prosecuted the Prime

Minister of Rwanda, Jean Kambanda for genocide and crimes against humanity (Rockwood 2007, 172).

The *Celebici* case provided the foreground for the ICC to include the command responsibility into its Statute. The Rome Statute for the ICC under article 28 made "command responsibility a basis for criminal responsibility when international crimes are committed" (Bantekas 1999, 575). Article 28(a) adopts a stricter "should have known standard by two distinct standards, one for military commanders and the other for civilians which is more rigorous (Rockwood 2007, 172). Eugenia Levine (2005, 4) asserts that the "main advantage of the stricter knowledge requirement …serves as a deterrent, giving incentive to a commander to be aware of what his subordinates are doing". Levine notes that a relaxed approach would give commanders opportunity to argue that they are not criminally responsible for their subordinate crimes especially when they did not receive any reports to indicate that grave atrocities occurred (2005, 4).

More emphasis should focus on ways of deterrence by an aggressive enforcement of the command responsibility doctrine which would instill the fear of punishment on high-ranking leaders. The direct prosecution of high-ranking officials responsible for rape and other sexual crimes committed under their supervision will ensure that soldiers do not use sexual violence as a weapon against women. Fortunately, prosecutors and judges have ample guidance from Articles 86 and 87 of the additional Protocol 1 to the *Geneva Conventions*. Both articles have significantly codified the doctrine of command responsibility and clarified the complex nature of dealing with military and non-military leaders in conflict areas (Bantekas 1999, 575).

With regards to rape, international tribunals must continue to enforce a stricter "should have known" standard of command responsibility. This approach will better address the collective nature of rape because it has a strong framework which destroys the complexities and legal protections surrounding high-ranking officials. Consistent with this approach, the courts should pursue a far more aggressive prosecution of high-ranking officials that previously endorsed rape of a collective nature.

To be sure, Levine (2005, 4) warns that command responsibility may place a heavy burden on commanders who must be informed of every activity within their territory. Yet, this excuse is unacceptable given that commanders are generally obligated to have knowledge of the activities of their soldiers. High-ranking officials can no longer argue the lack of knowledge under this doctrine. This doctrine helps limit the use of rape as a weapon of war in areas where it is rampant because commanders and soldiers are aware of the punishments that awaits such endorsements. Essentially, the command responsibility doctrine regulates the behavior of soldiers and keeps high-ranking officials on the alert against rape.

One last criticism that merits attention is the failure to address the societal causes of rape and conflict. International tribunals tend to place heavy focus on dealing with the aftermaths and or consequences of conflicts. By so doing, global tribunals forget to address the root sources of conflict in the first place. This cycle where tribunals pay too much attention to broader mandates of accountability and deterrence repeats itself with the emergence of new conflicts in different areas of the world. Moreover, international tribunals miss the point that sexual violence contributes to war in itself. Perhaps, it can be concluded that legal tribunals are not capable of such deeper tasks. I remain unconvinced but if so, then

it is imperative to establish a separate commission of experts with some binding authority to address the root issues of sexual violence.

More broadly, it is essential to have a range of other institutions to address these societal-structural problems. Local institutions can complement international tribunals in dealing better with sexual violence and conflict in general. My conclusion looks at alternative routes to justice for raped women who constantly seek justice where domestic courts have been destroyed.

CHAPTER 6

CLOSING IMPRESSIONS

International tribunals have broken new grounds in the prosecution of gender based offenses. For instance, the *Foca Trials* ruled that rape and sexual enslavement constitute crimes against humanity. Global tribunals have brought justice to some rape victims in conflict-related areas and have given recognition to rape as an international crime worthy of adequate punishment. International tribunals have provided a forum for individuals to be recognized in the global arena and a lens that encourages a proper understanding of rape through definitions.

Although, sexual atrocities committed in the Former Yugoslavia and Rwanda signify that rape is a weapon of war, international tribunals struggle to conceptualize rape in their failure to perceive rape as one of the grave breaches of the *Geneva Conventions* subject to universal jurisdiction. With the use of inconsistent definitions to prosecute rape, international tribunals portray that they may be confused on how to properly address conflict-related rape leading to the current perpetration of rape in refugee camps. For instance, "a former UNPROFOR commander accepted offers from a Serbian commander to bring him Muslim girls for use" (MacKinnon 1994, 192).

The prosecution of sexual violence guarantees accountability for mass atrocity in conflict prone areas. Global courts are more likely to advance retributive justice than reconciliation and reconstruction. Moreover, the definitional inconsistencies of rape show that global tribunals are not equipped to tackle the social consequences of rape especially in a large scale and must defer to local institutions and NGOs who are experts in handling cases

of sexual violence. In the aftermath of conflict, raped women continue to suffer in spite of interventions from international tribunals showing that tribunals as a sole mechanism for accountability and justice can only provide half measures of justice.

While international tribunals have attempted to reduce the use of systematic rape during conflict by subscribing to a retributive framework, it is necessary to assess their success relative to other mechanisms through which greater justice can be achieved. Alternative avenues exist to judicial court systems and their retributive package in which some victims are not adequately protected and privileged to have. The resuscitation of societies where conflict has occurred needs various kind of assistance both from the local and international community, but most importantly reconciliation and reconstruction to prevent the emergence of new conflicts.

A multi-dimensional and holistic approach will hopefully signify that rape must be treated as a phenomenon that implicates both the domestic and international arenas. Most fundamentally, there is a need to modify structural and cultural institutions as well as customs that propagate negative values that hinder women's human rights across the globe.

With a relaxed attitude towards gender related crimes such as rape, international tribunals and by extension the international community are not likely to satisfactorily address structural inequalities that cushion conflict-related rape even if they have a great and consistent definition of rape. In reality, State actors are reluctant to codify treaties that place women's rights issues at the core. One of the many theories States use as justification for their non-commitment and extensive reservations to treaties such as CEDAW follow the logic that "some documents on women's right violate their own cultural practices" (Merry 2009, 89).

This lethargic excuse adopted by some State actors reveals the influence of negative patriarchal cultures and values that promote violations against women during peace times and conflict. For some State actors, negative cultural values transcend the fundamental rights of women. This perspective directly speaks to the structural inequalities present in most global communities' perpetrated by a dominant male gender who ensure that most women find it difficult to assert their fundamental rights. Because international tribunals are geared towards justice, they disregard the power and influence of patriarchal cultures in areas prone to conflict.

More so, it is obvious that some State actors deliberately discourage female representatives in the decision making process, one of the many structural causes of conflict-related rape. State actors are more concerned with preserving their relationship with fellow countries than they are in providing an effective space where women's voices and concerns can be heard. Catherine MacKinnon (1994, 193) argues that "[w]hen men sit in rooms, being states, they are largely being men. They protect each other; they identify with each other; they try not to limit each other in ways they themselves do not want to be limited." International tribunals fail to see the discrimination against women in leadership as a hindrance in the justice process because they are not designed to deal with such structural problems.

The consequences of rape are yet to be fully understood especially in an international community prone to violence. For this reason, it becomes imperative to embrace an understanding of this atrocity in ways that encourage global communities to depart from utilizing women as a weapon of war. Oliver (2007, 22) shows that the impact of sexual violence on women has began to materialize in her study of military women in war zones and

prisons. Women serve as an "offensive and defensive of war for the military". In Abu Ghraib and Guantanamo, women are a means of torture for Muslims where "fake menstrual blood is used to threaten criminals to confession" (Oliver 2007, 22).

Oliver (2007, 24) notes the conservative blame on feminism for why military women have been described as weapons and torture machines when they argue that "feminism has created violent women". This argument seems to disregard that, extreme violence especially one that affects both the internal and external being of a certain population, male or female will most likely produce a generation of violent people. Therefore, it should be no surprise that military women with equal power to men exhibit similar barbaric characteristics.

With a global community that is slow to address the plights of women in conflict zones, an insertion of NGOs in the decision making process instead of leaving them as by-standers can further ensure that women's voices will be heard. NGO's influenced the creation of CEDAW norms and policy recommendation. In addition, local NGOs have experiences in working with cultures and human rights norms that can be translated across the globe. NGOs can serve as an advisory board to international tribunals because they primarily are local experts in reporting and documenting sexual violence during conflict.

Alana Tiemessen (2004, 59) argues, "it is the nature of post genocide societies in Rwanda [and the Former Yugoslavia] not the form of violence that occurred, that indicates what type of justice is most appropriate." The current situations in both conflict areas reveal that truth and reconciliation commissions represent good forms of restorative justice for victims of rape. A restorative procedure welcomes local people and communities to the reconciliation table who are most affected by the conflict. For example, "great social stigma exists against rape …such that a woman who reveals that she has been raped faces the

likelihood of being shunned by her family and community" (Merry 2009, 170). Therefore, there is an imperative need to encourage and support local institutions such as *gacaca*, an indigenous form of justice in Rwanda. Human Rights Reports reveal that some victims are more likely to participate in traditional forms of justice such as *gacaca* because it is community oriented and has also given women opportunities to be judges and part of the reconciliation and justice process (Tiemessen 2004, 63).

Despite international critical arguments against *gacaca* courts that states it violates principles of legal due process and has the potential to lead to mob justice (Clark 2009, 299), its additional benefits to women is that the communal basis of *gacaca* allows women to participate on various levels, recognizes their role in reconciliation process, and perceives them more than their current identification as victims and or survivors. Thus, restorative justice can attain newer heights through *gacaca* because it individualizes justice and allows women full access to the law. Phil Clark (2009, 300) asserts that "*gacaca* as an institution of restorative justice punishes those convicted of genocide and crimes against humanity in order to promote reconciliation". Nevertheless, Gerald Gahima (2007, 178) warns against the shortcomings of local institutions such as *gacaca* that presents risks of unfair trials highly manipulated by those in power. More or less, *gacaca* has been shaped by the RPF and so mostly targets Hutu and ignores the many atrocities of the RPF officials. This one-sided politicized factor would have to be remedied.

To be sure, the deficiencies of the global order and of domestic societies across the globe are profound with respect to matters of gender. Indeed, these deficiencies implicate global injustices more broadly, including poverty, unending war, and aggression. Accordingly, I have no illusions that any of the reforms proposed in this conclusion will be

easy to attain. Yet it is imperative that we be fully aware of the problem and not settle on half-hearted measures.

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