



AUTHOR(S):

TITLE:

YEAR:

Publisher citation:

OpenAIR citation:

Publisher copyright statement:

This is the _____ version of proceedings originally published by _____
and presented at _____
(ISBN _____; eISBN _____; ISSN _____).

OpenAIR takedown statement:

Section 6 of the "Repository policy for OpenAIR @ RGU" (available from <http://www.rgu.ac.uk/staff-and-current-students/library/library-policies/repository-policies>) provides guidance on the criteria under which RGU will consider withdrawing material from OpenAIR. If you believe that this item is subject to any of these criteria, or for any other reason should not be held on OpenAIR, then please contact openair-help@rgu.ac.uk with the details of the item and the nature of your complaint.

This publication is distributed under a CC _____ license.

Rape and Sexual Violence in War- Establishment of a Non-Derogable Norm?

Elimma C Ezeani and Rhian Elin Jones^{*}

Abstract

International rules and custom have not always out-rightly condemned and punished rape and sexual violence against women as a war crime. Its contemporary evolution under the jurisprudence of the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and its strategic inclusion in the Rome Statute of the International Criminal Court (ICC) is therefore of significance and demands continued support and protection. This paper examines Sexual and Gender Based Violence (SGBV) against women in conflict and the legal mechanisms of addressing these crimes in the modern responses under international criminal courts.

1. Introduction

Compared to a century ago where the majority of war casualties were military personnel, it is the civilians in war zones, in particular women and children, who constitute the majority of victims of armed conflict today.¹ The reason is more circumstantial than that there has been a change of approach to warfare in this regard – women being non-combatants were often not on the battle field and the contemporary all pervasive form of military engagement – in towns, cities, etc. have

^{*} Elimma C. Ezeani LLB, BL, LLM, PhD. Lecturer in Law, Robert Gordon University Aberdeen e.ezeani@rgu.ac.uk (Corresponding author and conference presenter); Rhian Elin Jones, LLB RGU r.e.jones@rgu.ac.uk , Peer reviewed Conference paper for the *RUW Conference on Women and Society*, Royal University for Women, Kingdom of Bahrain, 20 April 2016.

¹ 'Women and Armed Conflict' (*The United Nations Department of Public Information*, May 2000) <<http://www.un.org/womenwatch/daw/followup/session/presskit/fs5.htm>> accessed 15 September 2014.

made women more accessible targets. Notably, sexual violence in war had been significantly under-reported in the media and war accounts and war tribunals had not dealt with these cases as violations of the laws of war, it was therefore less visible on the political plane. Reflecting on the changes to this silence on sexual violence as a weapon of war, United Nations High Commissioner for Human Rights Mary Robinson (1997-2002) made the following observation:

In recent times, there have emerged extensive accounts of violence against women in times of armed conflict. Systematic rape and other forms of gender based violence are increasingly used as weapons of war in armed conflicts in different regions of the world. Furthermore, the use of rape to reinforce policies of ethnic cleansing and the establishment of camps explicitly intended for sexual torture and the forcible impregnation of women are tragic developments which mark a definite escalation of violence against women in situations of armed conflicts.²

While this systematic abuse remains an ever present threat for women in conflict situations, it is women who still have to assume the key role of ensuring family livelihood and adopt active key roles in the cultivation of peace within their communities.³ Women have to take care of their children and become the only providers of food and other necessities where the male folk are absent, fighting the war. Often weakened, frightened and defenceless, female prisoners of war become domestic and sexual slaves, objects of sport for the fighting men and transport mules.

With such a visible presence and first-hand experience of the violence war brings, the

² Mary Robinson, *Message from the UN High Commissioner for Human Rights* in Rashida Manjoo & Calleigh McRaith, 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas' (2011) 44 *Cornell International Law Journal* 11 at 12.

³ 'Women and Armed Conflict' (*The United Nations Department of Public Information*, May 2000) <<http://www.un.org/womenwatch/daw/followup/session/presskit/fs5.htm>> accessed 15 September 2014.

absence of the female voice on the international stage only reinforces the accepted view that rape being shameful for the victim can only be addressed by decisions *about victimhood* but not decisions *by or with* women. This is surely wrong. As Kirby and Shepherd note narrowing the focus of the women peace and security (WPS) agenda to discussions of “conflict-related sexual violence” means that there is little of the much needed progress on women’s participation in peace and security governance.⁴ This paper wishes to bridge the gap between women as victims and women as decision makers in countering rape and sexual violence against women. This paper is in five sections: Section 2 examines international rules relating to sexual violence against women in conflict and how women are protected under International Humanitarian Law. Section 3 evaluates modern rules on SGBV against women with a focus on some decisions from the International Criminal Tribunal(s) at Rwanda and Yugoslavia, and the International Criminal Court. Section 4 discusses the need for greater participation by women in the political process before, during and after conflict. The paper makes its conclusions in section 5.

2. Protection of Women under International Humanitarian Law

Expert opinion on the effectiveness of International Humanitarian Law (IHL) for the protection of women in wartime diverges.⁵ Critics of the IHL regulations suggest that certain of its features are out-dated and reflect the very stereotypical notions about women that perpetuate discrimination.⁶ In attempting to assess the strength of this argument, an exploration of how adequately IHL addresses women’s experiences in

⁴ Paul Kirby and Laura J Shepherd, “The Futures Past of the Women Peace and Security Agenda” *International Affairs* 92:2 (2016) 373-392 at 380.

⁵ Karima Bennoune, ‘Do We Need New International Law to Protect Women in Armed Conflict?’ (2006-2007) 38 *Case Western Reserve Journal of International Law* 363.

⁶ *Ibid.*

war will be undertaken. In doing so, our emphasis will be on examining the impact of armed conflict focusing primarily on sexual and gender-based violence and revealing the gender inequalities exacerbated during conflict.

2.1 Sexual and Gender-Based Violence (SGBV) and International Humanitarian Law

According to the United Nations High Commissioner for Refugees (UNHCR), the term GBV ‘refers to violence that targets individuals or groups on the basis of their gender.’⁷ Such violence predominantly includes slavery, rape, kidnapping/trafficking, disease transmission and numerous other human rights abuses.⁸ In many war zones women continue to undergo gender-targeted violence, a suffering of which the effects continue in the transition from periods of armed conflicts to peace.⁹ Such violence occurs not only at the height of armed conflict but also after and during population displacement. It occurs in places of detention, military sites, homes, fields, and even camps for refugees and displaced persons.¹⁰

Perpetrators of sexual violence include members of official armed and security forces, non-state armed groups, civilians, and even humanitarian and peacekeeping

⁷ IRIN: humanitarian news and analysis: ‘In-depth: Our bodies – Their Battle Ground: Gender-based Violence in Conflict Zones’ <<http://www.irinnews.org/indepthmain.aspx?IndepthId=20&ReportId=62814>> accessed 5 October 2014.

⁸ Askin includes humiliation, forced maternity, forced impregnation, ethnic cleansing and rape facilities (camps). See Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Cambridge: Kluwer Law International) 1997, 181

⁹ Even after the cessation of hostilities, women remain vulnerable as has been evidenced by sharp rises in domestic abuse, forced prostitution and sex trafficking in post-conflict areas. See Rashida Manjoo & Caleigh McRaith, ‘Gender-Based Violence and Justice in Conflict and Post-Conflict Areas’ (2011) 44 *Cornell International Law Journal* 11.

¹⁰ Megan Bastick, Karin Grimm and Rahel Kunz, ‘Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector’ (*Geneva Centre for the Democratic Control of Armed Forces*, 2007) <[http://www.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full\[1\].pdf](http://www.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full[1].pdf)> accessed 8 October 2014.

personnel.¹¹ It is an act of domination during armed conflict and is grounded in a complex mesh of cultural preconceptions, specifically as regards gender roles.¹² Sexual violence is commonly used as a method to humiliate or punish not just the targeted victims but also the other side of the conflict, a psychological weapon of war in a sense.¹³ Slavery and abduction are also common forms of GBV in war zones where forces kidnap civilian women and girls for the provision of both domestic and sexual services within camps.¹⁴ Manjoo and McRaith explain that such actions are occasionally disguised as a marriage, despite international definitions suggesting that such ‘marriages’ should be considered as crimes of enslavement.¹⁵ Article 7(2)(c) of the Rome Statute of the International Criminal Court for instance, defines enslavement as ‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.’¹⁶

The *Vienna Declaration and Programme of Action* notes that:

Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder,

¹¹ Ibid.

¹² Megan Bastick, Karin Grimm and Rahel Kunz, ‘Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector’ (*Geneva Centre for the Democratic Control of Armed Forces*, 2007) <[http://www.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full\[1\].pdf](http://www.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full[1].pdf)> accessed 8 October 2014.

¹³ Askin notes that the various means of sexual abuse include forced maternity and rape facilities (camps). See Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Cambridge: Kluwer Law International (1997) 181.

¹⁴ Rashida Manjoo & Calleigh McRaith, op cit, 11.

¹⁵ Ibid.

¹⁶ Art. 7(2)(c), 17 July 1998, 2178 UNTS 90.

systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.¹⁷

The rules of conflict have of course evolved over time both by the development of rules governing resort to force (*jus ad bellum*) and those seeking to limit the effect of armed conflict by regulating the conduct of hostilities (*jus in bello*). These principles cover for example, the treatment of civilians in occupied territory, sick and wounded personnel, prohibited methods of warfare and human rights in circumstances of conflict.¹⁸ IHL regulates the methods and means of warfare by aiming to ‘strike a balance between legitimate military objectives and the humanitarian objective of reducing suffering, particularly among civilians.’¹⁹ There was however no specific focus on the vulnerability of women who are not combatants in the main but are ready targets along with children and those *hors de combat*, from the early discussions at the Hague Peace Conferences of 1809 and 1907. The Hague provisions addressed war circumstances but the concern was mainly for those who were engaged in actual combat however with broadly constructed provisions possibly applicable to women affected by collateral damage of war such as the provision that ‘family honour and rights...must be respected.’²⁰

Under the *Geneva Convention Relative to the Treatment of Prisoners of War* (first signed in 1929 and subsequently revised in the 1949 Third Geneva Convention),

¹⁷ World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, 38, U.N. Doc. A/CONF. 157/23, II (July 12, 1993) in Rashida Manjoo & Calleigh McRaith, ‘Gender-Based Violence and Justice in Conflict and Post-Conflict Areas’ (2011) 44 *Cornell International Law Journal* 11 at 18.

¹⁸ Rebecca M.M. Wallace and Olga Martin-Ortega, *International Law* (6th edn, Sweet & Maxwell 2011) 326.

¹⁹ ‘International Law on the Conduct of Hostilities: Overview (*International Committee of the Red Cross*, 29 October 2010) <<https://www.icrc.org/eng/war-and-law/conduct-hostilities/overview-conduct-of-hostilities.htm>> accessed 5 October 2014.

²⁰ Article 46, Hague Convention IV on the Laws and Customs of War on Land.

‘prisoners of war are entitled to respect for their persons and honour.’²¹ Because of their gender, and the specific risks associated with this, the Third Geneva Convention included a protective measure for women combatants by specifying that ‘[W]omen shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.’²² Such provisions did little to prevent the mass occurrences of rape in World War II where a staggering 200,000 women were reported to have been raped, abducted and forced into sexual slavery within only the first two weeks of the conflict.²³ In addition to the violations perpetrated by German soldiers, thousands of women were also abducted in order to provide comfort facilities for the Japanese troops. Not considered as prisoners of war under the 1949 Geneva Convention which entitles only female combatants to the protections contained therein, calls for compensation and punishment were refused by the Japanese Government.²⁴ Consequently, these female sex slaves were considered to be less entitled to the protective measures given to women prisoners of war.

Originally applicable to international armed conflicts only, the Geneva Conventions were extended to include wars of ‘self-determination’ (Protocol I) and victims of ‘non-international conflicts’ (Protocol II) in 1977. Nevertheless, the four 1949 Geneva Conventions and the two Additional Protocols of 1977 now regarded as customary international law did not fare much better in identifying and protecting the peculiar susceptibility of women during conflict. Conventions I and II afford protection to sick, wounded and shipwrecked military personnel respectively. The Third Geneva Convention as noted earlier deals with the treatment of prisoners of

²¹ Article 14 1949 Third Geneva Convention.

²² *Ibid.*

²³ Katherine T. Bartlett & Deborah L. Rhode, *Gender and Law: Theory, Doctrine, Commentary* (4th edn, 2006) 803 in Benedetta Faedi, ‘What Have Women Got to Do with Peace: A Gender Analysis of the Laws of War and Peacemaking’ (2009) 10 *Georgetown Journal of Gender and the Law* 37 at 43.

²⁴ Benedetta Faedi *op cit* at 44.

war. With the adoption of the Fourth Geneva Convention in 1949 international law included for the very first time an explicit prohibition on the violation of female rights. This provided that '[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.'²⁵ By making sexual violence an assault on the *honour* of women, the provision it could be argued, merely reinforced the view that a woman's social relevance and status did not derive from an inherent and inalienable right to life in her own capacity as a human. Rather, it suggested and still suggests that, a woman who suffers sexual violence has been robbed of her honour.

Furthermore, the concern for women rights whether in war or in peace appeared to be of interest only when the women became *victims*. Faedi asserts that modern international law and historical chronicles have documented the role of women in wartime only when they have been identified as victims of war – targets of rape and other sexual atrocities.²⁶ In her view, the same exclusion has been reflected in IHL by reinforcing the social relevance of women as mainstays of social morals and family honour – as opposed to holders of personal rights.²⁷ This historical paradigm confined women to the private realm, and only brought them to the public fore, when they had suffered, as victims of war. Holding them up only when they were victims in Faedi's view ultimately, 'did not even serve the purpose of protecting them from abuse and sexual torture.'²⁸ This position is supported by Charlesworth and Chinkin who state that the protective provisions of the Fourth Geneva Convention applying to female civilians 'did not actually succeed in prohibiting the listed offences *per se*, but rather

²⁵ Art 27, Geneva Convention Relative to the Protection of Civilian Persons in Time of War .

²⁶ Benedetta Faedi, 'What Have Women Got to Do with Peace: A Gender Analysis of the Laws of War and Peacemaking' (2009) 10 Georgetown Journal of Gender and the Law 37.

²⁷ Ibid.

²⁸ Ibid.

contributed to the further anchoring of women in their sole status of victims in need of protection.²⁹

The High Contracting Parties under the terms of the Fourth Geneva Convention must ‘undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches³⁰ listed in the treaty itself. This provision, Art 146, however fails to explicitly mention sexual assault, enforced prostitution, or rape. As a final resort, a wide interpretation of the term grave breaches, which includes under Art 147, acts ‘wilfully causing great suffering or serious injury to body or health,’ may be extended further to embrace violations of women’s human rights and sexual integrity.³¹

The two Additional Protocols of 1977 partially remedied the flaws of the Fourth Geneva Convention with its limited reference to the woman’s honour. Under Protocol I, ‘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.’³² Protocol II equally prohibited ‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.’³³ Yet again though, both provisions cite the basis for these provisions not on the inherent right of a woman to her life and body, but on *personal dignity*, a severely limited and incorrect acknowledgement of totality of the human rights of women.

²⁹ Hilary Charlesworth & Christine Chinkin, ‘The Boundaries of International Law: A Feminist Analysis’ (2000) 314 in Benedetta Faedi, ‘What Have Women Got to Do with Peace: A Gender Analysis of the Laws of War and Peacemaking’ (2009) 10 Georgetown Journal of Gender and the Law op cit.

³⁰ Art 146, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, 12 August 1949, 6 UST 3516.

³¹ Benedetta Faedi, op cit at 45.

³² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict art. 76, June 8, 1977, 1125 UNTS 3 [hereinafter Protocol I].

³³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4, Dec. 7, 1978, 1125 UNTS 609 [hereinafter Protocol II].

These provisions have not in our view, denounced rape and sexual violence against women as strongly as it ought to and in recognition of the fact that what is violated are not just social expectations of dignity and honour, but women's inherent human rights. It is not surprising that compared to other grave breaches of human rights rape has taken an inordinately long time to be recognised as a war crime, under international law. Copelon had earlier asserted that '[p]rosecuting rape as a grave breach should effectively expand the meaning of the Conventions and Protocols and obviate the need for formal amendment'.³⁴ This position was supported by Bennouna who acknowledged that 'international criminal courts can indeed promote progressive, creative interpretations of IHL's key texts.'³⁵

Today, rape can now be prosecuted - as a result of the progressive jurisprudence of the modern rules formulated by the ad hoc criminal tribunals for Yugoslavia and Rwanda, and under the International Criminal Court – as a war crime and as a crime against humanity, including its recognition as a method of genocide. In practice however, the crime has not been easy to prosecute with few decisions on criminal responsibility for its perpetration.

3. Modern Rules on SGBV against Women: The ICTR; ICTY; ICC

Two tribunals laid the foundations for prosecuting individuals for sexual violence in war - the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The creation and approach of the

³⁴ Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 *Hastings Women's L.J.* 243.

³⁵ Karima Bennouna, 'Do We Need New International Law to Protect Women in Armed Conflict?' (2006-2007) 38 *Case Western Reserve Journal of International Law* 363. See also, Theodor Meron, 'Rape as a Crime Under International Humanitarian Law' (1993) 87 *AM. J. Int'l L.* 424.

International Criminal Court (ICC), as a result of the experience of both tribunals, has also expanded the scope of punitive measures against SGBV.

Details of SGBV in both the Bosnian and the Rwandan conflicts are graphic and horrendous. One such recorded account from the Bosnian conflict notes:

[They] brought her fourteen-year-old son and forced him to rape her...On [another] occasion, I was raped with a gun by one of the three men...in the room...Others stood watching. Some spat on us. They were raping me, the mother and her daughter at the same time. Sometimes you had to accept ten men, sometimes three...I felt I wanted to die...The Serbs said to us, “Why aren’t you pregnant?”...I think they wanted to know who was pregnant in case anyone was hiding it. They wanted women to have children to stigmatize us forever. The child is a reminder of what happened.³⁶

It was only after the reporting of sexual assaults during the Yugoslavian conflict in the 1990s that rape was finally acknowledged and prosecuted as a human rights violation in war. Between 20,000 and 50,000 women were raped by Serbian forces³⁷ and as Hodzic identified, ‘rapes were further intended to cause the long term destruction on the soul of the community.’³⁸

The discrepancy between the estimations of rape are even greater during the Rwandan genocide, with the numbers of women being raped ranging from 250,000 to 500,000.³⁹ Here, the genocide saw the instigation of planned systematic murders and

³⁶ Sylvia Pieslak, ‘The International Criminal Court’s Quest to Protect Rape Victims of Armed Conflict: Anonymity as the Solution’ (2004) 2 Santa Clara Journal of International Law 137 at 138.

³⁷ Lindsey Crider, op cit.

³⁸ Ibid.

³⁹ Anne-Marie de Brouwer, *Supranational Criminal prosecution of Sexual Violence: The ICC and the Practice of ICTY and ICTR* (Antwerpen, Oxford: Intersentia, 2005) 12 in Lindsey Crider, ‘Rape as a War Crime and Crime against Humanity: The Effect of Rape in Bosnia-Herzegovina and Rwanda on

violence by Hutu militia groups against the ethnic minority group, Tutsi. Approximately 800,000 people were killed during the conflict, lasting roughly 100 days. Contrasted with the war in Bosnia-Herzegovina, the ultimate goal in Rwanda was not just the displacement of Tutsis from the region, but extermination. Rape alongside murder was therefore the prevalent means of warfare in that conflict:

If you looked, you could see the evidence, even in the whitened skeletons. The legs bent apart. A broken bottle, a rough branch, even a knife between them... There was always a lot of blood. Some male corpses had their genitals cut off, but many women and young girls had their breasts chopped off and their genitals crudely cut apart. They died in a position of total vulnerability.⁴⁰

These conflicts – the former Yugoslavia and Rwanda created a significant shift in international perceptions of rape and sexual violence such that now, these crimes are no longer a consequence of war, but an illegitimate means of war.⁴¹

3.1 SGBV at the International Criminal Tribunal for Yugoslavia (ICTY)

In response to the war in Bosnia, the United Nations Security Council set up the ICTY in 1993. History was made when rape was included by the ICTY as a war crime and a serious violation of human rights. We can consider the Court's historic step in issuing

International Law' (Samford University, 2012) <<http://www.cla.auburn.edu/alapsa/assets/File/4CCrider.pdf>> accessed 3 May 2016.

⁴⁰ Romeo Dallaire, *Shake Hands with the Devil: The failure of Humanity in Rwanda* (New York, NY: Carroll and Graf Publishers, 2003) and Kinzer, Stephen, *A thousand Hills* (Colorado Springs, Colorado: John Wiley and Sons, 2008) 130-132 in Lindsey Crider, 'Rape as a War Crime and Crime against Humanity: The Effect of Rape in Bosnia-Herzegovina and Rwanda on International Law' (Samford University, 2012) <<http://www.cla.auburn.edu/alapsa/assets/File/4CCrider.pdf>> accessed 3 May 2016.

⁴¹ See further, Anne-Marie L.M. de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR Intersentia (2005)

an indictment devoted exclusively to rape and other sexual crimes⁴² in the *Foca* case⁴³ - representing a momentous step forward in defining the field of international humanitarian law. No one previously had ever been convicted of rape as a crime against humanity⁴⁴. In that case three Serbs were charged for their involvement in the running of a rape camp. The legal question here was whether the acts of the soldiers were simply individual acts of depravity or crimes against humanity. In order to prove the latter, the prosecution argued three things: that the rape on civilians was widespread and systematic; that it was a method of ethnic cleansing, and that it involved a chain of command with commanding officers doing nothing to stop it.⁴⁵

This *Foca* case is a landmark one for a number of reasons. Sexual enslavement was included as part of the crime of sexual violence, and the case was focused exclusively on SGBV. The facts revealed that women in particular (Muslim women) were targeted: The Appeals Chamber in its paragraph 3 noted that: “[O]ne specific target of the attack was Muslim women, who were detained in intolerably unhygienic conditions in places like the Kalinovik School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly.”⁴⁶ The pronouncements of the Appeal Chamber, in finding the accused guilty have put a better interpretation on rape and related offences, and their place as a war crime. On enslavement, it stated categorically that the *mens rea* for that crime “consists of the intentional exercise of a power attached to the right of ownership”

⁴² Lindsey Crider, op cit.

⁴³ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgement), IT-96-23-T & IT-96-23/1-T.

⁴⁴ Although the Charter of the International Military Tribunal for the Nuremberg Trials (1945) defined a number of specific acts as ‘crimes against humanity,’ rape was not specifically indicated as one of these crimes.

⁴⁵ John Hagan, ‘How Rape Became a Crime Against Humanity’ (*Center on law & globalization*) <https://clg.portalxm.com/library/keytext.cfm?keytext_id=74> accessed 10 October 2014.

⁴⁶ Available online: <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> accessed 3 MAY 2016.

over the victims and that it was not required “to prove that the accused intended to detain the victims under constant control for a prolonged period in order to use them for sexual acts.”⁴⁷ Overruling the appellants argument that rape required in addition to penetration, force or the threat of force and the continuous and genuine resistance from the victim, it held upholding the trial Chambers position, that “[F]orce or threat of force provides clear evidence of nonconsent, but force is not an element per se of rape.”⁴⁸ Emphasising that rape *was* torture, the Chamber noted that “some acts establish *per se* the suffering of those upon whom they are inflicted. Rape is obviously such an act.”⁴⁹ As Than and Shorts rightly note, the *Foca case* is a strong endorsement of women’s human rights in armed conflict and distanced the Tribunal from the typical identification of women in international law with questions of honour.⁵⁰

3.2 SGBV at the International Criminal Tribunal for Rwanda (ICTR)

In the ICTR prosecuting rape as a criminal method of war was taken one step further. The *Akayesu* case like *Foca* at the ICTY would also prove a defining moment in establishing the violation of human rights of women as an international crime.⁵¹ In 1995 Jean Paul Akayesu, Rwandan political leader, was indicted for fifteen counts of genocide. The trial established rape, as well as other forms of sexual violence, as acts of genocide with the intent to destroy another group. The Tribunal upheld that ‘rapes in fact resulted in physical and psychological destruction of Tutsi women, their

⁴⁷ Ibid para 122.

⁴⁸ Ibid para 129.

⁴⁹ Ibid. para 150.

⁵⁰ Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Sweet and Maxwell 2009) 365.

⁵¹ Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law (2000) 46 McGill Law Journal 217 at 227.

families and their communities.’⁵² *Akayesu* is significant in that it is the most progressive case concerning sexual violence. The statements of the Trial Chamber further upheld on Appeal are instructive on the progress but also the enduring challenges faced in the use of rape in conflict. The Trial Chamber noted in paragraph 687 of its judgement that:

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

In paragraph 688 it defined sexual violence including rape in far reaching and constructive terms as:

...any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact... The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence.

There were other indictments and convictions for rape and genocide at the ICTR but we cannot ignore the conviction of a woman in this regard. Pauline Nyiramasuhoko was a former Minister for Women Affairs in Rwanda before the conflict, charged

⁵² Doris Buss, ‘Rethinking Rape as a Weapon of War’ [2009] *Feminist Legal Studies* 145 in Lindsey Crider, *op cit*, 31.

alongside her son (Shalom Ntahobali) and others.⁵³ In paragraph 2630 of the Trial Chamber's judgement, a witness account identified the accused's participation in the abduction and subsequent killings of Tutsi refugees. In paragraph 2712, another witness stated that "...Nyiramasuhuko instructed Ntahobali and the Interahamwe to systematically select young women and young girls and to rape and kill them..." These accounts were echoed by other witnesses and in paragraph 2781, the Chamber found that "between 19 April and late June 1994 Nyiramasuhuko, Ntahobali, Interahamwe and soldiers went to the BPO to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; and the Tutsi refugees were killed in various locations throughout Ngoma commune..."

It is not only that Nyiramasuhoko is the first woman to be convicted of genocide; it reaffirms that rape is a crime against humanity, is employed as a deliberate means of warfare and that sexual violence is sadly not the exclusive preserve of men. Nyiramasuhoko is an educated, high ranking female who had been in charge of women affairs – part of the political decision making organ of the government. For the ICTR to find that "[I]n the first half of June 1994, Nyiramasuhuko ordered Interahamwe to rape Tutsi women at the BPO and that as a result numerous women were raped at that location" only reinforces the terrible descent into inhumanity that even women can be guilty of in carrying out sexual violence against women.

3.3 SGBV at the International Criminal Tribunal (ICC)

The elements that form the definition of rape under Article 7 (1) (g)-1 (Crime against humanity of rape) of the ICC Statute are that:

⁵³ *Prosecutor v Nyiramasuhoko et al* Case No ICTR-98-42-T 24 June 2011

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such persons or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁵⁴

During the Congolese war, over 40,000 incidences of sexual violence and rape occurred in the Congo and over 100,000 women and children were subjected to GBV during the period 2000-2005.⁵⁵ Yet, the International Criminal Court did not start off strongly on matters of SGBV in its early cases arising from the conflict in the Democratic Republic of Congo. The first case before the Court, *The Prosecutor v Thomas Lubanga Dyilo*,⁵⁶ was a poor start in gender justice for the ICC. Although findings of widespread and systematic sexual violence were published (prior to the trial) by the Women's Initiatives for Gender Justice in 2006, their request to participate as *Amicus Curiae* was rejected by the Office of the Prosecutor (OTP),

⁵⁴ 'Elements of Crimes' (*The International Criminal Court*, 2011) <<http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>> accessed 2 March 2015.

⁵⁵ Rebecca Penfold, 'Gender Crimes in International Criminal Law and the role of the International Criminal Court' (*The Student Journal of Law*) <<http://www.sjol.co.uk/issue-3/gender-crimes>> accessed 15 March 2015.

⁵⁶ *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06.

stating it as inadmissible due to the issues being irrelevant to the case. Moreover, the failure of the prosecutor to include charges of sexual violence in time for the hearing (and thus rejected by the Court Regulations) demonstrated a lack of understanding, commitment and recognition (at the highest levels) of gender-based crimes.⁵⁷ In the case of *Bosco Ntaganda* the ICC was criticised for failing to bring charges of sexual violence, despite human rights organisations and the availability of UN reports documenting such violence.⁵⁸ In *The Prosecutor v Germain Katanga and Mathieu Ngudjolo*⁵⁹ it was held that in order to ensure that they met the evidential burden at trial, the charges must be fully supported by sufficient evidence and that new factual evidence could not be introduced at a later stage of the hearing.⁶⁰ An insufficiently prepared prosecution would invariably impact the trial at that later stage.⁶¹ In these cases, charges of sexual violence were not successful.

On March 21 2016 however, the ICC in a three hundred and sixty four page judgement in the *Bemba case* brought in respect of military activity in the Central African Republic, found Jean-Pierre Bemba Gombo, a Congolese politician guilty under Articles 7 and 8 of the ICC Rome Statute, on two counts of crimes against humanity for murder and rape and three counts of war crimes for murder, rape, and pillaging.⁶² What is remarkable is that the crimes were attached to Mr Bemba Gombo under the doctrine of command responsibility despite the fact as was put in the accused's defence that he was not in direct control of the MLC forces, only

⁵⁷ According to O'Connell, According to O'Connell, this was due to the majority of senior level employees in the OTP being male. See S O'Connell, 'Gender Based crimes at the International Criminal Court' (2010) 1 Plymouth Law Review 70.

⁵⁸ *The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06*.

⁵⁹ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo 01/04-01/07 OA 8*.

⁶⁰ S O'Connell, 'Gender Based crimes at the International Criminal Court' (2010) 1 Plymouth Law Review 70.

⁶¹ B Inder, *Making a Statement: A review of charges and prosecutions for gender-based crimes before the International Criminal Court* (2nd edn, Women's Initiatives for Gender Justice 2010) 16.

⁶² *The Prosecutor v Jean-Pierre Bemba Gombo ICC-01/05-01/08 at para 752*.

communicating with them by telephone. It was alleged that Bemba Gombo had sent soldiers from the MLC Congolese rebel group to the Central African Republic in response to a request for assistance against a coup attempt, from the latter's embattled President, Ange-Félix Patassé. The MLC forces had engaged in a rampant reign of terror and criminality and in the view of the court:

Despite Mr Bemba's effective authority and control over the ALC, including authority over disciplinary matters, he failed to take any measures to remedy such deficiencies in training, either prior to deployment of the troops or in response to the consistent reports of crimes occurring from the earliest days of the 2002-2003 CAR Operation. Additionally, the Chamber incorporates by reference its findings regarding Mr Bemba's failure to take all necessary and reasonable measures within his power to prevent and repress the commission of the crimes, and submit the matter to the competent authorities. Such failures further demonstrate that Mr Bemba failed to exercise control properly over the forces deployed to the CAR.⁶³

In prosecuting future SGBV crimes, the ICC's success will depend upon its influence on States following in its footsteps with domestic prosecutions. However, without the effective prosecution of high-level perpetrators by the ICC, 'there is less impetus for States to do so.'⁶⁴ With the decision in the *Bemba case* the Rome Statute has in practical terms, put 'friendly pressure...or at least [shames] that state into taking the required action,'⁶⁵ although it is not certain that there will be successful prosecutions of soldiers and rebel forces in the Central African Republic or indeed in the Congo. This is evidenced by the continuing occurrence of systematic sexual violence in the Central African Republic and as some noted while the *Bemba case* was in progress,

⁶³ Ibid, para 737.

⁶⁴ S O'Connell, 'Gender Based crimes at the International Criminal Court' (2010) 1 Plymouth Law Review 69.

⁶⁵ Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Sweet & Maxwell 2003) 341.

‘the tempest of violence has yet to fully subside,’⁶⁶ and the likelihood of any domestic prosecutions is ‘almost zero.’⁶⁷

Be that as it may, the enactment of the Rome Statute and subsequent formation of the ICC were significant advances for international law. It has been described as ‘a qualitative leap forward,’⁶⁸ and representative of ‘a truly great accomplishment...for international justice.’⁶⁹ It had also been submitted that the provisions of the statute are a ‘concrete indication’ of the advances made; proof of women’s rights no longer being as marginalised as before.⁷⁰ Penfold had noted that it is for the Court to “ensure such adherence,”⁷¹ and with the decision in the Bemba case, the ICC is clearly making some effort towards achieving this objective.

4. Action by and for Women

For women to uphold their right to sexual autonomy in war or in peace, the decisions of the ICTR and the ICTY condemning rape and sexual violence as international crimes, must be preserved as a non-derogable norm in IHL. Women must be at the forefront of changing the culture and mind sets which consider their sex as ready targets in war. The limited involvement of women in political groups that discuss

⁶⁶ The Economist: ‘Violence Against Women: Wars Overlooked Victims: Rape is Horrifyingly Widespread in conflicts around the World’ (*The Economist*, 13 January 2013) <<http://www.economist.com/node/17900482>> accessed 05 Nov 2015.

⁶⁷ B Inder, *Making a Statement: A review of charges and prosecutions for gender-based crimes before the International Criminal Court* (2nd edn, Women’s Initiatives for Gender Justice 2010) 16.

⁶⁸ Meredith Tax ‘Women have human rights, too: The ICC’s failure to prosecute gender violence is symptomatic of the way human rights advocacy has come to overlook women’ (*The Guardian*, 13 December 2010) <<http://www.guardian.co.uk/commentisfree/cifamerica/2010/dec/13/international-criminal-court-moreno-ocampo>> accessed 20 March 2015.

⁶⁹ ‘Gender and the International Criminal Court’ (*Foreign Affairs, Trade and Development Canada*) <http://www.international.gc.ca/court-cour/gender-hommes_femmes.aspx?lang=eng> accessed 18 March 2015.

⁷⁰ Barbara Bedont and Katherine Hall-Martinez, ‘Ending Impunity for Gender Crimes under the International Criminal Court’ (1999) 6 *Brown Journal of World Affairs* 65 at 80.

⁷¹ Rebecca Penfold, ‘Gender Crimes in International Criminal Law and the role of the International Criminal Court’ (*The Student Journal of Law*) <<http://www.sjol.co.uk/issue-3/gender-crimes>> accessed 15 March 2015.

international crimes and matters relating to international humanitarian law, the very few women lobbyists that appeal to domestic governments and legislators on matters of rape and sexual violence and the underwhelming condemnation of rape and sexual violence against women in war time and in peace time, is largely to blame for the continued prevalence of these atrocities.

What the decisions of the courts both at the ICTR and the ICTY have done is to remove the silent restrictions both in media reports and legal reviews, on what constitutes rape and sexual violence and how these crimes are to be interpreted in IHL. These judgements have come at a most opportune time with ever-increasing numbers of women trafficked as sex slaves, raped and violated, as bounties of war. The potential impact for stronger domestic punitive measures against rape and sexual violence in peace time cannot be overemphasised. It is of utmost urgency that the clear condemnation of rape and sexual violence as international crimes should be replicated by domestic courts and regional tribunals. The judgements of the courts also deserve wider dissemination in schools, publications, media and public discourses.

In addition, for women to uphold their right to sexual autonomy in war or in peace, women must be at the forefront of changing the culture and mind sets which consider their sex as ready targets of war. The participation of women so far in peace processes, an important venue where mind sets and political positions can be changed, has not been significant enough as the table below shows:

Table 1: Women's Participation in 31 Peace Processes (1992 – 2011)⁷²

		Women Signatories	Women Lead Mediators	Women Witnesses	Women in Negotiating Teams
1	El Salvador (1992) Chapultepec Agreement	12%	0%	—	13%
2	Croatia (1995) The Erdut Agreement	0%	0%	0%	11%
3	Bosnia (1995) The Dayton Accords	0%	0%	0%	0%
4	Guatemala (1996) Agreement on a Firm and Lasting Peace	11%	0%	—	10%
5	Northern Ireland (1998) Good Friday Agreement.	10%	0%	—	10%
6	Kosovo (1999) Interim agreement for Peace and Self-Government in Kosovo (The Rambouillet Accords)	0%	0%	0%	3%
7	Sierra Leone (1999) The Lomé Peace Agreement	0%	0%	20%	0%
8	Burundi (2000) – Arusha Arusha Peace and Reconciliation Agreement for Burundi	0%	0%	—	2%
9	Papua New Guinea (2001) Accord Papua New Guinea	7%	0%	—	4%
10	Macedonia (2001) The Ohrid Peace Agreement	0%	0%	0%	5%
11	Afghanistan (2001) – Bonn Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions	9%	0%	—	9%
12	Somalia (2002) - Eldoret Declaration on Cessation of Hostilities and the Structures and Principles, Principles of the Somalia National Reconciliation Process	0%	0%	0%	—

⁷² Pablo Castillo Diaz and Simon Tordjman, 'Women's Participation in Peace Negotiations: Connections between Presence and Influence' (*UN Women*, October 2012) <<http://reliefweb.int/sites/reliefweb.int/files/resources/03AWomenPeaceNeg.pdf>> accessed 18 April 2016.

13	Cote d'Ivoire (2003) <i>Linas-Marcoussis Peace Accords</i>	0%	0%	0%	—
14	DRC (2003) <i>The Sun City Agreement ("The Final Act")</i>	5%	0%	0%	12%
15	Liberia (2003) – Accra <i>Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia and the political parties</i>	0%	0%	17%	—
16	Sudan (2005) - Naivasha <i>The comprehensive peace agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/ Sudan People's Liberation Army.</i>	0%	0%	9%	—
17	Darfur (2006) – Abuja <i>Darfur Peace Agreement</i>	0%	0%	7%	8%
18	Nepal (2006) <i>Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist)</i>	0%	—	0%	0%
19	The Philippines (2007) <i>Communique on the Tripartite Meeting between the GRP, MNLF and OIC</i>	0%	0%	—	—
20	DRC (2008) - Goma - North Kivu <i>Acte D'Engagement</i>	5%	20%	0%	—
21	DRC (2008) - Goma - South Kivu <i>Acte D'Engagement</i>	0%	20%	0%	—
22	Uganda (2008) <i>Juba Peace Agreement</i>	0%	0%	20%	9%
23	Kenya (2008) – Nairobi <i>Agreement on the Principles of Partnership of the Coalition Government</i>	0%	33%	0%	25%
24	Central African Republic (2008) <i>Accord de Paix Global</i>	0%	0%	0%	—
25	Zimbabwe (2008) <i>Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe</i>	0%	0%	0%	—
26	Somalia (2008) <i>Agreement between the Transitional Federal Government of Somalia (TFG) and the Alliance for the Re-Liberation of Somalia (ARS) (The Djibouti Agreement)</i>	0%	0%	10%	—
27	Honduras (2009) <i>Diálogo Guaymuras Acuerdo Tegucigalpa/San José para la reconciliación nacional y el fortalecimiento de la democracia en Honduras - Intra-State Agreement</i>	33%	0%	—	—
28	Iraq (2010) <i>Erbil Agreement</i>	0%	0%	0%	—
29	Philippines (2011) <i>Oslo Joint Statement</i>	33%	0%	0%	35%
30	Central African Republic (2011) <i>Accord de cessez-le-feu entre l'UFDR et le CPIP</i>	0%	0%	0%	—
31	Yemen (2001) <i>Agreement on the implementation mechanism for the transition process in Yemen in accordance with the initiative of the Gulf Cooperation Council (GCC)</i>	0%	0%	—	—

More attention needs to be paid to women's voices given that they have experienced directly, the ravages of war and sexual violence. This is how ultimately visibility, awareness and political leadership can preserve what the judicial leadership of the ICTR and ICTY has managed to achieve – that sexual violence against women in all

its forms being a crime against humanity will not be tolerated and will be severely punished. If a just and equitable response is to be adopted by the international community to the conflicts of this age, then those who are most impacted by the suffering and injustices of conflict must be empowered to participate in developing effective solutions. As McGuinness explains, effective peace processes go even further: they help prevent violence in the future.⁷³ The participation of women and influence over the terms of peace is therefore ‘both a precondition for addressing a range of post-conflict issues and to long-term prevention of armed conflict and of the harms that war inflicts disproportionately on women.’⁷⁴

5. Conclusion

With the ultimate conclusion of the trials in the ICTY and the ICTR, there is a danger that the achievements made possible judicially in criminal punishment for SGBV in conflict, may be lost particularly if the ICC does not advance the progress made already. One hopes that international political and legal action will go one step further in the specific and positive establishment of sexual violence in war as a grave and serious violation of women’s rights, a war crime, and as a crime against humanity. In our view, the Fourth Geneva Convention should be widened to reflect the interpretations the ICTY and the ICTR were forced to draw from common Article 3 to the Conventions on rape, enslavement and other forms of sexual violence. We suggest that such a widening of the provisions under Article 27 of the *Fourth Geneva Convention* could include that:

⁷³ Margaret E. McGuinness, ‘Women as Architects of Peace: Gender and the Resolution of Armed Conflict’ (2007) 15 Michigan State Journal of International Law 63 at 64.

⁷⁴ Ibid.

...there must be no violations of personal rights and freedoms including violations of a sexual nature - rape, enslavement, assault, or any derogation from the inherent sexual autonomy of all civilians. Such violations are war crimes and crimes against humanity and are prohibited.

There is also a need for an international convention that recognises the decisions of the International Criminal Tribunals on the non-derogability of respect for sexual autonomy, as a core value of human rights.⁷⁵ A Convention guarantees the protection from rape and sexual violence not only in war but also, in peace time.

What is most urgent however is that women ought to know and hold closely the fact that SGBV in conflict is prohibited and punishable under international law. Whereas it had been seen as an attack on women's honour and promoted as such, the story must change to reflect the present truth – that the spotlight is now on perpetrators and it is those perpetrators who have lost *their* honour and dignity in their depravity.

Greater action by women is fundamental to realising these goals. If the conflict or post-conflict issues affecting women are to be addressed meaningfully then women must not be content with being side-lined into informal processes: 'they must literally have a seat at the peace table and a hand in the drafting, interpretation and application of the rule of law that is created during transitions from war to peace.'⁷⁶ McGuinness explains that formal peace processes are important for two reasons: achieving justice for previous harms, and establishing a sustainable peace that helps avoid the harms in the future.⁷⁷ References to the 'importance of women, peace and security' without actually including women in all aspects of peace building, peace negotiations and

⁷⁵ There have been discussions on proposing a Convention on violence against women. See <https://ilg2.org/2013/12/02/towards-an-international-convention-against-violence-against-women/> accessed 19 April 2016.

⁷⁶ Margaret E Guinness, *op.cit.*

⁷⁷ *Ibid.*

post-conflict reconstruction of societies really does not help address an inclusive agenda in the prevention of SGBV in conflict or in conflict resolution.⁷⁸

⁷⁸ 'Include women in peace processes: Nobel Laureates' (*Nobel Women's Initiative*, 27 February 2015) <<http://nobelwomensinitiative.org/2015/02/nobel-laureates-call-for-international-attention-to-women-and-children-in-conflict/>> accessed 11 April 2015.