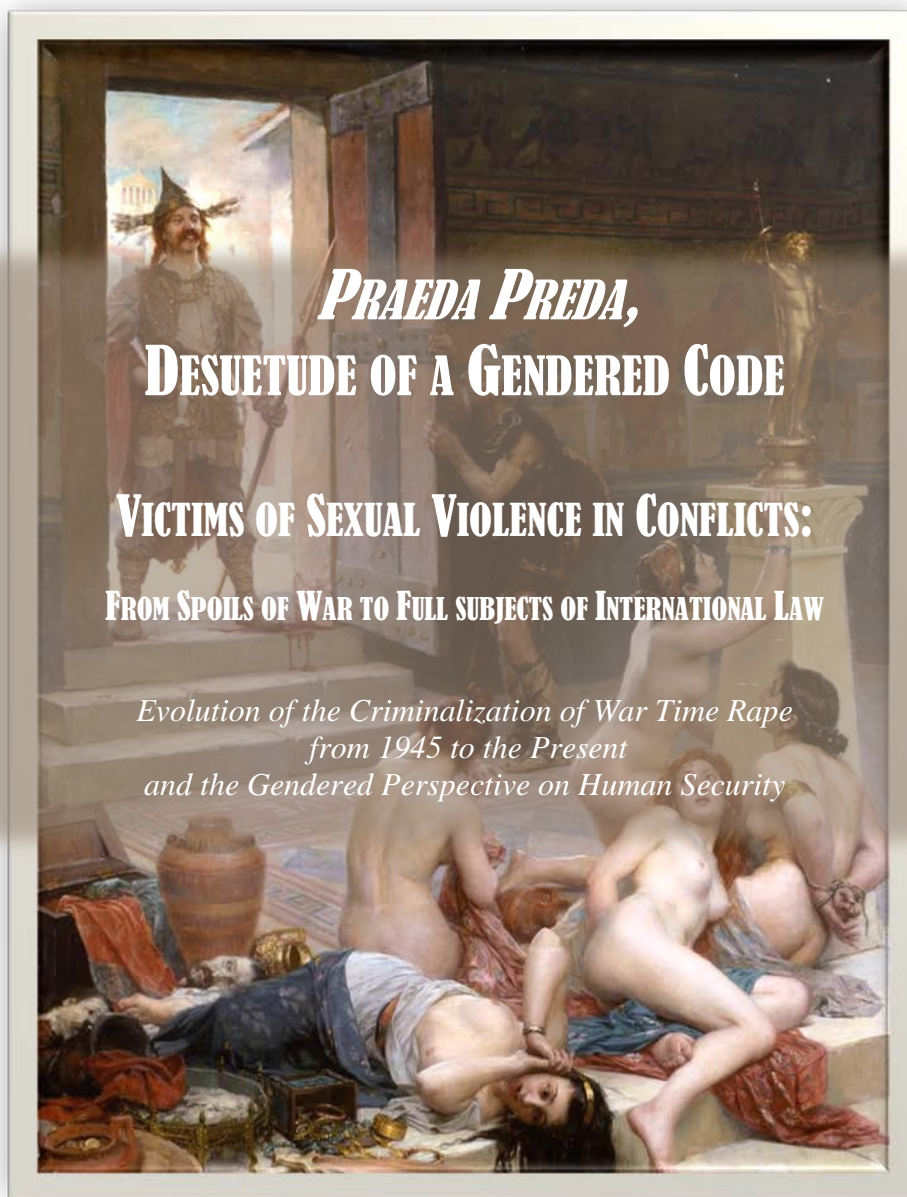


THE FLETCHER SCHOOL OF LAW AND DIPLOMACY
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1. Paul Jamin, *LeBrenn and his Portion of the Spoils*, 1893

Abstract

Women's legal status in times of war has historically been that of objects available to the conquering males; sexual violence perpetrated on those spoils of war (or in Latin, Praeda Preda) was a legitimate prerogative of the combatant and a victor's right. While novel, neither post-World War II judicial proceedings in Nuremberg and the Far East sought to address large scale, sexual violence perpetrated by Allied troops. This was a clear indication that accountability for wartime sexual violence (to include rape and other sexual crimes) by armed forces on civilians was a largely invisible field of the Law of Armed Conflicts. Essentially non-existent, it was incorporated in vague legal terminology relating to personal dignity or respect of honor. With the specter of mass atrocities perpetrated by Axis forces guiding a throng of normative developments, four new Geneva Conventions were adopted in 1949. However, it was not until two major intra-state wars confounded the international community both by their intensity and their brutality that the latter's transformation into full subjects of international law occurred. This paper therefore seeks to analyze the evolution of the legal status of victims of wartime sexual violence that has resulted from the said developments. It explores the shift from objects to subjects of international law as having occurred within the context of the emergence of an individualized perspective on security. Contending that supranational criminal prosecution is crucial to preventing the systemic use of sexual violence in current and mostly intra-state conflicts, it also argues favor of the creation of an engendered human security paradigm informed by norms of refugee, human rights and humanitarian law as a legal tool against impunity.

Keywords: sexual crimes, sexual violence, war time rape, international law, international humanitarian law, international criminal law, international tribunals, gender, human security, Bosnia, Rwanda, Sierra Leone, Democratic Republic of the Congo

PRAEDA PREDATA, DESUETUDE OF A GENDERED CODE

VICTIMS OF SEXUAL VIOLENCE:
FROM SPOILS OF WAR TO FULL SUBJECTS OF INTERNATIONAL LAW

*Evolution of the Criminalization of War Time Rape from 1945 to the Present
and the Gendered Perspective on Human Security*

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ABBREVIATIONS

CEDAW	Convention to End All Forms of Discrimination Against Women
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
MONUC	Organization Mission in the DR Congo
MONUSCO	Organization Stabilization Mission in the DR Congo
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OIOS	Office of Internal Oversight and Services
OSCE	Organization for Security and Cooperation in Europe
PMSC	private military security company
SFOR	Stabilization Force (in Bosnia)
SOFA	Status of Force Agreement
SCSL	Special Court for Sierra Leone
UN	United Nations
UN ECOSOC	United Nations Economic and Social Council
UNHCR	United Nations High Commissioner for Refugees
UNMIBH	United Nations Mission in Bosnia Herzegovina
UNMIK	United Nations Mission in Kosovo
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs

Introduction

“*War breeds atrocities,*” Justice Murphy of the United States Supreme Court once stated, also contending that “*from the earliest conflicts of recorded history to the global struggles of modern times, inhumanities, lust and pillage have been the inevitable by-products of man’s resort to force and arms.*”¹

Long considered as an inevitable feature of armed conflicts and shelved under the label of customary acts by deserving, fighting men, sexual violence reaches back into ancient times when sexual enslavement was a norm. It was a combatant’s reward, as the forceful acquisition of the female body meant owning a piece of conquered territory. Depicted in Saint Augustine’s 5th century accounts of Barbarians’ raids on Rome, such outrages on personal dignity victimized indiscriminately. The desperate whimpers of those whose lives it shattered were echoed by thousands of victims, fifteen centuries later, in Europe and the Far East.

Sexual violence, to include rape and other sexual crimes (*inter alia* sexual humiliation, forced prostitution, forced pregnancy, coerced undressing, forced impregnation, non-penetrating sexual assault such as sexual mutilation)², is no longer common to every conflict due to the fact that most modern armed forces no longer tolerate it. The evolution of the law of armed conflicts or international humanitarian law (IHL) embodied in the 1907 Hague Conventions and the 1949 Geneva Conventions among other major multilateral instruments, may be credited.

¹ Justice Murphy, as quoted during the *Yamashita v. Styer* case, 1946. Yamashita, a general in the Japanese army, was tried by the US Military Commission of Manilla in 1945. The Commission found that a commander in his position may be held responsible, even criminally liable, for the lawless acts of his troops and sentenced him to death (retrieved from <http://www.icrc.org/ihl-nat.nsf/0/1d4c8a391cc93c38c1256d1700575bb2?OpenDocument>)

² Although the ad hoc international courts tend to refer to, and place wartime sexual violence under the umbrella of ‘rape’, I would rather use the terminology of ‘sexual violence’ to include rape and every other crime of a sexual nature identified in jurisprudence. As will be argued in this paper, the ICTR, ICTY and ICC have developed elaborated albeit extremely narrow definitions of ‘rape’ and other acts of a sexual nature may not qualify as such when in fact, they are.

However, 20 and 21st centuries events have revealed that this scourge can become a policy *in war*. By then, international law did little to elevate the legal status of victims, mostly women, and thereby provide for both a protective regime and avenues of redress; accountability for wartime sexual violence remained mostly absent from ceasefire agreements and rarely if ever, mentioned during peace negotiations. A highly gendered crime, the causes of which span a wide spectrum of rationales, its repercussions reach far beyond physical and mental scarring, destroying entire communities and perpetuating social dynamics antithetical to basic, individual security. Considering the increasing number of internal, violent conflicts, mostly in Africa, and the remaining gap between the widespread use of sexual violence for military ends and the norms needed to address it in a manner that better protects victims, an individualized conception of security appears as a tool with the potential to alleviate threats of violence from state and non-state actors alike. How can, or should a nexus between such individualized conception of security, international law and wartime sexual violence be established?

The research query of this thesis therefore is: if it can be hypothesized that the late 20th century emergence of an international accountability for wartime sexual violence coincides, *inter alia* with the increasing focus on an individual, human security paradigm, would adding a gender component to the said paradigm better protect victims, and deter future violations?

The aim of this paper will be to first provide for an analysis of accountability for wartime sexual violence from the post-World War II era to the early 1990s, when a difficult but emerging consensus on protecting women and children gained credence. Then followed the Balkans and Africa's civil wars, during which rape became as a weapon. Supranational institutions, with great insight from feminist advocates lobbying for gender-sensitive approach to prosecution, sought to castigate impunity, ushering a new era for victims as subjects in international criminal

proceedings. However, the past decade has witnessed the proliferation of new intra-state wars and a dramatic surge in targeted attacks against women, thus highlighting the lack of deterring power of this protective regime. Using Africa's Great Lakes as an example, and the Democratic Republic of the Congo as a case study, this paper will argue for the necessity of establishing a gender-specific, human security *corpus iuris* as a tool against impunity everywhere wars occur.

I.

**ACCOUNTABILITY FOR SEXUAL VIOLENCE
PERPETRATED DURING WORLD WAR II:**

**A Largely Invisible Field of the Law of Armed Conflicts
(1944 – 1970s)**



2. Korean Comfort Women in a Japanese Camp, 1945

I.A. COMING TO TERMS WITH ATROCITIES PERPETRATED BY AXIS FORCES

1. Special Tribunal and the IMTFE: No Justice for Comfort Women and Nanking's Flowers of War

Inescapability of Rape

“The chronicle of humankind’s cruelty to fellow humans is a long and sorry tale,” Iris Chang wrote (Chang, 1997: 3), referring to the massive sexual violence, or what Hugo Slim dubbed the second sphere of human suffering in conflict (Slim, 2007: 37), that occurred in the Pacific theater during World War II. The 1937 “rape of Nanking” resulted in the widespread rapes and executions by Japanese soldiers in the eponymous Chinese city of an estimated 20,000 to 80,000 women and girls (Wood, 2006: 310). If men were executed summarily once the Chinese army was defeated, women suffered the most, a former soldier in the Japanese army in Nanking recalled (Chang, 1997: 49):

No matter how young or old, they all could not escape the fate of being raped. [...] And then each of them was allocated to 15 or 20 soldiers for sexual intercourse and abuse.

Infantrymen were not alone in indulging in atrocities; officers not only encouraged such behavior but recommended that their subordinates “dispose of the women afterwards to eliminate evidence of the crime” (Chang, 1997: 50). Sexual violence was so engrained in Japanese military culture, that “some soldiers were even known to wear amulets made from the pubic hair of such victims, believing that they possess magical powers against injury” (Chang, 1997: 49).

In a widespread and systemic fashion, and in a horrific example of common patterns of wartime sexual violence, Japanese soldiers would roam the streets of Nanking day and night, and raping victims in front of their families who were slaughtered afterwards. Infants, when present during the rape of their young mothers, were either silenced or killed. In a display of despicable cleverness, Japanese units also spread false rumors about special rice markets to lure large

groups of famished women to certain places. Women coming out of hiding would then be held, raped and killed. As Slim wrote (2007: 64),

Many were left with bamboo sticks or bottles rammed inside them as a sickening sign that they were finished with. [...] Women who did survive rape often gave birth to half Japanese children and were overcome with shame, self-hatred and deep moral confusion as to how to feel about them and what to do with them. In the months that followed the rapes, there were rumors of babies being drowned or suffocated at birth and diplomats reported significant numbers of women committing suicide by hurling themselves into a particularly fast flowing part of the Yangtze River.

As news of atrocities committed by the Japanese Imperial Army reached the West, Japanese officials, rather than hold soldiers responsible accountable, made plans to establish a wide underground system of military forced prostitution to keep troops from further engaging in mass rapes. This was how women, “mostly kidnapped or purchased, from China, Korea, the Philippines and Indonesia filled facilities of sexual comfort” built for the entertainment of the Japanese soldier and officer (Chang, 1997: 53). As Copelon described (2000: 4),

The comfort women slave system was designed to meet at least four articulated military needs: the need of their soldiers to "have sex"/rape to keep them fighting; the need to avoid antagonizing the local populations by preventing rape of women in the communities being occupied; the need to minimize sexually transmitted disease among the troops; and the need to keep rape from international scrutiny and outrage such as had occurred during the rape and killing spree that attended the conquest of Nanking. In other words, the notion of women as the "booty" of war and the entitlement of fighting men was never in question.

Most of the comfort women were between fourteen and eighteen years old (Wood, 2006: 311).

Prosecuting War Criminals

Forced to surrender after the bombings of Nagasaki and Hiroshima, the Japanese government and armed forces were subjected to two sets of judicial proceedings related to the events that had taken place in Nanking.

First, the Nanjing War Crimes Tribunal, established in 1946 by the government of Chiang Kai-Shek and one of thirteen other similar judicial organs, sought to judge four Japanese Imperial Army officers accused of crimes committed during the war. One committed suicide,

another died, and a third, a member of the imperial family was granted immunity. The only officer prosecuted for the Nanking massacre was found guilty in 1947 and executed.³

The second wave of judicial proceedings launched in 1946, when the International Military Tribunal for the Far East (IMTFE). The prosecution opened its case, charging the defendants with conventional war crimes, crimes against peace, and crimes against humanity; however, the entire imperial family, including career officer Prince Asaka, was not prosecuted for involvement in any of the three categories of crimes, which entailed mostly to prisoner abuses, and mentioned mass rapes.

In an example of expedited justice, the IMTFE Charter provided that evidence against the accused could include any document “without proof of its issuance or signature.” Article 13 of the Charter indeed states: “The tribunal shall not be bound by technical rules of evidence [...] and shall admit any evidence which it deems to have probative value.” Although allegations of rape were corroborated by such evidence, the tribunal relegated as ancillary the forced prostitution of over two hundred thousand girls and young women and their detention in what were essentially ‘rape camps’ and not brothels, as the tribunal would have it. As Copelon wrote (2000: 4),

Responsibility for the outrages against comfort women was never prosecuted in the International Tribunal for the Far East in Tokyo. Calling the "comfort stations" brothels, not rape camps, and referring to the women as prostitutes and not sexual slaves, obfuscated the horrors of the system through a suggestion of immorality and voluntariness.

This institutionalized enslavement and rape system failed to retain the attention of the judges, and only became public knowledge in the 1990s, when aging survivors began to tell their stories, as well as of their exclusion from the transitional justice proceedings (Copelon, 2000: 3).

³ Budge, Kent, Pacific War Online Encyclopedia at <http://pwencycl.kgbudge.com/index.htm>, retrieved on 8 April 2014

2. Sexual Violence in the Nuremberg Trials

The magnitude and scale of Nazi planned barbarism during World War II has been well-documented but few details have emerged over the years on sexual crimes perpetrated by German troops who

German soldiers raped girls and women of various ethnicities, including Jews, despite regulations against sexual relations with non-German women. Much sexual violence appears to have taken the form of forced prostitution as many girls and women were forced to serve in military brothels in cities and field camps. [Some] were forced to serve under threat of death or internment.

An estimated 50,000 women and girls served in military brothels (Wood, 2006: 310) yet rape and forced prostitution were as absent from the judicial proceedings of Nanking and Tokyo as they were in the Nuremberg Trials. Rape was indeed, neither named in the International Military Tribunal (IMT) Charter, nor charged as an offence independently from outrages against personal dignity and crimes against humanity perpetrated by the Nazis.

At the time the IMT became in session, the Hague Law was the only codified international *corpus iuris* regulating the conduct of inter-state armed conflicts. Comprised primarily of the Hague Conventions of 1899 and 1907, it provided the legal basis for a majority of the IMT's assessments on the illegality of certain acts and was used rather selectively as rules and customs "recognized by all civilized nations and [...] declaratory of the laws and customs of war."⁴ Though the 1907 Hague Convention (IV)⁵ did not explicitly prohibit rape and sexual assault, it provided some form of protection for victims under Article 46, which states that "*Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.*" However, it should be noted that if rape was listed as a "crime against humanity in the Allied Local Council Law No. 10, under which intermediate-

⁴ As reprinted in the American Journal of International Law (AJIL), Vol. 41, 1947, pp. 248-249.

⁵ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907

ranking Nazi war criminals were prosecuted,” none of the individuals indicted was actually charged (Copelon, 2000: 3).

I.B. UNADDRESSED QUESTION OF ATROCITIES PERPETRATED BY ALLIED FORCES

The status of victims of sexual violence remained frozen within the parameters of inevitability and the definition of ‘spoils of war’ once the conflict ended. In no other setting than during the Nuremberg Trials was a realization of victor’s justice more obvious because thousands of the Allied troops were equally guilty of raping women, “an example,” Copelon contended, “of the banality of evil in militarized patriarchal culture” (Copelon, 2000: 4). It also constituted a clear disregard of the *tu quoque* principle⁶. Not only was some of the evidence submitted to the IMT alleged that acts said to have been perpetrated by Axis troops, had also been committed by the prosecuting States’ armies, but were not prosecuted, the defense was not at all permitted to raise the issue of crimes committed by the Allies (Cryer, Friman, Robinson and Wilmshurst, 2010: 113-4). Such crimes implicated U.S., French and Soviet troops on a much larger scale than was alleged at Nuremberg.

1. France Liberated, France Raped

In her book on U.S. soldiers’ behavior with regards to French women post-liberation, Mary Louise Roberts⁷ depicts in which ways young U.S. service members were encouraged to believe in the availability of the liberated women before D-Day. As a result, and soon after Normandy was invaded, allegation of rapes of local women by U.S. soldiers began to surface, prompting villagers to complain to U.S. commanders. Weary to not further antagonize French authorities, the U.S. military leadership took action; however, and in a mockery of justice, it

⁶ Latin for "you, too" or "you, also" or an argument that intends to discredit the opponent's position by asserting the opponent's failure to act consistently in accordance with that position.

⁷ *What Soldiers Do: Sex and the American GI in World War II France*, 2013.

prosecuted then executed scapegoated African Americans posthumously presumed to have been innocent.⁸ Victims were not given much agency in the proceedings as the abuses subsided only once village leaders demanded they did.

Interestingly enough, troops under French command, Moroccan colonial soldiers known as *Goumiers*, had also committed mass rape, after being promised mastery over the booty and no punishment for what they would do. During the capture of the town of Monte Cassino, Italy, 1944, thousands of *Goumiers* and other colonial troops raped an estimated 60,000 women, ranging in age from eleven to 86 and killed civilian men who tried to protect them. The French commanders' promise was kept and no charge or prosecution was ever brought against the culprits.⁹

2. Soviet Troops in Poland and Germany: Spoils of War as a Soldier's Reward

Acts perpetrated by U.S. and French soldiers, though outrageous by war crimes standards, did not reach those committed by Soviet troops in scale, as the Soviet army moved westward onto German territory in early 1945.

While the earlier Soviet offensives in Romania and Hungary had seen widespread rape of civilian women (particularly after the siege of Budapest), the practice intensified as the army moved into East Prussia and Silesia. Although women of various ethnicities were raped in the course of looting villages and cities, German women were particularly targeted. [...] As the Soviet army occupied Berlin in late April and early May 1945, thousands of women and girls were raped, often by several men in sequence, often in front of family or neighborhood, sometimes on more than one occasion. Soldiers sometimes detained a girl or woman for some days in her home or elsewhere and subjected her to repeated rape. Even after occupation became more institutionalized, Soviet soldiers continued to rape girls and women.

⁸ J. Robert Lilly in a 2007 book entitled *Taken by Force: Rape and American GIs in Europe in World War II*. (Palgrave Macmillan) reveals that 130 of the 153 troops disciplined for rape by the army were African Americans. With the help of the French authorities U.S. officers allegedly scapegoated African American soldiers, proclaiming rape to be black a crime. U.S. forces executed 29 soldiers as conducting rapes, including 25 African Americans.

⁹ See *In War Crimes in Ciociaria*, retrieved from <http://www.dalvolumoacassino.it/asp/doc.asp?where=Lettura&id=019>

Wood went on to suggest that sexual violence ceased only once occupying powers were made aware of the political impact of the crimes, not on account on the victims' well-being (Wood, 2006: 309). The majority of the assaults were committed in the Soviet occupation zone; estimates of the numbers of German women raped by Soviet soldiers range from the tens of thousands to 2 million (Schissler, 2000). Anthony Beevor describes it as the "greatest phenomenon of mass rape in history", and has concluded that at least 1.4 million women were raped in East Prussia, Pomerania and Silesia alone (Beevor, 2002). Soviet soldiers were said to perceive themselves to be conquerors rather than liberators in hostile regions, and viewed violence against civilians as a privilege of victors.¹⁰ Military orders indeed encouraged soldiers (Wood, 2006: 310)

to take revenge on and punish Germans broadly speaking, not just soldiers. Naimark documents the tolerance of sexual violence against civilians on the part of the Soviet command structure, from field officers to Stalin himself.

Such command-condoned violations were also a marked feature of the Soviet advance on Poland against Nazi Germany in later stages of World War II. Among the factors contributing to the escalation of sexual violence against Polish women was a sense of impunity on the part of individual Soviet units left to fend for themselves by their military leaders (Jolluck, 2006).

If the judicial expediency of both The IMT and IMTFE combined with the overall patriarchal militarized context of the post-World War II era can be blamed for the failure of the international community to fairly assess widespread sexual violence, the magnitude of the horrors perpetrated did at the very least, trigger a major legal development: the 1949 Geneva Conventions.

¹⁰ See *Silence Broken on Red Army Rapes in Germany*, by Eric Westervelt (2009), Retrieved in <http://www.npr.org/templates/story/story.php?storyId=106687768> 8 April 2014

**I.C. LAYING BASIC ALBEIT IGNORED FOUNDATIONS OF WAR TIME SEXUAL VIOLENCE
CRIMINALIZATION: THE 1949 GENEVA CONVENTIONS**

The Lieber Code of 24 April 1863¹¹, in its Article 44, recognized a prohibition of rape under international humanitarian law as it stated:

*All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.
A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.*

The Code's influence on the Geneva Conventions and their 1977 Additional Protocols was reflected in similar protective provisions. The Geneva Conventions and their Additional Protocols, unlike the Hague Conventions aim to limit the barbarity of war by protecting individuals not taking part (civilians, medical personnel, etc.) or no longer participating in the hostilities (wounded, sick and shipwrecked troops, prisoners of war). The scope of the Geneva Law was limited to inter-state conflicts, at the exception of Common Article 3, which applies to conflicts not of an international character. Several new protective concepts emerged from its provisions.

1. IHL Concept of “Humane treatment of POWs and Others” and “Respect for their Persons and their Honor”

The Third Geneva Convention (GC III) relative to the Treatment of Prisoners of War provides in its Article 14 that prisoners of war are in all circumstances entitled to “respect for their persons and their honor”, as does Article 14 of the Second Geneva Convention (GC II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. A possible attempt at gender sensitivity on the drafters' part, it also recommends

¹¹ Instructions for the Government of Armies of the United States in the Field, General Order № 100, named after its author, German-American legal scholar and political philosopher Franz Lieber, and instructing the Union Forces of the United States during the American Civil War (1861-1865) on how to conduct themselves in wartime.

that “women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men.” Article 13 GC III specifies the parameters of humane treatment by stating that

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.

Furthermore, Article 75 § 2 of Additional Protocol I and II (AP I & II) cement the status of the prohibition of “outrages upon personal dignity” as a fundamental guarantee for civilians and persons hors de combat. It also specifies that this prohibition covers in particular “humiliating and degrading treatment, enforced prostitution and any form of indecent assault.” Three additional provisions establish legal protective status for vulnerable groups. First, Article 4 of AP II specifically adds “rape” to this list. Secondly, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) and Article 27 § 2 of AP I require protection for women and children against rape, enforced prostitution or any other form of indecent assault.¹²

2. IHL Concept of “Outrages upon Personal Dignity” and Prohibition of “Violence to Life and Person”

While Common Article 3 of the Geneva Conventions does not explicitly mention rape or other forms of sexual violence, it prohibits “violence to life and person” including cruel treatment and torture and “outrages upon personal dignity.” The latter will become the legal foundation of future indictment for wartime sexual violence.

Those positive legal developments notwithstanding, Copelon noted that the mention in AP I and II of “rape, forced prostitution and any other form of indecent assault,” merely as

¹² International Committee of the Red Cross Rule 93. Rape and Other Forms of Sexual Violence

“humiliating and degrading treatment,” remained a characterization that reinforced the secondary importance of the victimized women (Copelon, 2000: 3) as he saliently argued that

The offence was against male dignity and honor, or national or ethnic honor. In this scenario, women were the object of a shaming attack, the property or objects of others [...], but not the subjects of rights.

One example in U.S. history illustrates this point and involves the second inter-state conflict of the post-World War II era.

3. Lack of Implementation of the Geneva Conventions and Ethnically Targeted Sexual Violence in Vietnam: U.S. Soldiers in My Lai

In the prolonged conflict between the U.S. and Communist armed groups in Vietnam (1956-1975), US troops carried out an unknown number of ethnically targeted acts of sexual violence. American soldiers of Charlie Company perpetrated the “most notorious face-to-face massacre by US troops since the Second World War” in the village of My Lai on 6 March 1968. The attacks, a reprisals operation to avenge the death of fellow soldiers, left 300 to 500 civilians dead and an estimated twenty girls and women raped, some by groups of soldiers, and then murdered (Wood, 2006: 316).

In an infantry attack on this single Vietnamese village, US soldiers massacred about 500 unarmed men, women and children, often subjecting the women and young girls to extreme acts of rape and sexual violence before killing them. Although My Lai is by far the most well-known massacre by US forces in Vietnam, it was by no means unique in its murder and rape. Many US soldiers reported that indiscriminate attacks on villages, killing civilians and raping women, were commonplace and frequently tolerated by US officers.¹³

There has, to date, been no scholarly study of the scale of sexual violence perpetrated during the war, including the sexual enslavement of young girls by mobile platoons, and as Wood contended, many documents containing pertinent information remain classified materials. Soldiers involved then investigated after the massacre was publicized in the media, claimed to

¹³ Slim, 2010: 49

have received their marching orders from their commanders. It is doubtful, however, that My Lai was an isolated incident, as it has been well documented

that another platoon, the Tiger Force of the 101st Airborne, also carried out acts of sexual violence, mutilation, and execution of civilians over a seven-month period in the same province the year before the events at My Lai. According to an investigative report published in 2003, the first incidents were sexual abuse of both male and female prisoners held by the platoon. The violence dramatically increased after two members of the Tiger Force were killed and many wounded in an ambush.¹⁴

The military personnel implicated, both enlisted and officers, had left the service by the time the tragedy was exposed, and were thus exempt from prosecution by a court martial. Only one officer was charged and convicted, but his life sentence was commuted to two years in house arrest by President Nixon. No civilian court sought to try the matter. Reiterating arguments denouncing the failure to uphold the principles established in the Nuremberg and Tokyo War Crimes Tribunals,¹⁵ I concur with the suggestion that at the very least, U.S. military commanders could and should have been prosecuted for failing to prevent (and punish) the atrocities committed at My Lai and other locations.

These tragic events were evidence that improving the legal status of wartime sexual violence victims would require more than victor's justice but concerted actions by the international community.

¹⁴ Wood, 2006: 316

¹⁵ See Marshall, Burke and Goldstein, Joseph (April 2, 1976). "Learning From My Lai: A Proposal on War Crimes". *The New York Times*. p. 26.

II.

FINDING A PLACE FOR SEXUAL ASSAULT VICTIMS IN THE LAW OF ARMED CONFLICTS:

A Difficult but Emerging Consensus on Protecting Women and Children (1970 - 1990s)



3. Sculpture of a Soldier Raping a Woman at Mujinagar Birangana Memorial, Bangladesh

II.A. UN EFFORTS TO ADDRESS RAPE: 1974 DECLARATION ON THE PROTECTION OF WOMEN AND CHILDREN

1. Impact of the Women's Liberation Movement

In the decade following World War II, a nascent Organization of United Nations, through Articles 55 and 56 of its Charter began promoting the “universal respect for and observance of human rights and fundamental freedoms for all without distinction.” Structural changes to the international system after 1945 and a common desire to protect rights inherent to human nature fed the rationale behind the adoption and the creation of a new regime of individual rights and duties. As a result, and as more colonized territories demanded independence from countries involved in the war, the belief in individual human rights began to gain currency. In addition to the 1948 Universal Declaration on Human Rights, several other international instruments came to form the basis of human rights law. This treaty-based system included *inter alia* the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966). Along with assumptions that all men being born free and equal, came the presumption that the individual rights of women should also be considered universal.

Women's rights thus became an important issue, and although a nascent UN had established a Commission on the Status of Women back in 1946, it was not until the early 1960s that an international women's liberation movement slowly emerged and significant progress was made with regards to women's issues. A combination of local advocacy efforts and international institutional work culminated in the organization of several world conferences on women's issues under the auspices of the UN. The first World Conference of the International Women's Year in Mexico City in 1975 coincided with the UN's first efforts to address the issue of women in armed conflicts.

2. UN Responses to Sexual Violence and the Bangladesh War of Independence

The first major international treaty codifying rights to which women are entitled was the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted as a result of the development discussed above in 1979. This international ‘bill of rights’ for women came into force in September 1981 and binds all State Parties that have signed and ratified it. In addition to the CEDAW, and as early as 1969, the Commission on the Status of Women showed an interest in granting special protection to particularly vulnerable groups (women and children) during armed conflicts. It was not long until the Economic and Social Council (ECOSOC) requested that the UN General Assembly (GA) drafted a document officializing the UN’s position on the matter. This was how the Declaration on the Protection of Women and Children in Emergency and Armed Conflict was adopted in 1974. It recognized “the particular suffering of women and children during armed conflict. It emphasizes the important role that women play in society, in the family and particularly in the upbringing of children” (UN, 1998) and the corresponding need to accord them special protection. The Declaration also urges States to uphold the standards set forth in international instruments, including the 1949 Geneva Conventions.

However, there was no explicit reference to women's vulnerability to sexual violence during armed conflict, despite a Special Rapporteur on violence against women’s report documenting rape committed on a “massive scale” during the conflict in Bangladesh (UN, 1998). The eastern Pakistani province of Bengali had seceded from Pakistan in early 1971, leading to a brutal civil war with India as a proxy. The conflict ended with the defeat of Pakistan and the creation of the Republic of Bangladesh; however, allegations that the Pakistan Army, along with religious extremist militias, engaged in the systematic torture, rape and killing during the war

surfaced. While Bangladesh estimated that approximately 200,000 women raped, giving birth to thousands of war babies, the numbers were never confirmed and remained for long the source of debate. It remains that, in an all-too familiar, behavioral pattern of war, the Pakistan Army also kept numerous Bengali women as sex-slaves inside camps; most of the women and girls were captured from Dhaka University and private homes.¹⁶

Although greater attention was being placed on how conflicts affect women, the main discourse on sexual violence remained objective and focused on the horrifying acts as opposed to their effects on the victims. The concept of the direct applicability of international law (IL), a body of law originally designed to regulate interaction between States had yet to find credence. Once again, and as was the case with the My Lai events, proven victimization of women by wartime sexual violence would not lead to a change of their international personality or legal status to include the granting of rights.

II.B. SEXUAL VIOLENCE IN CONFLICT: A PRIMARILY OBJECTIVE DISCOURSE AND VAGUE PROTECTION FOR VICTIMS

The lack of agency of wartime sexual violence victims in the 1945-1990s time period is a remnant a state-centric system reluctant to grant full legal status to non-state actors, namely individuals. Moreover, because individual direct claims regimes established under the Human Rights conventions was still in a relative infancy, the predominant role of sovereign States as international persons was still generally recognized as a sacrosanct tenet of IL. The state of the international system at the time certainly validated Marcel Sibert's assertion on the "*répugnance du droit positif à faire de l'individu un sujet de droit*" or positive law's reluctance to turn the individual into a subject of law (St Korowicz, 1956: 558). Through this lens, "only states could

¹⁶ See "East Pakistan: Even the Skies Weep" in <http://www.time.com/time/magazine/article/0,9171,877316,00.html>, *Time*, 25 October 1971, retrieved on 8 April 2014.

be viewed as subjects of IL [and] individuals could not assert rights against their own states or another.

It certainly was the case for victims of crimes perpetrated by agents of sovereign states who would need their national state as intermediary to be allowed any kind of vindication. Furthermore, traditional gender roles have often been sustained by international law, and as Barrow argued (Barrow, 2010: 221),

While the differing impact of armed conflict on men and women is increasingly acknowledged, constructions of 'gender' and gender-specific provisions within international humanitarian law have proved problematic. Advances in women's human rights and other international instruments [...] have gone some way towards developing the scope of existing provisions. Despite increased awareness of gender-based violence, however, significant challenges remain.

Even the CEDAW had no specific provision on violence against women, let alone sexual violence in conflict, which was not labeled a human rights issue. It would not be until the 1993 World Conference on Human Rights in Vienna, Austria that victims' voices would be heard in an international forum. A tribunal organized by NGOs during the conference, heard testimonies regarding violations of women's human rights around the world, including sexual violence during armed conflict (UN, 1998).

This was the beginning of a series of developments further acknowledging the occurrence of sexual violence as an obstacle to equality.

II.C. REASSESSMENT OF THE TRADITIONAL SECURITY PARADIGM AND EMERGENCE OF AN INDIVIDUALIZED PERSPECTIVE ON SECURITY

The end of the Cold War brought about drastic changes not the least of which was a greater focus on a broader, individual security in a multipolar world, one nearly antithetical to the traditional, state-centered concept of security in place since the Peace of Westphalia (1648). Its emergence coincided with the convergence of several factors ranging from globalization to

the failure of an increasing number of states unable to guaranty the safety of their citizens within their borders.

Although definitions of human security vary, Paris wrote, “most formulations emphasize the welfare of ordinary people”; as discussed earlier in this chapter, it resulted from an “alliance of some states, [international institutions] and advocacy groups,” which has altered the landscape of international politics since the end of the Cold War (Paris, 2001:87). A definition relevant to the issue of wartime sexual violence would narrow its expansiveness to the human rights paradigm’s aim of reducing threats to human dignity and survival, and promoting the humanitarian goals of “protection from sudden and hurtful disruptions in the patterns of daily life, whether in homes, in jobs or in communities” (Paris, 2001: 89). Such disruptions may be caused by conflict and the nexus between finding means to prevent them and ending impunity in conflict will be discussed in the last chapter.

Notwithstanding, it should be noted that while contradicting the realist, militarized paradigm that has dominated international relations until the second half of the 20th century, the human-centered approach coincides with the adoption of several women’s rights instruments: the 1993 General Assembly Declaration on the elimination of violence against women condemns all violence against women including sexual violence; the 1994 appointment by the United Nations Commission on Human Rights (UNCHR) of a Special Rapporteur on violence against women; and the 1995 Beijing Declaration and Platform for Action following the Fourth World Conference on Women, which recognized that violence against women including rape, sexual slavery and forced pregnancy, is an obstacle to equality, development and peace.

The end of the Cold War produced a definite shift in the security paradigm, which in turn opened a space for victims of wartime sexual violence to be seen and heard. However it would take the mass atrocities plaguing the war fields of Bosnia, Rwanda and Sierra Leone in the early to mid-1990s to trigger a catalyst for major legal change.

III.

AFRICA'S CIVIL WARS, THE BALKANS AND RAPE AS A WEAPON: Punishing Impunity in Times of Conflict through Supranational Criminal Prosecution (1990s – 2000)



4. Woman Victim of Violence, Congo

III.A. RAPE AS A TOOL OF WAR

1. Widespread and Systemic Violence in Rwanda and Sierra Leone

Rwanda

Events that led to the 1994 genocide in Rwanda include a civil war which began on 1 October 1990, when the Uganda-based, Tutsi exiled paramilitary group Rwanda Popular Front (RPF) launched a major attack on Rwanda from Uganda, in a failed attempt to destabilize the Hutu-dominated government. As a result, targeted propaganda by the government labeled all



Figure 5. Map of Rwanda. Source: <http://www.sahistory.org.za/places/rwanda>

Tutsis inside the country as accomplices of the RPF. On 6 April 1994, the deaths of the Presidents of Burundi and Rwanda in a plane crash caused by a rocket attack prompted the state-owned *Radio Television Libres Des Mille Collines* (RTLM) to attribute the plane crash to the RPF, and incite the Hutu population “to eliminate the Tutsi cockroach.”¹⁷ Such calls to violence exacerbated ethnic tensions and

triggered a 3-month genocide targeting individuals identified as Tutsis, and during which as many as 1 million people are estimated to have died. An estimated 150,000 to 250,000 women were also raped and subjected to brutal form of sexual violence. As a 1996 Human Rights Watch report indicated (Human Rights Watch, 1996:

39)

Rape was widespread. Women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (collectively or individually) or

¹⁷ See United Nations Prevent Genocide, Outreach Programme on the Rwanda Genocide and the United Nations, at <https://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml>

sexually mutilated. In almost every case, these crimes were inflicted upon women after they had witnessed the torturer and killings of their relatives, and the destruction and looting of their homes. Some women were forced to kill their own children before or after being raped. [...] Others were held prisoner in houses specifically for the purpose of rape for periods ranging from a few days to the duration of the genocide. Pregnant women or women who had just given birth were not spared, and these rapes often caused hemorrhaging and other medical complications which resulted in their deaths. At check points and mass graves, women were pulled aside to be raped, often before being killed. Many women came close to death several times during the three month period and in some cases begged to be killed so that the suffering would end. Instead, they were often spared so they could be raped and humiliated by the genocide perpetrators.

Some survivors recounted to have witnessed militia, known as the *Interahamwe* raping the corpses of women they had killed. Genocidal acts were condoned by the authorities, with rapes also committed by soldiers of the Armed Forces of Rwanda. As the Human Rights Watch report further stated (1996: 38),

women were targeted, regardless of their ethnicity or political affiliation. [...] “Rape was a strategy,” said Bernadette Muhimakazi, a Rwandan women’s rights activist. “They chose to rape. There were no mistakes.”

The gendered aspect of the genocide was evident as both Tutsi and Hutu women were victimized by sexual violence; however, more of the women raped were Tutsi and were “attacked as one more means of terrorizing and destroying the Tutsi ethnic group” (Human Rights Watch, 1996: 38). Also, women were active perpetrators of both killing and sexual violence, including rape. Many were involved in raping other women (Hutus v. Tutsis), encouraged and ordered it, while turning over victims to be raped and killed (Cohen, Green and Wood, 2013: 4). As most of the men were killed or left for dead, torture of a sexual nature seemed to be specifically targeting women because they were women as demonstrated by the frequent “mutilation of the sexual organs or of features held to be characteristics of the Tutsi ethnic group. Sexual mutilations included the pouring of boiling water into the vagina; the opening of the womb to cut out an unborn child before killing the mother, cutting off breast”

(Human Rights Watch, 1996: 62). Furthermore a great number of Tutsi women ended as a Hutu fighter's "wife," as Marie recounted after being captured (Human Rights Watch, 1996: 53):

"They raped many of us. They were saying "we want a Tutsi wife." [...] At night they came around with torches to look for the beautiful women. They shone the torches in our faces and they kept saying "you come, you come." [...] They kept changing the women through the night."

Sexual crimes included rape of women by women and collective sexual slavery; many women were being held by militia groups for the purpose of servicing members for the duration of the genocide.

Sierra Leone

The ten-year Sierra Leone Civil War began on 23 March 1991, pitting the Revolutionary United Front (RUF), supported by the special forces of Charles Taylor's National Patriotic Front of Liberia (NPFL), against armed forces loyal to then-president Joseph Momoh. The resulting conflict lasted 11 years (2002), and left over 50,000 dead and thousands of women and girls victimized by widespread sexual violence.



Figure 6: Map of Sierra Leone. Source: <http://www.sahistory.org.za/places/sierra-leone>

Sexual violence during the war in Sierra Leone, in contrast to Rwanda, did not involve ethnic antagonism. It was perpetrated

indiscriminately on women of all ages, of every ethnic group and from all social classes. Young women and girls were targeted particularly because they were presumed to be virgins; female rebels occasionally checked the virginity of detained young women. Less frequently, older women also suffered sexual assault, including post-menopausal women for whom it broke a particular cultural taboo against sexual activity among this group.¹⁸

¹⁸ Wood, 2006: 314

Those who had been internally displaced by the war, nearly a quarter of the entire population, were particularly vulnerable to attacks. A Physicians for Human Rights survey of 991 internally displaced women, 9% admitted to have suffered sexual assault. Then the report specifies that 89% of that group

reported being raped and 33% reported being gang-raped.⁴⁶ Of the human rights abuses suffered by household members, 40 percent were alleged to have been carried out by the rebel group Revolutionary United Front (RUF), 34% by unknown groups, 16% by unspecified rebels. Sexual violence in Sierra Leone was also extremely brutal. Gang rapes often took the form of very young victims enduring gang rapes, with rebel combatants lining up to take turns.¹⁹

Severe disabilities often resulted from the extreme violence with which victims were assaulted (tears in the vagina, anus, and surrounding tissue; long-term bleeding and incontinence; and sometimes death). Furthermore, and in a scenario experienced in Rwanda, sexual slavery quickly became a feature of the conflict, as did forced marriage following abduction. “At war’s end,” Wood wrote, “some “wives” were not willing or able to leave their spouses.” The Truth and Reconciliation Commission in Sierra Leone found that

all the armed factions, in particular the RUF and the Armed Forces Revolutionary Council, embarked on a systematic and deliberate strategy to rape women and girls, especially those between the ages of ten and 18 years of age, with the intention of sowing terror amongst the population, violating women and girls and breaking down every norm and custom of traditional society.²⁰

The war in Sierra Leone, if started as a struggle for political power, degenerated into a war on women, the weaknesses of whom were often exploited as currency to remunerate rebels.

2. Horrors in the Former Yugoslavia

The ethnically rooted war (6 April - 14 December 1995) that devastated the territory of the former Yugoslavia began shortly after the former Soviet satellite split into three multiethnic

¹⁹ Wood, 2006: 314

²⁰ Ibid, 315

entities, including Croatia and Bosnia Herzegovina.²¹ Among the several factions involved were on one side the forces of the Republic of Bosnia and Herzegovina and Bosnian Croat entities within Bosnia Herzegovina, and on the other, those of the Bosnian Serb (Serbs forces of Republic Srpska, VRS) supported by the Serbian government, and the Yugoslav People's Army (JNA).²² Ending with the signature of the 1995 Dayton Accord, this war became another late 20th century example of genocide and exhibited war crimes on a scale not seen in Europe since World War II.



Figure 7. Map of the Former Yugoslavia.

²³ Men rape for a variety of reasons in war and each conflict that has been thus far been mentioned provides its own specific motivations for sexual violence. But dispersion was precisely the goal of the Serbian forces in Bosnia-Herzegovina. Aiming at forcibly displacing Bosniaks (Bosnian Muslims) from Bosnia, the Bosnian Serb forces of VRS used mass executions,

internment camps, deportations, and torture, but also targeted women and girls for physical

²¹ See Rogel, Carole (2004). *The Breakup of Yugoslavia and Its Aftermath*. Greenwood Publishing Group. p. 59

²² See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43.

²³ Source: <http://origins.osu.edu/article/kosovos-year-zero-between-balkan-past-and-european-future>

annihilation. The Serbian army, which had been reconstituted in Bosnia-Herzegovina from parts of the former Yugoslavian Federal Army, organized into ‘Cleansing squads,’ or special units of the Serbian army and Serbian irregular units, to spread terror in predominantly Muslim neighborhoods.

“The refugees and displaced people from Bosnia-Herzegovina have brought with them stories of the terror they have left behind,” Stiglmeier wrote in her account of the Bosnian War (1994: 82), and “in all these tales rapes play a role: [...] women and girls who were systematically raped, rape camps and forced brothels, intentional impregnation of women- the atrocities knew no bounds.” However, sexual slavery seemed to have been the most prominent for of sexual violence. A 2008 UN Office for the Coordination of Humanitarian Affairs (OCHA) investigation²⁴ in fact reports that an estimated 20,000 and 50,000 girls and women suffered rape during the war, a majority of them while held in rape camps. As the UN Commission of Experts sent to investigate allegations of sexual violence indicated, the “vast majority of the victims [were] Bosnian Muslims and the great majority of the alleged perpetrators [were] Bosnian Serbs” (Wood, 2006: 312). In the village of Foča, for instance,

Muslim girls and women were subjected to rape in the forests, in their homes, in detention centers, and in private flats. Of the sixty-three cases of rape and sexual assault in Foča compiled by the commission, about 55% took place in detention centers, including the local high school, a gym, and the workers’ barracks of a hydroelectric plant under construction. In such centers, members of the various Bosnian Serb forces walked in, chose from among the girls and women there, and raped them either on the premises or in nearby flats. Many of the women and girls endured gang rapes, repeated over days or weeks.²⁵

Besides inflicting humiliation, causing demoralization and the destruction of individuals, families and communities, rape and sexual violence generally are “surefire weapon[s] that

²⁴ See “Sexual and Gender-Based Violence in Conflict: A Framework for Prevention and Response” United Nations Office for the Coordination of Humanitarian Affairs. 2008 at <http://ochaonline.un.org/News/InFocus/SexualandGenderBasedViolence/AFrameworkforPreventionandResponse/tabid/4751/language/en-US/Default.aspx>.

²⁵ Wood, 2006: 312

doesn't need any fuel or ammunition," as the Zagreb feminist Asija Armanda²⁶ once said. Consequently,

it is obvious that rapes in Bosnia-Herzegovina are taking place "on a large scale" that they are acquiring a systematic character, and that "in by far the most instances Muslim women are the victims of the Serbian forces."²⁷

The following paragraphs are nearly full accounts of women's experiences of sexual violence, based on interviews conducted by Alexandra Stiglmayer (1994). The details provided on the atrocities will, after the war, give much needed substance to international law as it relates to setting evidentiary parameters of wartime sexual violence.

Fatima

They probably planned it.

They used to get together and sing '*O beautiful bula, a Chemik's beard will scratch you,*' or about how Muslim women would give birth to Serbian children.

[Fatima's husband taken prisoner on May 2, 1992, and has since disappeared without a trace. Fatima remained behind with [...] her two little daughters, nine and eleven years old, because she wanted to wait for her husband. Mid-August three soldiers in camouflage uniforms with Serbian insignias came into her house.]

They pretended to be policemen. One of them stayed with my daughters in one room while two of them went with me into another room. My little girl began to cry and called out for me. But he put a rifle her head and said,

"If you cry for your mama again, I'll kill you."

They ordered me to get undressed, and they cursed my mother. I wept. They yelled at me not to cry, they threatened me with their guns:

"We'll knock out all your teeth, we'll butcher your kids, hack them to pieces, and make you watch."

I recognized one of them, it was Sasa G.; he used to be a neighbor of mine in Foca; he's about twenty-five years old. I said,

"You're Sasa."

He was in disguise, wearing a scarf and a headband so that I wouldn't be able to recognize him. When I told him I recognized him he started whispering with the other guy. Then they really did begin to threaten me, and all three of them raped me.

I couldn't do anything to stop it.²⁸

²⁶ Asija Armanda is an anthropologist and leader of Kareta, one of Croatia's feminist groups dedicated to providing relief and assistance to women survivors of the genocide and sexual atrocities during the war in the former Yugoslavia.

²⁷ Stiglmayer, 1994: 85

²⁸ Ibid., 104

In a different town, humiliation or threat of rape of loved ones was used when the actual sexual act could not be performed.

Slavenka

According to her statement, three Muslim soldiers broke into her house [...] early one morning [...]. One of the men had a knife in one hand and in the other a piece of glass that he held up to Slavenka's throat. While doing so he threatened her:

"I'll cut your throat; your husband's a Chetnik."

Besides Slavenka, her children and her parents-in-law were staying in the house. The men beat up her in-laws and cursed her mother-in-law as a 'Chetnik mother.' One of them told Slavenka,

"I fancy you,"

and pulled her into the bathroom. There he ordered her to get undressed and threatened her with his pistol. He forced her to have oral intercourse with him and announced that he would kill her children if she refused.

Afterward Slavenka had to lie down on the floor and he raped her, saying,

"I'm going to give you a little Muslim."

When he was finished, the next man came into the bathroom, pulled her hair and screamed, "You whore, I'm going to fuck you in the ass and then do it to your husband in the slammer, too."

Before he left the house he went into her children's room and urinated on one of the children.²⁹

In some instances, bottle necks were purportedly stuck into the genitalia, as were shattered, broken bottles and guns (Stiglmayer, 1994:115).

Considered "the most authoritative investigation of sexual violence in the former Yugoslavia" (Wood, 2006: 312), the previously mentioned UN Commission in charge of investigating sexual crimes in the former Yugoslavia identified several distinct patterns of sexual violence:

(1) by individuals and small groups in conjunction with looting and intimidation of the targeted group; (2) in conjunction with fighting, often including the public rape of selected women in front of the assembled population after the takeover of a village; (3) against some women and girls held in detention or collection centers for refugees; (4) in sites for the purpose of rape and assault where all women were assaulted frequently, apparently for the purpose of forced impregnation (women were told that was the case, and pregnant women were sometimes held past the point when an abortion was possible); and (5) in detention sites for the purpose of providing sex. Sexual violence against men of various ethnicities (castration, being forced to perform fellatio or to have intercourse in front of guards), while much less frequent than that against women, also occurred in camps and detention centers

²⁹ Stiglmayer, 1994: 138

[...]. Among the characteristics stressed by the commission were an emphasis on shame and humiliation [...], the targeting of young girls and virgins along with educated and prominent female community members, and sexual assault with objects.³⁰

Although the Commission was unable to prove that such campaign of sexual violence was part of an overall, planned strategy, the scale and magnitude of the atrocities would provide fodder for jurisprudential innovations. Tragedies in Rwanda, Sierra Leone and Bosnia had one positive outcome; changing the wartime sexual violence narrative from reducing it to an objective crime to elevating it to a subjective transgression with long term repercussions on the individuals it victimizes. They helped shape both the internationally recognized definition of rape and other sexual crimes, and the scope of the crimes that rape constitutes.

III.B. DEFINING SEXUAL VIOLENCE WITHIN AN INTERNATIONAL LEGAL FRAMEWORK: A JURISPRUDENTIAL INNOVATION

1. Rape as Genocide: ICTR in *Prosecutor v. Akayesu*

The scale of the sexual violence that occurred during the 1994 Rwandan genocide gave rise to significant developments in jurisprudence as regards the crime of rape. Once the war came to an end with the military and political victory of the Rwandan Patriotic Front (RPF), and the signature of a peace agreement in Arusha in 1993, the task of holding mass atrocities perpetrators accountable emerged. The ad hoc International Criminal Tribunal for Rwanda (ICTR) was thus authorized by a UN Security Council resolution, Resolution 955 and established in November 1994 in Arusha, Tanzania. Having jurisdiction over the crimes of genocide, crimes against humanity and war crimes (as defined in the previously mentioned Common Article 3 and AP II), the ICTR issued a landmark decision in the *Prosecutor v. Akayesu* case³¹ (1998). The Court

³⁰ Wood, 2006: 312

³¹ *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998.

established the legal precedent of categorizing rape as an act of genocide in the case of a former teacher and mayor of Taba, Rwanda, Jean-Paul Akayesu. Accused of not only refraining from stopping killings in his commune but also supervising and ordering some, he stood trial for genocide and crimes against humanity. The Court found him guilty, making its enforcement of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide the first.

The ruling marked a departure from the hitherto limited sanction of rape as a crime under international humanitarian law (the law of war) and international criminal law by stating in its

Paragraph 16:

[R]ape, which it defined as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive", and sexual assault constitute acts of genocide insofar as they were committed with the intent to destroy, in whole or in part, a targeted group, as such. It found that sexual assault formed an integral part of the process of destroying the Tutsi ethnic group and that the rape was systematic and had been perpetrated against Tutsi women only, manifesting the specific intent required for those acts to constitute genocide.

The Tribunal held that “rape is a form of aggression” and that “the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts”. It defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”³² Second and also of great significance the judgment widened the scope of the types of crimes that rape constitutes by categorizing it, in addition to genocide, as a crime against humanity and as a form of torture (Bedont, 1999). *Akayesu* was thus “the first international conviction for genocide, the first judgment to recognize rape and sexual violence as constitutive acts of genocide, and the first to advance a broad definition of rape as a physical invasion of a sexual nature, freeing it from mechanical descriptions and required penetration of the vagina by the penis” (Copelon, 2005: 5). Furthermore, *Akayesu* acknowledges that preventing births within the group with “measures such as forced sterilization, abortion, or birth control, as well as forced

³² International Committee of the Red Cross, IHL Rule 93

pregnancy [...] represents an effort to affect ethnic composition by imposing the enemy's ethnicity on the children of rape” in a patriarchal society (Copelon, 2005: 5). Rape, Copelon concludes, “with its potential to cause infertility or make sexual intercourse impossible, as well as its potential to render a woman psychologically or culturally unable to reproduce, may also qualify, as a measure intended to prevent births within the group.”

Considering the importance of such developments for victims and the overall criminalization of wartime sexual violence, it is essential to discuss the process and negotiations that have led to the landmark decision. The resulting reflections may reveal how engendering mechanisms that were everything but gender-sensitive led to better efficiency and access to redress for victims. Interestingly, if the Statute of the ICTR included rape as a crime against humanity (Article 3 g), as genocide (Article 2.2 (d)) and as the war crime of humiliating and degrading treatment (Article 4 e), the Tribunal did not mention rape in the first series of indictments. Assumptions on investigators considering rape as an ancillary offense were made.³³ As a result, despite evidence of the destructive impact of rape on victims and the communities in which they live, and specific accounts of “women's view that rape left them wishing for death,” the case went to trial without any rape charge. Fortunately, and as Copelon wrote,

All that changed when Judge Navanethem Pillay, the only woman judge on the ICTR Trial Chamber hearing the case, pursued the inquiry with two of the women-- who were called by the prosecutor to testify to other crimes--whether rape had occurred in the Taba Commune. [T]he prosecutor returned to court and indicated his intention to amend the indictment to include charges of rape. [...] Without the intervention of the only woman judge and the serendipitous disclosures at trial, this issue would not have been pursued by the prosecutor.³⁴

The tribunal's legacy has been a mixed one but as its mandate comes to an end (December 2014), it is nevertheless important to keep the significance of its contribution to

³³ In its 1996 report on the Rwandan genocide title ‘Shattered Lives’, Human Rights Watch reiterate conversations between male and female investigators, with the first insisting on focusing on more serious crimes than rape.

³⁴ Copelon, 2005: 5

international criminal law in mind. Along with cases to be discussed below, it has added a layer of legality to the treatment of sexual offenses in times of conflict (Cryer, Friman, Robinson and Wilmshurst, 2010: 141).

2. Definition of Rape in International Law: ICTY in *Prosecutor v. Tadić*³⁵ and *Prosecutor v. Furundžija*³⁶

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia (ICTY), located in The Hague, Netherlands, was established by UN Security Council Resolution 827 (1993). Its jurisdiction extends to four crimes committed on the territory of the former Yugoslavia since 1991: grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. The following sections will aim to analyze a few of its most significant decisions on wartime sexual violence.

Tadić

As the first individual to be tried by an international criminal court since the Nuremberg Trials, Bosnian Serb Duško Tadić was convicted of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the customs of war by the ICTY. Although the decision made some major strides in defining rape, its relevance to the wartime sexual violence debate is not as significant as that of later judgments (i.e. *Furundžija* or *Kunarac*). Few remarks should nevertheless be made, pertaining mostly to how the Court initially intended on treating rape.

First, the ICTY prosecutor appeared reluctant to give equal treatment to both male and female victims of sexual violence. As Copelon wrote,

³⁵ Judgment Case No. IT-94-1-A – ICTY Trial Chamber 14 July 1997

³⁶ Judgment Case No. IT-95-17/1-T ICTY Trial Chamber 10 December 1998

the original *Tadic* indictment used torture very sparingly in general and charged as torture only the forced sexual mutilation of a male prisoner. This example of sexual violence against a man became the signature of the case in the press, while the rape of women did not carry the same weight. Although rape was charged as the grave breach of "willful infliction of great suffering", there was resistance among some members of the OP staff to applying the word "torture" to rape.³⁷

The months before proceedings began were a struggle for victim advocates to force the Tribunal into including a gender perspective in the indictment and ensure equal representation of the abused before the law. The amicus brief drafted by lawyers from the Harvard International Human Rights Project "emphasized the failure to treat rape as an indictable offence." As a result, the only female judge in the panel, Judge Elizabeth Odio-Benito "questioned the lack of sexual violence charges from the bench," thus allowing the issue of sexual violence, and more particularly, its reconceptualization as a form of torture or grave breach, and not solely as humiliating and degrading treatment, to be addressed fully by the Tribunal (Copelon, 2005: 8). The indictment was amended to include the above changes; ultimately, however, the Tribunal dropped the charges due to lack of witness willing to come forward.

Furundžija

The case against Anton Furundžija focused on the rape/torture of one woman prisoner occurring during the process of interrogation in his capacity as local commander of a special unit of the military police of the Croatian Defence Council. During the questioning, a victim had a knife rubbed against her inner thigh and lower stomach by the other soldier, who threatened to put his knife inside her vagina should she not tell the truth. Furundžija continued to interrogate the victim and another, while they were beaten by the other soldier; he also stood by, failing to

³⁷ Copelon, 2000: 8

intervene in any way, while the first victim was forced to have oral and vaginal sexual intercourse with the other soldier.³⁸

The Trial Chamber found that in certain circumstances, rape may amount to torture under international law. However, it went further than in previous decisions by expanding the definition of rape first formulated by Trial Chamber I of the ICTR in the *Akayesu* case. Accordingly, the Trial Chamber found that under international criminal law the offence of rape comprises the following elements: “the sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person”.³⁹ Also recognizing that rape in interrogation can be used as a means of punishing, intimidating, humiliating the victim, or obtaining information, the judgment reviews many of the precedents. Adding the concept of aiding and abetting to the conviction⁴⁰ (pursuant to Article 7 (1) of the Tribunal’s Statute), it affirms that “rape inflicts severe physical and psychological suffering, and that in situations of armed conflict, when it occurs with the consent or acquiescence of an official, rape “inherently” meets the purpose element of torture” (Copelon, 2000: 9). Lastly, on the question of whether the raped victim, a woman’s credibility should be questioned by Post-Traumatic-Stress Disorder (PTSD), the Trial Chamber rejected the defense’s argument on the unreliability of the witness (Copelon, 2005: 9).

³⁸ See ICTY Press Release of 10 December 1998 at <http://www.icty.org/sid/7609>

³⁹ International Committee of the Red Cross IHL Rule 93

⁴⁰ The ICTY’s press release states that to establish individual criminal responsibility under Article 7(1) of the Statute, aiding and abetting under international criminal law requires practical assistance, encouragement, or moral support having a substantial effect on the perpetration of the crime (*actus reus*), and knowledge that such acts assist the commission of the offence (*mens rea*).

3. Advancing the definition of “outrages upon personal dignity” *Prosecutor v. Kunarac, Kovac, and Vukovic (Foča)*⁴¹

Some of the type of events that have taken place in Foča were documented in a previous section and the judicial proceeding to which they led produced other jurisprudential advances worth discussing. The crimes of which Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic were found guilty by the ICTY Trial Chamber in 2001, marked the first conviction of rape as a crime against humanity in the ICTY (Askin, 2003).

From April 1992 to February 1993, non-Serb civilians living in the neighborhood of Foča were killed, raped or otherwise mistreated as a direct consequence of the armed conflict. Kunarac, Kovac and Vukovic also participated in this campaign which sought, inter alia, to rid the area of Foča of its non-Serb inhabitants, with a special focus on systematic attacks against Muslim women. The Trial Chamber found Kunarac guilty of crimes against humanity of enslavement, rape and torture as well as violations of the laws and customs of war on the counts of rape and torture. In the same decision, Kovac was found guilty of crimes against humanity of enslavement and rape as well as violations of the laws and customs of war on the count of outrages upon personal dignity. Vukovic was found guilty of crimes against humanity of rape and torture as well as violations of the laws and customs of war on the counts of rape and torture.⁴²

The decision was appealed but the Appeals Chamber essentially upheld the Trial Chamber’s conclusions in relation to the attack and elements of the crimes. Some provisions of the decision issued by the Appeals Chamber should be highlighted with regards to the nature of the attacks and the definition of the offenses. On the “widespread or systematic” nature of the

⁴¹ Judgment Case No. IT-96-23-T IT-96-23/1- T ICTY Trial Chamber 22 February 2001

⁴² See Summary of facts as related in the Appeals Chamber decision, retrieved from <http://www.icty.org/sid/8095>

attack contested by the appellants as being restricted in terms of quantity and significance, the Appeals Chamber argued that

the Trial Chamber correctly defined the adjective "widespread" as referring *inter alia* to the number of victims of the attack and to its being carried out on a wide scale and the adjective "systematic" as referring to the organized or repetitive character of the acts of violence. In order to determine what constitutes a "widespread" or "systematic" attack, a Trial Chamber relies in particular on the means, methods and resources of the attackers, the consequences of the attack upon the targeted population, the number of victims, the discriminatory nature of the acts, the possible participation of officials or authorities or any other identifiable patterns of the crimes.

In assessing the “widespread or systematic” element, the Appeals Chamber not only took into consideration the impact of the crimes on the victims, but also specified that “the requirement is disjunctive rather than cumulative,” thus expanding the scope within which the attacks qualify as crime against humanity.

The Appeals Chamber’s redefinition of the offenses and consent also constitutes a major advance. On the definition of enslavement reaffirmed that

the required *mens rea* for this crime consists of the intentional exercise of a power attached to the right of ownership over the victims without it being necessary 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.

Similarly, to the Appellants’ contention that the crime of rape “requires, in addition to penetration, the showing of two additional elements: force or threat of force and the victim’s "continuous" or "genuine" resistance,” and that consent may have been implied, the Appeals Chamber disagreed. It rejected the "resistance" requirement as “justified neither in law or fact, and that the use of force in itself is not an element constituting rape.” The Chamber went on making a salient and powerful argument that “the *coercive circumstances present in this case made the victims’ consent to the instant sexual acts impossible*” (emphasis added).

Lastly, and with regards to defining outrages upon personal dignity, the Appeals Chamber, in response to Appellant Kovac’s argument that “the Trial Chamber did not define

which acts are likely to constitute outrages upon personal dignity or establish a specific intent on his part to humiliate or degrade the victim”, opted for a low threshold to establish intent. It reaffirmed the Trial Chamber’s ‘reasonable person’ argument by it only sufficed that the appellant knew that “his acts could cause serious humiliation, degradation or otherwise be a serious attack on human dignity.” The *Kunarac* case thus acknowledged that there might be other factors, mostly subjective, that can help expand the legal status of sexual violence victim to those who may otherwise, due to unexpressed consent, not qualify for it.

4. Impact of the Jurisprudential Evolution on the Definition of Sexual Violence in International Law

Victims Protection

As has been discussed, international practice brought the intentional and unintentional “discriminatory treatment of women in the process, as well as the need for gender-sensitive protective measures for women victims and witnesses” (Copelon, 2005:9). For instance, if Tadic did not bring much substance to the definition of rape *per se*, the decision helped define criteria according to which the identities of witnesses can be kept confidential, and, Copelon wrote, “under special circumstances, anonymous even to the defence.”

Thus, the ICTY, more so than the ICTR benefited from feminist amicus briefs in two specific areas: 1. on the issue of protective measures for victims and 2. on the issue of excluding information on victims’ prior sexual conduct in the proceedings (pursuant to Rules of Procedure and Evidence Rule 96 on the prohibition the introduction of prior sexual conduct evidence).⁴³

Consideration of Other Forms of Sexual Violence by International Law and Courts: Spotlight on Male Rape

⁴³ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 1994 Rules of Procedure and Evidence, as amended on 24 July 2009.

Most likely as a result of the higher visibility of sexual violence in international criminal proceedings, other acts committed during conflicts have been determined to constitute sexual violence for which accountability can be sought. Of particular interest are rape, genital violence that does not amount to enforced sterilization, and enforced masturbation perpetrated on men.

Wartime male rape can take several forms. As Sivakumaran best described it in a brilliant study,

Victims may be forced to perform fellatio on their perpetrators or on one another; perpetrators may anally rape victims themselves, using objects, or force victims to rape fellow victims. It has been noted that an appropriate name has not even been invented for this latter form of abuse, though it may be termed ‘enforced rape.’ In Nanking, men were sodomized, forced to perform other sexual acts in front of soldiers and forced to commit incest.⁴⁴

Numerous reports of rapes also emerged in the former Yugoslavia, as indicated in the previously mentioned Report of the UN Commission of Experts⁴⁵, as well as from a few ICTY decisions. Criminal committed against male prisoners include (but may in no manner be limited to): naked men being positioned one behind the other “in such a way as if engaged in intercourse;”⁴⁶ brother being forced at gun point, to publicly perform fellatio on each other;⁴⁷ detainees having phallic objects such as police truncheons, inserted into the anus;⁴⁸ and last but certainly not least, detainees being raped by individuals infected with the HIV/AIDS virus⁴⁹ in a practice cruelly dubbed ‘rape plus’ (Sivakumaran, 2007: 264).

Sexual violence perpetrated on men may also take the form of genital violence. Various Organization for Security and Cooperation in Europe (OSCE) reports include accounts of prisoners’ penises being placed on tables to be beaten, and having their testicles hit, bit or plainly

⁴⁴ Sivakumaran, 2007: 264

⁴⁵ Final Report of the United Nations Commission of Experts *supra* note 31, UN Doc. S/1994/674, at 56, para. 235 and UN Doc. S/1994/674/Add. 2, Vol. V, Annex IX, at 11, para. 20, at 40, paras 179 – 180, at 41, para. 183.

⁴⁶ *Prosecutor v. Milomir Stakic*, Trial Judgment, IT-97-24, para. 241 ICTY 31 July 2003.

⁴⁷ *Prosecutor v. Cesi*, Sentencing Judgment, IT-95-10/1-S, paras 13– 14 ICTY.

⁴⁸ *Prosecutor v. Stevan Todorovic*, Sentencing Judgment, IT-95-9/1-S, paras 39– 40 ICTY 31 July 2001.

⁴⁹ OSCE, *Kosovo/Kosova: As Seen, As Told* (1999), Chapter 7.

cut off, as castration seemed to have been widely practiced in camps in Bosnia. Once again, the Tadic case provided for another infamously grueling account of atrocities:

Probably the most infamous incident comes from the first case to be brought before the ICTY, that of *Tadic*: After G and Witness H had been forced to pull Jasmin Hrni 's body about the hangar floor they were ordered to jump down into the inspection pit, then Fikret Harambasi, who was naked and bloody from beating, was made to jump into the pit with them and Witness H was ordered to lick his naked bottom and G to suck his penis and then to bite his testicles. Meanwhile a group of men in uniform stood around the inspection pit watching and shouting to bite harder. All three were then made to get out of the pit onto the hangar floor and Witness H was threatened with a knife that both his eyes would be cut out if he did not hold Fikret Harambasi's mouth closed to prevent him from screaming; G was then made to lie between the naked Fikret Harambasi's legs and, while the latter struggled, hit and bite his genitals. G then bit off one of Fikret Harambasi's testicles and spat it out and was told he was free to leave. Witness H was ordered to drag Fikret Harambasi to a nearby table, where he then stood beside him and was then ordered to return to his room, which he did. Fikret Harambasi has not been seen or heard of since.⁵⁰

The last category of sexual violence experienced by male victims during conflicts is enforced sterilization to include castration and other forms of sexual mutilation. As seen above, these were practices common in detention camps.

The ICTY and ICTR jurisprudence lay the foundations for the wider criminalization of wartime sexual violence under international law. From being an objective crime linked to the traditional cornerstones of a woman's honor and dignity under the Geneva Conventions, sexual violence became a crime against humanity and constitutive of genocide, and the identification of which is highly dependent of subjective elements. However, neither the statute of the ICTR nor of the ICTY included provisions qualifying rape as a war crime, or better yet, as the most serious violation in international humanitarian law, grave breaches.

III.C. GRAVE BREACHES, PROSECUTORIAL AND EVIDENTIARY RULES FAVORING VICTIMS: THE ICC STATUTE

1. Sexual Violence in the Statute of the International Criminal Court

⁵⁰ Sivakumaran, 2007: 265

The creation of the International Criminal Court (ICC) was not the only legislative milestone as regards the criminalization of a wide range of sexual violence under international law of the past twenty years. The adoption of its founding document, the Rome Statute⁵¹ signed on 17 July 1998 and which came into force in July 2002, brought a new dimension to the criminalization of wartime sexual violence. Establishing four core international crimes (genocide,⁵² crimes against humanity,⁵³ war crimes⁵⁴ and crime of aggression), it did so in three novel ways.

First it palliates the identified weaknesses of the ICTR and ICTY statutes by enumerating both rape and forced pregnancy as war crimes (in both international and non-international armed conflicts) and crimes against humanity. Article 6 ICC on Genocide reads as follows:

For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; [...]

While Article 7 ICC on Crimes against Humanity reads as follows:

1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (c) Enslavement; [...] (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; [...] (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1: (a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to

⁵¹ Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

⁵² Article 6 ICC

⁵³ Article 7 ICC

⁵⁴ Article 8 ICC

commit such attack; [...] (c) 'Enslavement' means 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; [...] (e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or (f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy; [...]

3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

Lastly, Article 8 ICC on war crimes reads as follows:

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:[...] (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; [...]

This is significant due to the more burdensome criteria required to secure a conviction for crimes against humanity. Prosecution of a war crime requires that the acts be committed during an armed conflict, while a crime against humanity requires that the act be committed on a widespread or systematic basis (Bedont, 1999: 148).

Secondly, the Rome Statute's accompanying document, the Elements of Crime codifies the elements of rape and forced pregnancy.⁵⁵ It implies that rape and forced pregnancy may be prosecuted as crimes of genocide under its Article 6 (b) relating to genocide by causing serious bodily or mental harm. (Boon, 2000: 636). Viewed in context, victims of rape and forced pregnancy during armed conflict have more avenues than ever to seek redress for these crimes

⁵⁵ Boon, 2000: 630.

within the international legal framework. Thus, except for forced pregnancy, the crimes of sexual violence in the ICC Statute are prohibited when committed against “any person”, not only women. In addition, in the Elements of Crimes for the International Criminal Court, the concept of “invasion” used to define rape is “intended to be broad enough to be gender-neutral”.⁵⁶

Thirdly, the Rome Statute fills another gap left open by both the ICTY and the ICTR statutes: it introduces the concept of ‘Grave Breaches’ into the criminalization of wartime sexual violence. Such terminology was incorporated into the 1949 Geneva Conventions under the umbrella of ‘Repression of Abuses and Infractions’ and through GC I Article 49. I § 3 of which reads as follows:

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

The same provision appears in GC II Article 50, GC III Article 129 and GC IV Article 146 which states as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

Although ‘grave breaches’ were restated in Article 2 of the ICTY Statute, their application was limited to international conflicts, as stated by ICTY Appeals Chamber in *Tadic* who limited their application to international conflicts (Eboe-Osuji, 2011: 220). This reflects a clear intent to equate sexual violence as a grave breach, “equivalent in gravity to other crimes subject to universal jurisdiction” (Copelon, 2000: 9).

2. Victims’ Needs and Reparations

⁵⁶ International Committee of the Red Cross IHL Rule 93

The establishment of reparation mechanisms for victims is perhaps the other major innovation under the ICC regime. It is indeed a remarkable development for the *ubi jus ibi remedium*⁵⁷ principle found its place in present day international criminal law (Eboe-Osuji, 2011:287), and most importantly in international law as it relates to wartime sexual violence. Two articles thus provide for the basis of reparations for international criminal acts. First, Article 75 ICC on Reparations to victims specifies the type of reparations available to victims, reading as follows:

- 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.*
- 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.*

Rule 97 of the Rules of Procedure and Evidence further states that reparations in case of mass atrocities can be individual or collective (McCarthy, 2012: 227). In addition the above article, Article 79 ICC establishes fiduciary reparations mechanisms:

- 1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.*
- 2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.*
- 3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.*

The ICC provisions thus create two distinct features in the Trust Fund's mandate. First "it is to act as an institution through which the Court can make reparations awards," and secondly, as "an institution which can use its 'other resources' for the benefit of victims in accordance with Rule 98 (5) of the Rules of Procedure and Evidence (McCarthy, 2012: 225).

⁵⁷ "Where there is a right, there must be a remedy."

However, lethargy endured by the idea of reparation for victims of armed conflicts as an emerging norm in international law and policy. However, and as Eboe-Osuji suggests, “despite a generally acknowledged need for a reparation program,” implementation measures have yet to materialize, particularly as they relate to victims of armed conflicts (Eboe-Osuji, 2011:276).

After a dawdling evolution that cost the lives and physical integrity of millions of women, girls, and in lesser extent, men, the gendered code that was wartime sexual violence has legally fallen into desuetude. Those who were once considered mere spoils of war crossed the threshold turning them into subjects of international law with all the rights and benefits to which such status entails. The ICTR, ICTY and ICC have built a very significant body of jurisprudence that recognizes “rape and sexual violence as forms of egregious violence” (Copelon, 2005: 9). However, with the increase in protracted conflicts in regions such as Africa’s Great Lakes, and the prevalence of rape and other forms of sexual crimes on the rise, why have legal developments of the past decade not contributed to the decline of sexual violence?

While an increased emphasis on the security of the individual is slowly gaining currency in the international realm, should an engendered human security paradigm be the next step to guarantee the safety of the millions of women and girls affected by conflicts?



8. Baccio Bandinelli, *Rilievo del Monumento a Giovanni delle Bande Nere*, Florence

IV.A. INCREASE IN PROTRACTED CONFLICTS: AFRICA'S GREAT LAKES REGION

1. Case Study Introduction: the Democratic Republic of the Congo

The end of the Cold War brought about changes felt well beyond the borders of the Western and Eastern blocks. National political systems outside the geographical sphere of influence of either power collapsed when the latter's support came to an abrupt end, as was the



case in several African countries. The violent conflicts that ensued occurred mainly within state borders, though often with inter-state dimensions, as was and still is the case in Africa's Great Lakes region.⁵⁸ Burundi and Rwanda experienced war and genocide and are now on the road to

recovery, while the young state of South Sudan, Uganda, the Central African Republic (CAR) and the Democratic Republic of the Congo (DRC) engulfed in endless wars.

⁵⁸ The African Great Lake region consists of countries that surround the African Great Lakes. Although some institutions prefer to limit it to Burundi, the Democratic Republic of Congo, Kenya, Rwanda, Tanzania and Uganda, the area can also be expanded to South Sudan and the Central African Republic.

The DRC's armed conflict (1996-present)⁵⁹ deserves special attention for several reasons, not the least of which is the scale and magnitude of sexual violence perpetrated by all warring parties, state forces and rebels alike, and the climate of impunity in which the abuses occur. Furthermore, because the conflict in the DRC does not have ethnic ramifications, at least none has prevalent as in Bosnia or Rwanda, for instance, sexual violence appears to be a crime of opportunity, a reward for underpaid soldiers, and in some instances, part of a forced displacement strategy for rebel control of territories rich in mineral resources.

As one of the deadliest intrastate conflicts of the late 20th century, the civil war that has been devastating the Democratic Republic of the Congo has puzzled scholars both by its intensity and its complexity. At the core, it is an ethnic conflict thirty years in the making yet the active participation of foreign forces in the hostilities (and atrocities) taking place within Congolese borders have turned it into a hybrid war: one that is civil but with international ramifications going far beyond what the African continent has thus far experienced. The international community's efforts to end the violence were met by skepticism fed by its failures, the causes of which range presumably from misdiagnosis of the roots of the conflict to wrong determination on the proper exit strategy. Parties to the conflict include state armed forces, the *Forces Armées de la République Démocratique du Congo* or FARDC pitted essentially against the now defeated M23, Mai-Mai, the *Congrès National pour la Défense du Peuple* CNDP and the foreign Lord's Resistance Army (LRA) and the *Forces démocratiques de libération du Rwanda* or FDLR, a group composed almost entirely of Rwandan ethnic Hutus opposed to Tutsi rule. Rape has been rampant throughout the war. However, accurate numbers of occurrences

⁵⁹ The war began in 1996 until 1999, between rebel factions and then-President Mobutu's forces, but it supposed to have entered its second phase in 2003 (until 2006) after a tumultuous, and ultimately failed transition to democracy against factions loyal to President Kabila. However, armed activities between various rebel and transnational groups never ceased, particularly in the Ituri, North and South Kivu regions.

have been impossible to tabulate due to the fact that “many women have been raped more than once by different fighting factions as they crisscross different parts of DRC,” Slim suggests, also referring to a Human Rights Watch report making similar assumptions (Slim, 2007: 65). The following appalling story of sexual violence in the eastern part of the country has become part of the daily lives of women and girls:

Four heavily armed combatants-they were Hutu, came to our house [...]. Everyone in the neighborhood had fled. I wanted to hide my children, but I didn't have time. They took my husband and tied him to a pole in the house. My four-month-old baby started crying and I started breastfeeding him and then they let me alone. They went after my daughter, and I knew they would rape her. But she resisted and said she would rather die than have relations with them. They cut off her left breast and put it in her hand. They said, “Are you still resisting us?”

She said she would rather die than be with them. They cut off her genital labia and showed them to her. She said, “Please kill me.”

They took a knife and put it to her neck and then made a long vertical incision down her chest and split her body open. She was crying but finally she died. She died with her breast in her hand.

Such torture, Slim concludes, “has become routine in a continent where machetes and knives are always to hand as multi-purpose instruments that are used easily and seamlessly between acts of war, farming, rape and animal slaughter” (Slim, 2007: 65). In South Kivu, for instance, sexual violence is pervasive, a Harvard Humanitarian Initiative study⁶⁰ shows. It affects women of all ages, ethnicities and marital statuses. In all too familiar scenarios from the Rwandan War, women are attacked everywhere, including inside their own homes. The sexual assaults are ruthless, some perpetrated by the rogue former ‘*génocidaires*’ from Rwanda who had fled criminal prosecution after the war. Gang rape, sexual slavery, genital trauma, forced rape between victims and rape in the presence of family members are common, the report indicates and sexual violence survivors often witness the torture and murder of their children and spouses.

⁶⁰ *Now the World is Without Me*, is an extensive study of rape victims in the Democratic Republic of Congo (DRC) commissioned by Oxfam and conducted by the Harvard Humanitarian Initiative, April 2010.

Another interesting feature of the conflict addressed in the report is the militarization of rape and its consequences on the safety of rural women and girls:

From 2004 to 2008, the number of civilian rapes increased by an astounding 1733% or 17-fold, while the number of rapes by armed combatants decreased by 77%. These findings imply a normalization of rape among the civilian population, suggesting the erosion of all constructive social mechanisms that ought to protect civilians from sexual violence. After years of military rape in South Kivu, civilian adoption of sexual violence is becoming recognized as its own problem. To address this new wave of civilian perpetrated sexual violence, the environment of impunity in DRC must end. Congolese sexual violence laws must be fully enforced and perpetrators must be held responsible. In parallel with upholding accountability, the mindset of an entire society will have to be reset to recognize rape as a morally unacceptable and criminal act.⁶¹

What those findings suggest is that sexual violence by armed forces was high but decreased after 2008, as rapes committed by civilians have increased. It could be argued that it is so because many armed groups wreaking havoc in eastern DRC are not part of regular armed forces but essentially civilians who have taken arms and became combatants as a result. This makes attempts to apply current mechanisms of accountability daunting.

2. Addressing Misconceptions on Sexual Violence

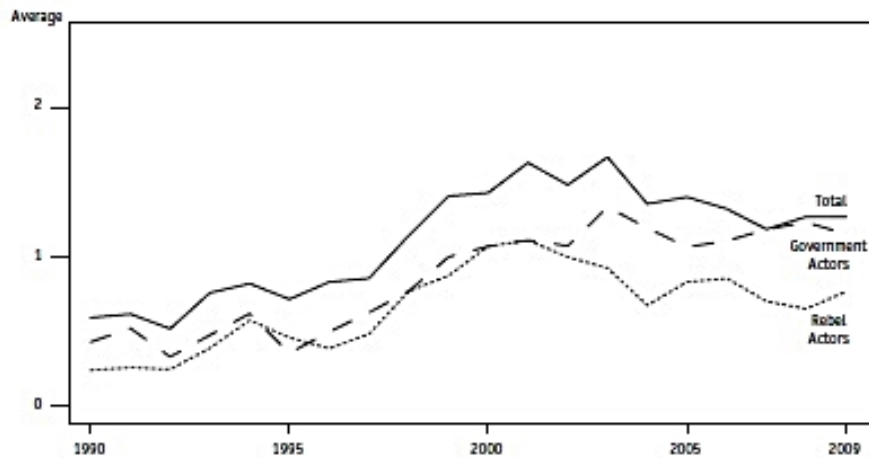
In order to understand why fear of prosecution and progress made in holding perpetrators accountable have not helped curb the violence, several major misconceptions about sexual violence in the DRC must be discussed.

First, it should not be presumed that only rebels commit sexual violence. The duration of the conflict and the government's lack of effective control over its own forces, make accountability for acts perpetrated in rural areas of this vast land hard to enforce, when they do in fact exist. The below United States Institute for Peace graph shows incidences of wartime rapes between 1990 and 2009, and the actors involved; it appears armed forces associated with the state are more likely to victimized populations than rebel groups do. Those statistics are

⁶¹ Harvard Humanitarian Initiative Study, 2010, p.2-3

consistent with accounts of abuses by the DRC's FDLR, the supposed country's official armed forces. Everyone participates in the rapes, Stiglmayer wrote on wartime sexual violence, regular soldiers and members of paramilitary groups, "simple foot soldiers as well as high officers and commandants; policemen as well as friends [...] of the raped women" (Stiglmayer, 1994: 147).

Figure 1. Reported Wartime Rape Level



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Secondly, and as we have briefly discussed in the case of Rwanda, Bosnia and even in Nanking, findings revealed that women were not the sole victims of wartime sexual violence, nor were men the only perpetrators. If sexual violence against women is common feature of armed conflict, sexual violence against men indeed takes place in nearly every armed conflict in which sexual violence is committed (Sivakumaran, 2007: 255). Recent research indeed suggests that female combatants sometimes perpetrate wartime rape and other forms of sexual violence, and the DRC is no exception. As indicated in the aforementioned Harvard Humanitarian Initiative Report, approximately 41% of female sexual violence victims reported that they were victimized by female perpetrators, as did 10% of male victims (Cohen, Green and Wood, 2013: 4). It is the

⁶² In Cohen, Green, and Wood, *Wartime Sexual Violence Misconceptions, Implications, and Ways Forward*, United States Institute For Peace Special Report, 2013, p. 9

extent to which such violence occurs, and its effects on male victims that has yet to be known.

Reasons for this can be explained as follows:

Doctors, counsellors and humanitarian workers present on the ground mirror the responses of survivors, thus not picking up signs of male sexual violence. Men are not seen as being as susceptible to sexual violence as women; hence medical workers may not pay as much attention to detecting signs of sexual violence as they otherwise might. Further, unlike in the case of sexual violence against women, medical workers may not be trained to look for signs of sexual abuse of men. Those that are, and do, may focus on male rape to the exclusion of other forms of male sexual violence due to their familiarity with female sexual violence, which often takes the form of rape. [...] All this is compounded by the fact that sexual violence against men may not leave any visible scars, whereas the resulting effects of other forms of abuse may jump out at medical workers diverting their attention away from the sexual violence. If the abuse is recognized, it may not always be seen as *sexual* violence, for the issue is often buried under the rubric of ‘abuse’ or ‘torture.’⁶³

Increasingly, reports on the pervasiveness of male violence in the DRC surface, with local activists confirming that “the rape of men is much more frequent than you might think” (Sivakumaran, 2007: 260). It remains that all survivors of rape, whether male or female are similarly rejected by their communities. In extremely gender-specific ways, while women face being abandoned by husbands, relatives and communities, men, as traditional heads of households suffer from lower social status as a “feminized male,” a station in society, described by one commentator as “one of the most lethal gender roles in modern times” (Sivakumaran, 2007: 271).

Another misconception worthy of consideration is the one according to which wartime sexual violence is decreasing. Although “differences in rape reporting across victim types remain unknown and under-investigated, [...] systematic data on rape likely underrepresents some types of victims and over-represents others.” However, Cohen, Green and Wood contend, data on wartime rape during civil wars between 1980 and 2010, drawn from State Department monitoring of human rights violations, “show a generally upward trend, both in the average

⁶³ Sivakumaran, 2007:256

yearly level of wartime rape” (Cohen, Green and Wood, 2013: 8). Because war increases the likelihood and opportunities for sexual violence due perhaps due to highly unregulated environments (both legally and socially) in which conflicts occur, it could be argued that new mechanisms ought to be put in place to increase protection of vulnerable groups. The failure of the state to control armed groups and armed forces in the DRC clearly demonstrate the accuracy of this statement.

A rarely discussed issue with regards to misconceptions, is the impetus behind systemic sexual violence as reported in recent years. While I have emphasized the historical patterns identified in previous conflicts as either relating to rewarding soldiers or ethnicity, I have also noticed a trend in the use of women particularly, as currency. With the increase of rebel/insurgent groups involved in localized conflicts worldwide, and the scarcity of financial resources available for commanders to remunerate fighting men, the promise of ‘brides’ that would otherwise not be available to them through traditional social channels becomes a major incentive. Societal norms requiring, for instance, that the groom-to-be provide for a dowry, are falling into desuetude in shattered, war-torn communities and in conflict settings; rebels, mostly young men of marrying age are unable or unwilling to return to social normalcy after acquiring an empowering new status as armed fighters. As a result, young men recruited in militias agree to forgo their pay in exchange for free access to young women is becoming common in places such as Nigeria, where Boko Haram’s frequent mass-abductions of girls is crippling entire villages, and the Great Lakes Region. Regrettably this has become a common feature of every internal conflict of the past five years, in South Sudan, Sudan, Uganda and to a lesser extend the Middle East, prompting to the conclusion that some armed activities have been elevated to a war against women.

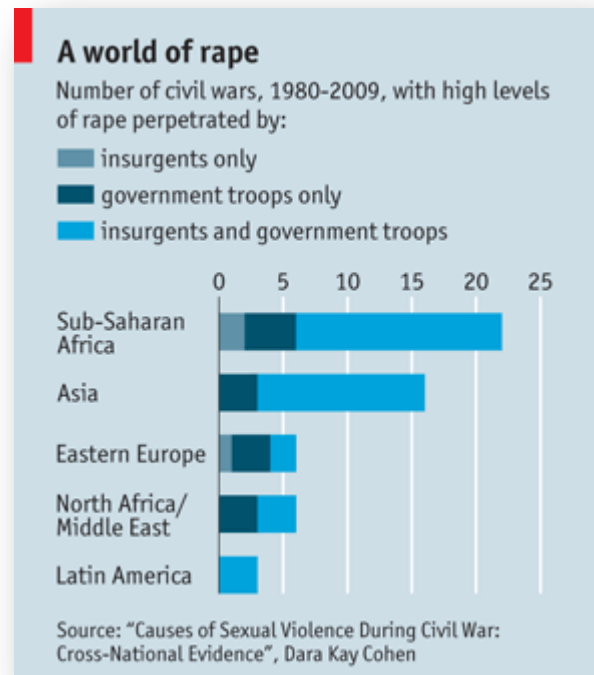
The last misconception needing clarification to further this paper’s argument on the necessity of a generalized, engendered security paradigm, is the fact that wartime sexual violence appears primarily as an ‘African problem.’ Aside from the fact that the DRC has been repeatedly called the ‘rape capital of the world,’ recent high-profile cases of widespread wartime rape have occurred in the Great Lakes region, including in the CAR, Uganda and South Sudan.

However, Cohen, Green and Wood also argue,

reports of wartime rape are not limited to one geographic region. [...] Global patterns suggest that wartime rape is a serious problem in most regions of the world; in recent years, State Department reports show at least one year with high or very high levels of rape in the majority of war-affected countries.

These patterns, they conclude, refute the idea that wartime rape is an African problem (Cohen, Green and Wood, 2013: 3).

Efforts to eradicate this deeply embedded pattern of the DRC Conflict have resulted in greater awareness; as has been previously argued in this paper, women's rights have been incorporated into the human rights terminology, yet the violence failed to stop (Pillay, 2002: 37). Where do the roots of widespread violence lie?



IV.B CLOSE-UP ON THE NEW WARS: ENHANCED TIES BETWEEN WAR AND LIVELIHOODS AS OBSTACLES TO ENDING IMPUNITY

1. Impact of Systemic Sexual Violence on Communities

A majority of current civil wars, the Congolese conflict included, find their origins in the end of the Cold War. When Eastern or Western blocks-supported regimes collapsed due to lack of support from either power, the resulting political vacuum triggered armed struggles between different factions. In most cases, the struggle is still ongoing but as resources lessened, the impetus for finding alternative sources of war funding increased: diamonds in Sierra Leone, and in parts on the DRC, or coltan in the DRC as well to name a few.

For many rebel groups, civil war becomes, over time, a struggle for control of mineral resources and the forced displacement of rural populations an economic and strategic necessity to the war economy. Not only is the fight pitting non-state armed groups against the Congolese state, it also involves foreign armed groups against local rebel groups and the Congolese state.⁶⁴ In eastern DRC, foreign armed groups from Rwanda and Uganda have allegedly been involved in the illegal mining and smuggle of coltan.⁶⁵ In this war economy context, sexual violence, a ‘cost-effective’ and gratifying tool for all, is used *ad nauseam* to subjugate, displace or terrorize communities standing between groups and mines. Is it presumably ‘advertised’ by recruiting groups, as a combatant’s reward. As Kelly also argued (Kelly; 2010: 3),

The strategic rape theory states that SGBV is a tool to subjugate populations, instill fear, curtail movement and economic activity, stigmatize women, undermine community and family structures, contribute to bonding of perpetrators through the common act of rape [...]

Further along those lines, as the conflict endured and failed peacekeeping missions multiplied, the political purpose of rebel groups eroded, giving way to an impetus to continue participating in the war economy. As cattle rarified and agriculture production stalled due to previous conflicts and mass migration in neighboring countries in the early years of the conflict,

⁶⁴ See UN Security Council Press Release, “Security Council Condemns Illegal Exploitation of Democratic Republic of Congo’s Natural Resources” (Press release). UN. 3 May 2001 at <http://www.un.org/News/Press/docs/2001/sc7057.doc.htm>

⁶⁵ See UN Security Council Report, S/2003/1027, United Nations, 2003-10-26, at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/567/36/IMG/N0356736.pdf?OpenElement>

returning to eastern DRC was to adapt to daunting survival conditions. The combination of the social consequences of stigmatization and lack of economic development/opportunities for both fighters and victims has a destructive effect on communities. Great time and efforts are required to rebuild the latter in the aftermath of mass sexual violence sometimes perpetrated by fellow community members. The existence of children born out of wartime rape or sexual slavery further complicates reconstruction endeavors as their status as spawn of the enemy keeps them and their mothers from reintegrating.

2. Bearings on National and Regional Peace and Stability

Communities unable to find a path to recovery from conflict or trapped in a vicious cycle of violence contribute to the chronic instability that has plagued the DRC the past twenty years. Furthermore, the transnational nature of both the war and the crimes perpetrated affects areas sometimes without consideration of borders. The Lord Resistance Army, for instance, an originally Ugandan militia group, has been known to cross into the DRC and engage in sexual violence against Congolese nationals, thus allowing the stigmatization it causes to spread to an entire region.

In addition, and with regards to reconstruction, failed Demobilization, Disarmament and Reintegration (DDR) and Security Sector Reform (SSR) policies left thousands of former combatants (mostly young males) without alternative livelihoods, thus facilitating their re-recruitment by remaining non-state armed groups. It perpetuates a cycle of violence that transforms into a new, profitable way of life in destroyed communities, a propensity exacerbated by the existence of a weak state unable to adequately provide for its citizens both in urban and rural areas.

The case of the rebel group Mai Mai⁶⁶ illustrates those contentions. In interviews with J. Kelly of the United States Institute for Peace (Kelly, 2010: 4), some young combatants revealed their motivations for joining the group:

Conversations with Mai Mai combatants largely revolved around the devastating consequences that years of war have had on communities throughout eastern DRC. Nearly all the soldiers described having a family member killed in the conflict and losing the ability to study or find a job. As one soldier said, “There was nothing else for me to do. I knew I had no other support, so I had to join the military.”

Protecting the country’s natural resources from foreign exploitation was another stated Mai Mai objective (Kelly, 2010: 5):

“The goal of this group is to protect natural resources that are in this part of the country. We know already that natural resources are what motivate the enemy to come here.” Despite their dedication to these stated aims, however, soldiers emphasized how difficult their lives were. Lack of pay was most often cited as a problem, though soldiers also spoke about the lack of uniforms, supplies, and health care. Many expressed a desire to go back to life as it existed before the war and not to be seen as soldiers but as members of the community once again. At the same time, civilians were seen as a source of income and an exploitable resource. Some interviewees described in the same sentence that they were there to protect people but had to steal from them to survive.

In this unforgiving context, sexual violence against women by other armed groups, particularly foreign groups, is seen as a motivation to fight, although some Mai Mai soldiers justified its commission by members of their own group. Some commanders indeed “explicitly support rape by treating women as a spoil of war” (Kelly, 2005: 5). However, there are reasons to believe that commanders can be instrumental in “effectively limit[ing] their perpetration of rape [and] prevent rape and other forms of sexual violence if they choose to do so,” Cohen, Green and Wood contend. Such results can be achieved when naming and shaming is utilized as a deterrent. “Commanders tolerate rape when the perceived cost of prohibition is higher than perceived cost of later consequences” (Cohen, Green and Wood, 2013). In any case, this, for

⁶⁶ Mai-Mai refers to community-based militia group active in the DRC, initially formed to defend their local territory against other armed groups. Most were formed to resist the invasion of Rwandan forces and Rwanda-affiliated Congolese rebel groups, but some fought to exploit the war for their own advantage. According to a 2001 UN report, 20,000 to 30,000 Mai Mai were active in the two Kivu provinces.

lack of a better term, ‘strategy’ clearly impedes efforts to restore peace and stability not only in the DRC, but in the Great Lakes Region as a whole.

It remains that commanders are not the only perpetrators of sexual violence in conflict. Ironically culprits can be, and have been members of groups, armed or civilians, dispatched in conflict zones to prevent abuse. Any efforts to lessen its occurrence, first in the Great Lakes region, then worldwide might require addressing the issue of sexual violence by peacekeepers.

IV.C. ADDRESSING THE ISSUE OF SEXUAL VIOLENCE BY PEACEKEEPERS

The DRC conflict provides for analysis fodder, as it has been the most recent setting of multiple scenario of wartime sexual violence, often the theater of all there is to address with regards to abuse. The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo or MONUSCO (French: *Mission de l'Organisation des Nations Unies en République Démocratique du Congo*), previously known as the MONUC, has been deployed to war-torn DRC since 1999. Established under UN Security Council Resolutions 1279 (1999) and 1291 (2000), it was mandated to monitor the peace process of the Second Congo War (2003-2006), though much of its focus subsequently turned to the Ituri and Kivu conflicts (eastern DRC).

Among the many failures imparted to this peacekeeping mission are the allegations of sexual assaults against adults and children, including boys or hundreds of babies being born to Congolese teenage girls fathered by UN personnel (Simm, 2013: 151). In a pattern already present in previous peacekeeping settings, the West African “Aid for Sex” Scandal prompted an inquiry by the UN Office of Internal Oversight Services (OIOS). Investigators “uncovered 43 cases involving UN volunteers and peacekeepers, and stated that risk of sexual exploitation was real, highlighting blatant lack of accountability of NGOs and international institution personnel.

(Simm, 2013: 122). Similarly in the DRC, the range of the complaints is so widespread (soldiers from almost all contingents, military observers and civilians) there is little doubt that sexual violence and abuse have become common practice. This state of affairs prompted then UN Secretary General Kofi Annan to send Prince Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of Jordan to the UN and former civilian peacekeeper to investigate the allegations (Simm, 2013: 153). The resulting action was the issuance of a report, the eponymous Zeid Report, which recommended that a 'zero tolerance' policy be established in 2003, and be applied to ALL UN peacekeeping personnel, including civilian contractors and experts. Simm's description of the UN peacekeepers' disregards of the 'Zero Compliance' policy currently in place and the situation on the ground is telling:

The range of personnel involved includes UN police, diplomats, international humanitarian workers so need to broaden the scope of current regulatory paradigm, not sufficient, laissez-faire approach [...] When accountability was present it was repatriation on disciplinary grounds. OIOS found the abuse of Congolese women and girls to be "serious and ongoing" during tenure of the MONUC.⁶⁷

Impunity is, to a certain extent, enabled by law as officials of international organizations enjoy immunity analogous to diplomatic immunity. Thus immunity from criminal prosecution under host state law is granted to members of national contingents through 1. Status of Force Agreements (SOFA) between host state and the UN; or 2. through UN Model Memorandum of Understanding (MOU). International law as it currently stands provides immunity in practice to those who commit sexual offences in peace operations; individual peacekeepers, as representatives of foreign states' military forces, private military security contractors (PMSC) or international organizations fall mostly within the jurisdiction of international law and rarely under the host country legal framework.

⁶⁷ Simm, 2013: 5

The current state of the international legal system is either insufficient to deter widespread and systematic sexual violence in war, or inadequate to prevent its commission by individuals entrusted with ending it. Although great strides have been made with regards to including a gender perspective in the legal and institutional mechanisms aiming at curbing and punishing atrocities, the high incidence of such abuses remains a major concern. It appears the time is ripe for the acknowledgment of not merely human security as a legitimate paradigm, but as one in which a multi-faceted gender component ought to be added.

IV.D. STRENGTHENING THE INDIVIDUALIZED HUMAN SECURITY PARADIGM BY CEMENTING ITS GENDER COMPONENT

1. Overview of the current concept of Human Security: UNDP 1994 Human Development Report

Defining the Concept

An argument was made, in a previous section, that the end of the Cold War resulted *inter alia*, in the emergence of a broader, individual-centered concept of security that stands in contrast with the traditional, state-centered concept of security.⁶⁸ Roland Paris' attempt at a definition was deemed relevant for the purpose of including wartime sexual violence in this new paradigm. It involved all mechanisms aiming at reducing threats to human dignity and survival, as well as promoting the "humanitarian goals of "protection from sudden and hurtful disruptions in the patterns of daily life, whether in homes, in jobs or in communities" (Paris, 2001: 89). The challenge set forth in the aforementioned section was to determine a nexus between the means to prevent/address such disruptions and the end of impunity in conflict.

Based on Paris' assumptions, human security may be defined as focused on the individual and, arguably as critical to national, regional and global security and stability as traditional,

⁶⁸ *Supra*, II.C.REASSESSMENT OF THE TRADITIONAL SECURITY PARADIGM AND EMERGENCE OF AN INDIVIDUALIZED PERSPECTIVE ON SECURITY, p. 26.

militarize security. By protecting the well-being of individuals, answering their needs and mitigating threats to which they might be subjected, entities involved in providing such security, contribute to the greater goal of international peace and security.

United Nations Development Programme (UNDP) Definition

The UNDP's 1994 *Human Development Report*, a milestone in its own right established a framework within which areas considered to be paramount to human development can evolve. By distinguishing "freedom from want" and "freedom from fear" for all persons, it essentially argued that the combination of both may ultimately lead to better global security and stability.⁶⁹ The Report identified threats in seven distinct areas: 1. Economic security; 2. Food security; 3. Health security; 4. Environmental security; 5. Personal security; 6. Community security; and 7. Political security.

Using the existing theoretical framework, I will determine which aspects of human security could benefit from a gender perspective and contribute to a better protection regime against wartime sexual violence. Human security has its detractors and a majority (Roland Paris among several others) tends to deem the concept excessively vague and its goals, rather unrealistic. My focus will thus remain on freedom for fear along with personal, community and political security and each term shall be tentatively defined.

With regards to freedom from fear, it can be understood as protecting individuals from conflicts, and associated threats whether internal or external, human or weapon-based. Of relevance in this approach are: conflict prevention, resolution, post-conflict reconstruction (as it

⁶⁹ See UNDP's *Human Development Report*, 1994 at http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf

relates to the security and justice pillars)⁷⁰, peacekeeping, and emergency assistance. Within the freedom from fear approach to human security, personal, community and political security are critical. First, personal security seeks to protect individuals from physical abuse/violence by state and non-state actors. Secondly, community security applies in the context of individual groups whether social, religious, ethnic or gender; ideally it would provide parameters to ensure the latter are not targeted for violence or discrimination by state and non-state actors. Last but not least, political security emphasizes the respect for basic human rights and accountability for violations.

One of the most interesting advances in the development of the human security paradigm in the past few years, is the inclusion of gender in its different parameters. Although ‘engendering’ is often manipulated to fit organizational interests, the realization that the traditional security model excluded any consideration of gender equality, in spite of the fact that women have been the prime civilian victims of violence and conflict. A focus on gender seeks to address security concerns specific to each gender groups, bearing in mind, and as has been demonstrated in this paper, that conflict and its aftermath do not affect men and women equally. Furthermore, an engendered human security model would make gender considerations prerequisites for sustainable peace. In favoring this approach, I adhere to two ‘schools of thought’.

The first, led by Sabina Alkire,⁷¹ prioritizes the safeguard by all institutions, of a “vital core”, which combines minimal functions related to ensuring survival, maintaining dignity and

⁷⁰ The traditional Post-Conflict Reconstruction (PCR) paradigm is composed of four distinct pillars, namely Security, Governance, Justice and Reconciliation, and social/Economic.

⁷¹ Sabina Alkire directs the Oxford Poverty and Human Development Initiative (OPHI), a research center within the Department of International Development, University of Oxford. In addition, she is a Research Associate at Harvard and Vice President of the Human Development & Capability Association (HDCA). Her article, "A Conceptual Framework for Human Security", is the basis of one of my two preferred approach to human security.

sustaining livelihood (Alkire, 2003). The second, spearheaded by international human rights specialist Lyal S. Sunga is the most adapted to the challenges of preventing wartime sexual violence. Sunga is in favor of a human security paradigm that relies on an international legal regime encompassing human rights, humanitarian, criminal and refugee law (Sunga, 2009). Laying the foundations of human security on relevant legal norms (particularly the *jus ad bellum* and *jus in bello*), will solidify its normative status in the long term. I believe the ‘Sunga approach’ to be the most appropriate to wartime sexual violence in human security and would consider an additional set of normative basis as necessary inclusions, as they instill a missing gender perspective into this legal combination.

2. UN Resolutions 1325, 1820 and 2122

1325

Adopted in October 2000, UN Security Council Resolution 1325 (S/RES/1325) is the first Security Council resolution to focus specifically on women’s experience of armed conflict, aiming to empower women at all levels of decision-making in conflict prevention, conflict resolution and peace-building. It also seeks to reduce gender-based violence by bringing gender-specific concerns within mainstream peace and security but only as it relates to peacekeeping missions. The resolution does not create new rights; rather, it refers to existing treaties and reaffirms their relevance to gender mainstreaming initiatives, the 1949 Geneva Conventions and their 1977 Additional Protocols; the 1951 Refugee Convention and its 1967 Protocol; the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW) and its 1999 Optional Protocol; and the ICC Statute.

One of the most significant provisions of Resolution 1325, Clause 10 relating to gender-specific protective measures, presents several important features. First, it correlates conflict with proliferation of gender-based atrocities in situations of conflict. Second, it

suggests that recognition of gender-specific harms forms an integral component of the gender mainstreaming process by enabling appropriate policy responses to be developed. For instance, levels of gender-based violence that occur before, during and after conflict could provide a gender-specific indicator, allowing an assessment of the success of the gender mainstreaming process in reducing these harms in practice.⁷²

Another provision, Clause 11 “reinforces recognition of sexual violence and rape as crimes against humanity and war crimes,” while Clause 8(a) calls for “all actors involved in peace negotiations and agreements to consider the ‘special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction” (Barrow, 2010: 229-231). Despite some major advance in recognizing the need for gender specific protective measures, the lack of benchmarks and targets have caused critics to mention its vagueness (Barrow, 2010: 233).

1820

UN Security Council Resolution 1820 (S/RES/1820) of 19 June 2008 came to reinforce its groundbreaking predecessor by recognizing that “sexual violence of a widespread or systematic character not only threatens civilians, but undermines the security of communities and, in many cases, nations as a whole.”⁷³ It helps to expand norms on conflict prevention, including the evacuation of women and girls susceptible to sexual violence, an element that may appear beyond the scope of international humanitarian law. It also empowered security actors, including UN and regional peacekeepers, to respond to sexual violence “with as much alacrity as

⁷² Barrow, 2010: 230

⁷³ See UN Action Against Sexual Violence website, www.stoprapenow.org

they would to any other atrocity.”⁷⁴ Resolution 1820 extended the reach of existing gender-based provisions under the Geneva Conventions, as its Clause 1

not only recognizes systematic use of sexual violence against civilian populations, but also pinpoints how it can ‘significantly exacerbate situations of armed conflict’ and stresses the importance of prevention.⁷⁵

Additionally, Clause 3 lists specific measures aiming to improve the protection of civilians, with particular reference to women and girls, to include

military training on the prohibition of all forms of sexual violence, and disciplinary action against those security forces who commit acts of rape or sexual violence. The evacuation of women and children under imminent threat of sexual violence to safety is also stipulated, which demonstrates a shift towards preventative rather than reactionary measures, thus helping to expand norms on conflict prevention.⁷⁶

After July 2009, the UN Action against Sexual Violence reported on the adoption of several follow-up UN Security Council resolutions specifically aiming to implement measures related to sexual violence.⁷⁷

First, Resolution 1888 (2009) called for concrete measures to “operationalize and institutionalize” commitments made through Resolution 1820, including the nomination of a Special Representative of the Secretary-General (SRSG) on Sexual Violence in Conflict; the creation of a team of rapidly-deployable experts on the rule of law, Women Protection Advisers; improved data on trends, emerging patterns of attack and early-warning indicators of sexual violence.

Secondly, Resolution 1960 (2010) defined the concept of conflict-related sexual violence, *illustrated its nexus with international peace and security* (emphasis added) using examples from the field; established a new accountability system to ensure that mass rape will no longer be met

⁷⁴ Ibid.

⁷⁵ Barrow, 2010: 323

⁷⁶ Barrow, 2010: 323

⁷⁷ See UN Action against Sexual Violence website, www.stoprapenow.org

with mass impunity; calls upon the Secretary-General to include information in his annual reports on parties “credibly suspected of committing or being responsible for acts of rape and other forms of sexual violence”; listing in an annex to these annual reports parties credibly suspected of committing or being responsible for “patterns of rape and other forms of sexual violence in situations of armed conflict that are on the Security Council agenda” as a basis for focused engagement, including through relevant sanctions committees; and calls upon the SRSG-SVC and senior UN officials to engage in dialogue with parties to armed conflict to secure specific and time-bound commitments to prevent and address sexual violence.

Essentially, this resolution “ensures that conflict-related sexual violence will no longer go unreported, unaddressed or unpunished.”⁷⁸

2122

As the latest UN Security Council to complete a list a gender-specific provisions as they relate to sexual violations in conflict, UN Security Resolution 21022 (2013 seeks to achieve two main objectives. First, request that member States assess and accelerate progress and prepare to formulate new targets, in time for the 2015 Resolution 1325 High-level Review. Secondly, it plans on making the implementation of the Council’s women, peace and security mandate a focus of one of its periodic field visits in advance of the 2015 High-level Review.⁷⁹

The Resolution also requests that the Secretary-General “submit his next report by October 2014 and include in that report an update of progress across all areas of the women, peace and security agenda, highlighting gaps and challenges.”⁸⁰

⁷⁸ See UN Action against Sexual Violence website, www.stoprapenow.org

⁷⁹ See UNDPI, Security Council Adopts Resolution 2122 (2013), Press release available at <https://www.un.org/News/Press/docs/2013/sc11149.doc.htm>

⁸⁰ United Nations S/RES/2122 (2013)

By continuing to prompt the international community to “recognize widespread sexual violence against women in conflict as a threat to international peace and security” (Kelly, 2010: 1), the UN Security Council through these successive resolution palliates serious gaps contained in the Geneva Conventions. Although the latter, as I have argued, contain provisions relating to victims of sexual violence, they were hardly reflective of the reality of women’s and men’s experiences of armed conflict. The resolutions highlight “gender limitations and conceptual constraints within international humanitarian law” (Barrow, 2010: 221), complement it and help analyze it through a gender lens. As similarly argued in the provisions of CEDAW General Recommendation 30,

As all the areas of concern addressed in those resolutions find expression in the substantive provisions of the Convention [...] The Committee reiterates the need for a concerted and integrated approach that places the implementation of the Security Council agenda on women, peace and security into the broader framework of the implementation of the Convention and its Optional Protocol.

They contribute to the development of a human security concept fully informed by relevant provisions of international law as defined by Sunga.

3. Developing a concept fully informed by international human rights law, international humanitarian law, international criminal law and international refugee law

By revisiting the history of wartime sexual violence since World War II, I sought to establish that no race, culture or country has a monopoly on conflict-related gender-based violence. As Iris Chang indeed suggested, “the veneer of civilization seems to be an exceedingly thin-one that can easily stripped away, especially by the stress of war” (Chang, 1997:5). Due to the randomness of sexual violence in war, the necessity of adding a gender layer to mechanisms currently in place arise from all corners of the globe where conflict struck, as does creating new protective regimes. An engendered human security paradigm would therefore have the following parameters.

Freedom from Fear

The cases of Rwanda, Sierra Leone and Bosnia have demonstrated a systemic targeting of women through abductions to serve as servants and sexual partners of combatants for extended periods. In two of the conflicts studied (Bosnia, Rwanda) women belonging to particular groups were targeted; in the two others (Sierra Leone, the DRC), the violence was indiscriminate. In all, men were targeted to instill terror and a sense of lacking protection in targeted communities and what those findings show, is that such patterns create a fear of being subjected to atrocities as civilians realize that soldiers no longer target enemy soldiers, but prey on civilians thus expanding the scope of war. The 1966 International Covenant on Civil and Political Rights could serve as the basis for this parameter. Under the overall umbrella of freedom from fear, the following areas also ought to be engendered.

Personal Security

Widespread and systematic attacks on women during conflicts have been connected to their individual identities as women. As Cynthia Enloe suggested,

If military strategists [...] imagine that women provide the backbone of the enemy's culture, if they define women chiefly as breeders, if they define women as men's property and as the symbols of men's honor, if they imagine that residential communities rely on women's work—if any or all of these beliefs about society's proper gendered division of labor are held by war-waging policy makers—they will be tempted to devise an overall military operation that includes their male soldiers' sexual assault of women.⁸¹

The long-term, damaging and often permanent effects of sexual violence on the victim's status or inherent value as a person, the consequential, increased risk of repeated assaults by members of war-shattered communities reluctant to protect them, should be highlighted in designing legal parameters for the personal security of women. This would entail acknowledging the individual rights of victims *per se*, and perhaps prioritize their (and their dependents) access to services

⁸¹ Enloe, Cynthia, *Maneuvers*, 134 as cited in Wood, 2006: 327

(health, social, education, etc.) based on various human rights treaties such as the 1966 International Covenant on Social, Economic and Cultural Rights.

Community Security

“Women play a major role in building and preserving the clan-based, ethnic, or cultural identity of any society in which they live,” Josse wrote (2010: 178). Furthermore, and as Sivakumaran suggested (Sivakumaran, 2007: 274),

the symbolic construction of the female body tends to be that of the community, for example ‘Marianne’ personifying France, the Statue of Liberty of the United States, the Bavarian national statute ‘Bavaria’ and ‘Mother India.’ Accordingly, an attack on the female body is a symbolic attack on the personification and culture of the entire community. In much the same way as sexual violence against women may symbolize to offender and victim alike the destruction of the national, racial, religious or ethnic culture as appropriate depending on the context of the conflict, sexual violence against men symbolizes the disempowerment of the national, racial, religious or ethnic group. [Sexual violence against men] is symbolic appropriation of the masculinity of the whole group.

Yet among the most contentious issue with regards to persecution beyond the traditionally accepted grounds of race, ethnicity, nationality, religion, and politics, is the qualification of ‘gender’ as a social group. Re-theorization of human security with a gender lens, would acknowledge that women may be targets of violence not only as individuals, but because they are part of a collective group— namely, women (Tripp, 2013:20) and that the same applies to men albeit to a lesser extent

The evolution of international law since 1945 has had one primary result: the normativization of general prohibitive rules meant to safeguard peace, security and actors of the international arena, whether states or individuals. Norms agreed upon in various degrees of consensus thus formalized a set of common principles or ideologies; prohibition or limitation in the use of nuclear weapons, the laws of armed conflicts, human rights or rules pertaining to state sovereignty are examples. A concept still in its infancy, human security has the potential to become more than a mere amalgamation of vague principles, at least, as it relates to victims of

wartime sexual violence. Its normative potency can be enhanced by existing legal structures which may help prevention, increase then systematize protection and support.

International Human Rights Law

The human security paradigm's focus on human rights is generally limited to issues relating to basic individual rights. This is of particular relevance, because "in the context of civil war, combatants use rape strategically in order to acquire women's assets" and both government and rebel forces used violence systematically to strip women of their economic and political assets," Pillay wrote. With the transferability of their productive and reproductive labor implied in their status as property, women are often targeted for what they may possess, "which is often livestock and land for the army" (Pillay, 2002: 39). Domestic laws that guarantee the non-transferability of women's property and ensure their equal treatment before the law, making it illegal to encroach on their economic rights would help mitigate the risks of seeing their prerogative collapse when a war breaks.

Additionally, although the CEDAW did not include any provision regarding sexual violence, The Committee on the Elimination of Discrimination against Women decided at its forty-seventh session, in 2010, to adopt a general recommendation, General Recommendation 30 on women in conflict prevention, conflict and post-conflict situations. The primary aim and purpose of the general recommendation was to provide authoritative guidance to States parties on legislative, policy and other appropriate measures to ensure full compliance with their obligations under the Convention to protect, respect and fulfil women's human rights. Another important suggestion made in the General Recommendation pertains to the application of the CEDAW to non-state actors. The Committee did acknowledge that non-State actors cannot become parties to the Convention; however, it suggested, "under certain circumstances, in

particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights” (CEDAW, 2010). This would apply equally to members and leaders of non-State armed groups and private military contractors, leading to individual criminal responsibility for severe violations.

International Humanitarian Law

I have discussed the impact, at least theoretically, of the UN Security Council resolutions on women, peace and security, and their complementarity to international humanitarian law with regards to non-state actors and their obligations towards civilians. Placing gender at the center of an analysis of the jus in bello may also be an avenue of inclusion of a different category of non-state actors, namely private military and security contractors and peacekeepers. The Montreux Document,⁸² an initiative by the Swiss government and the ICRC to clarify the role of PMSCs in armed conflicts certainly lays possible foundations for a specific *corpus iuris* applicable to individuals who function outside the scope of current international humanitarian law.

Furthermore, the promulgation in 2003 of the UN Secretary-General’s *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (SGB) as a response to allegations about sexual exploitation by peacekeepers indicated a willingness to seriously address the issue (Simic, 2012: 165). However, considering its disregard by peacekeepers in the DRC, the inclusion of such policies in the engendered human security would be a major step toward systematic implementation on the field.

⁸² “Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict,” reaffirms the obligation on States to ensure that private military and security companies operating in armed conflicts comply with international humanitarian and human rights law. States should also take concrete measures to ensure that the personnel of private military and security companies can be prosecuted when serious breaches of the law occur.

International Criminal Law

Accounts of judicial proceedings at the ICTY and ICTR have demonstrated one significant fact: the gender lens placed on international criminal cases has resulted in major normative breakthroughs. Engendering the process has allowed the inclusion of rape in indictments that blatantly ignored it despite heavy evidence *ab initio*. Prominent sexual assault cases were kept from being mere cases of a “bunch of guys got riled up after a day of war” (Sharatt, 2011: 40). The presence of women’s rights groups has been critical on the ICTY, and this trend should be institutionalized as part of gender mainstreaming. The individual criminal responsibility of perpetrators of atrocities needs to be systematized to act as a deterrent against impunity, and warring parties constantly informed on the risks they encounter when committing, condoning or failing to prevent sexual violence. The ICC Statute is thus a critical tool in implementing measures emphasizing gender in international law; it may even be instrumental in prosecuting crimes omitted by peacekeepers due to Court’s approach to gender crimes (Simm, 2013: 61).

International Refugee Law

Among the five grounds on which refugee status can be claimed –race, religion, political opinion, nationality and membership in a particular social group- gender is not listed. Thus, individuals on whom violence was perpetrated solely on account of their gender do not qualify, *de lege lata*, as refugees. Although major strides were made in recent years to expand the scope of the 1951 Convention relating to the Status of Refugees to victims of gender crimes such as domestic violence and female genital mutilation (FGM), and the UN High Commissioner for Refugees (UNHCR)’s publication of guidelines for victims of sexual violence, there is still some level of resistance to the full integration of gender in refugee law.

CEDAW General Recommendation No. 30 provides for valuable insight on how displacement increases risks of sexual violence within conflict-affected areas. The provisions of the Convention “reinforce and complement the international legal protection regime for refugees, displaced and stateless women and girls in many settings, especially as explicit gender equality provisions are absent in relevant international agreements” (CEDAW, 2010). The Committee has previously noted that the Convention applies at every stage of the displacement cycle and that situations of forced displacement and statelessness often affect women differently from men, and include gender-based violence. In addition, they are often subjected to gross human rights violations during flight and in the displacement phase, as well as within and outside camp settings, including risks relating to sexual violence.

The purpose of establishing parameters for human security is to ensure the well-being of individuals independently of the ability of a state to provide for it. In the context of a conflict, particularly one of internal character, security of the individual may not be left to the state apparatus, as it may not be a fully functioning entity. A paradigm enforced by an international legal framework would enable the international community at large to palliate a state’s weakness when the latter is fighting for its survival.

Is gender central to human security? Yes.

Centralizing gender leads to differing conceptions of safety from male and female perspectives; it would contribute to rethinking security outcomes and provide “greater local ownership and more effective” service delivery. In other words, it would help “recalibrate what it means to be secure” (Aolain, Haynes and Cahn, 2011: 61).

Conclusion

Sexual violence occurs in all wars but to varying extent and distinct forms: crime against humanity in Bosnia-Herzegovina, war crime in Sierra Leone and a form of genocide in Rwanda under international law. Those judicial innovations notwithstanding, and more so than in earlier decades are women specifically targeted, no longer, as in past wars to ease ethnic cleansing, but solely for the purpose of standing as impetus to join armed groups with limited means and large objectives. The recent abduction of over 100 girls by the Nigerian-based group Boko Haram to service fighters, sexual violence in the DRC's Kivus and Central African Republic confirm the gendered nature of wartime sexual violence in the 21st century. It is also evidence that in weak systems, despite the improved legal status of victims, the domestic impact of the current protective regime reveals a gap between what international treaties, institutions and courts recommend and how countries with failing state apparatus implement it.

Does the individualized notion of security as it relates to victims of wartime sexual violence warrant a responsibility to protect?

Beyond the moral imperative of protecting vulnerable populations, is one of regional stability, mass migration curbing and fostering environments propitious to development –social, political and economic. Where a state is no longer able or willing to protect its own citizens from mass gender-based violence, a gendered human security paradigm would be a first step toward improving the current systems of the collective security of individuals who risk becoming spoils of war, enforcement of fundamental rights, and integrity of post-conflict processes.

Preventing or properly prosecuting sexual violence in times of conflict therefore requires more than legal innovation but a redefinition and resynchronization of all existing political, judicial and military international and regional mechanisms involved in human security.

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