FROM INCIDENTAL TO INSTRUMENTAL: THE CODIFICATION OF RAPE AS AN INTERNATIONAL CRIME

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> "More can and must be done. . .to ensure that women's bodies are not the battlefield and that sex crimes are no longer used systematically as weapons of warfare and terror."[1]

I. INTRODUCTION

Rape is no stranger to war. Gross incidences of sexual violence during times of armed conflict are traced to ancient times.[2] However, for most of history, wartime rape has been considered unavoidable, and at times legitimate.[3] Women, and the sexual pleasure derived from them, were thought to be the legitimate "spoils of war," as victors conceived of women as property belonging to the conquered group.[4] Even as the legal community began to express condemnation toward wartime sexual violence, little changed in the laws of war.

It was not until the 1990's that major strides were made in the criminalization and prosecution of sexual violence as an international crime. The horrific conflicts in the former Yugoslavia, Rwanda, Sierra Leone and elsewhere confronted the international legal community with the tragic realities of gender-based persecution. As investigation into those crises carried on, and the United Nations established international tribunals to try war criminals, it became increasingly apparent that rape and other forms of sexual violence are prevalently used as strategic methods of warfare—not merely as the "spoils of war."

In the last 20 years, rape and numerous other forms of sexual violence during armed conflict have been codified, charged, and prosecuted as instruments of genocide, crimes against humanity, and violations of the laws and customs of war ("war crimes"). These advancements have taken place through the rich jurisprudence of *ad hoc* international military tribunals, and through the statute of the first permanent International Criminal Court. This paper outlines the shifting conception of rape, from *incidental* to war, to *instrumental to* war, how the codification and prosecution of sexual violence in international criminal law have embodied that notion, and some of the obstacles facing future advancements.

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[1] Kelly Askin, *Treatment of Sexual Violence in Armed Conflicts, in* SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 55 (Anne-Marie de Brouwer et al. eds., 2013).

[2] SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 33-34 (1975).

[3] United Nations Outreach Programme on the Rwandan Genocide, *Background Information on Sexual Violence used as a Tool of War*, http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.

[4] BROWNMILLER, *supra* note 2, at 33-34.

II. RAPE AS INCIDENTAL TO WAR: HISTORICAL CONCEPTIONS OF SEXUAL VIOLENCE IN ARMED CONFLICT.

A. Pre-World War I and the Lieber Code

Rape has historically been framed as an inevitable collateral consequence to armed conflict. Supporting this view was the deep-rooted notion that women were simply property of men—they belonged to their husbands, fathers or brothers.[5] The ancient Hebrews, Greeks, and Romans alike, considered rape to be an acceptable act in the context of war, since the conquered women of their enemies were "legitimate booty."[6] Thus, the unfortunate truth is that for much of history, women and girls were largely considered "spoils of war" to which the victors were legitimately entitled.

Early legal philosophers theorized that wars for property were "just" wars, and the collateral consequences of "just" wars were limitless.[7] With little to no restriction on the means implored to conquer the enemy and its belongings, sexual violence against women and children was rampant and, unfortunately, expected. Even as legal protection for women in times of peace progressed, legal protection during war remained severely inadequate[8]

As scholars in the fifteenth and sixteenth centuries began to distinguish between the *jus ad bellum* (legitimacy of war) and the *jus in bello* (conduct in war), sexual violence against women generally remained unaffected.[9] Some jurists during that time recognized important limitations on the use of violence against civilians, specifically women, but codification of these principles did not occur until much later.[10]

It was not until the late eighteenth and nineteenth centuries that codes and treaties began to incorporate guidelines meant to protect women and children from sexual assault during wartime.[11] The first recognizable attempt to codify the customary laws of war was the Lieber Code, drafted in 1863 during the United States Civil War.[12] The Lieber Code unambiguously stated, "all rape. . .[is] prohibited under penalty of death."[13] While these instructions were developed for use by American soldiers, they still shed light on the greater customs of war. The Lieber Code's staunch

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[5] Askin, *supra* note 1, at 21.

[6] BROWNMILLER, *supra* note 2, at 33-34.

[7] Askin, *supra* note 1, at 21-22.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 22-25

[11] *Id.* at 25.

[12] David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 236 (2005).

[13] *Id.* 236

criminalization of wartime rape suggests "prohibitions on rape had a firm status in customary international law at the time."[14] However, the leading pre-World War I regulation of international warfare, the 1907 Hague Convention, did not expressly criminalize rape, but rather provided for the respect of family honor.[15] Even if the concept of protecting family honor implicates rape, "the language of 'respect' rather than prohibition leads to very low obligation."[16]

B. World War I

The First World War is crucial to this inquiry, not because of any leaps in the prosecution of wartime rape, but rather for the lack of such action in the face of unprecedented reporting. It is not at all evident that incidents of sexual violence were any more prevalent during World War I than they were in previous conflicts. However, it is abundantly clear that the international community gave much more attention to wartime rape than ever before.[17]

Accounts of rape and the forced prostitution of French and Belgian women at the hands of German soldiers became a useful tool, not only in demoralizing the victims, but also in enticing support for the Allied powers. While reports of rape on behalf of the Axis powers were more heavily tracked in the beginning stages of the war, their force in international propaganda was hugely successful for the opposition: "In the hands of skilled Allied manipulators, rape was successfully launched in world opinion, almost overnight, as a *characteristic* German crime. . ."[18] [original emphasis]. This represents the first large-scale shift in the perception of rape, from merely a by-product of war to a tactical component of conflict.

This shift, however, was not entirely reflected in the response of the international legal community. In the aftermath of the war, the victorious Allied nations struggled to establish an international criminal tribunal to prosecute war crimes.[19] Thus, in 1919, a small War Crimes Commission was established to compile offenses and report on the need for a tribunal.[20] Ultimately, the Commission recommended the creation of an international tribunal to try Germany and the other Axis powers for "extensive violations of the laws of war," including the offenses of rape and forced prostitution.[21]

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[14] Askin, *supra* note 1, at 26.

[15] Mitchell, *supra* note 12, at 237.

[16] TUBA INAL, LOOTING AND RAPE IN WARTIME: LAW AND CHANGE IN INTERNATIONAL RELATIONS 61 (2013).

[17] BROWNMILLER, *supra* note 2, at 40-47.

[18] *Id.* at 43-44.

[19] Askin, *supra* note 1, at 29.

[20] *Id.*

[21] *Id.*

The inclusion of these sexual offenses on the final indictment is a good indication that the Commission considered rape to be a war crime. However, despite this report, the Commission did not establish an international tribunal, and only a miniscule portion of accused war criminals were actually tried. Unfortunately, after World War I, all efforts to hold persons liable for grave war crimes, including sexual violence, "failed miserably,"[22] perpetuating the silence of wartime rape.

C. World War II and the Geneva Conventions

The Second World War involved nearly every global superpower, and further affected most corners of the globe. A notorious hallmark of this conflict is the unparalleled violence toward civilian populations. Sexual violence against women took on many forms, as the fascist regimes of the Axis powers set out on a long mission of territorial domination and ethnic cleansing.[23] An array of horrific gender crimes, not limited to rape, were committed in furtherance of the conflict, whether the goals being served were genocide, suppression, or both.[24] In a war aimed at total domination of the other, rape was a "quintessential act by which a male demonstrate[d] to a female that she [was] conquered."[25]

The post-war international tribunals in Nuremberg and Tokyo, as well as the drafting of the 1949 Geneva Conventions, signified noteworthy steps toward the criminalization and prosecution of sexual violence and gender-based persecution during wartime. As sexual violence became recognized as a strategic instrumentality of warfare, there was a parallel shift in the legal characterization of sexual violence as a war crime.

1. International Military Tribunal at Nuremberg

At a meeting in London in August 1945, the victorious Allied powers agreed to establish the International Military Tribunal at Nuremberg ("IMT") to prosecute high-level war criminals from the European Axis powers.[26] Unfortunately, while the IMT charter did not delineate any crimes of sexual violence, nor did it expressly try such crimes in Nuremberg, it is clear from the trial transcripts that ample evidence of sexual violence was presented and at least incorporated in the IMT's final judgment.[27]

As is now well recognized, the primary objective of the Nazi regime

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22 *Id.* at 30.

23 BROWNMILLER, *supra* note 2, at 48-78.

24 *Id.*

25 *Id.* at 49.

26 Askin, *supra* note 1, at 32.

27 *Id.* at 32-33.

was to exterminate the Jews and promote Aryan supremacy. That objective was not just perpetuated by mass murder, but also through means that would ensure any surviving Jewish women could no longer reproduce.[28] Reports of forced abortion and forced sterilization were recounted at the Nuremberg Trials, telling of barbaric sterilization experiments that resulted not only in the inability to reproduce, but also extreme physical and emotion pain, and sometimes death.[29]

Sexual violence was not only used to prevent Jews from reproducing, but further as a form of humiliation and subordination. The Nuremberg transcripts provide compelling evidence of rape, forced prostitution, sexual slavery, and forced pornography.[30] Indeed, even German war documents presented during the trial support the conclusion that Nazi soldiers routinely employed rape as a "weapon of terror."[31] It is certainly true that sexual crimes received less than adequate attention during the Nuremberg Trials. However, the fact that this type of evidence was presented in a way that illustrated the use of gender violence as a *method* of warfare, not just a by-product, is indicative of a breakthrough in international law.

2. International Military Tribunal for the Far East

The Allies established an equivalent of the Nuremberg Trials in Tokyo, the International Military Tribunal for the Far East ("IMTFE"), in order to prosecute leading Japanese war criminals. Among other atrocities committed throughout the war, the IMTFE shed light on the horrific 1937 invasion of Nanking (the former capital of the Republic of China), appropriately known as the "Rape of Nanking."[32] In anticipation of the invasion, the armed forces, and any civilians with the means, fled Nanking, thereby leaving the defense of the vulnerable city to the poorest residents and a few foreign missionaries.[33] The IMTFE prosecution concluded that incidents of rape exceeded 20,000 in the first six weeks of the occupation.[34]

Evidence presented at the IMTFE verified the incidence of numerous forms of rape and atrocious sexual violence, which the Japanese utilized in the advancement of their mission to subordinate and humiliate the Chinese people.[35] Reports from Nanking described individual rapes under the threat of death, gang rape, forced prostitution and sexual slavery, and forced

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28 *Id.* at 35.

29 *Id.* at 36.

30 *Id.* at 34-35.

31 BROWNMILLER, *supra* note 2, at 53.

32 *Id.* at 57.

33 *Id.*

34 Askin, *supra* note 1, at 39.

35 BROWNMILLER, *supra* note 2, at 56-65

incest.[36] Women and girls who attempted to resist were killed instantly, as was anyone who tried to protect them.[37] As one American missionary noted in his diary, "Never have I heard or read of such brutality. Rape! Rape! Rape! We estimate at least 1,000 cases a night, and many by day. In case of resistance. . .there is a bayonet stab or a bullet."[38]

While the IMTFE charter did not specifically include rape, the Tokyo Indictment still included the crime, and some Japanese war criminals were charged with, and ultimately convicted of, crimes involving sexual violence[39] Rape charges were included under the headings "inhumane treatment," "ill-treatment," and "failure to respect family honour and rights."[40] Given this indictment and usage at trial, it clear that the IMTFE prosecutors, and possibly the larger international legal community, likely considered rape and other forms of sexual violence committed by the Japanese forces to be war crimes.

3. Geneva Conventions

The atrocities of World War II, coupled with the striking insufficiencies of the Hague Conventions, led the international community to draft a new set of regulations policing the *jus in bello*; the 1949 Geneva Conventions were a major milestone in the criminalization of wartime rape. Article 27 of the Conventions specifically protects women against, "rape, enforced prostitution, or any form of indecent assault."[41] Admittedly, these provisions are distinctly protective, not prohibitive.

In drafting the Geneva Conventions, the Conference of Government Experts received reports from the Red Cross that explicitly condemned the ambiguity of the Hague Conventions and called for increased specificity in the definition of rape.[42] The Red Cross stressed that the pervasive incidence of rape throughout the war called for greatly increased legal protection of women and children during times of war.[43] While it is true that the Geneva Conventions did not use *prohibitive* language with regards to sexual violence, as they did for other crimes like holding hostages, it is still evident that in the wake of World War II, international law finally identified *rape*, in such precise terms, as contrary to the laws of war.

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[36] *Id.*

[37] *Id.* at 61.

[38] *Id.* at 58.

[39] Askin, *supra* note 1, at 39.

[40] *Id.* at 45.

[41] Geneva Convention Relative to the Treatment of Prisoners of War art. 27, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[42] INAL, *supra* note 16, at 93.

[43] *Id.* at 94.

III. RAPE AS AN INSTRUMENTALITY OF WAR: MODERN MILESTONES IN THE DEFINITION AND PROSECUTION OF GENDER-BASED VIOLENCE IN ARMED CONFLICT.

For almost 50 years following World War II, jurisprudence on sexual violence as an international war crime was virtually silent. However, starting in the 1990's there was a massive resurgence in the prosecution of gender crimes in the International Criminal Tribunals for the former Yugoslavia ("ICTY")[44] and for Rwanda ("ICTR"),[45] and in the Special Court for Sierra Leone ("SCSL").[46] These *ad hoc* tribunals have successfully broadened the legal definition of sexual violence, insofar as it constitutes a war crime. Additionally, the International Criminal Court ("ICC"), the first permanent international criminal tribunal, explicitly listed a large number of gender crimes in its statute.[47] Together, these efforts have made a huge push toward ending impunity for those responsible for rape and other forms of sexual violence during armed conflict.

A. International Criminal Tribunal for Rwanda

In 1995, the United Nations Security Council created the ICTR as an *ad hoc* tribunal to "prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between 1 January 1994 and 31 December 1994."[48] What is truly unique about the ICTR is that it was the first criminal tribunal set up to prosecute violations of *international* humanitarian law committed during a *non-international* armed conflict.[49]

The height of the infamous conflict lasted 100 days, during which time Hutu extremists claimed the lives of almost one million Tutsis and moderate Hutus, including many women and children.[50] During the conflict, rape and

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[44] International Criminal Tribunal for the former Yugoslavia, Security Council Resolution 827, U.N. SCOR, 48th Sess., 3217TH mtg. at 29, U.N. Doc. S/827/1993 (1993) (ICTY Statute).

[45] International Criminal Tribunal for Rwanda, Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/INF/50 Annex (1994) (ICTR Statute).

[46] Statute of the Special Court for Sierra Leone, 16 January 2002, 2178 U.N.T.S. 145 (SCSL Statute).

[47] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (entered into force 1 July 2002) (Rome Statute).

[48] UN International Criminal Tribunal for Rwanda, *The ICTR in Brief*, http://www.unictr.org/en/tribunal.

[49] Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions in the ICTR, in* SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 123 (Anne-Marie de Brouwer et al. eds., 2013).

[50] UN International Criminal Tribunal for Rwanda, *The Genocide*, http://www.unictr.org/en/genocide.

other gender crimes were committed on a massive scale in furtherance of the Hutu objective (i.e. Tutsi extermination).[51] It is estimated that anywhere from 250,000 to 500,000 women were raped during the Rwandan Genocide.[52] Accounts of sexual violence described incidents of rape, gang rape, and rape with objects such as sharpened sticks or gun barrels, sexual slavery, forced marriage, and sexual mutilation.[53] Most women were killed immediately after being assaulted, but some were left alive to "die of sadness."[54]

As outlined above, sexual violence during armed conflict, particularly against women, has been rampant for most of human history. Indeed, during times of war and in peace, being female is certainly a risk factor for sexual assault, regardless of other demographics like age, race, or political identity. However, during genocide, like in Rwanda, womanhood inevitably overlaps with other aspects of identity, like ethnicity. As a result, rape is often used as another tool to terrorize and exterminate a group.[55] Thus, sexual violence becomes another instrumentality of war.

1. Statute

While the bulk of the ICTR's contribution to gender crimes jurisprudence derives from the case law, it is important to note some significant aspects of the statute itself. UN Security Council Resolution 955 set forth the statute for the ICTR, which officially reinforced the grave need to bring justice to those responsible for the, "genocide and other systematic, widespread and flagrant violations of international humanitarian law. . .committed in Rwanda."[56]

The statue for the ICTR is broken up into 32 short articles, which outline the jurisdiction and procedure of the tribunal. Articles 2, 3, and 4 define the crimes that the court has the power to prosecute. Article 2 addresses the crime of Genocide, and provides in part that, "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."[57] While rape is not specifically enumerated as an act constituting genocide, the statute broadly identifies (in part) the following acts, which have been deemed to include rape and other forms of sexual violence:

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[51] HUMAN RIGHTS WATCH (HRW), SHATTERED LIVES (1996) http://www.hrw.org/reports/1996/Rwanda.htm.

[52] Bianchi, *supra* note 49, at 126.

[53] HRW, *supra* note 51.

[54] *Id.*

[55] *Id.*

[56] ICTR Statute, *supra* note 45, at 1.

[57] *Id.* at 3.

> (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.[58]

Articles 3 and 4 of the statute are much more explicit in their definitions. Article 3 addresses Crimes Against Humanity and specifically lists "rape" as a punishable act "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[59] Finally, Article 4, which deals with violations of the Geneva Conventions, enumerates "rape, enforced prostitution, and any form of indecent assault," as war crimes.[60]

2. Prosecutor v. Akayesu

The Office of the Prosecutor (OTP) at the ICTR has succeeded in prosecuting and holding criminally liable numerous persons for acts of sexual violence, either as acts of genocide under Article 2, or as crimes against humanity under Article 3, and as war crimes under Article 4.[61] However, the leading ICTR case on sexual violence is the tribunal's first trial judgment, issued in 1998, *Prosecutor v. Jean Paul Akayesu.* The revolutionary holding of *Akayesu* concluded that rape and sexual violence *can,* and in the case of Rwanda *did,* constitute genocide, insofar as those acts were committed with the intent to destroy, in whole or in part, a particular group.[62] The Trial Chamber held that rape can be a form of genocide much the same as any other violent act.[63]

The Chamber based its findings on reports and testimony of witnesses and concluded that sexual violence constitutes infliction of serious bodily and mental harm, and was "systematic and was perpetrated against all Tutsi women and solely against them."[64] The Chamber also concluded that sexual violence, usually coupled with imminent death, was an integral strategy in the destruction of the entire Tutsi race—"destruction of the spirit, of the will

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58 *Id.* at 4.

59 *Id.*

60 *Id.* at 5.

61 Bianchi, *supra* note 49, at 140-141.

62 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 731 (Sep. 2, 1998).

63 *Id.*

64 *Id.* at ¶ 732.

to live, and of life itself."[65] This is the first case in history that explicitly identified rape as a constituent act of the international crime of genocide.[66] Thus, this decision marks a major breakthrough in the legal redefinition of rape as an instrumentality of war.

Also important to *Akayesu*'s legacy in prosecuting sexual violence are the Trial Chamber's definitions of rape and sexual violence. In its opinion, the Chamber noted that there is no common definition of rape in international law, and thus defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[67] Additionally, the Chamber asserted that sexual violence includes rape, and is defined as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[68] These definitions are necessarily broad so as to encompass the many forms of gender crimes that are committed during armed conflicts.

As a final note on the ICTR, it is important to address the seemingly low rates of conviction for rape and other forms of sexual violence. These numbers are certainly due to numerous factors that make the prosecution of gender crimes particularly difficult, rather than any lack of desire to prosecute such crimes.[69] However, those difficulties encountered by the ICTR and similar tribunals, while important in their own right, should not detract from the profound effect that the tribunals have had on the status of sexual violence under international law.

B. International Criminal Tribunal for the Former Yugoslavia

In 1993, two years before the creation of the ICTR, the UN Security Council passed Resolution 827 formally establishing the International Criminal Tribunal for the Former Yugoslavia. The UN created this court to prosecute grave breaches of international humanitarian law that were then being committed in Croatia and Bosnia and Herzegovina, and later in other areas of the Balkan Peninsula.[70] The ICTY is unique for many reasons. First, it was the first international criminal tribunal set up since the Nuremberg and Tokyo trials after World War II. Second, it is the only *ad hoc* international tribunal to be established while the conflict was still going on, rather than

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[65] *Id.*

[66] Kelly Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals*, 11 HUMAN RIGHTS BRIEF, 16, 17 (2004).

[67] *Akayesu*, *supra* note 62, at ¶ 686-688.

[68] *Id.*

[69] Bianchi, *supra* note 49, at 127-139.

[70] UN International Criminal Tribunal for the former Yugoslavia, *About the ICTY*, http://www.icty.org/sections/AbouttheICTY.

after the fact.[71] As a result, the ICTY was in a very unique position, with the potential opportunity to take part in the peace process, and the simultaneous need to overcome new obstacles in prosecution.

At the time of the ICTY's inception, it was abundantly evident to the United Nations that Serbian extremist forces had subjected women, primarily Bosnian Muslims and Croatians, to systematic sexual violence.[72] UN agencies estimate that as many as 60,000 women were raped between 1992 and 1995 in the former Yugoslavia.[73] Even early reports of pervasive sexual violence told stories of rape and gang rape, both in and out of detention camps, as well as forced pregnancy, various forms of sexual humiliation, and sexual slavery.[74] It was clear that Serbian forces were using sexual violence as a strategic means of subordinating non-Serb civilians, and the ICTY expressed its dedication to adjudicating the grave offenses as such.[75]

1. Statute

As was true with the ICTR, most of the ICTY's significant contributions to sexual violence as an international crime derive from the case law. However, there are some noteworthy components of the ICTY statute that warrant commentary. The statute was set forth in UN Security Council Resolution 827, which recognized the need for an international tribunal, and expressly reprimanded the:

> [W]idespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, *massive, organized and systematic detention and rape of women*, and the continuance of the practice of "ethnic cleansing".[76] [Emphasis added.]

The fact that the Security Council specifically enumerated the crime of sexual violence in its resolution expressing the reasons for establishing a tribunal is itself a triumph. It is evidence that the United Nations was not willing to sign on to the historical perception of rape as merely the "spoils of

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[71] CATHERINE MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 174 (2006).

[72] UN Outreach Programme, *supra* note 3.

[73] *Id.*

[74] AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: RAPE AND SEXUAL ABUSE BY ARMED FORCES (1993).

[75] ICTY Statute, *supra* note 44.

[76] *Id.*

war." Additionally, in Article 5 of the statute, "rape" is explicitly listed as a crime against humanity, "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."[77]

While the ICTY statute only lists rape as a crime against humanity, sexual violence has been held to constitute a grave breach of the Geneva Conventions under Article 2 and a violation of the law and customs of war under Article 3.[78] Additionally, while Article 5 separately lists the crimes of rape and enslavement, the ICTY has held that sexual slavery constitutes a crime against humanity under the statute.[79]

2. The Čelebići Case

One of the landmark sexual violence cases decided by the ICTY Trial Chamber is *Prosecutor v. Mucić et al.*, also known as the *Čelebići* case. The ICTY delivered the *Čelebići* judgment just two and half months after the ICTR issued its decision in *Akayesu*. Of the four accused, three men were ultimately convicted of numerous crimes, including sexual offenses, committed in the Čelebići prison camp in Bosnia and Herzegovina. Under theories of individual and superior responsibility, the tribunal found the accused in this case guilty of extensive grave breaches of the Geneva Conventions and violations of the laws and customs of war for sexual offenses committed by themselves and their subordinates.[80]

One notable aspect of the *Čelebići* case is that the Chamber found the accused guilty of both grave breaches and violations of the laws of war for sexual offenses committed by subordinates against *male* detainees.[81] The tribunal found three of the accused to have known, or should have known, that a subordinate at the Čelebići camp forced two brothers to perform fellatio on one another, and tied burning fuses to their genitals.[82] The Chamber found that these forms of sexual violence were, at the very least, a fundamental attack on personal dignity and constituted inhumane acts in violation of the laws of war and the Geneva Conventions.[83] This holding is significant because it expands the definition of sexual violence to include offenses against men is key in shifting the perception of rape and gender

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[77] *Id.*

[78] *Prosecutor v. Mucić et at.*, Case No. IT-96-21, Trial Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

[79] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, Trial Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

[80] Askin, *supra* note 66, at 17.

[81] *Mucić*, *supra* note 78, at 474.

[82] *Id.* at 363.

[83] *Id.* at 364, 474.

crimes as constituting war crimes.

Finally, while the *Čelebići* case made many lasting contributions to sexual violence prosecution, it is a leading international authority on the theory of superior responsibility.[84] Section III of the Judgment is the first elucidation of superior responsibility by an international tribunal since WWII.[85] Most importantly, the Chamber stated that superior responsibility is not limited to military commanders, but also covers civilians who hold positions of power during the conflict.[86] Additionally, so long as the superior knew or had reason to know of the offenses and failed to take action to prevent or punish them, superior responsibility applies to both *de jure* and *de facto* positions of power.[87] In the context of rape and other forms of sexual violence, superior responsibility is crucial in ending impunity for the pervasive occurrence of those crimes during armed conflict.

3. Prosecutor v. Kunarac

Perhaps the most important trial Chamber judgment delivered by the ICTY, with respect to sexual violence, is *Prosecutor v. Kunarac et al.* The *Kunarac* decision handed down the first convictions for enslavement and rape as crimes against humanity.[88] Significantly, the Chamber expressly condemned various forms of sexual violence *as instruments* of terror and persecution. Indeed, in delivering a summary of the judgment of the Chamber, presiding Judge Florence Mumba said, "The trial against the three accused has sometimes been called the 'rape camp case', an example of the systematic rape of women of another ethnicity being used as a 'weapon of war'."[89]

The accused were members of the Serbian forces that overtook the Foča region of Bosnia and Herzegovina in a campaign of ethnic cleansing.[90] Evidence presented at trial illustrated egregious accounts of rape, gang rape, human trafficking, sexual slavery, and humiliation on behalf of the accused and their subordinates.[91] The Chamber found that two of the accused took women and girls, mostly Muslims, from horrific detention centers throughout Foča, and kept them as their own personal slaves.[92] The accused and their soldiers forced the women and girls to cook and clean, and then

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84 Askin, *supra* note 66, at 17.

85 *Prosecutor v. Mucić* Judgment Summary, 3, *available at* http://www.un.org/icty.

86 *Mucić*, *supra* note 78, at 131.

87 *Id.*

88 *Prosecutor v. Kunarac*, Judgment Summary, 1, *available at* http://www.un.org/icty.

89 *Id.* at 2.

90 *Id.* at 1.

91 *Id.* at 3-8.

92 *Id.*

raped them.[93] These acts resulted in convictions of rape, torture, and enslavement as crimes against humanity and violations of the laws and customs of war.[94]

Additionally, one of the accused was found guilty of several acts amounting to outrages upon personal dignity in violation of the laws of war.[95] The acts included forcing girls to dance naked on tables, playing music on a radio while raping several girls, and "loaning" or selling girls to other men.[96] These gender-based crimes did not amount to rape in and of themselves, but were still recognized as sexual violence in a larger operation of persecution. Indeed, in yet another case with a focus on rape, the ICTY noted that other forms of gender-based violence, including sexual mutilation, forced marriage, forced abortion, forced pregnancy, sexual slavery, and enforced sterilization are also international crimes of sexual violence.[97]

The fact that the entirety of the *Kunarac* case was focused on rape and other forms of sexual violence as part of the Serbian campaign of ethnic cleansing is monumental in the field of gender crimes jurisprudence. In reading these judgments, it is hard to believe that rape was ever considered merely "incidental" to armed conflict. It is true that the ICTY has not been perfect in its prosecution of sexual violence, but it is clear that the tribunal's jurisprudence has made large strides in the perception of rape and other forms of gender-based violence as unequivocal violations of the laws of war.

C. Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) was established in 2002 by a treaty agreement between the Government of Sierra Leone and the United Nations in the aftermath of a brutal civil war.[98] As with the conflicts in Rwanda and the former Yugoslavia, the UN Security Council passed a resolution expressing its concern for the grave crimes committed during the conflict and the need for an *ad hoc* tribunal to bring justice to the perpetrators.[99] The SCSL was the first "hybrid" international tribunal, meaning it was composed of both local and international officials, and it

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[93] *Id.* at 5.

[94] *Id.* at 3-8.

[95] *Id.* at 7.

[96] *Id.*

[97] *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Trial Judgment, 49 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

[98] Teresa Doherty, *Jurisprudential Developments Relating to Sexual Violence: The Legacy of the Special Court for Sierra Leone*, *in* SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 157 (Anne-Marie de Brouwer et al. eds., 2013).

[99] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1, Jan. 16, 2002, 2178 U.N.T.S. 38342.

applied both national and international law.[100] The decade long civil war in Sierra Leone occurred from approximately 1991 to 2002, and was rife with incidences of extreme sexual violence.[101]

1. Statute

What is most notable about the sexual violence jurisprudence of the SCSL is its explicit willingness to expand the traditional scope of gender crimes, both in its statute and case law. First of all, Article 2 of the statute, which defines crimes against humanity, lists not only rape, but also "sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence."[102] As discussed above, ICTR and ICTY have prosecuted these additional gender crimes as either crimes against humanity or war crimes , but the statute of the SCSL specifically enumerates these offenses as crimes against humanity.

Further, in Article 3 of the statute, "rape, enforced prostitution and any form of indecent assault" are listed as outrages upon personal dignity constituting a violation of the Geneva Conventions.[103] And finally, the statute grants jurisdiction to the SCSL to prosecute some crimes under the domestic laws of Sierra Leone. Notably, these include "offenses relating to the abuse of girls under the Prevention of Cruelty to Children Act."[104] The specificity used in defining sexual violence under the SCSL statute was unprecedented in any *ad hoc* international criminal tribunal.

2. Prosecutor v. Brima

In 2004, the SCSL Prosecutor petitioned to the Trial Chamber to add a new count to the indictment in the case of *Prosecutor v. Brima et al.*[105] The indictment already listed the crimes of rape, sexual slavery, and outrages upon personal dignity, but the Prosecutor wished to add the offense of forced marriage as a crime against humanity.[106] The Trial Chamber narrowly interpreted the crime of forced marriage to be subsumed into the crime of sexual slavery, and therefore found the evidence lacking in regards to a requisite physical violation, beyond mere exercise of ownership.[107]

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[100] Special Court for Sierra Leone, *The SCSL and its History and Jurisprudence*, http://www.rscsl.org/index.html.

[101] Doherty, *supra* note 98, at 157.

[102] SCSL Statute, *supra* note 46, at 1.

[103] *Id.* at 2.

[104] *Id.*

[105] Doherty, *supra* note 98, at 160.

[106] *Id.*

[107] *Id.* at 168.

The Trial Chamber dismissed the forced marriage count, but the Prosecutor appealed.[108] In a groundbreaking decision, the Appeals Chamber reversed the lower courts ruling on the crime of forced marriage, and held that:

> [I]n the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.[109]

The Appeals Chamber further concluded that forced marriage in this context satisfies the requirements of "other inhumane acts," meaning it is therefore a crime against humanity.[110] This holding, and others in the SCSL, has pushed the limits of the traditional legal perception and scope of sexual violence as an instrumentality of armed conflict.

D. International Criminal Court

The International Criminal Court is "the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community."[111] The ICC is a separate body from the United Nations, and is governed by the Rome Statute, which 120 countries adopted in 1998.[112] While the ICC has not yet handed down any convictions for sexual violence, the breadth and specificity of the Rome Statute has expanded the permanent jurisdiction under which the court may prosecute an array of gender crimes

Under Article 7 of the Rome Statute, "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity," constitute crimes against humanity.[113] This list is both specific and broad. The statute enumerates individual crimes with specificity, but the latter portion of the sentence leaves open the possibility of including other sexual offenses. The listed crimes provide a framework for deciding whether other offenses fall in line

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[108] *Id.* at 170.

[109] *Prosecutor v. Brima*, Case No. SCSL-04-16-A-675, Appeals Judgment, ¶ 196 (Feb. 22, 2008).

[110] *Id.* at ¶ 200.

[111] International Criminal Court, *About the Court,* http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.

[112] *Id.*

[113] Rome Statute, *supra* note 47, at 4.

with the intended purpose of the section.

Further, Article 8, governing war crimes, states that the previously listed offenses also constitute violations of the laws and customs of war, as do "any other form of sexual violence also constituting a grave breach of the Geneva Conventions."[114] These expansive legal definitions create an opportunity for rape and other forms of gender violence to be vigorously prosecuted in the context of armed conflict. As an additional indication of the dedication of the international community to prosecuting a wide array of gender-based crimes, the ICC's recent publication on its gender violence policy stated this:

> The Office [of the Prosecutor] considers gender-based crimes as those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. These crimes may include non-sexual attacks on women and girls, and men and boys, because of their gender, such as persecution on the grounds of gender.[115]

IV. CONCLUSIONS

A. Successes

This brief analysis of the advancements in the legal definition and prosecution of sexual violence as an international crime is by no means exhaustive. What is clear, however, is that modern jurisprudence has completely reshaped the traditional conception of wartime gender crimes. Rape and other forms of sexual violence that, for most of history, were simply considered the "spoils of war," are now widely recognized as strategic methods of warfare and persecution. Rape is no longer just incidental to war – it is an instrumentality of war.

International criminal law now reflects this shifting conception. At this point in history, rape has been expressly recognized and prosecuted as a constituent act of genocide, a crime against humanity, and a war crime. The Rome Statute of the ICC, as well as the rich jurisprudence of the ICTR and ICTY, makes indisputable the contention that rape and other forms of gender-based violence are *international crimes* in the context of armed conflict. Just half a decade ago, in the aftermath of World War II, that assertion would have garnered much more hesitation. This hurdle in international law, notwithstanding the many difficulties still ahead, is a

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[114] *Id.* at 7.

[115] International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, 12 (June 5, 2014).

victory in and of itself.

B. Obstacles

Though the international community has reached many milestones, there are numerous obstacles and shortcomings that still impede the prosecution of wartime sexual violence as an international crime. Social stigmas and inadequate education surrounding sexual violence present significant public policy hurdles that have yet to be sufficiently addressed in this field, but there are still more concrete legal obstacles that stunt the progress of gender crimes jurisprudence.

For instance, cumulative charging has resulted in a number of sexual violence charges being dropped in the pre-trial stage.[116] When several forms of sexual violence and persecution are charged alongside one another, there is an unfortunate tendency for courts to reject some of the charges as cumulative or redundant.[117] Essentially, since gender-based persecution can be said to subsume other acts of sexual violence, courts can potentially reject the latter charges. This idea that a single act can give rise to a single cause of action, and therefore harm, is very dangerous in the prosecution of gender violence during armed conflict, because it simplifies the context and far-reaching implications of those types of crimes.[118]

Yet another obstacle is the ICC's definition of "gender." Article 7 of the Rome Statute defines "gender" as "the two sexes, male and female, within the context of society."[119] This definition was apparently the product of an agreement between competing member states, some of whom wanted to include the term for fairness and sensitivity, and others who opposed including it for fear that it might afford more rights than their domestic laws recognized (primarily conservative Catholic and Arab states).[120] The main issue with this definition is the controversy surrounding its interpretation, making it inherently difficult to apply to factual scenarios. Some commentators argue that the definition focuses too heavily on the biological differences of men and women.[121] Other critics seem to think that the definition excludes persecution based on sexual orientation.[122] And yet others find the definition to be satisfactory, as it allows for the consideration

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[116] Valerie Oosterveld, *Prosecuting Gender-Based Persecution as an International Crime*, *in* SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 73 (Anne-Marie de Brouwer et al. eds., 2013).

[117] *Id.* at 74.

[118] *Id.* at 76.

[119] Rome Statute, *supra* note 47, at 5.

[120] Oosterveld, *supra* note 116, at 66.

[121] *Id.* at 67.

[122] *Id.*

of "socially-constructed understandings of maleness and femaleness."[123] The problem seems to be that these opposing interpretations foreshadow future difficulties in prosecuting sexual violence against victims who do not conform to the hetero-normative ideals of male and female.

Just as there are many more successes not mentioned in this analysis, so too are there a number of obstacles. Overcoming an historical silence on wartime sexual violence is not an easy task. However, the progress made in this area of international law is astounding, especially in the last 20 years. As the international community continues to make advances in this field, there should be an enduring dedication to ending impunity for acts of sexual violence committed during armed conflict.

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[123] *Id.* at 68.